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From: [REDACTED]
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Bcc:
Subject: RE: 6512 Question

Both § 6512(a) and § 301.6512-1(a) are limited by their plain language to petitions timely filed after the Service issues a statutory notice of deficiency under § 6212(a). A notice of determination under § 6330 for a lien or levy action under §§ 6320 or 6330 is not the same as a notice of deficiency under § 6212(a). Therefore, § 6512(a) does not prevent a litigant from disputing in a refund suit a tax liability determined in a collection proceeding in Tax Court.

However, the law of the case doctrine would prevent the relitigation of the underlying liability. The law of the case doctrine is "part of a related set of preclusion principles that includes stare decisis, res judicata, and collateral estoppel." Gonzalez v. Arizona, 624 F.3d 1162, 1185 n.16 (9th Cir. 2010).

The law of the case doctrine generally precludes a court from "reconsidering an issue previously decided by the same court, or a higher court in the identical case." Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990) (citing Richardson v. United States, 841 F.2d 993, 996 (9th Cir. 1988), amended, 860 F.2d 357 (9th Cir. 1988)). For the law of the case doctrine to apply, "the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" Id. (quoting Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982)).

Bedrosian v. Comm'r, 143 T.C. 83, 121 (2014, Vasquez, J. dissenting)

Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. * * * Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action * * *.

Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

The rule of collateral estoppel provides that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." 1 Restatement, Judgments 2d, sec. 27 (1982) (emphasis added); see also Montana v. United States, 440 U.S. 147, 153-154, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

Koprowski v. Comm'r, 138 T.C. 54, 61-62 (2012)

Under the Supreme Court's explication of res judicata in *Commissioner v. Sunnen*, 333 U.S. at 597-598, four conditions must be met to preclude relitigation of a claim: (1) the parties in each action must be identical (or at least be in privity); (2) a court of competent jurisdiction must have rendered the first judgment; (3) the prior action must have resulted in a final judgment on the merits; and (4) the same cause of action or claim must be involved in both suits. See *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994). Once these conditions are met, each party is prohibited from raising any claim or defense that was or could have been raised as part of the litigation over the cause of action in the prior case. *Id.*

Koprowski v. Comm'r, 138 T.C. 54, 62 (2012)

A Tax Court decision in a on the merits in a CDP case that includes petitioner's underlying tax liability (e.g., no preclusion under § 6330(c)(2)(B)) would permit the Service to raise res judicata and collateral estoppel as affirmative defenses against the taxpayer's raising a challenge to the underlying liability in a refund suit. Res judicata (claim preclusion) would be the more appropriate defense than collateral estoppel (issue preclusion), because the same claim (challenging the existence or amount of the underlying liability) that was litigated in Tax Court is what the taxpayer is trying to relitigate in the refund suit. (In fact, if a petitioner in a CDP suit could have challenged the existence or amount of the underlying liability, then res judicata would apply whether she challenged it or not; but collateral estoppel would not apply in that case, because collateral estoppel is limited to issues actually litigated and determined and necessary to the judgment, even if they come up again in a different cause of action.)

Please let me know if you have further questions.

Thanks,