

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

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subject: I.R.C. § 6330 Collection Due Process Hearing and I.R.C. § 7429 Review

This memorandum responds to your request for assistance regarding the effect of the I.R.C. § 7429 review procedures on I.R.C. § 6330 Collection Due Process (CDP) hearings. This advice may not be used or cited as precedent.

ISSUES

- 1) Whether a section 7429 administrative or judicial review is a prior opportunity to contest the underlying tax liability pursuant to section 6330(c)(2)(B).
- 2) Whether a taxpayer may raise in a CDP hearing the reasonableness or appropriateness of the amount of a jeopardy/termination assessment and/or the reasonableness of a jeopardy levy.
- 3) To what extent should the Office of Appeals consider liability and collection alternatives during a CDP hearing after a jeopardy/termination assessment and jeopardy levy is made if the taxpayer petitions the Tax Court from a notice of deficiency issued pursuant to section 6851(b) or 6861(b).
- 4) What specific procedure should be followed if the Service a) receives both a section 7429 request for review and a CDP hearing request or b) receives one request but not the other.

CONCLUSIONS

- 1) A section 7429 review does not determine the underlying tax liability. The review involves an analysis of whether the method of calculating the assessment amount was done improperly. Therefore, an administrative or judicial

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determination under section 7429 does not preclude a taxpayer from challenging the existence or amount of the underlying tax liability in a CDP hearing under section 6330(c)(2)(B).

- 2) A taxpayer may raise the reasonableness of a jeopardy levy in a CDP hearing if the jeopardy levy is made 30 days or more after notice and demand for payment is issued. A taxpayer may not raise in a CDP hearing the reasonableness or appropriateness of the amount of a jeopardy/termination assessment or the reasonableness of a jeopardy levy subject to review under section 7429. A jeopardy/termination assessment or jeopardy levy subject to section 7429 review is one made less than 30 days after notice and demand for payment is made.
- 3) If Appeals determines in a CDP hearing a liability subject to a Tax Court deficiency proceeding based on a section 6851(b) or 6861(b) notice of deficiency and issues a notice of determination, there is a risk that the Tax Court will hold that Appeals abused its discretion by not waiting until the conclusion of the deficiency proceeding to issue the notice of determination. [REDACTED]
- 4) If the Service receives both a section 7429 request for review and a CDP hearing request, and issues a notice of determination before the conclusion of the section 7429 administrative and judicial review, there is a risk the Tax Court will hold that Appeals abused its discretion. [REDACTED]

## DISCUSSION

### Issue 1: Challenge to the Underlying Tax Liability

Under section 6330(c)(2)(B), a taxpayer may challenge the underlying tax liability in a CDP hearing if he did not receive a notice of deficiency or did not “otherwise have an opportunity to dispute such tax liability.” Jeopardy review under section 7429 is not a prior opportunity to contest the underlying tax liability. Review under section 7429 is limited to whether: a) the jeopardy/termination assessment or jeopardy levy was “reasonable under the circumstances” and b) whether the amount assessed was “appropriate under the circumstances.” I.R.C. § 7429(a)(3), (b)(3).

In the legislative history of section 7429, the Senate Finance Committee Report explained that a section 7429 determination has “no effect upon the determination of the correct tax liability . . . [and is] a separate proceeding that is unrelated, substantively and procedurally, to any subsequent proceeding to determine the correct tax liability.” S. Rep. No. 94-938, at 365 (1976). A court has jurisdiction to decide only the

appropriateness of the amount of a jeopardy/termination assessment, i.e., if the method of calculating the assessment amount was fatally defective, irrational, arbitrary, or unsupported, not the correct tax liability. Wellek v. United States, 324 F. Supp. 2d 905, 914 (N.D. Ill. 2004); Tinari v. United States, No. CIV.A. 93-3555, 1996 WL 472416, \*2 (E.D. Pa. Aug. 10, 1996) (Section “7429's legislative history suggests that . . . ascertaining the ‘correct tax liability,’ [is] an inquiry not sanctioned by § 7429.”).<sup>1</sup>

Since a section 7429 review is not a determination of the underlying tax liability, an administrative or judicial determination under section 7429 does not preclude the taxpayer from challenging the existence or amount of the underlying tax liability in a CDP hearing under section 6330(c)(2)(B).

Issue 2: Challenge to the Reasonableness or Appropriateness of a Jeopardy/Termination Assessment or Reasonableness of a Jeopardy Levy in a Section 6330 Hearing

When the Service levies based on “a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy,” a taxpayer will be given a notice of the opportunity for a CDP hearing under section 6330 within a reasonable period of time after the levy. I.R.C. § 6330(f). Although the last sentence of section 6331(a) states that a jeopardy levy may be made within the 10-day period after the notice and demand for payment is issued, the reference to section 6331(a) concerns the making of the jeopardy determination, not the timing of the determination.<sup>2</sup> The taxpayer is entitled to a notice of the opportunity for a CDP hearing whenever a jeopardy levy is made unless the taxpayer has been previously issued a pre-levy CDP notice for the same tax and period.

During the post-levy hearing the taxpayer may raise any relevant issue relating to the levy or unpaid tax, including the appropriateness of the collection action or an offer of collection alternatives. I.R.C. § 6330(c)(2)(A). A challenge to the reasonableness of the Service’s jeopardy determination is a challenge to the appropriateness of the levy under section 6330(c)(2)(A). See Prince v. Commissioner, 133 T.C. 270, 276 (2009).

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<sup>1</sup> Similarly, a court’s jurisdiction under section 7429 is limited to deciding the reasonableness of the Service’s decision to make a jeopardy/termination assessment and/or jeopardy levy because collection was in jeopardy. Treas. Reg. § 1.6851-1(a)(1) provides that collection is in jeopardy when at least one of the following conditions exists: (1) the taxpayer is or appears to be designing to leave the United States or to conceal himself; (2) the taxpayer is or appears to be designing to hide, transfer, conceal, or dissipate his assets; or (3) the taxpayer’s financial solvency appears to be imperiled.

<sup>2</sup> The same phrase about a finding of jeopardy under the last sentence of section 6331(a) appears in section 6331(d)(3), which permits jeopardy levy prior to the issuance of the section 6331(d) notice. Such notice is required at least 30 days prior to levy. The reference to section 6331(a) in a provision permitting jeopardy levy despite the 30-day pre-levy notice requirement shows that “a finding under the last sentence of section 6331(a)” cannot refer to a jeopardy determination made within the 10-day period after notice and demand but instead refers to the making of a jeopardy determination whenever it occurs.

The existence of section 7429, however, limits the issues a taxpayer may raise in a CDP hearing. The reasonableness of a jeopardy levy made less than 30 days after notice and demand for payment is issued (i.e., subject to section 7429 review) may not be raised in a CDP hearing. The reasonableness of a jeopardy/termination assessment or the appropriateness of the assessed amount also may not be raised in a CDP hearing. The reasonableness of a jeopardy levy made 30 days or more after notice and demand (i.e., not subject to section 7429 review) may be challenged in a CDP hearing under section 6330(f).

Section 7429 is the exclusive means by which to challenge the reasonableness or appropriateness of a jeopardy/termination assessment and the reasonableness of a jeopardy levy made less than 30 days after notice and demand is issued. See Vennes v. An Unknown No. of Unidentified Agents of the United States, 26 F.3d 1448, 1454 (8<sup>th</sup> Cir. 1994) (A taxpayer's remedies under section 7429 precludes him from pursuing other actions for improper institution of jeopardy assessments and collections because "Congress has provided specific and meaningful remedies for taxpayers [to] challenge [a jeopardy] assessment and collection . . . [under] § 7429."). The district court has exclusive jurisdiction to determine the reasonableness or appropriateness of a jeopardy/termination assessment and the reasonableness of a jeopardy levy under section 7429 unless a petition for redetermination of the deficiency under section 6213(a) has been timely filed with the Tax Court before the making of the jeopardy determination. I.R.C. § 7429(b)(2)(A), (B); Granse v. United States, 892 F. Supp. 219, 222 (D. Minn. 1995). The determination is final and non-reviewable by any other court, including a federal circuit court of appeals. I.R.C. § 7429(f); Humphreys v. United States, 62 F.3d 667, 671 (5<sup>th</sup> Cir. 1995); Meadows v. United States, 665 F.2d 1009, 1012 (11<sup>th</sup> Cir. 1982).

If the reasonableness or appropriateness of a jeopardy/termination assessment or the reasonableness of a jeopardy levy made less than 30 days after notice and demand is permitted to be raised in a CDP hearing, the taxpayer may appeal the determination to the Tax Court as well as a federal circuit court of appeals (see section 7482) thus circumventing the section 7429 limitation of exclusive district court jurisdiction (except for Tax Court review as provided in section 7429(b)(2)) and the prohibition of federal circuit court of appeals review. Such an interpretation of section 6330(f) would render the exclusivity language in section 7429 meaningless. See Morton v. Macari, 417 U.S. 535, 550 (1974) ("When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); Dorn v. Commissioner, 119 T.C. 356, 359 (2002) (quoting FTC v. Mandel Brothers, Inc. 359 U.S. 389 (1959)) (A statute must be interpreted to " 'fit, if possible, all parts into an[sic] harmonious whole.' "). There is a strong presumption against repeal by implication, "especially the implied repeal of a specific statute by a general one." Montana v. Blackfoot Tribe of Indians, 471 U.S. 759, 766 (1985). Since section 6330 cannot invalidate the specific provisions of section 7429 providing exclusive review, a taxpayer may not challenge in a CDP hearing the reasonableness or

appropriateness of a jeopardy/termination assessment or the reasonableness of a jeopardy levy made less than 30 days after notice and demand.<sup>3</sup>

If a jeopardy levy was made 30 days or more after issuing the notice and demand for payment, the taxpayer is not afforded the right to a section 7429 review. In this instance, the taxpayer may challenge the reasonableness of a jeopardy levy in a CDP hearing.

### Issue 3: Section 6213(a) Deficiency Proceeding and Section 6330 Hearing

Under section 6861(b), the Service must issue a section 6212(a) notice of deficiency within 60 days after making a jeopardy assessment. Under section 6851(b), if a termination assessment is made, the Service must issue a deficiency notice within 60 days after the later of the due date of the taxpayer's return for the taxable year or the date the taxpayer files the return. If a jeopardy levy was made to collect the jeopardy/termination assessment, the taxpayer will also be given a CDP notice under section 6330(f). If the taxpayer petitions the Tax Court from the notice of deficiency and also requests a CDP hearing, the taxpayer may contest the underlying tax liability in both proceedings.

A pending deficiency proceeding in Tax Court is not a prior opportunity to challenge the underlying tax liability under section 6330(c)(2)(B). To be a prior opportunity, a judicial proceeding must have concluded before the CDP hearing begins. See Mason v. Commissioner, 132 T.C. 301, 320 (2009) (“[A] simultaneous [CDP administrative] appeal and underlying tax liability [administrative] appeal is not an opportunity to contest the underlying tax liability within the meaning of section 6330(c)(2)(B).”). The taxpayer is permitted to challenge the liability subject to the deficiency proceeding in the CDP hearing.

Appeals may determine the liability or suspend the CDP hearing until the Tax Court deficiency decision becomes final. If Appeals determines the liability and issues a notice of determination, there is a risk the Tax Court will find Appeals abused its discretion. The court may decide that the issuance of the notice of determination before a final deficiency decision effectively deprived the taxpayer of his opportunity to discuss collection alternatives under section 6330(c)(2)(A)(iii). The taxpayer has little incentive to discuss any collection alternatives until the amount owed is conclusively determined. Cf. Harrell v. Commissioner, T.C. Memo. 2003-312, \*8 (by issuing the notice of determination, the Service effectively denied taxpayers the opportunity to present or consider collection alternatives that they might have presented or accepted had they known the outcome of a bankruptcy case before the issuance of the notice of

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<sup>3</sup> The Tax Court in Hoover v. Commissioner, T.C. Memo 2006-82 (2006), reviewed a CDP determination about the reasonableness of a jeopardy levy made less than 30 days after notice and demand, even though the taxpayer did not pursue his right to a section 7429 review. However, the court did not consider the issue of whether a section 7429 review is the exclusive means to challenge the reasonableness of a jeopardy levy, nor was the issue raised by either party.

determination). [REDACTED]

[REDACTED]<sup>4</sup>

#### Issue 4: Section 7429 Request for Review and Section 6330 Hearing Request

If the jeopardy levy is made less than 30 days after the notice and demand for payment is issued, the Service will issue Letter 2439, *Notice of Jeopardy Levy and Right of Appeal*, notifying the taxpayer of his appeal rights under both sections 7429 and 6330. See IRM 5.11.3.6. The taxpayer has 30 days from the date of Letter 2439 to request a section 7429 review and/or a CDP hearing. I.R.C. §§ 7429(a)(2), 6330(a)(3)(B). To request a section 7429 review, the taxpayer must file a written protest with the Area Director requesting a determination by Appeals of whether the jeopardy levy was reasonable. To request a CDP hearing, the taxpayer must submit to the Service a Form 12153, *Request for a Collection Due Process or Equivalent Hearing*, or other written request with the same information.

[REDACTED] If the amount of a jeopardy/termination assessment is found to be inappropriate, the assessment will be abated (section 7429(b)(4)) and the CDP determination should be that no future levy will be permitted. The taxpayer would be deprived of this determination if the CDP hearing is concluded before the end of the section 7429 review. If a jeopardy levy is found to be unreasonable in the section 7429 review, the jeopardy levy will be released (section 7429(b)(4)) or the collected tax will be returned to the taxpayer. Until the amount of unpaid tax is fixed, the taxpayer will not be in a position to offer a collection alternative. For these reasons, the Tax Court may decide that the issuance of a notice of determination before the conclusion of the section 7429 review was an abuse of discretion. See the discussion in Issue 3.

[REDACTED]

If you have any further questions, please contact Verónica Wong at 202-622-2012.

[REDACTED]<sup>4</sup>

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