

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

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to: John W. Gonzalez
Appeals Analyst
(Tax Policy & Procedure)

from: Laurence K. Williams
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(Procedure & Administration)

subject: Collection Appeal Program and I.R.C. § 6330(c)(4) Issue Preclusion

This memorandum responds to your request for assistance regarding the Collection Appeal Program (“CAP”) procedures and issue preclusion under I.R.C. § 6330(c)(4). This advice may not be used or cited as precedent.

ISSUES

- 1) Whether section 6330(c)(4) precludes consideration during a Collection Due Process (“CDP”) hearing of an issue that was raised and considered in a CAP hearing, in which the taxpayer meaningfully participated, when the CAP and CDP hearings were requested simultaneously.
- 2) Whether Appeals is required to provide a CAP hearing about a proposed levy when a CDP hearing is requested at the same time.

CONCLUSIONS

- 1) Section 6330(c)(4) does not preclude consideration during a CDP hearing of an issue that was raised and considered in a CAP hearing when the CAP and CDP hearings were requested simultaneously. The Settlement Officer may adopt the CAP decision as part of the determination in the CDP hearing.
- 2) There is no legal requirement that a taxpayer be given the right to a CAP hearing for a proposed levy when a CDP hearing is requested at the same time. The IRS Office of Appeals (“Appeals”) may decide for policy reasons not to provide a CAP hearing for a proposed levy when the taxpayer has requested a CDP hearing about the same proposed levy.

PMTA 2012-14

BACKGROUND

In 1996, Appeals administratively established CAP. This program provides taxpayers an administrative appeal right for certain collection actions, including seizure, levy, filing of a notice of federal tax lien (“NFTL”), and the rejection, modification, or termination of an installment agreement. The IRS Restructuring and Reform Act of 1998 expanded taxpayer rights to include a statutory right to a CDP hearing after a NFTL is filed and before, or in certain limited circumstances after, a levy or seizure is made. Taxpayers who request a CDP hearing may also be entitled to a CAP hearing. See IRM 8.24.1.1.1(7). The Settlement Officer will conduct an independent review of the issue raised in the CAP hearing in the same way as in a CDP hearing. The Settlement Officer in a CAP hearing will evaluate the appropriateness of the action, proposed or taken, based on law, regulations, policy, and procedures, considering all the relevant facts and circumstances, and will use his or her judgment to sustain, overturn, or partially sustain Collection’s action. See IRM 8.24.1.2.7(8), (10). Appeals does not give any deference to Collection’s decision about the appropriateness of an action.

The taxpayer may make simultaneous requests for CAP and CDP review when the Service’s collection action is a NFTL filing or levy. Under CAP, Appeals’ administrative decision is final and the review is limited to the specific collection action proposed or taken. See IRM 8.24.1.1.1(9). Under CDP, Appeals’ determination is subject to judicial review and the scope of Appeals’ review is broader. See I.R.C. § 6330(c), (d); IRM 8.24.1.1.1(10). For example, a taxpayer may, with certain exceptions, challenge the existence or amount of his or her underlying tax liability in a CDP hearing. See I.R.C. § 6330(c)(2)(B). A taxpayer may not challenge the amount of his or her liability in a CAP hearing. See IRM 5.1.9.4.1(2). A taxpayer may request a CAP hearing at the same time as a CDP hearing request in order to receive an expedited review, generally five days. See IRM 8.24.1.1.1(9). CDP consideration by contrast will generally take longer. The more expedited review provided by CAP may be desirable, for example, when a NFTL filing is interfering with a transaction or a levy causes the taxpayer economic hardship, and the taxpayer wants the NFTL withdrawn or the levy released as quickly as possible. Consequently, many taxpayers will request CAP consideration at the same time as their request for a CDP hearing.

You have asked if section 6330(c)(4) prevents the taxpayer from receiving Appeals’ consideration in a CDP hearing of the same issue decided in a simultaneously requested, but previously concluded, CAP hearing. You have also asked if Appeals is required to provide taxpayers with a CAP hearing about a proposed levy if the taxpayer has also requested a CDP hearing about the same proposed levy.

LAW AND ANALYSIS

Issue 1

Section 6330(c) prescribes the matters that may be raised in a CDP hearing and the matters that are precluded. Under section 6330(c)(2)(A), a person may raise any relevant collection issue, including spousal defenses, challenges to the appropriateness of the collection action, and offers of collection alternatives. The taxpayer may challenge the existence or amount of the underlying tax liability only “if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.” I.R.C. § 6330(c)(2)(B). Additionally, “an issue may not be raised at the hearing if ... the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and ... the person seeking to raise the issue participated meaningfully in such hearing or proceeding.” I.R.C. § 6330(c)(4)(A).

Section 6330(c)(4) applies to nonliability issues. See Magana v. Commissioner, 118 T.C. 488 (2002); West v. Commissioner, T.C. Memo. 2010-250. Section 6330(c)(4) may also apply to liability issues. See Westby v. Commissioner, T.C. Memo. 2007-194; Wooten v. Commissioner, T.C. Memo. 2003-113. See also Bland v. Commissioner, T.C. Memo. 2012-84, 7 n.12. Nothing in section 6330(c)(4) limits its preclusive effect to any particular type of issue. Nevertheless, for the purpose of this analysis, only section 6330(c)(4)’s application to nonliability issues is relevant, as only nonliability issues may be raised in a CAP hearing. See IRM 5.1.9.4.1(2).

“Administrative proceeding” in section 6330(c)(4) includes a hearing with Appeals. West, T.C. Memo. 2010-250 at 4. This interpretation is consistent with the inclusion of a hearing with Appeals in the definition of “opportunity” for purposes of section 6330(c)(2)(B). See Treas. Reg. §§ 301.6320-1(e)(3), Q&A E2, 301.6330-1(e)(3), Q&A E2 (“An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability.”). See also Lewis v. Commissioner, 128 T.C. 48, 61 (2007).

There is no case law or other authority defining when an “administrative proceeding” is “previous” for purposes of section 6330(c)(4). However, analogous authority interpreting section 6330(c)(2)(B) is instructive. The CDP regulations interpret section 6330(c)(2)(B) to require a “prior” opportunity to preclude liability consideration in a CDP hearing. See Treas. Reg. §§ 301.6320-1(e)(3), Q&A E2, 301.6330-1(e)(3), Q&A E2. The Tax Court has considered when an opportunity is “prior” for purposes of preclusion under section 6330(c)(2)(B). See Perkins v. Commissioner, 129 T.C. 58 (2007). In Perkins, the taxpayer requested a conference with Appeals (“initial Appeals request”) from a Letter 105C, notice of claim disallowance, on May 17, 2002, protesting the math error changes the Service had made to his 2000 tax return. Id. at 61. On August 10, 2002, before responding to the taxpayer’s initial Appeals request, the Service sent the taxpayer a CDP notice offering a CDP hearing about the proposed levy. The taxpayer timely requested a CDP hearing on September 6, 2002. Before any action was taken on the taxpayer’s CDP hearing request, Appeals considered and denied the taxpayer’s challenge to the math error change. During the CDP hearing, Appeals would not allow

the taxpayer to raise any challenges to the underlying tax liability, finding that Appeals' earlier consideration was a prior opportunity. Id.

The Perkins court concluded that an Appeals conference could not constitute an "opportunity" for purposes of section 6330(c)(2)(B) unless the conference was concluded before the taxpayer submitted a CDP hearing request. Id. at 66-67.¹ To hold otherwise "would consign to [Appeals'] discretion whether the underlying tax liability is subject to judicial review." Id. at 66. That is, Appeals "could cut off a taxpayer's right to judicial review of his challenge to the underlying tax liability by the simple expedient of postponing the [CDP] hearing until after a request for Appeals consideration ... was completed by Appeals." Id. at 67. Because the earlier Appeals conference was not resolved when the taxpayer requested his CDP hearing, the Court held that the taxpayer had not received an "opportunity" for purposes of section 6330(c)(2)(B). Id. at 66. Thus, Appeals erred in refusing to consider the taxpayer's underlying tax liability in the CDP hearing. Id. at 67.

Although Perkins involved the application of section 6330(c)(2)(B), the same analysis with respect to the timing of an Appeals request applies to section 6330(c)(4). The Tax Court interchangeably used "prior" and "previously" in describing the "opportunity" under section 6330(c)(2)(B). See Perkins, 129 T.C. at 65-66. The term "previous" is synonymous with the term "prior." THESAURUS.COM, <http://thesaurus.com/browse/previous> (last visited on April 26, 2012). Likewise, the "opportunity" described in Perkins and the "administrative proceeding" under section 6330(c)(4) both refer to a conference with Appeals. The Tax Court in Perkins determined that a CDP hearing effectively begins, for purposes of issue preclusion, when the taxpayer requests a CDP hearing. An Appeals conference that is not concluded by the time the taxpayer requests a CDP hearing cannot be deemed a "previous administrative proceeding" for the purposes of section 6330(c)(4). Otherwise, the Tax Court may find that Appeals is indiscriminately cutting off a taxpayer's right to judicial review of its determination of an issue by choosing the timing of the Appeals hearings. Cf. Perkins, 129 T.C. at 67.

If a CAP proceeding is concluded prior to the date the CDP hearing request is made and the taxpayer meaningfully participated, then the issue raised and considered at the CAP hearing is precluded from consideration in the CDP hearing under section 6330(c)(4) because the completed CAP hearing was a "previous administrative proceeding." However, if the taxpayer simultaneously requests a CAP and CDP hearing, or requests the CDP hearing before the conclusion of the CAP hearing, the CAP hearing cannot be a "previous" administrative proceeding. Any issue raised and considered in the CAP hearing is not precluded from being raised in the CDP hearing under section 6330(c)(4).

¹ See also Mason v. Commissioner, 132 T.C. 301, 320 (2009) (holding that a simultaneous CDP appeal and penalty appeal is not an "opportunity" to contest the underlying tax liability within the meaning of section 6330(c)(2)(B)).

The Settlement Officer conducting the CDP hearing may, but is not required to, adopt the decision made in the CAP proceeding as part of the CDP determination, as long as the taxpayer does not present any new information or reasons in the CDP hearing regarding the issue raised in CAP.² The issue raised and decided in the CAP hearing must be identical to the one raised in the CDP hearing. The CAP decision must have been made independent of and without deference to the decision of the Collection office taking or proposing the action reviewable in CAP. The basis for the CAP decision must be well-articulated and sound.³

Issue 2

There is no statutory mandate, and thus no legal requirement, that a taxpayer be given the right to appeal a proposed levy under CAP.⁴ [REDACTED]

Please contact Verónica Wong at (202) 622-3600 if you have any further questions.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

² [REDACTED]

³ [REDACTED]

⁴ Some CAP hearings, however, are statutorily required. The right to appeal the rejection or termination of an installment agreement is found in sections 6159(e) and 7122(e). The right to appeal the modification of an installment agreement or the Service's proposal to modify or terminate an installment agreement is mandated under Treas. Reg. § 301.6159(e).