Department of the Treasury

Internal Revenue Service

Office of Chief Counsel

Notice

CC-2001-038

Upon Incorporation

Subject: Collection Due Process Cases **Cancel Date:** into the CCDM

Purpose: The purpose of this Notice is to provide guidance on the handling of Collection Due Process (CDP) cases arising under the provisions of section 3401 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 685 (1998). The Act was signed into law on July 22, 1998, and is codified at sections 6320 and 6330. The CDP provisions became effective January 19, 1999. The text that follows will appear as an item on the Procedure and Administration Website and will be updated regularly.

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I. Background Material

Sections 6320 and 6330; Temp. Treas. Reg. § 301.6320-1T, and Temp. Treas. Reg. § 301.6330-1T; H.R. Rep. No. 105-599, 105 Cong., 2d Sess.1-368 (1998); General Explanation of Tax Legislation Enacted in 1998 (Blue Book), Staff of the Joint Committee on Taxation (1998).

II. Coordination of CDP Cases with the National Office

Chief Counsel Notice CC-2001-008, dated February 1, 2001, sets forth the procedures for the review by Procedure and Administration (PA) of defense letters to the Department of Justice and filings with the Tax Court in CDP cases. Effective as of the date of this Notice, all defense letters to the Department of Justice on CDP matters must be referred to TSS4510 for assignment and pre-review. Additionally, all pleadings, except for answers, motions, trial memoranda, briefs, and any other documents to be submitted to the Tax Court in a CDP case must be referred to TSS4510 for assignment and review. All offers of settlement or other issues in defense in any CDP case must likewise be referred to TSS4510 for assignment and review. Additional procedural guidelines for submission of draft documents for review to TSS, including a list of the documents which should be faxed to TSS4510 when sending in the first matter for review in a particular case, are set forth in the Notice.

Primary responsibility for all judicial matters arising in CDP cases has been transferred from Branch 3 of Administrative Provisions and Judicial Practice to Branch 1 of Collection, Bankruptcy & Summonses (CBS). Field attorneys seeking informal advice regarding CDP may contact Branch 1 (CBS), at 202-622-3610.

III. Assisting Appeals in Reducing CDP Inventory

Notice N(30)000-337a, dated May 24, 2000, announced a Chief Counsel program to assist the Office of Appeals in its efforts to reduce its significant CDP inventories. The program entails providing a dedicated counsel resource to Appeals offices in resolving legal questions arising in CDP hearings. Associate Area Counsel designate experienced attorneys to be available to provide prompt oral or written legal advice in resolving CDP issues. Associate Area Counsel, in turn, coordinate complicated or novel issues with National Office CDP experts. In order to ensure the uniformity of advice being given, Associate Area Counsel and Appeals should identify recurring legal issues, and Associate Area Counsel should forward to Branch 1 (CBS), copies of any advice given on such issues. Local and National Office Counsel also will provide direct assistance to Appeals in the design and implementation of Appeals training programs.

IV. Collection Due Process Overview

A. Notice of Federal Tax Lien - Section 6320

Prior to January 19, 1999, there was no requirement that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) had been filed. RRA § 3401 added section 6320 to provide that the Service must notify in writing the taxpayer against whom a NFTL has been filed and provide the taxpayer an opportunity for a CDP hearing before an impartial appeals officer. The post-lien filing notification (CDP Notice) under section 6320 may be given in person, left at the taxpayer's dwelling or usual place of business, or sent to the taxpayer by certified or registered mail to the taxpayer's last known address not more than five business days after the day the NFTL is filed. Among other things, the notification must inform the taxpayer of the right to request a hearing before the 31st day after the end of the five-business-day period in which the Service has to send the taxpayer a CDP Notice. Temp. Treas. Reg. § 301.6320-1T(c)(2)Q&A-C30. This notification is given by Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under I.R.C. § 6320. The taxpayer is entitled to one such hearing per tax period before an appeals officer who has had no prior involvement with respect to that tax period. CDP hearings with respect to liens may be held in conjunction with hearings under section 6330, involving levies. The period of limitations on collection with respect to that tax period is suspended while the CDP hearing and any appeal of that hearing are pending.

A taxpayer who does not request a CDP hearing under section 6320 within the 30-day period is not entitled to a CDP hearing, but is entitled to an equivalent hearing with Appeals as described in Temp. Treas. Reg. § 301.6320-1T(i). A taxpayer may judicially appeal a determination resulting from a CDP hearing. A taxpayer, however, may not appeal to a court any decisions made by an appeals officer at an equivalent hearing. In Johnson v. Commissioner, 2000 U.S. Dist. LEXIS 8320, 2000-2 U.S.T.C. 50,591 (D. Or. May 24, 2000), the taxpayer did not timely request a CDP hearing and was given an "equivalent" hearing under Temp. Treas. Reg. § 301.6330-1T(i). The court held that there was no provision for judicial review of the Service's determination in an equivalent hearing.

B. Prior to Levy - Section 6330

RRA § 3401 added section 6330 to provide that (except in the case of jeopardy levies or levies on State tax refunds) no levy may be made on any property or right to property of any taxpayer unless the Service sends the taxpayer a CDP Notice at least 30 days before the levy is made which provides the taxpayer with an opportunity for a CDP hearing. In jeopardy situations and in cases where a levy is made on a State tax refund, a CDP Notice is not required to be given until the levy action has actually occurred. The CDP Notice under section 6330 may be given in person, left at the taxpayer's dwelling or usual place of business, or sent to the

taxpayer by certified or registered mail, return receipt requested, to the taxpayer's last known address. Among other things, the CDP Notice must include a statement of the taxpayer's right to request a hearing during the 30-day period that commences the day after the date of the CDP Notice. This notification is given by Letter 1058 - Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing or LT 11- Final Notice, Notice of Intent to Levy and Your Notice of Right to a Hearing.

A taxpayer who does not request a CDP hearing under section 6320 within the 30-day period is not entitled to a CDP hearing, but is entitled to an equivalent hearing with Appeals as described in Temp. Treas. Reg. §301.6320-1T(i). A taxpayer may judicially appeal a determination resulting from a CDP hearing. A taxpayer, however, may not appeal to a court any decisions made by an appeals officer at an equivalent hearing.

Johnson v. Commissioner, 2000 U.S. Dist. LEXIS 8320, 2000-2 U.S.T.C. 50,591 (D. Or. May 24, 2000).

Kennedy v. Commissioner, 116 T.C. No. 19 (April 23, 2001).

Moorhous v. Commissioner, 116 T.C. No. 20 (April 23, 2001).

C. Procedures for Requesting a CDP Hearing

A taxpayer is entitled to one CDP hearing with respect to the tax and tax period covered by the post-lien filing CDP Notice or the pre-levy or post-levy CDP Notice provided the taxpayer. The taxpayer must request such a hearing in writing within the periods discussed above. Temp. Treas. Reg. §§ 301.6320-1T(c)(2)Q&A-C1, 301.6330-1T(c)(2)Q&A-C1. Johnson v. Commissioner, 2000 U.S. Dist. LEXIS 8320, 2000-2 U.S.T.C. 50,591 (D. Or. May 24, 2000), held that the requirement that a request for a CDP hearing be in writing is consistent with section 6330 and legislative intent.

A Form 12153, Request for a Collection Due Process Hearing, is included with the CDP Notice sent to the taxpayer. The Form 12153 requests the following information:

1. The taxpayer's name, address, daytime telephone number, and taxpayer identification number (SSN or TIN).

2. The type of tax involved.

3. The tax period at issue.

4. A statement that the taxpayer requests a hearing with Appeals concerning the proposed collection activity.

5. The reason or reasons why the taxpayer disagrees with the proposed collection action.

A taxpayer is encouraged to use a Form 12153 in requesting a CDP hearing so that the request can be readily identified and forwarded to Appeals. A taxpayer may also obtain a copy of Form 12153 by contacting the IRS office that issued the CDP Notice, by calling, toll-free, 1-800-829-3676, or at the IRS website, www.irs.ustreas.gov/forms_pubs/forms.html.

The regulations, however, do not require that a taxpayer use Form 12153 to request a CDP hearing. The regulations require that any request for a hearing include the taxpayer's name, address, and daytime telephone number, and be dated and signed by either the taxpayer or the taxpayer's authorized representative. Temp. Treas. Reg. § 301.6330-1T(c)(2)Q&A-C1. Any taxpayer who substantially complies with those requirements is entitled to a CDP hearing.

The regulations further provide that the written request for a CDP hearing should be filed with the IRS office that issued the CDP Notice at the address indicated on the CDP Notice. If the address of that office is not known to the taxpayer, the request may be sent to the Compliance Area Director serving the Compliance Area of the taxpayer's residence or principal place of business. If the taxpayer does not have a residence or principal place of business in the United States, the request may be sent to the Compliance Director, Philadelphia Service Center. Temp. Treas Reg. § 301.6330-1T(c)(2)Q&A-C6. If any one of these addresses is used, the request will be considered "properly addressed to the agency, officer, or office," for purposes of section 7502(a)(2)(B). Accordingly, if one of these addresses is used and the written request is postmarked within the applicable 30-day response period, the request will be considered timely even if it is not received by the IRS office that issued the CDP Notice until after the 30-day response period. Section 7503 will also apply.

D. Effect of Bankruptcy Proceedings

The automatic stay in bankruptcy, 11 U.S.C. § 362, may affect the Service's ability to issue a notice for a CDP hearing, Appeal's ability to conduct a CDP hearing, and the court's ability to review a CDP determination. When a taxpayer files a bankruptcy petition, the automatic stay halts a range of collection activities, including proceedings to recover a prepetition claim against the debtor; acts to recover a prepetition claim against the debtor's property; acts to create, perfect or enforce a lien against property of the debtor or the estate; and the commencement or continuation of a proceeding in the Tax Court. See 11 U.S.C.§ 362(a).

No NFTL should be filed and no levies proposed once the stay is in effect. If a NFTL is filed after the commencement of the stay, it should be withdrawn; if a levy is proposed after the commencement of the stay, it should be abandoned. Any CDP notices issued in connection with such activity should be rescinded.

If the taxpayer has already requested a CDP hearing before filing a bankruptcy petition, the impact of the automatic stay is less clear.

1. Prepetition CDP Levy Notice

Because the Service may not levy without providing the taxpayer an opportunity for a CDP hearing, the hearing itself is part of the collection process. As such, it is likely to be considered an "act to collect" stayed by the filing of a bankruptcy petition.

2. Prepetition CDP Lien Notice

A NFTL is effective when filed. Since the CDP hearing concerning the NFTL occurs in this instance after the collection action is complete, conducting the lien hearing is less likely to be regarded as a stay violation. Tax Court review of a CDP determination would be stayed, however. 11 U.S.C. § 362(a)(8).

In either case, however, proceeding with the CDP hearing is inconsistent with the bankruptcy regime, which is intended to provide a collective forum for dealing with the claims of all the debtor's creditors, including tax claims. Moreover, whether or not the CDP hearing itself is stayed, any further unilateral collection activity by the Service would be barred until the stay expires. At that time, the landscape will likely have changed. Assets that the Service sought to levy may have been distributed in the bankruptcy case, the Service's claims may be provided for in a reorganization or repayment plan, tax debts may have been discharged. Under the circumstances, it makes little sense to conduct a CDP hearing until the automatic stay expires and such issues have been resolved. Our general instruction to appeals officers is to suspend CDP hearings when they learn that a bankruptcy has been filed.

V. Sections 6320 and 6330 Procedures

A. Conduct of CDP Hearing

1. General Guidelines

A CDP hearing includes more than just what occurs at a face-to-face meeting. See TTK Management v. U.S., 87 A.F.T.R.2d ¶ 2001-313 (C.D. Cal. 2000) (two telephone conversations between the appeals officer and taxpayer's counsel prior to face-to-face meeting held to be part of "hearing"). Accord AJP Management v. U.S., 87 A.F.T.R. 2d, ¶ 2001-312 (C.D. Cal. 2000). The request for a hearing, correspondence from the taxpayer and telephonic communications with the taxpayer may raise relevant issues that are not raised at a face-to-face meeting. The Notice of Determination (referred to as a determination letter by Appeals) which is ultimately issued should address those issues as well. In Meyer v. Commissioner, 115 T.C. 417 (2000), the Tax Court found that the Appeals office did not provide petitioners with an opportunity for a hearing either in person or by telephone prior to issuing a disputed determination letter. The determination letter that was issued was held to be invalid and the petition was dismissed for lack of jurisdiction.

2. Location of CDP Hearing

The Tax Court has established a workable and reasonable rule on the location of a hearing. In Katz v. Commissioner, 115 T.C. 329 (2000), the petitioner argued that he had been denied a hearing because Appeals did not agree to a hearing in the city in which he lived. The Court looked to other tax contexts for guidance, including statutes and procedural regulations regarding the time and place for examinations and concluded that the appeals officer had complied with section 6320(b) by providing petitioner an opportunity for a hearing at the Appeals office closest to petitioner's residence, which was one hour's drive away.

3. CDP Hearing by Telephone or Correspondence may be Permissible

In Konkel v. Commissioner, 86 AFTR2d 5545 (M.D. Fla. 2000), the taxpayer contended that he was not given the opportunity for a hearing. The district court found that a hearing by correspondence was adequate (although, at magistrate judge's suggestion, an opportunity for a face-to-face meeting was also extended after the petitioner filed suit). In Meyer v. Commissioner, 115 T.C. 417 (2000), the Court found that the appeals officer did not provide petitioners with an opportunity for a hearing either in person or by telephone prior to issuing a disputed determination letter. The determination letter that

was issued was held to be invalid and the petition was dismissed for lack of jurisdiction.

4. No right of Petitioner to Call Witnesses or Obtain Discovery Before the Appeals Officer

Davis v. Commissioner, 115 T.C. 35 (2000), held that taxpayers do not have the right to subpoena and examine witnesses at a CDP hearing.

Katz v. Commissioner, 115 T.C. 329 (2000), noted that petitioner did not have right to examine witnesses during the CDP hearing.

Konkel v. Commissioner, 86 AFTR2d 5545 (M.D. Fla. 2000), held that there is no right to subpoena witnesses or documents at a CDP hearing.

5. Impartial Appeals Officer

In MRCA Information Services, Inc. v. Commissioner, 2000-2 U.S.T.C. 50,683 (D. Conn. 2000), the district court found that the appeals officer was not impartial if the appeals officer conducting plaintiff-corporation's CDP hearing had previously conducted a Collection Appeals Program (CAP) hearing for Trust Fund Recovery Penalty imposed on the corporation's sole shareholder. The court ordered a remand to Appeals. In Mesa Oil, Inc. v. United States of America, 86 A.F.T.R 2d 7312 (D. Colo., 2000), the district court remanded the case on several grounds, including the finding that the appeals officer was not "impartial" because statements she made in the letter she sent the taxpayer to set up the hearing showed that she had prejudged the matter.

B. Verification Requirements of 6330(c)(1)

The Secretary (Field Compliance or ACS) is responsible for providing the appeals officer with verification that all applicable laws and administrative procedures necessary for the collection of the tax have been followed. In many cases, this can be accomplished by reviewing the taxpayer's account on IDRS. In some circumstances the appeals officer may need to obtain further verification, for example, where the taxpayer questions whether the assessment was properly made or collection procedures have been followed.

1. Reliance on Transcript

Generally speaking, Appeals may rely on a MFRTX transcript to verify the validity of the assessment. Any transcript used to verify the validity of an assessment must include:

a. The identity of taxpayer,

b. The type of tax,

c. The tax period,

d. The assessment date, and

e. The assessment amount.

2. Reliance on Form 4340

Appeals may also rely on Form 4340, Certificate of Assessments and Payments, to verify liability. Davis v. Commissioner, 115 T.C. 35 (2000), involved a taxpayer's claim that a specific requirement had not been met. The taxpayer asserted that the assessments against him were invalid because he claimed there was not a valid summary record of assessments. The appeals officer obtained a Certificate of Assessments and Payments on Form 4340 to verify that the assessments against the taxpayer were valid. The Tax Court held that it was not an abuse of discretion by the appeals officer to rely on a Form 4340 to verify the validity of the assessments where the taxpayer did not demonstrate any irregularity in the assessment procedure that would raise a question about its validity.

C. Spousal Defenses

A taxpayer may raise any appropriate spousal defense at a CDP hearing. Section 6330(c)(2)(a)(i). Spousal defenses raised under section 6015 in a CDP hearing are governed in all respects by the provisions of section 6015. Temp. Treas. Reg. §§ 301.6320-1T(e)(2) and 301.6330-1T(e)(2). Thus, the limitations imposed under section 6330(c)(2)(B) do not apply to spousal defenses. A spousal defense raised under section 6015 is governed exclusively by that section and any limitations under section 6015 will apply. Temp. Treas. Reg. §§ 301.6320-1T(e)(3)Q&A-E-3 and 301.6330-1T(e)(3)Q&A-E-3.

D. Interest Abatement Claims

Under section 6404(i), the Tax Court has jurisdiction to review the Service's final determinations not to abate interest, which can also occur in CDP cases. In Katz v. Commissioner, 115 T.C. 329 (2000), the Court held that taxpayers could raise interest abatement claims in CDP hearings before Appeals and, upon appeal of the Notice of Determination to the Tax Court, the Court could review the appeals officer's determination with regard to interest that is the subject of the Service's collection activities. If a taxpayer seeks abatement of interest in a CDP hearing, the appeals officer conducting the hearing should analyze the interest abatement claim

in the same way that the officer would analyze an interest abatement claim brought directly under section 6404.

There are several unsettled issues on the scope of the Court's jurisdiction over interest abatement claims under section 6404. For example, section 6404(b) appears to preclude claims for interest abatement on income, estate, and gift tax when those claims are brought on grounds set forth in section 6404(a). See Melin v. Commissioner, 54 F.3d 432, 433 (7th Cir. 1995). Also, it is unclear whether the courts would have jurisdiction to consider an interest abatement claim when the challenge to interest is based in the claim that the taxpayer is not liable for the underlying tax and the law precludes the taxpayer from challenging the underlying tax directly. Accordingly, coordination with CC:PA:CBS:1 is advised when an interest abatement issue is identified.

E. Nonjusticiable Claims

1. Challenges to Liability Barred by Section 6330(c)(2)(B)

Section 6330(c)(2)(B) provides that the existence and amount of the underlying tax liability cannot be challenged at a CDP hearing if the taxpayer received a statutory notice of deficiency for the taxes in question or otherwise had an earlier opportunity to dispute the tax liability.

a. Receipt of a Statutory Notice of Deficiency

A review of the taxpayer's underlying tax liability is precluded only if the taxpayer actually received the statutory notice of deficiency relating to the tax liability in dispute. Receipt of a statutory notice of deficiency means receipt in time to petition the Tax Court for a redetermination of the deficiency. Temp. Treas. Reg. §§ 301.6320-1T(e)(3)Q&A-E2 and 301.6330-1T(e)(3)Q&A-E2.

If a taxpayer raises his underlying tax liability, and a statutory notice of deficiency was issued, review the administrative file and the appeals officer's CDP hearing file to see if there is any evidence that the taxpayer received the notice. Evidence could include correspondence from the taxpayer or an admission to the appeals officer. If there is no evidence, see if the taxpayer will acknowledge whether he received the notice.

If the taxpayer claims he did not receive the statutory notice of deficiency, evidence of receipt must be gathered. A copy of the Postal Service Form 3877, certified mailing list, should be obtained. The mailing list indicates the name and address of the recipient, the certified mail number, and the tax year of the notice. The certified mailing list demonstrates that the notice was sent by certified mail to a particular address. Evidence that the taxpayer

actually received mail at that address should also be obtained. If these two pieces of evidence are present, there is a presumption in the law of delivery and the burden is then on the taxpayer to prove non-receipt. See Sego v. Commissioner, 114 T.C. 604 (2000) (taxpayer could not defeat delivery by refusing to pick up certified mail from her local post office); Anderson v. United States, 966 F.2d 487, 491 (9th Cir. 1992). Moreover, the petitioner should not be able to defeat this presumption by mere denial of receipt. See Zenco Engineering Corp. v. Commissioner, 75 T.C. 318, 323 (1980).

If the notice was mailed two years earlier or less, a copy of the Postal Service Form 3849 should be obtained. Postal Service Form 3849 is available at the local post office which delivered the notice. A copy of Postal Service Form 3849 may provide proof that the notice was actually received by the taxpayer.

b. Opportunity to Dispute Liability

The existence or amount of the tax liability for the tax period shown in the CDP Notice may be challenged only if the taxpayer did not already have an opportunity to dispute that tax liability. If the taxpayer previously received a CDP Notice under section 6320 or 6330 with respect to the same tax and tax period, the taxpayer has had an opportunity to dispute the existence or amount of his underlying tax liability, whether or not the taxpayer had a hearing and challenged the liability.

An opportunity to dispute a liability includes a prior opportunity for a conference with Appeals that was offered either before or after assessment of the liability. Temp. Treas. Reg. §§ 301.6320-1T(e)(3)Q&A-E2 and 301.6330-1T(e)(3)Q&A-E2. Again, ask the taxpayer if he was provided an opportunity for an Appeals conference with regard to the tax liability in question. It may also be possible to determine if a prior opportunity for an Appeals conference was offered by checking the examination file or the trust fund recovery penalty file (see Letter 1153(DO) discussion below) for copies of letters sent to the taxpayer proposing the assessment and giving the taxpayer a chance to contest the assessment in Appeals. Also check the file for the case history notes that should state that a letter giving the taxpayer appeal rights was sent.

Examples of letters which provide an opportunity for an Appeals conference include:

> Letter 1153(DO) - required after June 30, 1996, by section 6672(b) to be sent when a trust fund recovery penalty is proposed (sent by certified mail))

Letter 950 - sent when employment tax assessments are proposed,

Letter 955 - sent when excise tax assessments are proposed,

Letter 1125(DO) - sent when return preparer penalties are proposed.

Actual receipt of one of these letters by the taxpayer or his representative must be established in order to preclude the taxpayer from raising any substantive arguments. See the statutory notice of deficiency discussion above concerning evidence of mailing and receipt. If the file indicates that any of these letters were mailed to the taxpayer and were either delivered to or delivery was refused by the taxpayer or his representative, and the taxpayer declined to challenge the assessment in Appeals, he cannot now contest the tax liability in the CDP hearing.

In addition, if the examination file has a copy of a signed Form 4549, "Income Tax Examination Changes," by which the taxpayer has waived appeal rights and the issuance of the notice of deficiency, the taxpayer has had an opportunity to dispute the liability.

While a prior opportunity for an Appeals conference with regard to the liability precludes review in the CDP conference, there may be other situations, for example, bankruptcy proceedings, in which the taxpayer had a previous opportunity to dispute the liability. The definition of a prior "opportunity to dispute" the underlying tax liability remains unsettled.

2. Challenges Barred by Section 6330(c)(4)

In contrast to section 6330(c)(2)(B) which addresses the ability of a taxpayer to raise his underlying tax liability at the CDP hearing, section 6330(c)(4) addresses the ability of a taxpayer to raise other allowable issues at a CDP hearing.

Section 6330(c)(4) provides that an issue may not be raised at the CDP 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.

a. Interplay with Section 6330(c)(2)

Under section 6330(c)(4), the taxpayer must have participated meaningfully in the hearing or proceeding, not just received an opportunity to participate as under 6330(c)(2)(B). A taxpayer may raise appropriate spousal defenses, challenges to the appropriateness of the proposed collection action, and offers of collection alternatives in a CDP hearing under section 6330 even if he previously received a CDP Notice under 6320 with respect to the same tax and tax period and did not request a CDP hearing.

b. Contrast with Res Judicata and Collateral Estoppel

The provisions of sections 6330(c)(2)(B) and 6330(c)(4) are similar to, and generally more expansive than, the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion). Those doctrines are independent of the statutory provisions and should be separately pleaded, where appropriate, in response to a petition for review of an Appeals determination. See MacElvain v. Commissioner, T.C. Memo. 2000-320, n. 7 (recognizing the applicability of the doctrine of res judicata in the CDP context).

3. Issues Not Raised to Appeals

In seeking Tax Court or district court review of the notice of determination, the taxpayer can only request that the court consider an issue that was raised in the taxpayer's CDP hearing. Temp. Treas. Reg. §§ 301.6320-1T(f)(2)Q&A-F5 and 301.6330-1T(f)(2)Q&A-F5. In Sego v. Commissioner, 114 T.C. 604, 612 (2000), the Court recognized that matters raised after a hearing do not reflect on whether the determination made by Appeals was an abuse of discretion.

The term "hearing" should be interpreted broadly. The taxpayer or his representative may raise issues not only in the written request for a CDP hearing or in the face-to-face hearing, but also in correspondence and telephone calls that are exchanged between Appeals and the taxpayer.

Be aware, however, that, contrary to Service position, one court appears to have construed the term "hearing" very narrowly as just the face-to-face meeting between the appeals officer and the taxpayer. See Mesa Oil, Inc. v. United States, 86 A.F.T.R. 2d 7312 (D. Colo. 2000) (in court's view, letter from appeals officer to taxpayer stating appeals officer's views prior to face-to-face meeting were communications prior to the "hearing").

F. Notice of Determination Issued by Appeals

1. In General

The determination letter is addressed to the taxpayer, gives a summary of the determination made by Appeals, and advises the taxpayer of the court to which an appeal may be taken. If the Tax Court normally has jurisdiction over that type of tax, for example, income taxes and estate taxes, Appeals will use the Tax Court letter, Form 3193. If the tax is a type over which the Tax Court usually does not have jurisdiction, like employment taxes, Appeals will use the District Court letter, Form 3194. Included with the letter is an attachment that discusses the so-called "Big Three" issues (i.e., those issues described in section 6330(c)(3)). These are: 1) verification that the requirements of applicable law or administrative procedure have been met, 2) consideration of the challenges the taxpayer raises to the tax liability and collection alternatives the taxpayer has proposed, and 3) determination of whether the collection action or the lien filing balances the need for efficient collection of taxes with the taxpayer's legitimate concern that the levy or notice of lien filing is no more intrusive than necessary. The Treasury regulations (Temp. Treas Reg. § 301.6320-1T(e)(3)Q&A-E1 and Temp. Treas Reg. § 301.6330-1T(e)(3)Q&A-E1), break down the "Big Three" into ten possible items that may be necessary to discuss in the determination letter.

2. The "Big Three" Issues

a. Verification

As discussed in V. B, above, Field Compliance or ACS is responsible for providing the appeals officer with verification that all applicable laws and administrative procedures necessary for the collection of the tax have been complied with. In many cases, this can be accomplished by reviewing the taxpayer’s account on IDRS. Any taxpayer who continues to question whether some aspect of the assessment or collection process has been correctly followed should be asked to identify which law or IRS procedure he believes was not followed. If the taxpayer identifies a particular law or IRS procedure, the appeals officer should determine whether the law or IRS procedure is applicable and whether it was met. The appeals officer should specifically discuss that issue in the determination letter. Appeals may rely on a MFRTX transcript to verify the validity of the assessment. Appeals may also rely on Form 4340, Certificate of Assessments and Payments, to verify liability. Davis v. Commissioner, 115 T.C. 35 (2000).

b. Issues Raised

See sections IV. C through E, above. The taxpayer may raise any relevant issue relating to the unpaid tax at the hearing, including appropriate spousal

defenses, challenges to the appropriateness of the NFTL filing, and offers of collection alternatives. The taxpayer also may raise challenges to the existence or amount of the tax liability specified on the CDP Notice for any tax period shown on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for the tax liability or did not otherwise have an opportunity to dispute the tax liability. Finally, the taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6320 or 6330 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding. Taxpayers are expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.

c. Balancing Appropriateness of Collection Action with Intrusiveness to Taxpayer

The determination letter must make a specific finding as to whether the NFTL filing or the proposed levy represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. See, for example, Mesa Oil, Inc. v. United States of America, 86 A.F.T.R. 2d 7312 (D. Colo. 2000), where a district court remanded a case on several grounds, including, for a finding that the appeals officer's application of the balancing test was perfunctory and did not contain an adequate explanation.

G. Judicial Review/Jurisdiction

1. In General

Jurisdiction under section 6330 for either the Tax Court or a district court depends upon a timely petition for review and the issuance of a valid notice of determination.

Offiler v. Commissioner, 114 T.C. 492 (2000).

Goza v. Commissioner, 114 T.C. 176 (2000);

Kennedy v. Commissioner, 116 T.C. No. 19 (April 23, 2001).

Moorhous v. Commissioner, 116 T.C. No. 20 (April 23, 2001).

a. Time Period for Petitioning

1. General Rule

Under section 6330(d)(1), a taxpayer has 30 days from the date of the notice of determination in which to appeal that determination to the Tax Court, or, if the Tax Court does not have jurisdiction over the underlying tax liability, to a district court. Offiler v. Commissioner, 114 T.C. 492 (2000). If a timely petition is filed with an incorrect court, the taxpayer will have 30 days after the court's determination to that effect to file an appeal with the correct court. Temp. Treas. Reg. § 301.6330-1T(f)(2)Q&A-F4. An untimely filing in an incorrect court cannot extend the time to file in the correct court. McCune v. Commissioner, 115 T.C. 114 (2000).

2. Special Rule

If the taxpayer is seeking review of a denial of relief by Appeals under section 6015(b), (c), or (f), relating to relief from joint and several liability on a joint return, in addition to liability related issues, the taxpayer should request Tax Court review within the 30-day period stated. Temp. Treas. Reg. §§ 301.6320-1T(f)(2)Q&A-F2 and 301.6330-1T(f)(2)Q&A-F2. If the taxpayer is seeking review only of the denial of relief by Appeals with respect to section 6015(b), (c) or (f), the taxpayer may have 90 days following the date of the determination by Appeals per section 6015(e). Id.; Butler v. Commissioner, 114 T.C. 276 (2000). This also has the effect of limiting judicial review to only the section 6015 claims where the request for Tax Court review is filed after the 30-day period. Temp. Treas. Reg. §§ 301.6320-1T(f)(2)Q&A-F2 and 301.6330-1T(f)(2)Q&A-F2.

b. Validity of Notice of Determination

1. In General

For jurisdiction, the courts also require a valid notice of determination. See Goza v. Commissioner, 114 T.C. 176 (2000). A decision letter issued following an equivalent hearing is not equivalent to a Notice of Determination as no statutory provisions exist for judicial review of an equivalent hearing. Temp. Treas. Reg. § 301.6330-1T(i)(2)Q&A-I5; Johnson v. Commissioner, 2000-2 U.S.T.C. 50,591 (D. Or. 2000); Kennedy v. Commissioner, 116 T.C. No. 19 (April 23, 2001); and Moorhous v. Commissioner, 116 T.C. No. 20 (April 23, 2001).

2. Lack of a Hearing

In Meyer v. Commissioner,115 T.C. 417 (2000), the Tax Court held that where the appeals officer did not provide petitioners with an

opportunity for a hearing either in person or by telephone prior to issuing a disputed determination letter, the letter was invalid and the petition was dismissed for lack of jurisdiction.

3. Unresolved Issues

Not all errors that occur in the CDP process result in invalidating the notice of determination. It is our position that a distinction exists between analytical errors in the determination based on the hearing and procedural errors that effectively deny the taxpayer an opportunity for hearing. We believe the former do not invalidate the Notice of Determination while the latter types of errors may invalidate the notice. Questions regarding this is should be coordinated with CC:PA:CBS:1.

2. Tax Court Jurisdiction versus District Court Jurisdiction

a. General Rule

Section 6330(d)(1) states that appeal of the determination made by Appeals is to the Tax Court unless the Tax Court does not have jurisdiction over the type of tax specified in the CDP Notice. Temp. Treas. Reg. § 301.6330-1T(f)(2)Q&A-F3 provides that, if the Tax Court would have jurisdiction over the type of tax specified in the CDP Notice (for example, income and estate taxes), then the taxpayer must seek judicial review by the Tax Court. If the tax liability arises from a type of tax over which the Tax Court would not have jurisdiction, then the taxpayer must seek judicial review by a district court of the United States. In Moore v. Commissioner, 114 T.C. 171, 175 (2000), the Tax Court interpreted section 6330(d)(1) to mean that Congress did not intend to expand the Court's jurisdiction beyond the types of taxes that the court may normally consider. The Court held that section 6330(d)(1) provides for Tax Court jurisdiction except where the Court does not normally have jurisdiction over the underlying liability.

b. Inapplicability of Full Prepayment Rule

In Flora v. United States, 362 U.S. 145 (1960), the Supreme Court held that jurisdiction of the district court over a suit for tax refund under 28 U.S.C. § 1346(a) does not exist unless the taxpayer has fully paid the tax. Section 1346(a) does not govern CDP proceedings. Jurisdiction to review CDP determinations is conferred on the district courts under section 6330(d). There is no full prepayment requirement under section 6330(d). Note that in two district court cases, the courts erroneously relied upon the full-payment rule of Flora to dismiss a judicial appeal of a notice of determination. See McCune v. Commissioner, 2000-1 U.S.T.C. 50,279 (N.D. Tex. 2000); Act Restoration v. Commissioner, 99-2 U.S.T.C. 50,911 (N.D. Fla. 1999). In our view, these cases were incorrectly decided as to this issue.

c. Tax Court

Generally, the Tax Court's jurisdiction is limited to redetermination of income, estate, gift and certain excise taxes. See Sections 6211, 6213(a). See, e.g., True v. Commissioner, 108 F. Supp. 2d 1361 (M.D. Fla. 2000), holding that since the liability at issue related to petitioner's self-employment tax, the Tax Court was the proper court for the action and the district court did not have jurisdiction. In CDP cases, the Tax Court has jurisdiction over income, estate, gift and certain excise taxes even where those taxes were not subject to deficiency procedures because they were reported due, but unpaid, with a filed return. Although the Service has a good indication which court is likely to have jurisdiction for certain issues, many issues remain untested. For example, direct challenges to liabilities for interest on income tax based on section 6404(e) are within the Tax Court's jurisdiction, but it remains unclear to what extent the Tax Court has jurisdiction for abatement claims under section 6404(a). See generally Katz v. Commissioner, 115 T.C. 329 (2000) (finding jurisdiction in the provisions of section 6330, to review interest abatement claims, but analyzing the claim only under section 6404(e), and not 6404(a); also determining that the Tax Court had jurisdiction to review all interest that was the subject of respondent's collection action, regardless of whether the interest was assessed).

Certain types of taxes have been determined to be within district court jurisdiction in the context of CDP cases, including trust fund recovery penalties under section 6672 (Moore v. Commissioner, 114 T.C. 171 (2000)), employment taxes (Anderson v. Commissioner, T.C. Memo. 2000-311), and frivolous return penalties under § 6702 (Van Es v. Commissioner, 115 T.C. 324 (2000)). District court jurisdiction also includes the appeal of a notice of determination concerning assessments under section 6201(a)(3) of alleged erroneous refunds resulting from alleged overstatements of

income taxes withheld. Stephen C. Loadholt Trust v. Commissioner, T.C. Memo. 2000-349; Samuel and Bernice Boone Trust v. Commissioner, T.C. Memo. 2000-350.

Generally, it is anticipated that all assessable penalties would be properly before the district courts, but the question of jurisdiction over many assessable penalities remains unlitigated.

Prior to the amendment to section 7436 relating to determinations of employment status by the Tax Court, we argued that the Tax Court had no jurisdiction over CDP cases involving employment taxes. Anderson v. Commissioner, T.C. Memo. 2000-311.

Section 314(f) of the Community Renewal Tax Relief Act of 2000 retroactively amended section 7436 to expand the Tax Court's jurisdiction to determine "the proper amount of employment tax under...[the] determination" whether one or more individuals performing services for the taxpayer are employees for purposes of subtitle C or whether the taxpayer is not entitled to the treatment under subsection (a) of section 530 of the Revenue Act of 1978.

This amendment is effective as of the date of enactment of section 7436, August 5, 1997. This effectively overrules Henry Randolph Consulting v. Commissioner, 112 T.C.1 (1999), in which the Tax Court held that it lacked jurisdiction to determine the amount of employment taxes for the periods at issue in a proceeding for determination of employment status under section 7436. As to its effect on the jurisdiction of the Tax Court in CDP cases, contact CC:PA:CBS:1. Other issues with respect to section 7436 should be coordinated with CC:TEGE:Employment Tax.

H. Retained Jurisdiction from Notice of Determination

1. In General

Section 6330(d)(2) provides that Appeals has retained jurisdiction with respect to any determination letter it has issued. This retained jurisdiction is limited to the consideration of collection actions taken or proposed with respect to the original determination made by Appeals, and, after the taxpayer has exhausted all administrative remedies, where the taxpayer can establish that a change in circumstances affects that original determination. The taxpayer may return to Appeals on retained jurisdiction. A taxpayer may not seek judicial review of a decision by Appeals resulting from a retained jurisdiction hearing. Temp. Treas. Reg. §§ 301.6320-1T(h)(2), Q&A-H2 and 301.6330-1T(h)(2), Q&A-H2.

2. Collection Actions Taken or Proposed

Retained jurisdiction over "collection actions taken or proposed" is limited to situations where a dispute arises as to how the determination made by Appeals is implemented by Compliance. For example, the determination by Appeals may limit the authority of Compliance to levy on certain items of the taxpayer's property. If a levy is made or proposed to be made on other property of the taxpayer, Appeals may review that action under its retained jurisdiction.

3. Change in Circumstances

Retained jurisdiction to consider a "change in circumstances" should be limited to situations where some economic disruption has occurred in the taxpayer's life that prevents him from complying with the terms of any agreement the taxpayer has made as part of the determination made by Appeals. For example, where a taxpayer who has agreed to a payment plan with Appeals subsequently loses his job and cannot obtain a revised payment schedule even after a conference with a Collection manager. The taxpayer must exhaust all administrative remedies before involving Appeals' retained jurisdiction to consider a change in circumstances. The district court does not have authority to require Appeals to reconsider a notice of determination under retained jurisdiction based on "changed circumstances." See TTK Management, supra and AJP Management, supra.

4. Effect of Section 6320(c)

Section 6320(c) limits retained jurisdiction with respect to determinations made by Appeals in cases involving Federal tax lien filings to the consideration of collection actions taken or proposed with respect to the original determination made by Appeals. The Service, however, has administratively determined that Appeals should also exercise retained jurisdiction with respect to any determination it made under section 6320 if the taxpayer has exhausted all administrative remedies and can establish that a change in circumstances affects that original determination. See Temp. Treas. Reg. § 301.6320-1T(h)(1).

I. Suspension of Statute of Limitations

The periods of limitation under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to suits) are suspended by a request for a CDP hearing. The suspension period commences on the date the Service receives the taxpayer's written request for a CDP hearing. The suspension period continues until the date the Service

receives a written withdrawal by the taxpayer of the request for a CDP hearing or the determination resulting from the CDP hearing becomes final by expiration of the time for seeking review or reconsideration. In no event shall any of these periods of limitation expire before the 90th day after the day on which the Service receives the taxpayer's written withdrawal of the request that Appeals conduct a CDP hearing or there is a final determination with respect to such hearing. The periods of limitation that are suspended under section 6320 or section 6330 are those that apply to the taxes and the tax period or periods to which the CDP Notice relates. Temp. Treas. Reg. §§ 301.6320-1T(g) and 301.6330-1T(g).

VI. CDP Litigation Practice

A. Tax Court Rules

Title XXXII of the Tax Court Rules of Practice and Procedure, which encompasses T.C. Rules 330 through 334, apply to petitions brought under sections 6320 and 6330. In general, these rules describe the jurisdiction of the Court, specify the contents of a petition under these sections and make other rules of the Court applicable to CDP cases.

B. Applicability of Small Case Procedures

Prior to December 21, 2000, section 7463 provided streamlined procedures, and authorized the Tax Court to prescribe rules, governing cases for redetermination of deficiencies in which $50,000 or less was in dispute. CDP cases were not covered by this provision. Effective December 21, 2000, section 7463 was amended to permit small case (or "S") designation in CDP cases "in which the unpaid tax does not exceed $50,000." Section 313(b)(1) of the Community Renewal Tax Relief Act of 2000 (H.R. 5662, incorporated in H. R. 4577, the Consolidated Appropriations Act, 2001) (Pub. L. No. 106-554, 114 Stat. 2763) (hereinafter Relief Act of 2000). It is unclear at this time what liabilities are included in the amount of "unpaid tax" for this purpose. Questions as to whether "S" designation is proper in a CDP case should be referred to CC:PA:CBS:1.

C. Motion to Change Caption

It has been the Tax Court's practice to identify lien or levy actions under section 6320(c) or 6330(d) by including the letter "L" in the docket number (i.e., Docket Number 12345-00L). If a petition does not have that docket number, it is likely that there was no notice of determination attached to the petition and the Court is uncertain that the taxpayer intended to bring an action under section 6320 or 6330. Although a notice of determination should be attached to the answer in such cases, the filing of the answer may not cause the Court to add the letter "L" to the case docket number. In the event that it is determined that the case is a lien or levy action, the field should consider filing a Motion to Change Caption so it is clear that

the Court agrees the case is an action under 6320(c) or 6330(d). See Exhibit 1 for an example of such a motion.

D. Answers

The title of the answer to a petition may merely be "Answer." Where the answer is to an amended petition for lien or levy action under code section 6320(c) or 6330(d), the title of the answer should mirror the language of the amended petition and be titled "Amended Answer to Petition for Lien or Levy Action under section 6320(c) or 6330(d)." Mirrored titling may reduce the odds that the clerk's office will bounce the answer. The following is recommended language for the prayer:

> WHEREFORE, it is prayed that the relief sought in the Petition for Lien or Levy Action Under Section 6320(c) or 6330(d) be denied and that Respondent's determination, as set forth in the Notice of Determination, be in all respects sustained.

The above language effectively encompasses the separate standards of review (as discussed below in section VI.F.) for cases involving either an alleged abuse of discretion or a review of the underlying tax liability. In a number of lien/levy actions, taxpayers have previously been involved in judicial proceedings involving the same issue which they are raising in a CDP petition. In such circumstances, the answer should raise a defense of res judicata and/or collateral estoppel where appropriate.

E. Additional Pleadings in Innocent Spouse Cases

In any proceeding before the Tax Court, including a CDP proceeding, in which the taxpayer raises a claim for innocent spouse relief and the other spouse is not a party to the case, respondent must serve notice of the claim on the other individual who filed the joint return for the years at issue. For a more detailed discussion, see Chief Counsel Notice N(35)000-173 (October 17, 2000).

F. Standard of Review

1. Abuse of Discretion: Nonliability Issues

Sections 6320(c) and 6330(d) are silent as to the appropriate standard for review in lien/levy actions. The conference report enacting these sections states that where the validity of the tax liability is not properly part of the appeal, the appeals officer's determination should be reviewed for an abuse of discretion. H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at p. 266 (1998); see also Goza v. Commissioner, 114 T.C. 176 (2000) ("where the validity of the underlying tax liability is not properly at issue, the Court will review the Commissioner's administrative determination for abuse of discretion"); Davis v. Commissioner, 114 T.C. 35 (2000). A non-exclusive

list of nonliability issues is set forth in section 6330(c)(2)(A): (a) spousal defenses, (b) challenges to appropriateness of collection action, and (c) offers of collection alternatives (including posting of bond, substitution of other assets, installment agreement or offer-in-compromise).

2. De Novo Review: Liability Issues

If the validity of the tax liability is properly at issue in the hearing and the determination of the tax liability is part of the appeal, the amount of the tax liability will be reviewed by the appropriate court on a de novo basis. H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at p. 266 (1998); see also Goza v. Commissioner, 114 T.C. 176 (2000) ("where the validity of the underlying tax liability is properly at issue, the court will review the matter on a de novo basis").

3. Interest Abatement Requests: Abuse of Discretion

The Tax Court has stated that the term "underlying tax liability" includes any amounts owed that are the subject of the Commissioner's collection activities. Katz v. Commissioner, 115 T.C. 329 (2000). In Katz, the court found that the underlying liability in that case included the tax deficiency, additions to tax, and statutory interest. Although interest was included within the term "underlying tax liability," the court considered the taxpayer's claim that he was not liable for statutory interest as a claim for interest abatement under an abuse of discretion standard, the same standard that the Court applies to interest abatement claims brought to it under section 6404(i).

G. Trial Preparation

1. Liability Challenges

A common issue is whether the petitioner is entitled to challenge the existence or amount of liability underlying the notice of determination. Early resolution of this issue will either significantly simplify the case, if the issue is not properly before the Court, or make clear the necessity for preparing to defend liability questions. The early use of motions to clarify the scope of the issues in the case is recommended. Where it is unclear whether the petitioner actually received a statutory notice of deficiency or otherwise had an opportunity to dispute liability, it may be appropriate to use discovery or requests for admissions, or both, to establish the facts needed to file a motion relying on section 6330(c)(2)(B) to preclude petitioner from challenging liability. Section V.E.1. above enumerates some of the evidence that should be gathered during pretrial preparation.

2. Approach

When liability is properly at issue, trial preparation of the case should be in the same manner as one would approach a deficiency or refund action.

3. Stipulation of Facts

Because the Court will be reviewing the appeals officer's determination for abuse of discretion with respect to all nonliability issues, it is important that all documents that the appeals officer considered or prepared in making a determination, including the Appeals Case Memorandum, are included in the stipulation of facts. See Mesa Oil, Inc. v. United States of America, 86 A.F.T.R. 2d 7312 (D. Colo. Nov. 2000) (record inadequate to afford effective judicial review).

4. Summary Judgment for Nonliability Issues

The Tax Court has recognized that matters raised after a hearing do not reflect on whether the determinations that are the basis of the petition were an abuse of discretion. See Sego v. Commissioner, 114 T.C. 604, 612 (2000). The period under consideration in an abuse of discretion hearing is from the time of the petitioner's request for a CDP hearing until the appeals officer issues a notice of determination.

Generally, these facts should not be in dispute and should be susceptible to proof by means of a stipulation of facts or an affidavit or declaration from the appeals officer who conducted the hearing and/or the attorney in possession of the file created by the appeals officer who conducted the CDP hearing. In such situations, a motion for summary judgment is particularly appropriate. See MacElvain v. Commissioner, T.C. Memo. 2000-320, slip op. at 10.

H. Settlement

1. Stipulated Decisions

Although it is our position that petitioners should not be able to raise new nonliability matters subsequent to the issuance of a notice of determination and have those matters decided by the Court, situations may arise where respondent and petitioner agree to enter into a collection alternative (such as an installment agreement or offer in compromise) after issuance of a notice of determination. To accomplish this, the parties have been successful in submitting stipulated decisions to the Court. [See exhibits for examples.]

2. Motions to Dismiss for Mootness

Sometimes a taxpayer will voluntarily pay his or her tax liability after

petitioning a notice of determination to the Tax Court. Alternatively, the petitioner may file for bankruptcy and receive a discharge of the tax liabilities at issue, and no prebankruptcy or exempt property may exist against which to pursue further collection. See Isom v. United States, 901 F.2d 744 (9th Cir. 1990). In such cases there may no longer be any need for enforced collection through lien or levy action and the petition may be effectively rendered moot. We, therefore, believe that filing a motion to dismiss as moot may be appropriate in such cases. If petitioner does not consent to the granting of a motion to dismiss, contact CC:PA:CBS:1 for assistance. [See exhibits for examples.]

I. Sanctions

When taxpayers bring CDP actions for delay or based on frivolous or groundless arguments, the Service has the ability to combat these abuses through the use of section 6673. In Pierson v. Commissioner, 115 T.C. 576 (2000), the Tax Court noted the applicability of penalties under section 6673 to CDP actions instituted primarily for delay or that are frivolous or groundless. Although the Court declined to impose a penalty in that case, the Court stated, "[W]e regard this case as fair warning to those taxpayers who, in the future, institute or maintain a lien or levy action primarily for delay or whose position in such a proceeding is frivolous or groundless." The Tax Court, on its own, has imposed sanctions for delaying the proceedings and for the making of frivolous arguments in Davis v. Commissioner, T.C. Memo. 2001-87 (April 10, 2001). This issue must be coordinated with CC:PA:CBS:1 and the sanctions officer before sanctions are requested.

J. Remedies

1. Liability Issues

When liabilities are properly in dispute, a decision that states what the tax liability is as of a date certain should be entered. Note that the Court's decision will not be limited to a determination of a deficiency, but will be more in the nature of a judgment in a suit to reduce an assessment to judgment. The decision should actually state the tax liabilities due.

2. Anti-injunction Act

The Anti-injunction Act generally prohibits suits to restrain the assessment or collection of any tax. Effective December 21, 2000, section 314(b)(2) of the Relief Act of 2000 amended section 6330(e)(1) to authorize the proper court, including the Tax Court, to enjoin a levy during the time the suspension under section 6330(e)(1) is in force. The Tax Court does not have jurisdiction under section 6330(e)(1) to enjoin any action or proceeding

unless a timely appeal has been filed with the Tax Court and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates. Contact CC:PA:CBS:1.

3. Refunds

In certain cases, section 6330(c)(2)(B) allows a taxpayer to challenge the existence or amount of the "underlying tax liability." In Katz v. Commissioner, 115 T.C. 376 (2000), the Court construed the term "underlying tax liability" to be the amounts owed that are the subject of the Commissioner's collection activities. Refund jurisdiction does not exist because amounts paid and subject to refund claims are not subject to collection activities. Furthermore, while there are statutory provisions that expressly grant the Tax Court the authority to determine overpayments in deficiency cases (see section 6512(b)) and actions for determination of relief from joint and several liability on a joint return (see section 6015(e)(3)(A)), there is no statutory provision expressly granting the Tax Court the authority to determine an overpayment and/or order a refund in an action arising under section 6320 or 6330.

4. Remand

The federal district courts have the authority to order remands to the Office of Appeals and have done so in at least two cases. See MRCA Information Services, Inc. v. Commissioner, 2000-2 U.S.T.C. 50,683 (D. Conn. 2000); Mesa Oil, Inc. v. United States of America, 86 A.F.T.R. 2d 7312 (D. Colo. 2000). To date, the Tax Court has never ordered a remand to the Service. Any case involving a question of whether remand is available as a remedy in a Tax Court case under section 6320 or 6330 should be closely coordinated with CC:PA:CBS:1.

/s/
DEBORAH A. BUTLER
Associate Chief Counsel
(Procedure and Administration)

EXHIBITS

1. Motion to change caption

MOTION TO CHANGE CAPTION

RESPONDENT MOVES that the Court enter an order correcting the caption in the above-entitled case by changing the docket number to read [insert docket number]"L" and designating this case as a Lien or Levy Action provided for in I.R.C. § 6320(c) or 6330(d) and T.C. Rules 330 through 334.

IN SUPPORT THEREOF, respondent respectfully states:

1. [Describe something in the petition from which it appears that the petitioner is challenging a Notice of Determination, such as a reference to lien or levy or collection or sections 6320 or 6330 of the Code.]

2. The petition appears to be an appeal of a Notice of Determination issued by respondent on [insert date], a copy of which is attached as Exhibit A.

3. The copy of the petition served on respondent does not include an "L" in the docket number.

4. Petitioner does not oppose the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

2. Motions to dismiss for lack of jurisdiction

a. No notice of determination

MOTION TO DISMISS FOR LACK OF JURISDICTION

THE RESPONDENT MOVES that this case be dismissed for lack of jurisdiction upon the grounds that no Notice of Determination under I.R.C. § 6320 or § 6330 was sent to the Petitioner for the taxable year(s) [insert years], nor has the respondent made any other determination with respect to the taxable years ___ that would confer jurisdiction on this Court.

IN SUPPORT THEREOF, the respondent respectfully shows the Court as follows:

1. The fact that the Petitioner attached to the petition a Notice of Levy [*or state the type of notice regarding liens, levies, or collection actions*] may indicate that the Petitioner is requesting that the Court invoke jurisdiction in accord with Tax Court Rule 330, which concerns Petitions for Lien or Levy Actions under I.R.C. §§ 6320(c) or 6330(d).

2. The Tax Court cannot acquire jurisdiction with respect to a lien or levy action unless, and until, there is a determination by the Internal Revenue Service Office of Appeals and the taxpayer appeals that determination within

thirty days thereof. Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

3. The respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under §§ 6320 and/or 6330 was sent to the Petitioner with respect to taxable years [insert years].

4. Petitioner has not demonstrated that a Notice of Determination sufficient to confer jurisdiction on this Court with respect to tax year(s) [insert year(s)] was issued by Appeals as required by I.R.C. § 6320(c) and/or § 6330(d)(1).

5. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under I.R.C. § 6320 or § 6330 and Tax Court Rule 330.

6. The respondent has diligently searched his records and has determined that no other determination has been made by the respondent that would confer jurisdiction on this Court.

7. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

b. Late-filed petition

MOTION TO DISMISS FOR LACK OF JURISDICTION

THE RESPONDENT MOVES that this case be dismissed for lack of jurisdiction upon the ground that the petition was not filed within the time prescribed by I.R.C. § 6330(d) or § 7502.

IN SUPPORT THEREOF, the respondent respectfully states:

1. The Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated [insert date], upon which the above-entitled case is based, was sent to the petitioner at his last known address by certified mail on [insert date], as shown by the postmark date stamped on the executed Application for Registration or Certification, United States Postal Service Form 3877, a copy of which is attached hereto as Exhibit A.

2. The 30-day period for timely filing a petition with this Court from the Notice of Determination expired on [insert day of the week], [insert date], which date was not a legal holiday in the District of Columbia.

3. The petition was filed with the Tax Court on [insert date], which date is [insert number of days] days after the mailing of the Notice of Determination.

4. The copy of the petition served upon the respondent bears a notation that the petition was mailed to the Tax Court on [insert date], which date is [insert number of days] days after the mailing of the notice of deficiency.

5. The petition was not filed with the Court within the time prescribed by I.R.C. § 6330(d) or § 7502.

6. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

c. Action in incorrect court

MOTION TO DISMISS FOR LACK OF JURISDICTION

THE RESPONDENT MOVES that this case be dismissed for lack of jurisdiction upon the ground that the United States Tax Court does not have jurisdiction of the underlying tax liability in this matter.

IN SUPPORT THEREOF, the respondent respectfully states:

1. The Petitioner herein appeals the Notice of Determination Concerning Collection Action(s) under section 6320 and/or 6330 (Determination) that the Internal Revenue Service Appeals Office ("Appeals Office") in [insert appropriate city and state] issued on [insert date].

2. The Determination instructs the petitioner to file a complaint in the appropriate United States District Court if the petitioner disputes the Determination.

3. According to paragraphs 4 through 7 of the Petition for Lien or Levy Action Under Code Section 6320(c) or 6330(d), the Notice of Intent to Levy and Right to a Hearing, which led to the Appeals' Determination at issue in this case, relates to collection of [insert type of liability, e.g., a Trust Fund Recovery Penalty].

4. I.R.C. section 6330(d)(1) provides that the Tax Court shall have jurisdiction to hear an appeal of a determination made under section 6330 [and/or section 6320] if it has jurisdiction of the underlying tax liability. If the Tax Court does not have jurisdiction of the underlying tax liability, a district court of the United States shall have jurisdiction to hear the matter. See also Temp. Treas. Reg. § 301.6330-1T(f)(2)Q&A-F3 [and/or § 301.6320-1T(f)(2)Q&A-F3].

5. The Tax Court has interpreted section 6330(d)(1) to provide for Tax Court jurisdiction except where the Court does not normally have jurisdiction over the underlying liability. Moore v. Commissioner, 114 T.C. 171 (2000).

6. The Tax Court does not have jurisdiction to determine liability for the [insert type of liability,] Id.

7. Because the Tax Court does not have jurisdiction over liability for the [insert type of liability], the Tax Court does not have jurisdiction over the appeal of the Determination in this case.

8. Should the Court grant this motion, petitioner will have thirty days after this Court's determination to file an appeal with the correct court under I.R.C. § 6330(d)(1).

9. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

3. Motion to dismiss for failure to state a claim

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

RESPONDENT MOVES that this case be dismissed for failure to state a claim upon which relief may be granted in that I.R.C. § 6330(c)(2)(B) precludes petitioners from challenging the underlying tax liability for the taxable year 1994 in the above-entitled case, the only error assigned in the petition, because the petitioners received a statutory notice of deficiency for such tax liability.

IN SUPPORT THEREOF, the respondent respectfully states:

1. Petitioner received a statutory notice of deficiency for tax year(s) [insert tax year(s)] that respondent mailed to petitioner's last known address on [insert date]. A copy of United States Postal Service Form 3849, proof of receipt, for the notice of deficiency is attached as Exhibit A. This receipt bears the signature of the addressee-petitioner and reflects a delivery date of [insert date].

2. On [insert date], respondent sent to petitioner by certified mail a [insert appropriate title for the CDP Notice that informed petitioner of the right to request a hearing], with respect to petitioner's liability for income taxes for tax year(s) [insert tax year(s)], a copy of which is attached as Exhibit B. Petitioner filed a timely "Request for Collection Due Process Hearing" on [insert date], a copy of which is attached as Exhibit C.

3. Respondent sent to petitioner a Notice of Determination dated [insert date] with respect to petitioner's income tax liability for tax year(s) [insert tax year(s)]. The Notice of Determination is attached as Exhibit D.

4. Pursuant to I.R.C. § 6330(c)(2)(B), the petitioner cannot raise at the CDP hearing the existence or amount of the underlying tax liability if the petitioner received a statutory notice of deficiency for that tax liability.

5. Temp. Treas. Reg. § 301.6330-1T(e)(3)Q&A-E2 [and/or Temp. Treas. Reg. § 301.6320-1T(e)(3)Q&A-E2, as appropriate] provides that receipt of a statutory notice of deficiency for purposes of I.R.C. § 6330(c)(2)(B) means receipt in time to petition the Tax Court for a redetermination of the deficiency asserted in the notice of deficiency.

6. Because respondent mailed the statutory notice of deficiency on [insert date] and petitioner received it on [insert date], petitioner received it in sufficient time to petition the Tax Court. Thus, during the subsequent CDP hearing with Appeals, it was improper for petitioner to challenge the tax liability to which the statutory notice of deficiency related.

7. Because it was improper for the taxpayer to challenge in the Collection Due Process hearing the existence or amount of petitioner's liability with respect to the [insert tax years] tax years, the validity of petitioner's underlying tax liability is not properly at issue before this Court. Goza v. Commissioner, 114 T.C. 176 (2000).

8. The petition raises no issues other than challenges to petitioner's tax liability.

WHEREFORE, it is prayed that this motion be granted.

Note: The Service will not be able to obtain a Postal Service Form 3849 in every case in which the taxpayer received a statutory notice of deficiency or otherwise had an opportunity to dispute his liability. In those cases, other evidence of receipt should be included in the motion in the absence of a Postal Service Form 3849. The type of evidence that could be included is discussed in section V.E.1. above.

4. Motion for summary judgment

MOTION FOR SUMMARY JUDGMENT

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 121, for summary adjudication in respondent's favor upon all issues presented in this case.

IN SUPPORT THEREOF, respondent respectfully states:

1. The pleadings in this case were closed on [insert date].

2. This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay the trial. Tax Court Rule 121(a).

3. On [insert date] respondent issued to petitioner a letter entitled "Final Notice of Intent to Levy and Notice of Your Right to a Hearing" (CDP Notice) with enclosures in conformity with the notice requirements of I.R.C. § 6330(a).

4. Petitioner requested a Collection Due Process hearing on or about [insert date].

5. On [insert date], respondent's appeals officer sent a letter to petitioner's designated representative inviting him to a conference in respondent's office on [insert date].

6. Respondent's appeals officer sent a letter to petitioner's representative, dated [insert date, offering to reschedule the conference to [insert date] as requested by the representative.

7. Respondent's appeals officer and petitioner's representative held a conference on [insert date].

8. At the conference, the appeals officer provided petitioner's representative with a copy of the Form 4340 (Certificate of Assessments

and Payments) with respect to petitioner's income tax assessments and payments for each of the years [insert years].

9. Respondent issued to petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (the "Notice of Determination") dated [insert date].

10. The petition filed in this case asserts that the appeals officer failed to properly verify that the Internal Revenue Service met the requirements of any applicable law or administrative procedure as required by I.R.C. § 6330(c)(1) by relying on Form 4340, Certificate of Assessments and Payments, and the Form 23C date (assessment date) listed therein. The petition asserts that the appeals officer should have verified that a Form 23C was actually prepared and signed pursuant to I.R.C. § 6203 and Treas. Reg. § 301.6203-1.

11. The petition filed in this case asserts that collection action is improper because the petitioner was not provided with Forms 23C, but was instead provided with a Form 4340. In his Answer, respondent admitted that Form 4340 was provided to petitioner and was relied upon by the appeals officer. There is therefore no factual dispute regarding this issue.

12. It is not an abuse of discretion for Appeals to rely on Form 4340 for the purpose of complying with I.R.C. section 6330(c)(1). Davis v. Commissioner, 115 T.C. 35 (2000); Anderson v. Commissioner, T.C. Memo 2000-211. Courts have consistently and unequivocally held that respondent's obligation under I.R.C. § 6203 and Treas. Reg. § 301.6203-1 to provide taxpayers with summary records of assessments is satisfied by providing a Form 4340, which was done in this case, rather than a Form 23C. Contrary to petitioner's assertions, neither I.R.C. § 6330(c)(1) nor any other provision of I.R.C. § 6330 requires such verification. See, e.g., Hefti v. IRS, 8 F.3d 1169 (7th Cir. 1993); Guthrie v. Sawyer, 970 F.2d 733 (10th Cir. 1992); United States v. McCallum, 970 F.2d 66 (5th Cir. 1992); Gentry v. United States, 962 F.2d 555 (6th Cir. 1992); Geiselman v. United States, 961 F.2d 1 (1st Cir. 1992), cert. denied, 506 U.S. 891 (1992); United States v. Chila, 871 F.2d 1015 (11th Cir. 1989), cert. denied, 493 U.S. 975 (1989).

13. The petition filed in this case also asserts that petitioner was not afforded the type of due process hearing that section 6330 envisions. The petition asserts that respondent erred in failing to furnish requested documentation prior to the hearing and failing to properly schedule or notify petitioner of the time and date of the hearing. Petitioner asserts that this prevented him and his representative from presenting his case, examining documents and cross examining witnesses. The petition avers no facts upon which petitioner relies to support these alleged errors. The undisputed facts in this case are that petitioner and his representative were notified of the hearing. Respondent sent two letters to petitioner's representative, setting forth the date and time of the hearing. Petitioner's representative (the same representative who signed and filed the petition on behalf of petitioner) attended the hearing. Petitioner was properly notified of the hearing.

14. Hearings at the Appeals level are usually conducted in an informal setting. Treas. Reg. section 601.106(c), Statement of Procedural Rules, provides that proceedings before Appeals are informal. There is no requirement that Appeals furnish requested documentation prior to a hearing. When Congress enacted section 6330 and required that taxpayers be given an opportunity to seek a pre-levy hearing with Appeals, Congress was fully aware of the existing nature and function of Appeals. Davis v. Commissioner, 115 T.C. 35 (2000). Nothing in section 6330 or the legislative history suggests that Congress intended to alter the nature of an Appeals hearing so as to compel the attendance or examination of witnesses. When it enacted section 6330, Congress did not impose upon either Appeals or taxpayers a requirement that documentation be furnished before a hearing. The references in section 6330 to a hearing by Appeals indicate that Congress contemplated the type of informal administrative Appeals hearing that has been historically conducted by Appeals and prescribed by section 601.106(c), Statement of Procedural Rules. Davis v. Commissioner, supra.

15. Pursuant to I.R.C. § 6330(c)(3), the determination of an appeals officer must take into consideration (A) the verification that the requirements of applicable law and administrative procedures have been met, (B) issues raised by the taxpayer, and (C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary. As stated in the attachment to the Notice of Determination, the appeals officer considered all three of these matters. The appeals officer fully responded to the petitioner's sole challenge to the proposed collection action at the collection due process hearing: that there was no valid assessment of his liabilities. Because the appeals officer fully complied with the requirements of I.R.C. § 6330(c)(3), particularly in responding to the issue raised by the petitioner, there was no abuse of discretion.

16. Respondent respectfully states that counsel of record has reviewed the administrative file and on the basis of the review of the file and the pleadings, concludes that there remains no genuine issue of material fact for trial.

17. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

5. Motion to dismiss for mootness

a. Mootness with respect to proposed levy

MOTION TO DISMISS ON GROUND OF MOOTNESS

THE RESPONDENT MOVES that this case be dismissed as moot given that, subsequent to the filing of their Petition, petitioners paid their tax

liability for the [insert years] taxable years and the proposed levy is no longer necessary.

IN SUPPORT THEREOF, the respondent respectfully states:

1. On [insert date] respondent issued a Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing ("CDP Notice") to petitioners with respect to their income tax liabilities, including penalties and interest, for the taxable years [insert years].

2. In response to the Final Notice, petitioners requested a Collection Due Process ("CDP") hearing with the Internal Revenue Service Office of Appeals ("Appeals") pursuant to I.R.C. § 6330(b)(1).

3. On [insert date] Appeals issued a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 approving the proposed levy to collect the liabilities arising with respect to taxable years [insert years].

4. On [insert date] petitioners filed a Petition for Lien or Levy Action Under Code Section 6320(c) or 6330(d) ("the Petition") in the present case.

5. Subsequently, petitioners paid all outstanding income taxes, penalties, and interest with respect to the taxable years [insert years].

6. As a result of petitioners' full payment of their liability, respondent no longer needs or intends to levy with respect to petitioners' income tax liabilities for taxable years [insert years], which gave rise to the Petition in the instant case.

7. The petitioners have been contacted and have confirmed that they have no objection to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

b. Mootness with respect to notice of federal tax lien

MOTION TO DISMISS ON GROUND OF MOOTNESS

THE RESPONDENT MOVES that this case be dismissed as moot given that, subsequent to the filing of his petition, petitioner was granted a discharge in bankruptcy and respondent released all the notices of federal tax liens filed against the petitioner at issue in this case.

IN SUPPORT THEREOF, the respondent respectfully states:

1. On or about [insert date] respondent sent petitioner and his wife a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under I.R.C. § 6320 with respect to income tax for tax years [insert years].

2. On [insert date], respondent received a timely request for a Collection Due Process hearing with respect to the notice of federal tax lien filed.

3. On [insert date] respondent's Office of Appeals issued petitioner a Notice of Determination Concerning Collection Action(s) Under Section

6320 and/or 6330 (Notice of Determination) determining that a notice of federal tax lien with respect to income tax for tax years [insert years] should not be withdrawn.

4. On [insert date] petitioner filed his petition in this case.

5. On [insert date] petitioner filed a petition in bankruptcy under 11 U.S.C. Chapter 7.

6. On [insert date] petitioner was granted a discharge under 11 U.S.C. section 727, which included a discharge of petitioner's income tax liability for taxable years [insert years].

7. On [insert date] respondent released all notices of federal tax lien filed against petitioner with respect to petitioner's income tax liability for taxable years [insert years], including the notice of federal tax lien subject to the Notice of Determination.

8. As a result of respondent's release of the notices of federal tax lien, there is no longer a controversy in the present case.

10. The petitioner has been contacted and has no objection to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

6. Stipulated decision

a. Installment Agreement Stipulated Decision

i. **DECISION**

Pursuant to the stipulation of the parties in this case and incorporating herein the terms of said stipulation, it is

ORDERED AND DECIDED: That the collection of petitioner's income tax liabilities for the taxable years [insert tax years], inclusive, shall be made in accordance with the terms of the [insert date] Installment Agreement entered into between the parties pursuant to the provisions of I.R.C. § 6159.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

ii. **STIPULATION**

The parties hereby stipulate to the terms of the installment agreement attached as Exhibit A.

b. Offer in Compromise Stipulated Decision

i. **DECISION**

Pursuant to the stipulation of the parties in this case and incorporating herein the terms of said stipulation, it is

ORDERED AND DECIDED: That the collection of petitioner's income tax liabilities for the taxable years [insert taxable years], inclusive, shall be made in accordance with the terms of the [insert date] Offer in Compromise entered into between the parties pursuant to the provisions of I.R.C. § 7122.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

ii. **STIPULATION**

The parties hereby stipulate and agree to the terms of the Offer in Compromise attached as Exhibit A.

c. Concession by the petitioner

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED: That the determinations set forth in the Notice of Determination Concerning Collection Action for the taxable years [insert years] upon which this case is based are sustained in full.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.