Department of the Treasury **Internal Revenue Service** **Office of Chief Counsel**

Notice

CC-2009-010

February 13, 2009

Subject: Collection Due Process Cases **Cancel Date**: May 15, 2009

Purpose:

This Notice updates and replaces CC-2006-019, the Collection Due Process (CDP) Handbook, which provided guidance on the handling of CDP cases arising under I.R.C. §§ 6320 (liens) and 6330 (levies). Those sections are a codification of section 3401, the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. No. 105-206, 112 Stat. 685 (1998). The CDP provisions became effective January 19, 1999. Final regulations became effective January 18, 2002, and apply to liens and levies on or after January 19, 1999. Amendments to the final regulations became effective November 16, 2006, and apply to requests for CDP or equivalent hearings made on or after November 16, 2006. The text that follows will appear as an item on the Procedure and Administration Website. Significant new cases will be digested on the Procedure and Administration Website. This Notice also incorporates and supersedes CC-2007-006, Application of the Ex Parte Communication Rules to Remanded CDP Cases; and CC-2007-001, Jurisdiction of Tax Court Over Collection Due Process Cases.

This Notice is not binding legal authority and should never be used or cited as precedent. It is intended to assist Chief Counsel attorneys handling CDP cases. It is not a substitute for doing legal research. In addition, please note that after May 15, 2009, the CDP Handbook will cease to exist in its current form. All procedural aspects of the current Handbook will be incorporated into the CCDM. A more concise version of the Handbook will be posted on the Procedure and Administration Website. The attorneys in Procedure and Administration are available to assist you when questions arise in particular cases.

Distribute to: X All Personnel
X Electronic Reading Room

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I. Background Material and Legislative Changes

The Treasury Regulations implementing sections 6320 and 6330 are at Treas. Reg. § 301.6320-1 and Treas. Reg. § 301.6330-1. The Congressional report explaining the final version of sections 6320 and 6330 is Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998). The Internal Revenue Manual (IRM) provisions addressing sections 6320 and 6330 are at IRM sections 5.1.9 and 5.19.8 (Collection Appeal Rights), and 8.22 (Collection Due Process).

Treasury Regulation sections 301.6320-1 and 301.6330-1 (previously issued by Treasury Decisions 8979 and 8980, respectively, on January 17, 2002) have been updated by Treasury Decisions 9290 and 9291, published at 71 F.R. 60835 (Oct. 17, 2006) and 71 F.R. 60827 (Oct. 17, 2006), respectively. These amendments are effective for all hearing requests made on or after November 16, 2006. Some of the more important changes are as follows:

- The written request for a CDP hearing must include a statement of the reasons for disagreement with the notice of federal tax lien or proposed levy. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C1; 301.6330-1(c)(2) Q&A C1.

- A face-to-face conference will not be granted to a taxpayer who raises solely frivolous arguments, who proposes only collection alternatives for which such taxpayer is ineligible, or who fails to provide the reasons why the taxpayer disagrees with the lien or levy action. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8; 301.6330-1(d)(2) Q&A D8.

- For a taxpayer to obtain judicial review of any issue, including a challenge to the underlying liability, that issue must be raised during the CDP hearing and the taxpayer must submit evidence with respect to that issue after being given a reasonable opportunity to do so. Treas. Reg. §§ 301.6320-1(f)(2) Q&A F3; 301.6330-1(f)(2) Q&A F3.

- A definition of what constitutes the administrative record for purposes of judicial review of a CDP determination. Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4; 301.6330-1(f)(2) Q&A F4.

- A taxpayer must be notified of the right to have an equivalent hearing in all cases when a tardy CDP hearing request is received. The request for an equivalent hearing must be in writing and made within one year commencing the day after the end of the five-business-day period following the filing of the notice of federal tax lien or within one year commencing the day after the date of the CDP levy notice. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C7 and (i)(2) Q&A I7; 301.6330-1(c)(2) Q&A C7 and (i)(2) Q&A I7.

- The amended final regulations also remove all references to district court review of CDP cases, in accordance with the enactment of the Pension Protection Act of 2006, which eliminated district court jurisdiction to review CDP determinations issued on or after October 17, 2006.

On December 6, 2006, Congress passed the Tax Relief and Health Care Act of 2006 (TRHCA), Pub. L. 109-432, 120 Stat. 2922 (2006). Section 407 of TRHCA made revisions to sections 6320, 6330 and 6702 to help the Service combat the problems associated with the submission of frivolous documents. These provisions provide that the Service may disregard frivolous CDP hearing requests, and may impose a penalty on such requests. These revisions are addressed in further detail in section IV.B.2 of this Notice.

On May 25, 2007, Congress passed the Small Business and Work Opportunity Act of 2007, Pub. L. 110-28, Title VIII, 121 Stat. 200. Section 8243 of this act included an amendment to section 6330(f). Generally, this amendment provides that the Service may levy to collect certain employment taxes without providing pre-levy CDP rights, if the taxpayer (or taxpayer's predecessor) has requested a CDP levy hearing with respect to unpaid employment taxes arising in the 2-year period before the beginning of the taxable period with respect to which the levy is served. The taxpayer will instead receive a post-levy CDP hearing. The amendment is effective with respect to levies served on or after September 22, 2007. These revisions are addressed in section IV.A.4 of this Notice.

II. Coordination of CDP Cases with the National Office

Pre-review is required for only those briefs, motions, other Tax Court documents (including motions for summary judgment) and defense letters raising novel or significant issues. *See* CCDM Exhibit 35.11.1-1(18). Issues that may be considered novel or significant include (but are not limited to):

- administrative record rule (*i.e.*, the rule that court review for abuse of discretion is limited to the administrative record);
- underlying tax liability involves a TEFRA partnership;
- nonroutine bankruptcy issues;
- nonroutine issues involving the standards for acceptance, rejection, and termination of offers in compromise and installment agreements;
- nonroutine issues involving the conduct of the administrative hearing;
- issues involving whether an opportunity for an Appeals conference, without judicial review rights, is a prior opportunity under section 6330(c)(2)(B);
- issues involving whether the tax was satisfied by payment of criminal restitution;
- issues involving whether validity of an assessment or application of payments are "liability" issues under section 6330(c)(2)(B) subject to de novo review;
- issues involving whether an assessment is invalid because there is insufficient proof of the issuance of a notice of deficiency;
- issues involving whether the taxpayer can raise entitlement to credits or overpayments from non-CDP years, and whether the Tax Court has jurisdiction

over such matters, under Freije v. Commissioner, 125 T.C. 14 (2005);

• issues involving ex parte contacts;

• issues involving prior involvement under section 6330(b)(3);

• issues involving whether the Tax Court has general equitable authority to order the Service to take or refrain from taking certain collection actions; and

• issues involving whether a Notice of Determination was issued in violation of the automatic stay.

Pre-review is also required for documents requesting sanctions against opposing counsel under section 6673(a)(2) and for responses to requests for sanctions against Chief Counsel attorneys. Stipulated decision documents require review only where there is a significant departure from the sample decision documents shown in section VI.J, *infra*.

Field attorneys seeking legal advice regarding CDP may contact Branch 3 or 4 of the Office of the Associate Chief Counsel (Procedure & Administration) (P&A), at 202-622-3600 or 202-622-3630. In the event it appears that a taxpayer may be able to challenge an underlying employment tax liability in a CDP proceeding, Counsel attorneys should discuss the underlying tax issue with TEGE Area Counsel. Pursuant to such discussion, coordination with the National Office for review of briefs, motions, and other Tax Court documents discussing novel or significant substantive employment tax issues will be required.

III. Working with Appeals

A. Assisting Appeals

Each SB/SE Associate Area Counsel designates experienced attorneys to be available to provide prompt oral or written legal advice to Appeals in resolving CDP issues. SB/SE Division Counsel, in turn, coordinates complicated or novel issues with National Office CDP experts. In order to ensure the uniformity of advice being given, SB/SE Division Counsel and Appeals should identify recurring legal issues, and SB/SE Division **Counsel should forward copies of any advice given on such issues to P & A Branch 3 or 4.**

B. Remand of CDP Cases—see section V.I.4.

C. Processing CDP Administrative Files

When a Tax Court decision becomes final and the case is closed, Field Counsel should return the CDP administrative file to Appeals. CDP administrative files should be returned to the Appeals Processing Section (APS) in either the Memphis or Fresno Campus, according to the taxpayer's state of residence on Transmittal Form 1734. Place the Tax Court decision document, and opinion if applicable, on top of the CDP Administrative file. If the Tax Court decision was appealed to a circuit court of appeals, place a copy of the court of appeals decision and opinion on top of the Tax Court decision.

To identify the Campus to which the CDP administrative files should be returned, Please check the current Appeals organization chart. For taxpayers residing in APS East states, the CDP administrative file should be returned to the Memphis Campus APS. For taxpayers residing in APS West states, the CDP administrative file should be returned to the Fresno Campus APS.

The address for the Memphis Campus APS is:

Memphis Appeals Campus Office
5333 Getwell Rd
Stop 86
Memphis, TN 38118

The address for the Fresno Campus APS is:

Fresno Appeals Campus Office
5045 E. Butler
Stop # 55202
Fresno, CA 93727-5136

IV. Sections 6320 and 6330

A. CDP Notice Requirements

1. Notice of federal tax lien - section 6320

Prior to January 19, 1999, there was no requirement in the Code that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) was filed against that taxpayer's property. RRA 1998, section 3401 added section 6320 to the Code, which requires the Service to provide written notification (CDP notice) to the taxpayer of the first filing of a NFTL for a specific tax period and of that taxpayer's right to a CDP hearing not more than five business days after the filing of the NFTL. In practice, this notification is given by Letter 3172 - Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320.

2. Prior to levy - section 6330

Prior to January 19, 1999, taxpayers had no statutory hearing rights in connection with the section 6331(d) requirement that the Service provide the taxpayer with a notice of intent to levy 30 days before levy. RRA 1998, section 3401 added section 6330 to the Code, which requires the Service (except in the case of jeopardy levies or levies on State income tax refunds) to provide written notification (CDP notice) of its intent to levy on any property or right to property of any taxpayer at least 30 days prior to the levy and inform the taxpayer of the right to a CDP hearing. In practice, this notification is given by either 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 Notice of Your Right to a Hearing. The Letter 1058 is issued by field collection, in cases assigned to a Revenue Officer. The LT-11 is the culminating notice in a series of collection notices issued from a Service Center by the Automated Collection System (ACS). Most delinquent tax accounts are handled by ACS. Cases meeting certain dollar criteria are handled by field collection.

In practice, a taxpayer is usually given a non-CDP notice of intent to levy under section 6331(d) (usually referred to on Forms 4340 as the "statutory" notice of intent to levy) prior to being given a CDP notice of intent to levy and right to a hearing under section 6330. The taxpayer can only request a CDP hearing from the section 6330 CDP notice.

3. Jeopardy levies and state income tax refunds

For jeopardy levies or levies on state income tax refunds, the requirement that the taxpayer be given a pre-levy hearing is not applicable. Instead, the taxpayer shall be given the opportunity for a CDP hearing "within a reasonable period of time after the levy." Section 6330(f). Thus, if the taxpayer has not previously been given CDP levy rights at the time of the levy, the taxpayer has a right to a hearing after the levy. If Appeals sustains the levy in the post-levy hearing, the taxpayer may appeal that determination to the Tax Court. Bussell, et al. v. Commissioner, 130 T.C. No. 13 (2008); Clark v. Commissioner, 125 T.C. 108 (2005).

With respect to jeopardy levies, hearing rights may be available under section 7429, as well as under section 6330(f), depending upon the timing of the jeopardy levy. A jeopardy levy subject to section 7429 appeal rights includes a levy made in connection with a jeopardy assessment, and also a levy made before the requirements of sections 6331(a) and (d) are satisfied (requiring ten days to pass after notice and demand, and thirty days to pass after the giving of a notice of intent to levy). *See* Treas. Reg. § 301.7429-1. Hearing rights for such jeopardy levies are available under sections 7429 and 6330(f). If the prerequisites for levy under section 6331 have been met, and levy is made either before the section 6330(a) CDP notice has been issued, or before the 30-day period for requesting a CDP hearing has passed, no review rights are available under section 7429. However, the taxpayer will be entitled to a post-levy CDP notice and hearing. If the jeopardy levy is made after the CDP hearing has been requested but while the hearing is still pending or on appeal, the taxpayer is not entitled to any additional notice or hearing under sections 6330(f) or 7429.

4. Disqualified employment tax levies

The "Small Business and Work Opportunity Act of 2007" amended I.R.C. § 6330(f) to permit (but not require) levy to collect employment taxes without first giving a taxpayer a pre-levy CDP notice if the levy is a "disqualified

employment tax levy" (DETL). If a DETL is served, then the taxpayer shall be given an opportunity for CDP hearing "within a reasonable period of time after the levy." The taxpayer may seek judicial review in the Tax Court of the determination resulting from the section 6330(f) post-levy hearing. This amendment is effective for DETLs served on or after September 22, 2007. This change was intended to address the problem of taxpayers who pyramid employment tax liabilities and use the CDP process to delay collection, by limiting their opportunity for pre-levy CDP hearings.

A "disqualified employment tax levy," as described in new section 6330(h), is a levy to collect a taxpayer's employment tax liability if that taxpayer or a predecessor requested a CDP hearing under section 6330 for unpaid employment taxes arising in the two-year period prior to the beginning of the taxable period for which the levy is served.

The prior request for a CDP hearing refers to a timely CDP hearing request. Even if the request is subsequently withdrawn, it qualifies as a prior hearing request. Requests for an equivalent hearing or untimely requests for CDP hearings do not satisfy the prior-hearing-request requirement. Thus, if the taxpayer requests an equivalent hearing or submits an untimely request for a CDP hearing, those requests cannot be used as a basis for a DETL. A timely post-levy request for a CDP hearing made in response to a post-levy CDP notice, however, may constitute a prior CDP hearing request for the purposes of determining the availability of a DETL.

If appropriate, a DETL may be served during a CDP hearing or judicial review of such hearing to collect employment tax liabilities subject to the hearing. In other words, after the IRS serves the first levy for a DETL period and the taxpayer requests a CDP hearing, the IRS may serve subsequent levies on different levy sources for the same period while the CDP case is pending before Appeals or in the Tax Court.

5. Notice issuance

A CDP notice must be given in person, left at the taxpayer's dwelling or usual place of business, or delivered to the taxpayer's last known address by certified or registered mail. Buffano v. Commissioner, T.C. Memo. 2007-32 (case dismissed for lack of jurisdiction where CDP notice not mailed to taxpayer's last known address). The CDP levy notice must also be sent return receipt requested. If the CDP notice is not properly sent, the 30-day period for requesting a hearing is not started, and the taxpayer is entitled to a substitute notice. Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A12, 301.6330-1(a)(3) Q&A-A10. Graham v. Commissioner, T.C. Memo. 2008-129. *See also* Haag v. United States, 485 F.3d 1 (1st Cir. 2007) (affidavits describing Service's computer records showing normal method of sending certified CDP notices, in absence of contrary evidence, established proper mailing). A CDP lien notice (Letter 3172) is valid even if given before the NFTL is actually filed, and the validity of the section 6320 notice does not depend on the validity of

the related NFTL. Graham, *supra*. Failure to provide an explanation of the appeals and collection process with the CDP notice is not harmful or prejudicial if the taxpayer knows of and pursues the taxpayer's right to administrative and judicial review. Klawonn v. Commissioner, T.C. Memo. 2002-27. A taxpayer's agreement with the appeals officer to address a non-CDP tax year in his CDP proceeding is not a substitute for the express CDP notice requirements prior to levy for the non-CDP period. Karara v. Commissioner, T.C. Memo. 2004-133.

6. Nominees and other third parties

A CDP lien notice will only be given to the person described in section 6321 who is named on the NFTL. Treas. Reg. § 301.6320-1(a)(2) Q&A-A1. A CDP levy notice will only be given to the person described in section 6331(a). Treas. Reg. § 301.6330-1(a)(3) Q&A-A1. In other words, CDP rights are only available to the delinquent taxpayer—the person liable to pay the tax due after notice and demand who refuses or neglects to pay. A nominee of, or person holding property of, the taxpayer is not entitled to CDP rights. Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A7, 301.6330-1(a)(3) Q&A-A2; 301.6320-1(b)(2) Q&A B5, 301.6330-1(b)(2) Q&A B5; Kendricks v. Commissioner, 124 T.C. 69, 71 n.3 (2005); Forman v. United States Dept. of Treasury, 2005-1 USTC ¶ 50,418 (N.D. Ill.).

7. General partners in partnerships

Under state law, general partners in partnerships are liable for taxes assessed against the partnership. The Supreme Court in United States v. Galletti, 541 U.S. 114 (2004), held that the Service's assessment against a partnership serves to make the general partner liable for the tax. While the Supreme Court in Galletti did not address administrative collection, Galletti is consistent with the Service's long-standing legal position that it can enforce a tax lien and take administrative levy action against a general partner based on the assessment, notice and demand directed to the partnership. *See* Chief Counsel Notice 2005-003.

After the Service files a NFTL identifying a general partner as being liable for a partnership's employment taxes, a CDP notice must be given to the partner. Section 6320(a)(1) requires that written notice of the right to a CDP hearing be given to the person described in section 6321; that is, any person liable to pay the tax who is described in the NFTL. Treas. Reg. § 301.6320-1(a)(2) Q&A A1. Because general partners are liable to pay the partnership tax liabilities, separate CDP notices should be given to the partnership and to all general partners listed on the NFTL.

A CDP levy notice must also be given to a general partner prior to levying on that partner's property or rights to property. Section 6330(a)(1) requires that written notice of the right to a CDP hearing be given to a person liable to pay the tax prior to any levy on the person's property or rights to property. *See*

Treas. Reg. § 301.6330-1(a)(3) Q&A A1. If the Service intends to levy on the property or rights to property of a general partner, separate CDP notices should be given to the partnership and the general partner whose property the Service intends to levy.

8. Owners of single-member LLCs

The court in Littriello v. United States, 484 F.3d 372 (6th Cir. 2007), upheld a proposed levy against an owner of a single-member LLC for employment taxes with respect to employees of the LLC where the owner was made liable for the taxes under the "check the box" regulations disregarding the LLC. *Accord*, McNamee v. Dept. of Treasury, 99 AFTR 2d 2871 (2d Cir. 2007); Stearn & Co., L.L.C. v. United States, 2007 U.S. Dist. LEXIS 47242 (E.D. Mich. 2007). The regulations were amended on August 16, 2007, to make the disregarded entity liable for employment taxes in these situations. For employment taxes on employees of disregarded entities incurred after January 1, 2009, the owner is no longer liable.

B. Collection Due Process Hearing

1. One hearing opportunity per tax and period

Sections 6320(b)(2) and 6330(b)(2) each provide that a taxpayer is entitled to only one CDP hearing with respect to the tax and tax period(s) covered by the CDP notice. This means that a taxpayer may have an opportunity for one CDP lien hearing, *see* Investment Research Associates, Inc. v. Commissioner, 126 T.C. 183 (2006) (upholds regulations only allowing hearing from filing of first NFTL), and one CDP levy hearing for each tax and tax period. Section 6320(b)(4) provides that, to the extent practicable, CDP hearings with respect to liens shall be held in conjunction with CDP hearings with respect to levies under section 6330. A taxpayer may receive more than one CDP hearing with respect to the same tax and period when there has been an additional assessment of tax (not including interest or penalty accruals) for that period or an additional accuracy-related or filing-delinquency penalty has been assessed. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D1, 301.6330-1(d)(2) Q&A-D1; Freije v. Commissioner, 131 T.C. No. 1 (2008). In CDP cases when the Tax Court has imposed a penalty under section 6673(a)(1), for proceedings instituted primarily for delay, etc., such penalty is collected in the same manner as a tax. I.R.C. § 6673(b)(2). Thus, sections 6330(a)(1) and (3) require a new CDP notice be given to a taxpayer when the Service intends to levy to collect the section 6673(a)(1) penalty.

2. Procedures for requesting a CDP hearing

A Form 12153, Request for a Collection Due Process or Equivalent Hearing, is included with the CDP notice sent to the taxpayer. Use of a Form 12153 to request a CDP hearing is not required, but if the form is not used, the request must still be in writing and include the taxpayer's name, taxpayer identification

number (e.g., SSN, ITIN or EIN), address, and daytime telephone number, and be dated and signed by either the taxpayer or the taxpayer's authorized representative. The request must also specify the type of tax and tax periods at issue, include a statement that the taxpayer requests a hearing with Appeals with respect to the lien or proposed levy, and provide a reason or reasons why the taxpayer disagrees with the notice of lien or proposed levy. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C1, 301.6330-1(c)(2) Q&A-C1.

If a timely written request for a CDP hearing is submitted that does not contain all of the required information, the IRS will make a reasonable attempt to contact the taxpayer and request that the taxpayer comply with the unsatisfied requirements, within a reasonable time period. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C1; 301.6330-1(c)(2) Q&A C1. A taxpayer may also affirm any timely written request which is signed or alleged to have been signed on that taxpayer's behalf by the taxpayer's spouse or other unauthorized representative by filing, within a reasonable period of time after a request by the IRS, a signed, written affirmation that the request was originally submitted on the taxpayer's behalf. *Id*.

The Tax Relief and Health Care Act of 2006 (TRHCA) amended sections 6320(b)(1) and 6330(b)(1) to provide that the CDP hearing request must state the grounds for requesting the hearing. The TRHCA also amended section 6330(g) to provide that the Service may disregard any portion of a section 6320 or 6330 hearing request that is based upon a position identified as frivolous by the IRS in a published list or that reflects a desire to delay or impede tax administration. Such portion shall not be subject to any further administrative or judicial review. If the entire hearing request meets one or both of these criteria, the hearing request will be denied. The TRHCA also amended section 6702 to allow imposition of a $5,000 penalty for specified frivolous submissions, including CDP hearing requests, where any portion of the submission meets one or both of these criteria. If the Service intends to impose the penalty, it must advise the taxpayer that the Service considers the submission to be a specified frivolous submission and allow the taxpayer 30 days to withdraw it. These amendments are effective for CDP hearing requests made after March 15, 2007, the publication date of Notice 2007-30, 2007-14 I.R.B. 1, identifying the list of frivolous positions.

The section 6320 hearing request must be submitted no later than 30 days after the expiration of five business days after the date the NFTL is filed. Treas. Reg. § 301.6320-1(b)(1). *See* Newsome v. Commissioner, T.C. Memo. 2007-111. The date the NFTL is filed is the date the NFTL is received by the recording office to be added to the public index, not the act of indexing it in the local records. *See, e.g.,* Tracey v. United States, 394 B.R. 635 (BAP 1st Cir. 2008). Because the Service does not ordinarily obtain this date from the recording office, the Service uses an estimated filing date on the Letter 3172 to provide the taxpayer with a "must file" date (the date by which the section 6320 hearing request must be submitted). The estimated filing date is calculated by adding 3 business days to the NFTL mailing date. In other

words, the Service assumes that the recording office will receive the NFTL 3 business days after it is mailed. The "must file" date is then determined by adding 5 business days plus 30 calendar days to the estimated filing date.

The section 6330 hearing request must be submitted no later than 30 days from the date of the CDP notice (provided the notice was mailed on or before that date). Treas. Reg. § 301.6330-1(b)(1). Premature requests for a CDP hearing (e.g., requests made before the Service has issued a CDP notice) are not valid. Andre v. Commissioner, 127 T.C. 68 (2006).

Any written request for a CDP hearing should be filed at the address indicated on the notice. If an address does not appear on the CDP notice, the taxpayer can obtain the address by calling, toll-free, 1-800-829-1040, and providing the taxpayer's identification number. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C6, 301.6330-1(c)(2) Q&A-C6. If this address (or other address authorized in the regulations) is used and the written request is postmarked within the applicable 30-day response period, then in accordance with section 7502, the request will be considered timely even if it is not received until after the 30-day period. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C4, 301.6330-1(c)(2) Q&A-C4. Section 7503 applies if the last day of the 30-day response period falls on a weekend or legal holiday. *Id.* If the request is not sent to the correct address (*e.g.*, if it is sent to Appeals instead), it must be received by the correct office within the 30-day period in order to be timely. I.R.C. § 7502(a)(2). On the other hand, a request that is hand-carried to a local Taxpayer Assistance Center will be timely if delivered within the 30-day period pursuant to Treas. Reg. §301.6091-1(b)(1) and (2). The 30-day period is not extended for taxpayers residing outside the United States. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C5, 301.6330-1(c)(2) Q&A-C5; Sarrell v. Commissioner, 117 T.C. 122 (2001).

3. Equivalent hearing

A taxpayer whose hearing request is untimely is not entitled to a CDP hearing, but may receive an "equivalent hearing." Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1). A taxpayer must make a written request for an equivalent hearing that contains all of the same information required for a CDP hearing request. Treas. Reg. §§ 301.6320-1(i)(2) Q&A I1, 301.6330-1(i)(2) Q&A I1. The same rules with respect to perfecting incomplete CDP hearing requests, and affirming improperly signed CDP hearing requests, also apply to equivalent hearing requests. Treas. Reg. §§ 301.6320-1(i)(2) Q&A I1(iii) and (iv), 301.6330-1(i)(2) Q&A I1(iii) and (iv). A taxpayer who submits an untimely written CDP hearing request will be offered and may obtain an equivalent hearing without having to submit an additional written request. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C7, 301.6330-1(c)(2) Q&A C7.

A taxpayer must request an equivalent hearing within the one-year period commencing after the date of a CDP levy notice or, with respect to a CDP lien notice, within the one-year period commencing the day after the end of the five-business-day period following the filing of the NFTL. Treas. Reg. §§

301.6320-1(i)(2) Q&A I7, 301.6330-1(i)(2) Q&A I7.

A taxpayer may not appeal to a court any decision (issued in the form of a decision letter) made by an appeals or settlement officer ("appeals officer") as a result of an equivalent hearing. Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I6, 301.6330-1(i)(2) Q&A-I6; Orum v. Commissioner, 123 T.C. 1 (2004); Moorhous v. Commissioner, 116 T.C. 263 (2001); Johnson v. Commissioner, 2000-2 USTC ¶ 50,591 (D. Ore. 2000). *Cf.* Craig v. Commissioner, 119 T.C. 252 (2002) (decision letter issued following taxpayer's timely CDP hearing request was appealable "determination" for purposes of section 6330(d)(1)). The Tax Court has accepted the use of USPS Form 3877, certified mailing list, as direct evidence of both the fact and date of mailing in cases when the issue of timeliness is raised in litigation. Magazine v. Commissioner, 89 T.C. 321, 327 n.8 (1987), *nonacq. at* 1988-2 C.B. 1 (non-acquiescence on separate issue); Figler v. Commissioner, T.C. Memo. 2005-230.

4. Effect of requesting a CDP hearing

a. Statute of limitations

The limitation periods under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to other suits) with respect to the taxes and periods listed on the CDP notice are suspended beginning on the date the Service receives a timely hearing request. I.R.C. § 6330(e)(1); Treas. Reg. §§ 301.6320-1(g)(2) Q&A-G1, 301.6330-1(g)(2) Q&A-G1; Boyd v. Commissioner, 117 T.C. 127 (2001). The suspension period ends either on the date the Service receives a written withdrawal of the hearing request, when the determination resulting from the CDP hearing becomes final by expiration of the time for seeking review, or upon the exhaustion of any right of appeal. Boyd v. Commissioner*, supra.*

Section 6330(e)(1) further provides that, in no event shall any of the limitation periods expire before the 90th day after the day on which there is a final determination with respect to such hearing. If there are fewer than 90 days left in any limitations period after the suspension ends, the remaining limitations period will be 90 days. Treas. Reg. §§ 301.6320-1(g)(3), 301.6330-1(g)(3). This means that if less than 90 days remain on the limitations period after the suspension ends, the difference between the number of remaining days and 90 days will be added to the limitations period. There is no automatic 90-day addition to the period.

b. Levy action and injunctive relief

A timely CDP levy hearing request generally suspends any levy action to collect liabilities listed on the CDP notice for the period during which the hearing and appeals therein are pending. I.R.C. § 6330(e)(1). There are no restrictions on filing a NFTL, however, under either section 6320 or 6330. Treas. Reg. §§ 301.6320-1(g)(2) Q&A G3, 301.6330-1(g)(2) Q&A

G3. A levy will not be suspended while an appeal is pending before the Tax Court or Court of Appeals if the underlying tax liability is not at issue and the court determines that the Service has shown good cause not to suspend the levy. I.R.C. § 6330(e)(2). *See* section V.I.7, *infra*. The Service must file a motion with the court requesting a good cause determination before proceeding with the levy. A motion to permit levy should be considered in any CDP case involving a taxpayer who raises solely frivolous arguments. These cases represent an abuse of the CDP process and the suspension of the Service's levy authority in these cases serves no legitimate purpose. *See* Burke v. United States, 121 T.C. 189 (2005); Howard v. United States, T.C. Memo. 2005-100. *See also* Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash.) (court found "good cause" when taxpayer corporation repeatedly failed to pay employment taxes on time).

The Anti-injunction Act, section 7421, generally prohibits suits to restrain the assessment and collection of any tax. The beginning of a levy or proceeding, however, may be enjoined by the proper court, including the Tax Court, during the time the suspension under section 6330(e)(1) is in force. The Tax Court cannot enjoin any action or proceeding unless a timely appeal of a notice of determination has been filed with the Tax Court and then only with respect to the unpaid tax subject to proposed levy. I.R.C. § 6330(e)(1); Davis v. Commissioner, T.C. Memo. 2008-238. As a result, only district courts have jurisdiction over injunction suits for tax years that are not properly before the Tax Court in a levy review case.

The amendment to section 6330(d)(1) by the Pension Protection Act of 2006 to eliminate district court jurisdiction in CDP cases, discussed further in section IV.D.1, does not affect district court injunction jurisdiction under section 6330(e)(1).

c. Permitted collection actions

Section 6330(e)(1) only prohibits levy if a proposed levy is the basis of the CDP hearing. Therefore, the Service may levy for taxes covered by a CDP lien notice if the section 6330 notice requirement for those taxes and periods has been satisfied. Treas. Reg. §§ 301.6320-1(g)(2) Q&A-G3, 301.6330-1(g)(2) Q&A-G3. As a matter of policy, however, the Service generally suspends any levy action pending the Appeals determination on the lien in CDP cases, and pending the Appeals determination in lien or levy equivalent hearings. Exceptions to this general policy include cases where the taxpayer is dissipating assets, making only frivolous arguments, or seeking solely to delay collection. IRM 5.1.9.3.5(5) and (8). In addition, nothing in section 6320 or 6330 prohibits the filing of a NFTL. *See* Beery v. Commissioner, 122 T.C. 184 (2004). If a taxpayer requests a CDP hearing under section 6320 or 6330, the Service may file a NFTL for the same tax and periods at another recording office or a NFTL for tax periods or taxes not covered by the CDP notice. Other permitted nonlevy

collection actions include initiating judicial proceedings, offsetting overpayments from other periods, and accepting voluntary payments of the tax. *Id.*; *see also* Boyd v. Commissioner, 451 F.3d 8 (1st Cir. 2006), *aff'g* 124 T.C. 296 (2005) (no CDP rights for offsets); Davis v. Commissioner, T.C. Memo. 2008-238 (no CDP rights for lock-in letter instructing taxpayer's employer to adjust taxpayer's withholding); Bullock v. Commissioner, T.C. Memo. 2003-5; Karara v. United States, 2002-2 USTC ¶ 50,667 (M.D. Fla.).

5. Hearing requirements

a. CDP hearings are informal

A CDP hearing is informal and the formal hearing requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., do not apply. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6. *See also* Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006); Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621 (6th Cir. 2005); Davis v. Commissioner, 115 T.C. 35 (2000). Accordingly, recordings of telephone or face-to-face conferences are not required. Living Care Alternatives, 411 F.3d at 625; Rennie v. Internal Revenue Service, 216 F. Supp. 2d 1078, 1079 n. 1 (E.D. Cal. 2002). *Contra* Mesa Oil, Inc. v. United States, 2001-1 USTC ¶ 50,130 (D. Colo. 2000) (suggests that CDP hearings must be recorded verbatim), *nonacq. at* AOD-2001-5, 2001-34 I.R.B. 174 (non-acquiescence on this point). While recording of all CDP conferences is not required, the taxpayer does have the right to record a face-to-face CDP conference in accordance with section 7521(a)(1). Keene v. Commissioner, 121 T.C. 8 (2003).

Taxpayers do not have the right to subpoena and examine witnesses at the hearing. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6; Robinette v. Commissioner, 123 T.C. 85, 98 (2004), *rev'd on other grounds*, 439 F.3d 455 (8th Cir. 2006). The appeals officer is not required to give the taxpayer a set of procedures governing the hearing. Lindsay v. Commissioner, T.C. Memo. 2001-285. Taxpayers do not have the right to subpoena documents, Barnhill v. Commissioner, T.C. Memo. 2002-116; Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000), or examine them, Watson v. Commissioner, T.C. Memo. 2001-213. Section 6330(c)(1) does not require the appeals officer to provide the taxpayer with copies of the documents the appeals officer obtains to verify that the requirements of any applicable law or administrative procedure were met. Robinette v. Commissioner, *supra*; Nestor v. Commissioner, 118 T.C. 162 (2002). Appeals gives a MFTRA-X (literal) transcript to each taxpayer who requests one.

Despite the informality of the hearing and the lack of a transcript and formal record, there must be a sufficient record, stating the appeals officer's findings and rationale, to permit review for abuse of discretion.

The notice of determination must discuss all issues raised and should state why arguments and collection alternatives raised by the taxpayer were rejected. *See* Robinette v. Commissioner, 439 F.3d 455, 461-62 (8th Cir. 2006); Living Care Alternatives, 411 F.3d 621, 629 (6th Cir. 2005); Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004); Cox v. Commissioner, 126 T.C. 237 (2006), *rev'd on other grounds*, 514 F.3d 1119 (10th Cir. 2008). There must be sufficient documentation in the record to show what happened at the administrative hearing. Cox, *supra,* 126 T.C. at 247 (the administrative file "provides a singularly clear portrayal of administrative developments as they occurred.") If the record is insufficient to permit abuse of discretion review, the case may need to be remanded to Appeals. *See* section V.I.4.a., *infra*.

The appeals officer has discretion regarding when to conclude a CDP hearing. In Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd,* 469 F.3d 27 (1st Cir. 2006), the Tax Court held that the appeals officer did not prematurely conclude the CDP hearing when the determination was made eight months after the hearing commenced. *Cf*. Industrial Investors v Commissioner, T.C. Memo. 2007-93 (appeals officer abused his discretion by allowing petitioner only 18 business days to assemble documentation required in support of offer-in-compromise, during part of which time petitioner's representative was under subpoena to appear in court).

While there is no period of time by which Appeals must conduct the hearing or issue the Notice of Determination, Appeals will attempt to conduct the hearing and issue the Determination as expeditiously as possible under the circumstances. Treas. Reg. § 301.6330(e)(3), Q&A-E9. Appeals does not have to wait for the outcome of an audit reconsideration, where liability is barred from consideration at the CDP hearing, before concluding the CDP hearing. Baltic v. Commissioner, 129 T.C. 178 (2007).

b. Face-to-face conference not required

The regulations provide that a CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications, or some combination thereof. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6. *See* Olsen v. United States, 414 F.3d 144 (1st Cir. 2005); *see also* Katz v. Commissioner, 115 T.C. 329 (2000) (combination of telephone calls and written letters); Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000) (solely written correspondence if the taxpayer consents). Therefore, all communications between the taxpayer and the appeals officer between the time of the request for the hearing and the issuance of the notice of determination are part of the CDP hearing. *See* TTK Management v. United States, 2001-1 USTC ¶ 50,185 (C.D. Cal. 2000).

A taxpayer who presents in the CDP hearing request relevant, non-frivolous reasons for disagreement with the proposed levy or lien will

ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to the taxpayer's residence or, if the taxpayer is a corporation, at the Appeals office closest to its principal place of business. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D7, 301.6330-1(d)(2) Q&A-D7. *See also* Parker v. Commissioner, T.C. Memo. 2004-226 (court remanded for new appeals hearing when CDP hearing was scheduled at appeals office 180 miles from taxpayer's residence, and there was a closer appeals office); Katz v. Commissioner, 115 T.C. 329 (2000).

The regulations do not require Appeals to offer the taxpayer a face-to-face or telephone conference in the absence of a request. Loofbourrow v. Commissioner, 208 F. Supp. 2d 698, 707 (S.D. Tex. 2002). *But see* Meyer v. Commissioner, 115 T.C. 417 (2000) (appeals officer erred in failing to offer a conference either in person or by telephone). Nevertheless, Appeals generally offers taxpayers a face-to-face or telephone conference in a nonfrivolous CDP hearing. Taxpayers who fail to avail themselves of an offered face-to-face or telephone conference cannot complain that they were denied the opportunity for such conference. A determination to proceed with collection can be made on the basis of Appeals' review of the case file. Maxton v. Commissioner, T.C. Memo. 2007-95. *But cf.* Cox v. United States, 345 F. Supp. 2d 1218 (W.D. Okla. 2004) (hearing inadequate when taxpayer was not provided with notice that the telephone conference with Appeals constituted the CDP conference); Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004) (court remanded to Appeals for new face-to-face CDP conference when taxpayer had requested a face-to-face conference and it was unclear whether taxpayer was advised that the telephone conference received instead constituted the CDP conference).

c. When face-to-face conference is not offered

The face-to-face conference contemplated by the regulations is a conference for the purpose of addressing issues relevant to the taxpayer's CDP case—*e.g.*, the issues listed in section 6330(c)(2). A face-to-face conference serves no useful purpose if the taxpayer has no intention of discussing relevant issues, or if the taxpayer wishes to use the conference as a forum to espouse only frivolous and groundless arguments.

Accordingly, a face-to-face CDP conference concerning a taxpayer's underlying liability will not be granted if the request for a hearing or other taxpayer communication indicates that the taxpayer wishes to raise only irrelevant or frivolous issues concerning that liability. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8, 301.6330-1(d)(2) Q&A D8. A face-to-face conference need also not be granted if the taxpayer does not provide in the CDP hearing request reasons why the taxpayer disagrees with the levy or NFTL filing.

Note: The TRHCA amended sections 6320 and 6330 to provide that a

> taxpayer must provide reasons for the hearing request, and the Service may disregard any portion of a hearing request that is based upon a position identified as frivolous by the IRS in a published list or reflects a desire to delay or impede tax administration. *See* section IV.B.2, *supra*. Accordingly, in cases where the TRHCA amendments are applicable, a taxpayer raising no issues or only frivolous issues may not only be ineligible for a face-to-face conference but may be denied a CDP hearing.

A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or offer-in-compromise, will not be granted unless other taxpayers would be eligible for the alternative under similar circumstances. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8, 301.6330-1(d)(2) Q&A D8. For example, a taxpayer who proposes an offer-in-compromise as the only issue to be addressed at the hearing, who has failed to file all required returns and is, therefore, ineligible for an offer-in-compromise, will not be granted a face-to-face CDP conference.

Appeals may, however, in its discretion, grant a face-to-face conference where it determines it is appropriate to explain the requirements to become eligible for a collection alternative. The taxpayer will have the opportunity to demonstrate eligibility for a collection alternative, or become eligible for a collection alternative, in order to obtain a face-to-face conference. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8, 301.6330-1(d)(2) Q&A D8.

If the taxpayer is not offered a face-to-face conference, the taxpayer will receive a hearing by telephone, correspondence, or some combination thereof (except as noted above, where the TRHCA amendments are effective and preclude the taxpayer from receiving any CDP hearing).

The Tax Court has held in cases when a taxpayer raising only frivolous issues contests being denied a face-to-face conference that such denial was not an abuse of discretion and that it would not be necessary or productive to remand the case to an appeals office for a new face-to-face hearing, citing Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). *See, e.g.,* Clough v. Commissioner, T.C. Memo. 2007-106. *See also* Hinman v. Grzesiowski, 96 AFTR 2d 6788 (N.D. Ind. 2005) (mandamus relief improper to compel a face-to-face CDP hearing, when taxpayer did not appeal the Appeals determination).

The regulations further provide that, if a taxpayer would ordinarily be offered a face-to-face conference with Appeals, but all of the Appeals officers at the location where that conference would normally be held have had prior involvement with respect to the unpaid tax and tax period involved in the hearing, the taxpayer will be offered a face-to-face conference at another Appeals office. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8, 301.6330-1(d)(2) Q&A D8. The face-to-face meeting may be

held at the normal location if the taxpayer waives the requirement that the hearing be conducted by an appeals officer without prior involvement. *Id*. The meaning of "prior involvement" with respect to the unpaid tax and tax period is discussed in Section IV.B.5.e.

d. Recording of CDP hearings under section 7521(a)(1)

The Tax Court has held that if a taxpayer is offered a face-to-face conference and requests to record the face-to-face CDP conference, in accordance with section 7521(a)(1), such recording must be allowed. Keene v. Commissioner, 121 T.C. 8 (2003). However, when a taxpayer is improperly denied the right to record, the court will not remand to Appeals for a new recorded hearing when such a remand would be unnecessary or unproductive. Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). *See*, *e.g.*, Carrillo v. Commissioner, T.C. Memo. 2005-290. .

In Calafati v. Commissioner, 127 T.C. 219 (2006), the Tax Court held that the taxpayer had no right to audio record a telephone CDP conference, as section 7521 only applied to "in-person interviews," meaning face-to-face meetings between the interviewer and interviewee.

e. Impartial appeals officer

Sections 6320(b)(3) and 6330(b)(3) require that the hearing be conducted by an officer or employee who has had no prior involvement with respect to the same unpaid tax. Prior involvement includes participation or involvement in a matter (other than a prior CDP hearing) that the taxpayer may have with respect to the tax and tax period shown on the CDP notice. Prior involvement exists only when the taxpayer, the tax and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP matter, and the Appeals officer or employee actually participated in the prior matter. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D4; 301.6330-1(d)(2) Q&A-D4. Where separate CDP hearings were conducted for the lien and levy for the same tax period, prior involvement does not include the prior CDP hearing. The prior involvement restriction only applies to the officer conducting the hearing, not the officer's manager who signs the notice of determination.

Prior involvement includes participation in examination and collection activities (other than CDP appeals hearings) with respect to the same taxpayer, type of tax, and tax period. For example, an appeals officer has prior involvement under sections 6320(b)(3) and 6330(b)(3) if he served as a mediator during the examination of the same tax liability or was the revenue officer assigned to collect the same tax liability subject to the CDP hearing.

In Cox v. Commissioner, 514 F.3d 1119 (10th Cir. 2008), *rev'g* 126 T.C. 237 (2006), the Tenth Circuit held that prior involvement includes

conducting a CDP hearing involving an earlier tax period where the existence of the tax liability for the later years was a material factor in the decision involving the earlier year. Thus, where an officer conducted a CDP hearing for the 2000 income tax liability, and considered the taxpayer's noncompliance for 2001 and 2002 incomes taxes at that hearing, he was precluded from conducting a subsequent CDP hearing for 2001 and 2002. The court reversed the opinion of the Tax Court that merely reviewing the compliance history of the 2001 and 2002 years in a CDP proceeding involving 2000 is not disqualifying prior involvement. **Cases involving this issue must be coordinated with P&A Branch 3 or 4.**

In MRCA Information Services, Inc. v. United States, 145 F. Supp. 2d 194 (D. Conn. 2000), the court held that an appeals officer who was assigned to hear a CDP case involving a corporation's employment tax liability was not impartial because he had presided at a hearing involving the section 6672 penalty assessed against the sole shareholder of that corporation for the same tax periods. MRCA does not take into account that a section 6672 penalty and employment taxes are separate and distinct liabilities. Treas. Reg. §§ 301.6320-1(d)(2) examples 3 and 4; 301.6330-1(d)(2) examples 3 and 4. *See also* Harrell v. Commissioner, T.C. Memo. 2003-271 (appeals officer is not rendered impartial for purposes of section 6330(b)(3) just because another employee in the same appeals office was involved with the same taxpayer, type of tax, and tax years at issue in CDP).

f. Prohibition of ex parte communications

i. Appeals and Collection

RRA 1998, section 1001(a) directed the Service to develop a plan to prohibit ex parte communications between Appeals employees and other employees of the Service. To ensure an independent Appeals function, ex parte communications between Appeals employees and other IRS employees are prohibited to the extent that such communications appear to compromise the independence of the appeals officers. Rev. Proc. 2000-43, 2000-2 C.B. 404. The term "ex parte communications" is defined in Rev. Proc. 2000-43 as the communications between Appeals and other Service functions without the participation of the taxpayer or the taxpayer's representative. Rev. Proc. 2000-43, Q&A 1. The following examples are not considered prohibited ex parte communications:

- Communications between appeals officers and other appeals employees. Rev. Proc. 2000-43, sec. 3, Q&A-3. Intra-Appeals communications during the deliberation process do not compromise or appear to compromise the independent Appeals function. *Id*.

- The transfer of the administrative file to Appeals by the office that

made the determination that is subject to the appeals process. Rev. Proc. 2000-43, Q&A-4.

• Communications between Appeals and the originating function (such as Collection in a CDP case) that are limited to ministerial, procedural, or administrative matters. Appeals and the originating function cannot discuss the relative strengths and weaknesses of a case. Rev. Proc. 2000-43, Q&A-5 and 6.

In Drake v. Commissioner, 125 T.C. 201 (2005), the Tax Court ordered a remand to Appeals for a new CDP hearing when an ex parte communication occurred between an Appeals employee and an IRS bankruptcy advisor that was not shared with the taxpayer, in violation of Rev. Proc. 2000-43. The subject communication was a memorandum from the bankruptcy advisor that questioned the credibility and motives of the taxpayer's counsel in a prior bankruptcy proceeding.

In Moore v. Commissioner, T.C. Memo. 2006-171, *nonacq*. *at* AOD 2007-02, the Tax Court held that improper ex parte communications among an appeals officer, offer specialist, and revenue officers previously involved in collection of the tax at issue could not be remedied by sharing the contents of the communications with the taxpayer and allowing the taxpayer an opportunity to respond. The court ordered a remand to Appeals for the purpose of identifying an appropriate remedy to avoid prejudicing the taxpayer as a result of the ex parte communications. The court further ordered that, if the appropriate remedy was a new CDP hearing before a new appeals officer, all references to the prohibited ex parte communications and any copy of the opinion should be deleted from the administrative file.

As explained in AOD 2007-02, we disagree that the violations in Moore warranted a remand to Appeals and the deletions from the administrative record. The court should have invoked the harmless error rule and found that the appeals officer did not abuse her discretion. Even though the information was received through prohibited ex parte communications, the appeals officer cured the violations of the ex parte communications by disclosing the information to the taxpayer and giving the taxpayer adequate opportunity to respond during the hearing. The violation of the ex parte communications rules, therefore, constituted harmless error and a remand to Appeals was unnecessary.

In Industrial Investors v. Commissioner, T.C. Memo. 2007-93, the court held that a cover memo from a revenue officer with the file submitted to Appeals putting the revenue officer's "spin" on the case and advocating a decision adverse to the taxpayer was a prohibited ex parte communication.

Issues involving ex parte contacts during a CDP administrative hearing should be coordinated with Branch 3 or 4, P&A.

ii. Appeals and Counsel

Rev. Proc. 2000-43, Q&A 11 addresses communications between Appeals and Counsel attorneys in nondocketed cases. Generally, Appeals may contact a Counsel attorney (other than a Counsel attorney who provided guidance on the same issue to the originating function) for advice on a legal issue during the course of the CDP hearing. Since Appeals is responsible for independently evaluating the strengths and weaknesses of the case, however, it would be inappropriate to discuss those aspects with Counsel—*e.g.*, for Counsel to propose a settlement range.

Pursuant to Q&A-11 of Rev. Proc. 2000-43, the following communications between Appeals employees and Counsel attorneys are prohibited:

- Communications between Appeals and a Counsel field attorney who previously provided guidance to the originating function on the same issue in the same case that Appeals is reviewing. In this situation, a different Counsel attorney should be assigned to provide advice to Appeals regarding the issue.

- Communications regarding settlement ranges for an issue in a case pending before Appeals or for the case as a whole.

Communications involving ministerial, administrative, or procedural matters are not prohibited. Rev. Proc. 2000-43, Q&A-5. *See* Planes v. United States, 98 A.F.T.R. 2d 2006-7044 (M.D. Fla. 2006) (settlement officer's communications with IRS counsel about the scope of his authority to reinstate an offer-in-compromise were not prohibited ex parte communications).

Revenue Procedure 2000-43 does not subject remanded CDP cases to the ex parte rules because the cases remain docketed with the Tax Court. Rev. Proc. 2000-43, Q&A 11. When a CDP case is remanded, however, the Appeals employee resumes the role of an independent officer. Therefore, it is imperative that guidelines similar to those stated in Rev. Proc. 2000-43 be applied to these cases. See section V.I.4.d for further discussion of application of the ex parte rules to remanded CDP cases.

6. Matters considered at hearing

a. Section 6330(c)(1) verification

Sections 6320(c) and 6330(c)(1) require the appeals officer to obtain verification from the Secretary that the requirements of any applicable law

or administrative procedure have been met. Verification can be obtained at any time prior to the issuance of the determination by Appeals. Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1). The requirements the appeals officer are verifying are those things that the Code, Treasury Regulations, and the IRM require the Service to do before collection can take place. *See, e.g.*, Trout v. Commissioner, 131 T.C. No. 16 (2008) (Marvel, concurring) (where OIC was terminated, appeals should verify that IRM administrative procedures for terminating the OIC were followed).

Section 6330(c)(1) does not require the appeals officer to rely on any particular document for verification. Craig v. Commissioner, 119 T.C. 252, 261-262 (2002). Verification is obtained by the appeals officer from the Service through its computer records and paper administrative files. The ACS or Field Compliance is responsible for providing Appeals with all the information necessary to conduct the verification required by section 6330(c)(1).

i. Computer transcripts

Most (but not necessarily all) of the legal and administrative procedural requirements can be verified by reviewing computer transcripts. The Form 4340 and TXMOD-A transcripts currently provide verification of assessment of the liability and the sending of collection notices. The current version of the MFTRA-X (literal) transcript provides verification of the assessment but not the sending of collection notices.

Generally, it is not an abuse of discretion for an appeals officer to rely on a Form 4340 to verify that legal and administrative requirements have been satisfied. Craig v. Commissioner, 119 T.C. 252, 261-263 (2002); Roberts v. Commissioner, 118 T.C. 365 (2002). An appeals officer may rely on a Form 4340 to verify the validity of an assessment, unless the taxpayer can identify an irregularity in the assessment procedure or other procedures. Nestor v. Commissioner, 118 T.C. 162 (2002). An appeals officer may rely on a Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig, 119 T.C. at 262-263.

Similarly, courts have found that it is not an abuse of discretion for an appeals officer to rely on computer transcripts other than the Form 4340 for verification, unless the taxpayer can identify an irregularity in the assessment procedure or other procedures. *See, e.g.,* Cipolla v. Commissioner, T.C. Memo. 2004-6 (citing Standifird v. Commissioner, T.C. Memo. 2002-245, and other cases). The appeals officer may rely on computer transcripts to verify the validity of an assessment, as long as the transcript relied upon contains the information required in Treas. Reg. § 301.6203-1. *See, e.g.,* Williams v. Commissioner, T.C. Memo. 2005-94 (citing Schroeder v. Commissioner, T.C. Memo. 2002-190); Hoffman v. United States, 209 F. Supp. 2d 1089, 1094 (W.D. Wash. 2002). An appeals officer may rely on a computer transcript to verify

that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. *See, e.g.,* Kun v. Commissioner, T.C. Memo. 2004-209 (citing Schaper v. Commissioner, T.C. Memo. 2002-203, among other cases).

ii. Invalid assessments

Sections 6320(c) and 6330(c)(1) require that the appeals officer determine whether the assessment was properly made. If the tax liability was incorrectly assessed under the math error procedures, the resulting tax assessment is invalid and must be abated. *See* I.R.C. § 6213(b)(1). Similarly, if the statutory notice of deficiency was not sent to the taxpayer's last known address, the resulting assessment is invalid. *Cf*. Blocker v. Commissioner, T.C. Memo. 2005-279 (assessment following return of undelivered notice of deficiency valid because sent to last known address). Such issues will often require the appeals officer to examine underlying documents in addition to the tax transcripts, such as the taxpayer's return, a copy of the notice of deficiency, and the certified mailing list for the notice of deficiency. *See* Hoyle v. Commissioner, 131 T.C. No. 13 (2008) (remanding to appeals to clarify the record as to what it relied upon in determining that the notice of deficiency was properly sent). In Clough v. Commissioner, T.C. Memo. 2007-106, the Tax Court held that an appeals officer did not properly verify the validity of the assessment for one of the years at issue because he did not confirm that a statutory notice of deficiency was sent for the 2000 year, even though the taxpayer did not contest the validity of the 2000 assessment. The taxpayer had attached a copy of the statutory notice of deficiency for the other years at issue to his CDP hearing request. The case record contained statements that the appeals officer was unable to verify a statutory notice of deficiency for the 2000 year. The court noted that there was nothing in the Form 4340 transcript showing that a statutory notice of deficiency was sent for the 2000 year, nor was there a copy of such notice in the record. Under these facts, the court held that the appeals officer did not properly verify issuance of a statutory notice of deficiency before the 2000 year was assessed.

> *Note*: As exemplified by the Hoyle and Clough cases, verification requires independent confirmation of the validity of assessments, including determining whether the notice of deficiency was properly issued and whether penalties were properly imposed. This is the case even in the absence of specific, nonfrivolous issues being raised by the taxpayer in this regard.

In Butti.v. Commissioner, T.C. Memo. 2008-82, the court held that collection could not proceed because respondent failed to prove that a notice of deficiency was issued to the taxpayer prior to the assessment. Even though respondent introduced a certified mailing list showing that the notice of deficiency was properly mailed, a copy of

the notice of deficiency was missing and so could not be introduced into evidence The court held, in reliance on Pietenza v. Commissioner, 92 T.C. 729 (1989), *aff'd without published opinion*, 935 F.2d 1282 (3d Cir. 1991), that where a taxpayer challenges the existence of the notice of deficiency, the certified mailing list will not by itself establish the existence of the notice of deficiency. *See* AOD 1992-05, 1991 WL 771260 (nonacquiescence in Tax Court's holding in Pietenza). **Any cases involving proving the issuance of the notice of deficiency under Butti and Pietenza should be coordinated with Branch 3 or 4, P&A.**

Note: Although the issuance of the notice of deficiency is often addressed in connection with establishing receipt of the notice for purposes of determining whether the taxpayer can raise liability under section 6330(c)(2)(B), where there are problems in proving issuance of the notice of deficiency, counsel should consider whether the validity of the assessment might be in question.

b. Relevant issues under section 6330(c)(2)(A)

Sections 6320(c) and 6330(c)(2)(A) provide that the taxpayer may raise during the hearing any relevant issue relating to the unpaid tax. Taxpayers will be expected to provide any relevant information requested by Appeals, such as financial statements, for its consideration of the facts and issues involved in the hearing. Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1). Relevant issues including the following:

i. Appropriate spousal defenses

A taxpayer may raise any appropriate spousal defense during a CDP hearing. I.R.C. § 6330(c)(2)(A)(i). A taxpayer is precluded from requesting relief under sections 66 and 6015 if the Commissioner has already made a final determination as to spousal defenses in a statutory notice of deficiency or final determination letter. Treas. Reg. §§ 301.6320-1(e)(2), 301.6330-1(e)(2); Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E4, 301.6330-1(e)(3) Q&A-E4. If the taxpayer had raised a spousal defense under section 66 or 6015 and meaningfully participated in a prior administrative or judicial proceeding that has become final, section 6330(c)(4) prevents the taxpayer from raising the defense in a subsequent CDP hearing or judicial review proceeding. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E5, 301.6330-1(e)(3) Q&A-E5. Further, section 6015(g)(2) bars a taxpayer who meaningfully participated in a judicial proceeding from raising relief under section 6015 for any tax year for which the court has rendered a final decision on the taxpayer's tax liability if section 6015 relief was available at the time of the decision. The taxpayer also may not raise any factual issues decided by the court that are relevant to relief under section 6015. Treas. Reg. § 1.6015-1(e).

ii. Challenges to appropriateness of collection action

Pursuant to section 6330(c)(2)(A)(ii), a taxpayer may challenge whether the collection action is appropriate.

(A) Taxes discharged in bankruptcy

If a taxpayer has received a bankruptcy discharge and that taxpayer's tax liabilities are dischargeable, the taxpayer is no longer personally liable for the taxes and the Service is enjoined from collecting the liability from the taxpayer personally. *See* 11 U.S.C. § 524(a); *see also* In re Rivera Torres, 309 B.R. 643, 647 (1st Cir. B.A.P. 2004). If, however, the Service filed a NFTL before the bankruptcy petition date, then after the bankruptcy the lien continues to attach to prepetition property of the taxpayer that was exempt or abandoned from the estate. 11 U.S.C. § 522(c)(2)(B). *See* Isom v. United States, 901 F.2d 744 (9th Cir. 1990); *see also* Johnson v. Home State Bank, 501 U.S. 78 (1991). A lien remains attached to property excluded from the estate, such as an ERISA-qualified pension plan, even if a NFTL was not filed before the petition date.

(B) Criminal restitution cases

In Creel v. Commissioner, 419 F.3d 1135 (2005), the Eleventh Circuit affirmed the Tax Court's unpublished Order and Decision holding that it was inappropriate to collect the tax because it was satisfied by criminal restitution payments.

The Eleventh Circuit held that there was no outstanding liability because the restitution payments, satisfaction of judgment for restitution, and release of the judgment lien meant that these years were fully paid. The Eleventh Circuit recognized the general rule that satisfaction of criminal tax liability does not include satisfaction of civil tax liability. The government can seek restitution through criminal proceedings and pursue recovery of excess civil tax liability in subsequent civil proceedings. The court, nevertheless, found that the "unique facts and the nuances" of the case dictated a departure from this general rule.

See Chief Counsel Notice 2007-008 for the details on how to address restitution issues that arise in CDP cases.

iii. Offers of collection alternatives

Section 6330(c)(2)(A)(iii) and Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E6 and 301.6330-1(e)(3) Q&A-E6 list the following as examples of collection alternatives:

- posting of a bond;

- substitution of other assets;
- an installment agreement;
- an offer-in-compromise; and
- withholding collection action to facilitate future payment.

In addition, Treas. Reg. § 301.6320-1(e)(3) Q&A E6 provides that specific collection alternatives in lien cases include a proposal to withdraw the NFTL in circumstances that will facilitate the collection of the tax liability, subordination of the NFTL, and discharge of specific property from the NFTL.

Note: Acceptance of collection alternatives in CDP lien cases does not necessarily affect the NFTL filing. For example, even if an installment agreement is accepted as a collection alternative during a CDP lien hearing, the NFTL will generally remain filed.

(A) Consideration of collection alternatives

In rejecting a proposed collection alternative, Appeals must consider all relevant evidence provided by the taxpayer, give the taxpayer reasonable time to submit requested documentation, follow statutory and regulatory requirements, and explain in detail in the notice of determination why collection alternatives offered by the taxpayer were rejected. *See generally* Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005). Acceptance of collection alternatives is generally within the discretion of the IRS and Appeals acts within its discretion when it follows guidelines in the IRM in evaluating the collection alternative. For example, an offer-in-compromise will be returned as no longer processable if all tax returns for which the taxpayer has a filing requirement are not filed within the time required by the Service. It is accordingly not an abuse of discretion for Appeals to return an offer-in-compromise if the taxpayer has not filed all required tax returns.

Six circuit courts have affirmed Appeals' return or rejection of proposed collection alternatives during the CDP hearing. In Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621 (6th Cir. 2005), the court held that it was not an abuse of discretion to return an offer-in-compromise when the taxpayer had not filed an actual offer, was not in compliance with employment tax deposits at the time of the hearing, and had defaulted on a previous installment agreement. In Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005), the court held that it was not an abuse of discretion to reject an offer-in-compromise when the taxpayer failed to provide necessary financial information during the CDP hearing. In Orum v. Commissioner, 412 F.3d 819, 820 (7th Cir. 2005), the court held that it was not an abuse of discretion to reject an installment

agreement when the taxpayer had failed to make required monthly payments on a previous installment agreement and because the taxpayer failed to provide additional financial information requested by the appeals officer. In Fargo v. Commissioner, 447 F.3d 706 (9th Cir. 2006), the court held that it was not an abuse of discretion to reject an offer based on "effective tax administration" grounds when large amounts of interest accrued on a liability arising out of a tax shelter. *See also* Christopher Cross, Inc. v. United States, 461 F.3d 610 (5th Cir. 2006); Speltz v. Commissioner, 454 F.3d 782 (8th Cir. 2006); Kindred v. Commissioner, 454 F.3d 688 (7th Cir. 2006).

For examples of favorable Tax Court decisions regarding rejection of offers-in-compromise, *see, e.g.*, Salazar v. Commissioner, T.C. Memo. 2008-38 (appeals did not abuse discretion in rejecting offer-in-compromise that would risk collecting bankruptcy distribution); Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006) (appeals did not abuse discretion by rejecting offer-in-compromise where computations as to collection potential were reasonably based upon income and expense information provided by taxpayer); Ertz v. Commissioner, T.C. Memo. 2007-15, *appeal pending* (9th Cir.) (appeals properly rejected doubt as to collectability/effective tax administration offer in Hoyt partnership case where taxpayer did not demonstrate special circumstances and acceptance would undermine voluntary compliance).

For examples of favorable Tax Court decisions regarding rejection of proposed installment agreements, *see, e.g.*, Giamelli v. Commissioner, 129 T.C.107 ("Reliance on a failure to pay current taxes in rejecting a collection alternative does not constitute an abuse of discretion."), Schwartz v. Commissioner, T.C. Memo. 2007-155 ("petitioners' circumstances illustrate one of the reasons for requiring current compliance before granting collection alternatives … namely, the risk of pyramiding tax liability.").

For adverse Tax Court decisions when the court found an abuse of discretion, *see, e.g.*, Samuel v. Commissioner, T.C. Memo. 2007-312 (appeals erred in not giving taxpayer opportunity to revise offer in compromise); Lites v. Commissioner, T.C. Memo. 2005-206 (abuse of discretion when appeals officer in rejecting installment agreement found without explanation taxpayers' disposable income to be higher than the financial information submitted by the taxpayers).

In Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006), the Tax Court rejected the taxpayer's argument that section 7122 requires the Service to provide administrative appeal rights within a CDP hearing from the rejection of an offer in compromise. The court noted that there was administrative review

as part of the CDP process and that the taxpayer had the right to appeal the CDP determination by seeking judicial review.

Note: Under section 7122(e)(2), review by Appeals is only required when the offer in compromise or installment agreement is rejected by a function of the IRS other than Appeals.

(B) TIPRA requirements for offers-in-compromise

Section 509 of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA), Pub. L. No. 109-222, amended section 7122 to require down payments for offers in compromise. These amendments apply to offers in compromise submitted on or after July 16, 2006.

As amended, section 7122(c)(1)(A) provides that a lump-sum offer (one payable in five or fewer installments) must be accompanied by the payment of 20 percent of the amount of the offer. Section 7122(c)(1)(B) also provides that a periodic payment offer (one payable in six or more installments) must be accompanied by the payment of the amount of the first proposed installment and additional installments must be paid while the offer is being evaluated by the Service. Section 7122(d)(3)(C) provides that if the offer does not meet one of the above down payment requirements, the offer may be returned to the taxpayer as unprocessable. Neither the 20 percent down payment for a lump-sum offer nor the installment payments on a periodic payment offer are refundable.

Section 7122(c)(2)(B) further provides that the assessed tax or other amounts shall be reduced by any user fee imposed with respect to the taxpayer's offer in compromise. The applicable regulations provide that a $150 user fee is generally charged for processing an offer in compromise, but no fee is charged if the offer is based solely on doubt as to liability or is made by a low-income taxpayer. Treas. Reg. § 300.3(b)(1).

Section 7122(f) provides that if an offer in compromise is not rejected within 24 months after submission of the offer, the offer shall be deemed to be accepted. Any period during which any tax liability which is the subject of the offer is in dispute in any judicial proceeding is not taken into account in determining the expiration of the 24-month period. See Notice 2006-68, 2006-31 I.R.B. 105, for further information on the TIPRA amendments to section 7122.

Because the payments made with the offer are not refundable, taxpayers may seek assurance from Appeals or other Service personnel regarding whether the proposed offer amount is acceptable. An appeals or settlement officer should be careful

about telling the taxpayer an acceptable offer amount before an offer is submitted. Otherwise, a taxpayer can in essence obtain consideration of an offer without making the required down payment. The appeals or settlement officer should make very clear that any suggested range is only an estimate and that an offer will not be considered until the taxpayer submits the Form 656 with the required payments. The appeals or settlement officer can assist an unrepresented taxpayer in calculating his reasonable collection potential (RCP) for purposes of determining the offer amount, by helping him fill out the Form 656 worksheet, using financial information submitted by the taxpayer on the Form 433. The taxpayer should be advised, however, that the only way to determine the actual RCP and acceptable offer amount is by formally submitting an offer with the required down payment. While it is acceptable to tell a taxpayer that the worksheet will assist him in deciding how much to offer, the taxpayer should never be told to offer his estimated RCP or any other amount. A taxpayer should never be told that a suggested offer amount is acceptable or unacceptable.

If the taxpayer never submits a processable offer, the case should be defended on the grounds that no collection alternative was proposed. The Tax Court should not be reviewing the appropriateness of a ballpark settlement range for abuse of discretion. The only issue for the court's review would be whether the taxpayer was given sufficient time to submit a processable offer.

(C) Doubt as to liability offer-in-compromise

When a taxpayer files an offer-in-compromise based on doubt as to liability, the taxpayer challenges the existence or amount of the liability. Therefore, under section 6330(c)(2)(B), the taxpayer does not have the legal right to consideration of a doubt as to liability offer submitted as part of the CDP proceeding if the taxpayer previously received a notice of deficiency or otherwise had an opportunity to dispute the liability. Kindred v. Commissioner, 454 F.3d 688, 699-700 (7th Cir. 2006); Baltic v. Commissioner, 129 T.C. 178 (2007). *Contra* Siquieros v. United States, 2005-1 USTC ¶ 50,244 (W.D.Tex. 2004) (finding that the taxpayer's offer based on doubt as to liability was not synonymous with a challenge to the underlying liability).

(D) Reconsideration of a previously rejected offer-in-compromise during the CDP hearing

If a taxpayer previously requested an offer-in-compromise that was rejected by Appeals prior to the taxpayer's request for a CDP

hearing, the taxpayer must submit a new offer-in-compromise as a collection alternative during the CDP hearing. Appeals may review the prior rejection for procedural compliance, but the prior offer may not be considered as a collection alternative during the CDP hearing. If the taxpayer resubmits a collection alternative, the taxpayer must demonstrate that there are changed circumstances and must submit updated financial information before Appeals can consider the resubmitted offer. *See generally* Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004).

(E) Review of a terminated offer-in-compromise during the CDP hearing

In Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004), the Eighth Circuit held that the failure to file one return (including a refund return) during the 5-year compliance period after an offer-in-compromise is accepted provides a legal basis for terminating the offer. The Eighth Circuit held that the Tax Court erred in reaching the question of "materiality" of breach, as the taxpayer's failure to file a timely income tax return was a breach of an express condition of the offer. Pursuant to the Eighth Circuit's decision, the taxpayer must strictly comply with the terms and conditions of the offer-in-compromise. In Trout v. Commissioner, 131 T.C. No. 16 (2008), the Tax Court adopted the express conditions analysis of the Eighth Circuit, holding that the IRS properly terminated an offer after the taxpayer failed to file his returns and the IRS sent warning letters to him.

(F) Partial payment installment agreements

The American Jobs Creation Act of 2004 amended section 6159(a) to provide the authority for the Service to enter into partial payment installment agreements (PPIAs). This is a new category of collection alternative that a taxpayer may propose in a CDP hearing. PPIAs are installment agreements that do not provide for full payment of the liabilities. Section 6159(d) was also added to require the Service to review all PPIAs at least once every two years. PPIAs are thus similar to deferred payment offers in compromise, but without the finality of offers in compromise. The amendments to section 6159 apply to all agreements entered into on or after October 22, 2004.

Section 6502(a)(2)(A) provides that the collection statute expiration date (CSED) may be extended in connection with granting installment agreements. It is the policy of the Service that collection statute extensions are permitted only in conjunction with PPIAs and only in certain situations. *See* IRM 5.14.2.2.3. It is the policy of the Service that CSED extensions are limited to 5 years

beyond the original CSED for each tax account (plus up to one year—see IRM 5.14.2.1(7)).

iv. Consideration of non-CDP Years during CDP hearing

The Tax Court has held that it has jurisdiction under section 6330(d)(1)(A) to consider facts and issues in non-CDP years when the facts and issues are relevant in evaluating a claim that all or part of the tax for a CDP year has been paid. *See* Freije v. Commissioner, 125 T.C. 14, 27 (2005). Taxpayers may attempt to raise issues involving non-CDP years at the administrative hearing in reliance on Freije. **Please contact Branch 3 or 4, P&A, if the issue of Tax Court jurisdiction over overpayments due for non-CDP years arises.** *See also*, Perkins v. Commissioner, T.C. Memo. 2008-103 (remanding for consideration of whether taxpayer is entitled to credit for non-CDP years).

A taxpayer is permitted to seek review of a non-CDP year if such review is necessary to determine an adjustment to the liability subject to the CDP hearing. For example, review of a non-CDP year would be permissible if the taxpayer is seeking the application of a net operating loss or credit carryover from a non-CDP year to a CDP year. This inquiry is necessary to determine the "existence or amount" of the liability subject to the hearing under section 6330(c)(2)(B). See section IV.D.1.b for a discussion about Tax Court review on these subjects.

v. Conscience-based objections to use of TIN raised during the CDP hearing

In a CDP hearing, if the taxpayer raises any conscience-based objections to the use of a dependent's taxpayer identification number (TIN) to claim an exemption under section 151, coordinate with Branch 1 or 2, P&A . Objections on religious or constitutional grounds, which may include references to the TIN as the "mark of the beast," are not necessarily frivolous. *See* CCDM Exhibit 35.11.1-1.

c. Section 6330(c)(2)(B) liability challenges

Under section 6330(c)(2)(B), a taxpayer may challenge the existence or amount of the underlying tax liability in a CDP hearing under sections 6320 and 6330 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. The term "underlying tax liability" means the total amount of tax (including interest and penalties) assessed for a particular tax period, including tax assessed under the deficiency procedures, tax reported on a tax return, or a combination of both. Callahan v. Commissioner, 130 T.C. 44 (2008); Montgomery v. Commissioner, 122 T.C. 1, 7-8 (2004).

If a taxpayer is barred from challenging the existence or amount of the underlying tax liability in a CDP hearing, the taxpayer is also precluded from raising the validity of the liability as an issue in a judicial review proceeding under section 6330(d). Goza v. Commissioner, 114 T.C. 176 (2000).

Note: In cases where a taxpayer is barred from challenging the existence or amount of the underlying liability pursuant to section 6330(c)(2)(B), but the taxpayer is raising a legitimate liability issue, Appeals and Counsel should make every attempt to resolve that issue, either within or outside of the CDP proceeding. For example, if the taxpayer files a return which shows a clear error in the amount assessed from the statutory notice of deficiency, Appeals should resolve this issue or ensure that Examination will address the matter before issuing its determination. Similarly, Counsel should not seek summary judgment under these facts without also ensuring that the Service will address the liability issue. Processing of returns and audit reconsiderations should not be delayed just because a CDP tax court petition has been filed. The goal of Appeals and Counsel should always be to ensure that the correct amount of tax liability is being fairly collected even if consideration of liability is precluded under section 6330(c)(2)(B). On the other hand, Appeals and Counsel should vigorously rely on section 6330(c)(2)(B) where the taxpayer is raising only frivolous issues or was uncooperative at the Appeals hearing.

i. Self-reported taxes

In Montgomery v. Commissioner, 122 T.C. 1 (2004), the Tax Court construed the term "underlying tax liability" under section 6330(c)(2)(B) to encompass tax liability reported due on a tax return and held that the taxpayers, who had not received a notice of deficiency or any other opportunity to dispute their underlying tax liability for the taxable year 2000, could challenge the amount of the tax reported on their 2000 return in the CDP proceeding.

Even under Montgomery, a taxpayer may not challenge the existence or amount of self-reported tax liability for a taxable year if the taxpayer received a notice of deficiency with respect to that year or had some other prior opportunity to dispute the tax liability. The fact that the taxpayer disputes items on the return that were not adjusted by the Service in the notice of deficiency is immaterial. Of course, if the Tax Court entered a decision involving the same tax liability in a deficiency proceeding, the doctrine of res judicata would preclude the taxpayer from disputing that liability in the CDP proceeding. Goodman v. Commissioner, T.C. Memo. 2006-220 (prior tax court stipulated decision is res judicata precluding taxpayer from disputing liability in CDP); Golden v. Commissioner, 548 F.3d 487 (6th Cir. 2008).

The Tax Court held in Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006), that section 6330 does not give the court jurisdiction to determine an overpayment or order a refund or credit of taxes paid. Therefore, the court cannot order a credit or refund if the court determines an amount of underlying tax liability for a taxable year that is less than the taxpayer's withholding, estimated tax, and other tax payments paid or credited for that year. A judicial determination of the amount of the underlying tax liability in a CDP case may, however, estop both parties from contesting the amount of that same liability in a subsequent refund action (subject to section 6511 limitations on filing refund claims).

ii. Taxpayer must raise issues at administrative hearing

A taxpayer is precluded from disputing the underlying tax liability in a CDP judicial review proceeding if the taxpayer failed to properly raise the merits of the underlying tax liability as an issue during the CDP hearing. Giamelli v. Commissioner, 129 T.C. 107 (2007). The merits are not properly raised if the taxpayer challenges the underlying tax liability, but fails to present Appeals with any evidence with respect to that liability after being given a reasonable opportunity to present such evidence. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3. A taxpayer would be precluded from challenging a self-reported tax liability when, prior to issuing the notice of determination, the appeals officer gave the taxpayer a reasonable opportunity to file an amended return and/or provide requested information substantiating his liability challenge but the taxpayer failed to do so. *See* Montgomery v. Commissioner, 122 T.C. at 19-20 (2004) (Marvel, J. and Goeke, J., concurring); Newstat v. Commissioner, T.C. Memo. 2005-262; Abu-Awad v. United States, 294 F. Supp. 2d 879, 889 (S.D. Tex. 2003). *Cf*. Sherer v. Commissioner, T.C. Memo. 2006-29 (failure to file tax return does not preclude raising liability when taxpayer provided evidence substantiating deductions).

iii. Receipt of a statutory notice of deficiency

Receipt of a statutory notice of deficiency under section 6320(c) or 6330(c)(2)(B) means receipt in time to petition the Tax Court for a redetermination of the deficiency. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E2, 301.6330-1(e)(3) Q&A-E2; Lee v. Commissioner, 129 T.C. 77 (2007) (receipt within 12 days of filing date insufficient time to petition court). Respondent has the burden of proving by a preponderance of the evidence that the receipt requirement has been satisfied. Sego v. Commissioner, 114 T.C. 604 (2000). Such proof may be obtained by asking the taxpayer about receipt through the discovery and admissions process.

(A) Presumptions of official regularity and delivery

Absent direct evidence that the taxpayer actually received the notice of deficiency or refused its delivery (s*ee, e.g*., Thompson v. Commissioner, T.C. Memo. 2004-73; Baxter v. Commissioner, T.C. Memo. 2001-300), respondent must rely on the presumptions of official regularity and delivery to meet his burden of proof. *See* Sego v. Commissioner, 114 T.C. 604, 610 (2000) (holding that "presumptions of official regularity and of delivery justify the conclusion that the statutory notice was sent and that attempts to deliver were made in the manner contended by respondent") (citations omitted); Bailey v. Commissioner, T.C. Memo. 2005-241 (noting that there is "a strong presumption in the law that a properly addressed letter will be delivered, or offered for delivery, to the addressee") (citations omitted).

The presumptions of regularity and delivery arise if the record reflects that the notice of deficiency was properly mailed to the taxpayer. *See*, *e.g*., Sego v. Commissioner, 114 T.C. 604 (2000); Bailey v. Commissioner, T.C. Memo. 2005-241. *See also, generally*, United States v. Ahrens, 530 F.2d 781, 785 (8th Cir. 1976) (presumption of regularity supports official acts of public officials and, in absence of contrary evidence, courts presume they have properly discharged duties).

"Proper mailing" of the notice of deficiency under sections 6320(c) and 6330(c) means mailing by certified mail to the taxpayer's last known address. Sego v. Commissioner, 114 T.C. 604 (2000). The notice of deficiency is properly mailed if the taxpayer received the notice, even if the Service failed to provide a copy of the notice to the taxpayer's representative. Bond v. Commissioner, T.C. Memo. 2007-240. In determining whether a deficiency notice has been properly mailed, the Tax Court has looked to the cases under section 6212(a) for guidance. *See the discussions in* Sego v. Commissioner, *id.*, Bailey v. Commissioner, T.C. Memo. 2005-241 and Figler v. Commissioner, T.C. Memo. 2005-230.

The act of mailing is established by evidence of compliance with the Service's IRM mailing procedures, corroborated by direct testimony or documentary evidence of mailing. *See* Coleman v. Commissioner, 94 T.C. 82, 91 (1990); Pietanza v. Commissioner, 92 T.C. 729, 746 (1989) (Ruwe, J. dissent), *aff'd*, 935 F.2d 1282 (3rd Cir. 1991) (table); Spivey v. Commissioner, T.C. Memo. 2001-29.

A properly prepared USPS Form 3877 or IRS certified mail list bearing a USPS date stamp or the initials of a postal employee is proof of compliance with the Service's established procedures for mailing deficiency notices and constitutes direct documentary

evidence of the date and fact of mailing. If the existence of the deficiency notice itself is not disputed, and absent evidence to the contrary, the Form 3877 or certified mail list by itself is sufficient to establish that the deficiency notice was properly mailed to the taxpayer. *See* Coleman v. Commissioner, 94 T.C. 82, 90-91 (1990); Figler v. Commissioner, T.C. Memo. 2005-230; Virgin v. Commissioner, T.C. Memo. 1991-63 (certified mail list performs same function as USPS Form 3877). *Cf*. Pietanza v. Commissioner, 92 T.C. 729, 738-39 (1989), *aff'd*, 935 F.2d 1282 (3rd Cir. 1991) (table), *non-acq*. *at* AOD- 1992-05, 1991 WL 771260 (respondent produced a properly completed USPS Form 3877 but failed to produce or corroborate the existence of the notice of deficiency; court concluded respondent failed to prove the mailing of the deficiency notice and dismissed the deficiency case for lack of jurisdiction.)

In Magazine v. Commissioner, 89 T.C. 321, 324-26 (1987), *non-acq*. *at* 1988-1 C.B. 1, the Tax Court held that respondent could not prove mailing a notice of deficiency based solely on evidence of respondent's mailing customs and practices. The court concluded that while "habit evidence" was admissible, respondent also had to present direct testimony or documentary evidence of mailing to show that the notice was in fact mailed. *Id*. at 326. It further noted that Form 3877 is often the only direct evidence of the mailing of a notice of deficiency. *Id.* at 327, n. 8.

The Service's failure to strictly comply with its mailing procedures is not fatal if the record contains evidence otherwise sufficient to prove proper mailing of the deficiency notice. *See, e.g.,* Massie v. Commissioner, T.C. Memo. 1995-173 (postal clerk did not initial certified mail list but respondent submitted credible evidence in the form of a manager's testimony regarding respondent's mailing procedures); Bobbs v. Commissioner, T.C. Memo. 2005-272 (USPS clerk did not initial certified mail list but address reflected on the list was taxpayer's undisputed last known address and taxpayer did not argue respondent failed to follow his established mailing procedures).

(B) Rebuttal of presumptions

If the presumptions of official regularity and delivery arise, then the burden shifts to the taxpayer to rebut the presumptions. *See* Conn v. Commissioner, T.C. Memo. 2008-186 (taxpayer rebutted presumption of receipt by establishing that he was in prison when statutory notice of deficiency mailed to his last known address). The presumptions of official regularity and delivery may be rebutted if the notice of deficiency is returned to the Service marked "undeliverable." *Cf.* Lehmann v. Commissioner, T.C. Memo. 2005-90 (liability challenge precluded where taxpayer deliberately

provided bad address to prevent delivery of IRS correspondence). If the notice is returned unclaimed, the presumptions may be rebutted by credible testimony denying receipt. *See*, *e.g.*, Tatum v. Commissioner, T.C. Memo. 2003-115. In Tatum, a denial of receipt of USPS Form 3849 (Notice of Attempted Delivery), combined with evidence that the Postal Service returned the notice of deficiency after only one attempt at delivery, was sufficient to rebut the presumptions.

If the notice of deficiency is returned to the Service unclaimed, the presumptions are not rebutted by testimony denying receipt if sufficient contrary evidence exists that the taxpayer refused to accept delivery or took deliberate steps to thwart delivery of the deficiency notice. *See* Sego v. Commissioner, 114 T.C. 604 (2000); Lehmann v. Commissioner, T.C. Memo. 2005-90. The presumptions are also not rebutted when the taxpayer admits to receiving the USPS Form 3849 but fails to pick up the certified mail. *See* Baxter v. Commissioner, T.C. Memo. 2001-300.

If the notice of deficiency is not returned to the Service, the presumptions generally are not rebutted if the taxpayer fails to deny receipt of the deficiency notice and there is no other evidence indicating nonreceipt. *See* Bailey v. Commissioner, T.C. Memo. 2005-241 (finding presumption of delivery not rebutted when only evidence to rebut presumption was taxpayer's testimony that he did not recall receiving notice of deficiency but taxpayer admitted he received other mail at address on the notice). *See also* Gilligan v. Commissioner, T.C. Memo. 2004-194. Even when the taxpayer denies receipt of the notice of deficiency, the denial alone may not be sufficient to rebut the presumptions if the record contains evidence impairing the taxpayer's credibility. *See*, *e.g.*, Figler v. Commissioner, T.C. Memo. 2005-230 (respondent produced evidence that the taxpayer had refused delivery of other IRS documents and lied at his prior divorce proceeding).

In Calderone v. Commissioner, T.C. Memo. 2004-240, the Tax Court permitted the taxpayer to challenge his underlying tax liability where respondent was unable to prove proper mailing and the taxpayer denied receipt. Although it was undisputed that the taxpayer's tax representative received a copy of the notice of deficiency in time to file a timely petition challenging the notice, the court found the representative had failed to properly represent the taxpayer and refused to impute the tax representative's receipt to the taxpayer.

(C) Frivolous challenges to liability

If the taxpayer is making only frivolous challenges to liability and it is questionable whether respondent can prove actual or

constructive receipt of the deficiency notice, Counsel should consider not raising section 6330(c)(2)(B) because defeating the frivolous challenge on the merits may be easier than proving receipt.

iv. Other opportunity to dispute liability

Other than receipt of a notice of deficiency, the Code does not define what constitutes an "opportunity to dispute" the underlying tax liability. We generally interpret this to mean an opportunity to challenge the merits of the liability in an administrative hearing before Appeals or in a judicial proceeding.

(A) Appeals hearing

An opportunity to dispute a liability includes a prior opportunity for a conference with Appeals offered either before or after assessment of the liability. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E2, 301.6330-1(e)(3) Q&A-E2. *See also, e.g.,* Bailey v. Commissioner, T.C. Memo. 2005-241; Pelliccio v. United States, 253 F. Supp. 2d 258, 261-62 (D. Conn. 2003). *But see* Perkins v. Commissioner, 129 T.C. 58 (2007) (prior opportunity does not include appeals conference that was pending when the CDP notice was issued).

The taxpayer (or the taxpayer's representative) must have received a letter offering a hearing with Appeals or must have actually participated in such a hearing to bar the taxpayer from challenging the underlying tax liability in the subsequent CDP hearing.

Note: An opportunity for a conference with Appeals prior to assessment of a tax subject to deficiency procedures is not a prior opportunity under section 6330(c)(2)(B). Treas. Reg. §§ 301.6320-1(e)(3) Q&A E2, 301.6330-1(e)(3) Q&A E2.

In Lewis v. Commissioner, 128 T.C. 48 (2007), the Tax Court held that a prior opportunity to dispute the underlying tax liability for purposes of section 6330(c)(2)(B) includes a prior conference conducted with Appeals, even where a taxpayer has no right of judicial review of the prior Appeals determination. The court held that the taxpayer was not permitted to contest his liability in the CDP hearing and in the Tax Court because he had previously contested the same liability in a hearing before Appeals, seeking abatement of late filing and late payment penalties. In the process of reaching this decision, the court upheld the validity of the CDP regulations as a reasonable interpretation of section 6330(c)(2)(B).

The Tax Court limited its holding in Lewis to situations in which the taxpayer has actually had a conference with Appeals about the liability in question. The court reserved judgment on the question of

whether the mere opportunity to contest a liability in Appeals is sufficient to prevent the taxpayer from raising the liability during CDP. **Please coordinate with Branch 3 or 4, P&A, if you have a case raising this issue**. Regarding the use of section 6330(c)(4) as an alternative basis for precluding a taxpayer from raising underlying liability, please see section IV.B.6.e.

(1) 30-day letter in deficiency case

Receipt of a 30-day letter preceding a notice of deficiency is not an opportunity to dispute underlying tax liability under section 6330(c)(2)(B). If it were, the rule that a taxpayer who received a notice of deficiency is barred from challenging the underlying tax liability in a CDP hearing would be meaningless.

(2) Other pre-assessment letters

An opportunity to dispute a tax liability under section 6330(c)(2)(B) includes an opportunity to dispute in Appeals taxes to which deficiency procedures do not apply, *e.g.*, employment tax, excise tax (except those in Chapters 41-44), and the trust fund recovery penalty. Each of the following is an example of an opportunity to dispute the liability because the notice received by the taxpayer informs the taxpayer of the right to go to Appeals.

- notice of a proposed excise tax assessment (Letter 955). Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.)

- notice of a proposed trust fund recovery penalty assessment (Letter 1153(DO)). Jackling v. IRS, 352 F. Supp. 2d 129, 132 (D.N.H. 2004); Pelliccio v. United States, 253 F. Supp. 2d 258, 261-62 (D. Conn. 2003); *cf.* Planes v. United States, 98 A.F.T.R. 2d 2006-7044 (M.D. Fla. 2006) (settlement officer properly allowed taxpayer to challenge trust fund recovery penalty when he did not receive notice of proposed assessment)

- notice that a section 6682 penalty will be assessed. Adams v. United States, 2002-1 USTC ¶ 50,295 (D. Nev.)

- notice of proposed employment tax assessment (Letter 950)

- notice of proposed return preparer penalty assessment (Letter 1125(DO))

(3) Letter disallowing refund claim

A letter (*e.g.*, Letter 105C) notifying a taxpayer that the

taxpayer's refund claim is disallowed would be a prior opportunity to dispute the tax if the letter gives the taxpayer an opportunity to dispute the disallowance in Appeals. *See, e.g.*, Farley v. Commissioner, T.C. Memo. 2004-168.

(4) Prior CDP notice

If the taxpayer received a prior CDP notice under section 6320 or 6330 for the same tax and taxable period, whether or not the taxpayer requested a CDP hearing, the taxpayer has had an opportunity to dispute the existence and amount of that liability and may not challenge it in a subsequent CDP hearing. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E7, 301.6330-1(e)(3) Q&A-E7. *See* Bell v. Commissioner, 126 T.C. 356 (2006) (CDP notice of determination provided prior opportunity to dispute liability by giving taxpayer the opportunity to file a petition in Tax Court, even where Appeals in prior CDP hearing erroneously determined that taxpayer was precluded from disputing liability).

(5) Audit reconsideration

An audit reconsideration conducted prior to the CDP hearing will preclude a challenge to the underlying tax liability under section 6330(c)(2)(B) only if the taxpayer was offered the opportunity for a conference with Appeals to dispute the results of the reconsideration. *Cf*. Bailey v. Commissioner, T.C. Memo. 2005-241 (audit reconsideration with appeal rights one of several factors indicating taxpayer had a prior opportunity to challenge liability).

(6) Not opportunities to dispute liability

(a) Receipt of a math or clerical error notice under section 6213(b)(1)

If upon receipt of the notice, the taxpayer timely challenges an assessment resulting from a math or clerical error on the taxpayer's return, the Service is required to immediately abate the assessment and any reassessment of the tax is subject to the deficiency procedures. The Service does not offer the taxpayer an opportunity for an Appeals hearing prior to issuance of the notice of deficiency under these circumstances.

(b) Penalties and interest

Issues involving accrued interest and penalties that were not at issue in the notice of deficiency or prior proceedings are not generally barred by section 6330(c)(2)(B). *See*, *e.g.*, Callahan v. Commissioner, 130 T.C. 44 (2008) (taxpayer can

challenge liability for frivolous return penalty); Ertz v. Commissioner, T.C. Memo. 2007-15, *appeal docketed*, No. 07-71719 (9th Cir. April 23, 2007) (challenge to section 6621(c) interest on tax motivated transactions); Pomeranz v. United States, 96 AFTR 2d 6767 (S.D. Fla. 2005); Light v. United States, 2002-2 USTC ¶ 50,483 (D. Nev.) (challenge to frivolous return penalties); Francis P. Harvey & Sons, Inc. v. IRS, 2005-1 USTC ¶ 50,154 (D. Mass. 2004) (challenge to late payment penalties). However, an opportunity for a prior penalty Appeals hearing after denial of a penalty abatement request is a prior opportunity under section 6330(c)(2)(B). *See* Lewis v. Commissioner, 128 T.C. 48 (2007) (participation in prior penalty Appeals hearing after denial of a penalty abatement request is a prior opportunity under section 6330(c)(2)(B)).

(B) Judicial proceedings

An opportunity to dispute the underlying tax liability may include the opportunity to contest the liability in a prior judicial proceeding.

(1) Waiver of receipt of notice of deficiency

If a taxpayer signed a form (*e.g.*, Form 4549, Form 870) consenting to the immediate assessment and collection of a tax liability, the taxpayer made a choice not to receive a notice of deficiency and, therefore, is precluded from contesting the underlying tax liability. Aguirre v. Commissioner, 117 T.C. 324 (2001) (Form 4549); A-Z Optics, Inc. v. Commissioner, T.C. Memo. 2007-27 (Form 870); Perez v. Commissioner, T.C. Memo. 2002-274 (Form CP-2000); *see also* Sillavan v. United States, 2002-1 USTC ¶ 50,236 (N.D. Ala.).

(2) Bankruptcy proceedings

If the Service filed a proof of claim regarding an unpaid tax liability in a bankruptcy proceeding, the debtor could have filed an objection to the proof of claim. 11 U.S.C. § 502. If the bankruptcy court had jurisdiction to determine the liability, the taxpayer is precluded from challenging the underlying tax liability in a subsequent CDP hearing (without regard to whether the debtor or Trustee actually filed an objection to the proof of claim). *See* Salazar v. Commissioner, T.C. Memo. 2008-38; Kendricks v. Commissioner, 124 T.C. 69, 77 (2005). The facts of a particular case should be examined to determine if the taxpayer had standing to object to the proof of claim (*e.g.*, perhaps no standing if the tax is dischargeable) and if the taxpayer had an actual opportunity to raise liability in the bankruptcy case (*e.g.*, perhaps no opportunity if the case was

dismissed soon after the claim was filed).The section 6330(c)(2)(B) bar should not be asserted when the taxpayer is disputing a tax liability for which the Service did not file a proof of claim in a no-asset Chapter 7 case. That argument would be inconsistent with our position that a bankruptcy court should abstain from determining a tax liability if there is no need to determine the tax for purposes of administering the bankruptcy estate. *See*, *e.g.*, In re Stevens, 210 B.R. 200 (Bankr. M.D. Fla. 1997); In re Williams, 190 B.R. 225 (Bankr. W.D. Pa. 1995).

(3) District court cases

A tax lien foreclosure suit or a suit to reduce assessments to judgment involving the tax liability included on a CDP notice would be a prior opportunity under section 6330(c)(2)(B), because the taxpayer would be entitled to challenge the liability in the suit. *See* MacElvain v. Commissioner, T.C. Memo. 2000-320.

(C) TEFRA proceedings

Under the Code's TEFRA provisions (sections 6221 to 6234), adjustments to partnership items are determined in administrative and judicial proceedings conducted at the partnership level and the adjustments flow through to the tax returns of the individual partners. If a dispute over partnership items reported on a partnership return cannot be resolved administratively, the Service issues a final partnership administrative adjustment (FPAA), which is the functional equivalent of a notice of deficiency insofar as both permit access to the Tax Court to challenge the determination by the Service. Although only the tax matters partner and other notice partners (who may be fewer than all the partners, depending on the size of the partnership) receive the FPAA (section 6223) and have the opportunity to file a petition seeking a readjustment of partnership items with the appropriate court (section 6226), the final decision of the court is binding on all partners (section 6226(c)). Under section 6226(c), every partner is deemed to be a party to the readjustment action and is allowed to participate in the litigation. *See* Kaplan v. United States, 133 F.3d 469, 473 (7th Cir. 1998); Chef's Choice Produce, Ltd. v. Commissioner, 95 T.C. 388 (1990). The tax matters partner is obligated to keep each partner informed of all administrative and judicial proceedings (section 6223(g)), but section 6230(f) provides that if the tax matters partner fails to provide actual notice of a judicial proceeding to any partner, the proceeding is nevertheless applicable to that partner.

In cases when no valid readjustment petition was filed in response to an FPAA, the partners entitled to notice under section 6223

would have had an opportunity to dispute the liability if they actually received a copy of the FPAA in time to file a timely petition. *See*, *generally*, Hudspath v. Commissioner, T.C. Memo. 2005-83, *aff'd without published opinion*, 177 Fed. Appx. 326 (4th Cir. 2006) (holding that section 6330(c)(2)(B) precludes a tax matters partner from challenging in his CDP case those partnership items covered in the FPAA issued to him previously).

By complying with the notice requirements of section 6223, the IRS gives any partner in a TEFRA proceeding an opportunity to dispute within the meaning of section 6330(c)(2)(B). By virtue of sections 6226(c) and 6230(f), every partner has or is deemed to have an opportunity to challenge the partnership items in response to an FPAA, and therefore is precluded from challenging the partnership item adjustments in a subsequent CDP hearing involving the partner's individual income tax liability. If the partner has not received a notice of deficiency or had any other prior opportunity to challenge his underlying tax liability, however, that partner would not be barred from contesting partnership affected items or the partner's nonpartnership related liability. *See also* Ertz v. Commissioner, T.C. Memo. 2007-15, *appeal docketed*, No. 07-71719 (9th Cir. April 23, 2007) (holding that the court lacks jurisdiction at the partner level CDP proceeding to determine "tax-motivated" character of partnership's transactions, for purpose of imposition of section 6621(c) increased interest rate).

v. Challenges to the unpaid tax outside the scope of sections 6320(c) and 6330(c)(2)(B)

A taxpayer's underlying tax liability should be distinguished from assessed tax and from unpaid tax. The term "underlying liability" refers to the validity of the tax and not to a request that payment be excused. Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 627 (6th Cir. 2005). "Underlying tax liability" has been interpreted by the Tax Court to include "the tax on which the Commissioner based his assessment." Robinette v. Commissioner, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). The Tax Court has also characterized this term to include the expiration of statutes of limitations and the application of payments and credits. Olender v. Commissioner, T.C. Memo. 2008-205 (contention that assessment was made after period of limitations lapsed is an underlying liability challenge that is barred by section 6330(c)(2)(B)). *See* Hoffman v. Commissioner, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); Boyd v. Commissioner, 117 T.C. 127 (2001) (claim that collection statute of limitations has expired is a liability challenge subject to de novo review, as is the claim that the taxpayer had already paid the liabilities at issue); Landry v. Commissioner, 116 T.C. 60 (2001)

(dispute as to IRS application of credits is a liability challenge subject to de novo review); Blocker v. Commissioner, T.C. Memo. 2005-279 (challenge to validity of notice of deficiency is a challenge to underlying liability). *See also* C&W Mechanical Contractors, Inc. v. United States, 2007 U.S. Dist. LEXIS 23059 (U.S.D.C. N.D. Ga.) (dispute as to IRS application of credits is a liability challenge subject to de novo review).

In Kindred v. Commissioner, 454 F.3d 688 (7th Cir. 2006), the Seventh Circuit states that it is "well settled law" that a challenge to the statute of limitations for making an assessment under section 6501 constitutes a challenge to the underlying liability, citing numerous Tax Court decisions including Hoffman. *But see* Golden v. Commissioner, 548 F.3d 487 (6th Cir. 2008) (declining to address Commissioner's position that the statute of limitations for assessment does not involve an underlying liability issue). **Counsel attorneys should contact Branch 3 or 4, P&A if the issue of the definition of "underlying liability" arises in one of their cases.**

Section 6330(c)(2)(B) does not preclude claims for spousal relief under sections 66 or 6015 because these claims do not dispute the existence of the liability but rather seek relief from the liability. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E3, 301.6330-1(e)(3) Q&A-E3. Claims for interest abatement under section 6404 are also not disputes about the existence of liability, because they seek relief from liability for interest.

d. The balancing analysis of section 6330(c)(3)(C)

Appeals must decide whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. I.R.C. § 6330(c)(3)(C). Trout v. Commissioner, 131 T.C. No. 16 (2008). Reviewing courts generally show deference to Appeals' conclusion regarding the balancing analysis. Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 627 (6th Cir. 2005). Additionally, the IRS is not required to consider in its balancing analysis whether there is sufficient equity in property to levy, whether it will receive any revenue from levy and sale, or whether the taxpayer's business will have to close down due to the levy and sale. *Id*. at 628-29. *See also* Jackling v. IRS, 352 F. Supp. 2d 129 (D.N.H. 2004); Elkins v. United States, 2004 WL 3187094 (M.D.Ga. 2004). In Johnson Home Care Services, Inc. v. United States, 96 AFTR 2d 6085 (E.D.N.Y. 2005), the court found no abuse of discretion in conducting the balancing analysis because the appeals officer expressly considered the taxpayer's financial situation and tax history, and gave reasoned explanations for the rejection of various payment options proposed by the taxpayer in lieu of the levy.

e. Section 6330(c)(4)

Sections 6320(c) and 6330(c)(4) provide that an issue may not be raised during a CDP hearing if: (1) the issue was raised and considered at a previous CDP hearing or in any other previous administrative or judicial proceeding; and (2) the person seeking to raise the issue participated meaningfully in such hearing or proceeding. *See also* Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1); McIntosh v. Commissioner, T.C. Memo. 2003-279. If an issue is precluded under section 6330(c)(4), it may not be raised in judicial review proceedings. Magana v. Commissioner, 118 T.C. 488 (2002).

"Previous administrative proceeding" in section 6330(c)(4) is limited to a hearing with Appeals. This interpretation is consistent with 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. For example, a taxpayer who appealed the rejection of an offer-in-compromise to Appeals, and participated meaningfully in that Appeals hearing, would be precluded from contesting that rejection in a subsequent CDP proceeding. If the taxpayer participated meaningfully in a proceeding at the exam level, however, but did not appeal the rejection of the offer to Appeals, section 6330(c)(4) would not apply.

Section 6330(c)(4) may be asserted as a basis for issue preclusion with respect to both liability and non-liability issues. In Lewis v. Commissioner, 128 T.C. 48 (2007), the Tax Court held that a prior opportunity to dispute the underlying tax liability, for purposes of section 6330(c)(2)(B), includes participation in a prior conference conducted with Appeals. In footnote 4 of its opinion, the court questioned why respondent did not argue that the taxpayer was also precluded from raising liability under section 6330(c)(4). *See* Westby v. Commissioner, T.C. Memo. 2007-194 (holding that sections 6330(c)(2)(B) and 6330(c)(4) precluded reconsideration of liability determined in prior tax court deficiency case). **Please contact Branch 3 or 4, P&A, if you have a case involving use of section 6330(c)(4) to preclude raising a liability issue in CDP.**

The TRHCA amended section 6330(c)(4) to provide that the taxpayer is also precluded from raising during a CDP hearing any position identified as frivolous by the IRS in a published list or that reflects a desire to delay or impede tax administration. The list of frivolous positions was released in Notice 2007-30, 2007-14 I.R.B. 1. This amendment is effective for CDP hearing requests made after March 15, 2007.

f. Consideration of precluded issues by Appeals

An appeals officer may, in that appeals officer's sole discretion, consider issues precluded under sections 6330(c)(2)(B) or 6330(c)(4), or any spousal defense under sections 66 or 6015 for which the Service made a final determination and/or which was raised and considered in a prior

judicial proceeding that has become final. Any determination, however, made by the appeals officer with respect to such precluded issue shall not be treated as part of the Notice of Determination issued by Appeals and will not be subject to judicial review. Even if a decision concerning a precluded issue is referenced in a Notice of Determination, it is not reviewable by the Tax Court. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E11, 301.6330-1(e)(3) Q&A-E11; Behling v. Commissioner, 118 T.C. 572 (2002); Swanson v. Commissioner, 121 T.C. 111, 118 (2003); Francis P. Harvey & Sons, Inc. v. IRS, 2005-1 USTC ¶ 50,154 (D. Mass. 2004).

7. Department of Justice jurisdiction

Once a case is referred to the Department of Justice for defense or prosecution, only the Department of Justice has the authority to compromise the case, including the collection of the underlying liabilities. I.R.C. § 7122(a). If a CDP hearing is held while a suit involving the same liabilities is pending, Appeals cannot consider any issue (such as the existence of the tax liability) that is part of the suit. Appeals may proceed with those issues that are not part of the suit (*e.g.*, compliance with all legal and administrative requirements with respect to the lien or proposed levy), or choose to suspend the CDP hearing until the suit is concluded. If Counsel attorneys believe that continuing the CDP hearing could in any way adversely affect the ongoing litigation, Counsel attorneys should ensure that Appeals suspends the CDP hearing. If a liability has been reduced to judgment by the Department of Justice, Appeals must get the Department of Justice's approval of any offer-in-compromise submitted to resolve collection of the liability. If a case ends in a final judgment that does not determine a taxpayer's liability *(e.g.*, a CDP case where liability is not at issue), however, the Department of Justice's settlement authority ends when the litigation is final—*e.g.*, the decision of a court of appeals can no longer be challenged in the Supreme Court. If there has been significant litigation over a legitimate legal issue, however, the Department of Justice should be given the opportunity to comment on a proposed settlement offer that will resolve issues addressed in the litigation. When the Department has referred a judgment to the Service for collection, no Department of Justice approval is required for Appeals to enter into an installment agreement under section 6159 providing for full payment of the liability.

C. Determination by Appeals

1. Notice of determination

Delegation Order No. App 8-a authorizes appeals officers, settlement officers, and Appeals Account Resolution Specialists to make determinations under sections 6320 and 6330, and appeals team managers to approve these determinations. In making a CDP determination under section 6320(c) or 6330(c)(3), an appeals officer is required to take into consideration: (A) verification that the requirements of any applicable law or administrative

procedure have been met; (B) issues raised at the hearing under section 6330(c)(2); and (C) whether the proposed collection action balances the need for efficient collection of taxes with the taxpayer's legitimate concern that the collection action be no more intrusive than necessary. S*ee also* Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E1, 301.6330-1(e)(3) Q&A-E1.

The determination, sent by certified or registered mail and entitled "Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330," is issued as a dated letter, Letter 3193, which informs the taxpayer of the right to judicial review by the Tax Court. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E8, 301.6330-1(e)(3) Q&A-E8. The notice of determination should be sent to the taxpayer's last known address, consistent with the requirements for sending notices of deficiency. Weber v. Commissioner, 122 T.C. 258 (2004); Sebastian v. Commissioner, T.C. Memo. 2007-138 (notice of determination sent to taxpayer's last known address valid; erroneous zip code was inconsequential error because it did not adversely affect proper delivery of notice). The letter provides a summary of the determination and includes an enclosure containing a complete description by the appeals officer of the basis of his or her determination.

If the case is remanded to Appeals by the Tax Court, the Tax Court retains jurisdiction over the case and Appeals, after holding a supplemental hearing, will issue a supplemental notice of determination (Letter 3978). The supplemental notice of determination does not inform the taxpayer of his right to judicial review because the case is already docketed with the Tax Court. Counsel should submit the supplemental notice to the court with a status report.

2. Retained jurisdiction

Section 6330(d)(2) dictates that the "Office of Appeals shall retain jurisdiction with respect to any determination made under [section 6330]." The statute sets forth two specific instances in which Appeals may exercise retained jurisdiction:

- With respect to collection actions taken or proposed with respect to the determination reached by Appeals (section 6330(d)(2)(A)); or

- With respect to consideration of a person's "change in circumstances" that affects the determination reached by Appeals (section 6330(d)(2)(B)).

Retained jurisdiction is available only when the person has first exhausted all other administrative remedies. *Id*. Treas. Reg. §§ 301.6320-1(h)(2) and 301.6330-1(h)(2) emphasize that Appeals' authority to exercise retained jurisdiction is separate and distinct from Appeals' more general authority to conduct CDP proceedings. The regulations provide that exercise of retained jurisdiction does not constitute a continuation of the original CDP proceeding, such that limitations periods suspended during the original CDP hearing are not similarly suspended under retained jurisdiction review. Treas. Reg. §§

301.6320-1(h)(2) Q&A H1, 301.6330-1(h)(2) Q&A H1. Similarly, the regulations provide that since a taxpayer is entitled to only one hearing under section 6320 and section 6330 per tax period, decisions resulting from retained jurisdiction consideration cannot be appealed to the Tax Court. Treas. Reg. §§ 301.6320-1(h)(2) Q&A H2, 301.6330-1(h)(2) Q&A H2. *See also* IRM 8.7.2.3.15.

The regulations follow from the plain language and structure of section 6330(d). Section 6330(d)(1) provides that a taxpayer may appeal a determination by Appeals made after the hearing described in section 6330(d). Section 6330(d)(2) provides that Appeals shall retain jurisdiction with respect to any determination made by Appeals pursuant to the original CDP hearing, and authorizes Appeals to conduct subsequent hearings in exercise of this authority. The statute does not provide for judicial review from such subsequent hearings. The judicial appeal rights allowed by section 6330(d)(1) relate only to the determination that concludes the original CDP hearing. Consequently, hearings conducted under the authority of section 6330(d)(2) occur subsequent to and are separate from the original hearing (and any judicial review of the original hearing) and are solely administrative in nature.

Accordingly, section 6330(d)(2) retained jurisdiction is not an appropriate basis for remand—a court should not order a remand for further hearing to consider a taxpayer's changed circumstances, while expressly finding no abuse of discretion on the part of Appeals. *See* TTK Management v. United States, 2001-1 U.S.T.C. ¶ 50,185 (C.D. Cal. 2000). Remand authority should be limited to instances of abuse of discretion by the appeals or settlement officer. The requirement in section 6330(d)(2) that persons experiencing changed circumstances first exhaust all administrative remedies prior to invoking Appeals' retained jurisdiction underscores this. By requiring administrative exhaustion, the statute contemplates that matters involving collection alternatives be first raised with Collection rather than with Appeals. This language clearly forecloses a remand directly to Appeals for consideration of changed circumstances without prior administrative exhaustion.

D. Judicial Review

1. Subject matter jurisdiction

A taxpayer has 30 days from the date of the notice of determination in which to appeal the determination to the Tax Court. Sections 6320(c), 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1).

The Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, enacted on August 17, 2006, amended section 6330(d)(1) to provide the Tax Court with exclusive jurisdiction to review CDP determinations. This amendment applies to all CDP determinations issued on or after October 17,

2006, regardless of the type of underlying tax. Prior to amendment, section 6330(d)(1) provided for judicial review in district court in cases where "… the Tax Court does not have jurisdiction of the underlying tax liability… .", *e.g*. employment tax cases and the frivolous return penalty. *See, e.g.,* Wagenknecht v. United States, 533 F.3d 412 (6th Cir. 2008).

Pursuant to the amendment, the Tax Court now has jurisdiction over cases previously within the sole jurisdiction of the district courts. Callahan v. Commissioner, 120 T.C. 44 (2008) (frivolous return penalty); Salazar v. Commissioner, T.C. Memo. 2008-38 (employment taxes). If a district court remands to appeals in a pre-amendment case over which it properly had jurisdiction, and appeals issues a supplemental notice of determination after October 17, 2006, the district court still retains jurisdiction since the supplemental notice relates back to the original notice, and so a Tax Court petition filed from the supplemental notice will be dismissed. Ginsberg v. Commissioner, 130 T.C. 88, 92-93 (2008). *See also* Livingston v. Commissioner, T.C. Memo. 2008-260 (2008) (Tax Court petition filed from supplemental notice dismissed for lack of jurisdiction, even though it was erroneously captioned as a notice of determination and instructed the taxpayer to petition the Tax Court). Prior to amendment, section 6330(d)(1) further provided a 30-day period to refile an appeal filed in the incorrect court. This refiling provision was also eliminated by the amendment.

Tax Court review in a CDP case pertains to the collection of the assessment listed in the NFTL filing or notice of intent to levy. Accordingly, CDP jurisdiction is distinguishable from deficiency jurisdiction in that it does not resolve all issues pertaining to a tax year or period. Unlike in deficiency cases, therefore, CDP litigation with respect to a particular tax liability does not preclude the Service from making an additional assessment for that same tax period. Freije v. Commissioner, 131 T.C. No. 1 (2008).

a. Overpayment jurisdiction

The Tax Court only has jurisdiction over the unpaid tax liability the Service is trying to collect. The court has no jurisdiction in CDP to determine an overpayment for the tax year at issue or to order a refund of any amounts paid. Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006). However, if the CDP case involves innocent spouse relief or interest abatement, and the notice of determination addresses and rejects innocent spouse relief or interest abatement, the Tax Court has overpayment jurisdiction with respect to such relief or abatement under sections 6015(g)(1) and 6404(h)(2)(B), subject to the rules provided by sections 6511 and 6512(b).

b. Jurisdiction over non-CDP years

In some cases, the taxpayer may claim that the liability for a tax year not in suit is less than the amount paid, and that taxpayer is entitled to an overpayment that could be credited toward the liability at issue. The Tax Court has stated that it can consider such issues regarding nonsuit years

insofar as the tax liability for the nonsuit years may affect the appropriateness of the collection action for the suit year. In exercising that jurisdiction, the court does not determine whether any collection with respect to the nonsuit year may proceed, but only whether collection may proceed for the suit year. Freije v. Commissioner, 125 T.C. 14, 27 (2005). *See* section IV.B.6.b.iv, *supra*. **Please contact Branch 3 or 4, P&A, if the issue of the Tax Court's jurisdiction under Freije arises.**

The Tax Court has jurisdiction to determine the existence and amount of an adjustment (such as a net operating loss carryover or credit carryover) from a non-CDP year that may be used to reduce the taxable income for the period subject to the CDP hearing. Because the adjustment affects the amount of tax imposed by the Internal Revenue Code for the CDP tax period, determination of the adjustment is part of the determination of the liability subject to the CDP hearing under section 6330(c)(2)(B). The Tax Court therefore may determine the existence and amount of the adjustment de novo.

c. Equitable jurisdiction

The Tax Court has exercised equitable authority to order the Service to return property to the taxpayer that was improperly levied upon, and to credit the taxpayer with the value of property that was seized but not sold as required by section 6335(f). *See* Chocallo v. Commissioner, T.C. Memo. 2004-152; Zaparra v. Commissioner, 124 T.C. 223 (2005), *reconsideration denied*, 126 T.C. 215 (2006), *appeal pending* (9th Cir.); Greene-Thapedi v. Commissioner, 126 T.C. 1, n. 13 (2006). **Please coordinate any cases in which issues arise involving the court's general equitable authority with Branch 3 or 4, P&A.**

d. Jurisdiction over section 6015(f) issues

The Ninth Circuit in Commissioner v. Ewing, 439 F.3d 1009 (9th Cir. 2006), *rev'g* Ewing v. Commissioner, 118 T.C. 494 (2002), held that in a "stand-alone" section 6015(f) case the Tax Court lacks jurisdiction to review a section 6015(f) determination when no deficiency has been asserted. After it was overruled by the Ninth Circuit, the Tax Court reversed its position on this issue. Billings v. Commissioner, 127 T.C. 7 (2006).

Section 6015(e)(1) was subsequently amended by the Tax Relief and Health Care Act of 2006 to confer jurisdiction on the Tax Court to review the Service's denial of relief in cases when taxpayers have requested equitable relief under section 6015(f), without regard to whether the Service has determined a deficiency. The amendments to section 6015(e)(1) apply to any taxable year when (1) a liability for tax arose after December 20, 2006, or (2) a liability for tax arose on or before December 20, 2006, but remained unpaid as of that date. For further guidance on these amendments, see Chief Counsel Notice 2007-13. **Any dispositive**

motions, or other documents concerning jurisdiction under section 6015(f), must be coordinated with Procedure and Administration Branch 1 or 2.

With respect to cases in which the amendments to section 6015(e)(1) are not applicable, the Tax Court lacks jurisdiction in a stand-alone section 6015(f) case. *See* Bock v. Commissioner, T.C. Memo. 2007-41. The Tax Court does have independent jurisdiction under section 6330(d), however, to review appeals' findings regarding section 6015(f) relief, when such issue was raised by the taxpayer at the CDP hearing and was addressed by the appeals officer in the notice of determination.

e. Improper court

Pursuant to the amendment to section 6330(d)(1) by the Pension Protection Act of 2006, if a taxpayer files an appeal to the district court from a notice of determination dated on or after October 17, 2006, counsel attorneys should draft a defense letter requesting the Tax Division to file a motion to dismiss the case for lack of jurisdiction. Section 6330(d)(1) no longer contains a 30-day period to refile in the Tax Court.

2. Notice of determination required

Jurisdiction under section 6320 or 6330 is contingent upon both the issuance a "valid notice of determination" and the filing of a timely petition. Boyd v. Commissioner, 451 F.3d 8, 11 (1st Cir. 2006); Offiler v. Commissioner, 114 T.C. 492, 498 (2000). A notice of determination includes a written notice that embodies a determination to uphold the proposed levy or sustain the NFTL filing. Salazar v. Commissioner, T.C. Memo. 2006-7 (rejection of an offer-in-compromise not a notice of determination). In determining the validity of the notice of determination for jurisdictional purposes, the court does not look behind the notice to see whether taxpayers were afforded a proper hearing. If the notice of determination is valid on its face, the court has jurisdiction. Lunsford v. Commissioner, 117 T.C. 59 (2001). *But see* Wilson v. Commissioner, 131 T.C. No. 5, n. 8 (2008) (limiting Lunsford to nonjurisdictional defects in the hearing). *See also* Ballard v. Commissioner, T.C. Memo. 2007-159 (letter instructing taxpayer's employer to change taxpayer's withholding status is not notice of determination subject to judicial review).

a. No notice of determination

If a notice of determination has not been issued to the taxpayer, a motion to dismiss for lack of jurisdiction should be filed. Kennedy v. Commissioner, 116 T.C. 255 (2001). *See, e.g.,* Davis v. Commissioner, T.C. Memo. 2008-238 (lock-in letter instructing taxpayer's employer to adjust taxpayer's withholding is not a notice of determination within the meaning of sections 6320 and 6330). Similarly, if a particular tax and period listed in the petition is not included in the notice of determination, a

motion to dismiss for lack of jurisdiction should be filed as to that tax and period, unless the taxpayer properly requested a CDP hearing for that tax and period and it was merely inadvertently not listed in the determination. *See* Lister v. Commissioner, T.C. Memo. 2003-17.

A motion to dismiss should be filed if the taxpayer appeals a decision letter (which is issued following an equivalent hearing), because courts lack jurisdiction to review a decision letter. Orum v. Commissioner, 123 T.C. 1 (2004); Moorhous v. Commissioner, 116 T.C. 263 (2001); Johnson v. Commissioner, 2000-2 USTC ¶ 50,592 (D. Ore.). If a taxpayer shows that he was entitled to a CDP hearing because the taxpayer's hearing request was timely, the decision letter will be treated as a notice of determination for the purpose of granting jurisdiction. Craig v. Commissioner, 119 T.C. 252 (2002). On the other hand, a decision letter will not be treated as a determination if the hearing was not in fact equivalent to a CDP hearing. Graham v. Commissioner, T.C. Memo. 2008-129 (court held that appeals failed to consider accuracy of assessment).

Where no notice of determination was issued, the question will arise whether a proper CDP notice was ever mailed to the taxpayer. If a proper CDP notice was not mailed, the court will dismiss the case for lack of jurisdiction on that ground rather than because no notice of determination was issued. *See*, *e.g.*, Buffano v. Commissioner, T.C. Memo. 2007-32 (respondent sought dismissal of appeal from decision letter; however, court dismissed for lack of jurisdiction on grounds that CDP notice was invalid because it was not mailed to taxpayer's last known address); Graham v. Commissioner, T.C. Memo. 2008-129. It is therefore important in such cases to prove through transcripts and certified mailing lists that CDP notices were properly issued and that taxpayer was given a CDP hearing if requested.

b. Invalid notice of determination

A motion to dismiss for lack of jurisdiction should also be filed if a notice of determination is invalid or void. For example, the Tax Court has held that a notice of determination sustaining a proposed levy that was issued during the automatic stay in bankruptcy is void and the court does not have jurisdiction to review such determination. Smith v. Commissioner, 124 T.C. 36 (2005); *but see* Beverly v. Commissioner, T.C. Memo. 2005-41 (holding that the court has jurisdiction to review a notice of determination even though the CDP levy notice was void because it was issued during the automatic stay in bankruptcy). *See* section IV.E, *infra*.

Additionally, a notice of determination mistakenly issued to a taxpayer who filed a late request for a CDP hearing is invalid. Wilson v. Commissioner, 131 T.C. No. 5 (2008). *But see* Soo Kim v. Commissioner, T.C. Memo. 2005-96 (court will not look behind facially valid notice of determination).

In Wilson, Appeals inadvertently issued a notice of determination, rather than a decision letter, following an equivalent hearing. The attached appeals case memorandum stated that the taxpayer had received an equivalent hearing because of his untimely hearing request and could not petition the Tax Court. The Tax Court held that, based on this internal inconsistency, the document was not a notice of determination for purposes of the jurisdictional requirements of section 6330(d)(1) and granted the government's motion to dismiss for lack of jurisdiction. The opinion expressly did not overrule Soo Kim v. Commissioner, *supra*, and address whether the court would treat a notice of determination as invalid where the hearing request was untimely, a Notice of Determination was issued, but the document was not internally inconsistent (*e.g.*, there is no indication in the Notice that the hearing request was untimely and that an equivalent hearing was given). **If you have questions or need assistance in cases presenting issues similar to Wilson or Soo Kim, please contact Branch 3 or 4, P&A**.

The portion of a notice of determination with respect to taxes and periods for which no valid CDP notice was ever issued would also not be valid. If a taxpayer includes in the request for hearing taxes and periods that are not listed on the CDP notice, only the portion of the notice of determination making a determination under section 6320 or 6330 with respect to collection of the liabilities listed on the CDP notice is valid. Any determination with respect to the liabilities not listed on the CDP notice is not subject to judicial review. Finally, a notice of determination that is undated or sent to the wrong address may not be valid. *Cf.* King v. Commissioner, 857 F.2d 676 (9th Cir. 1988) (notice of deficiency invalid if it was sent to the incorrect address and not actually received by the taxpayer). However, a notice of determination sent to an address other than the taxpayer's last known address would be valid if received in sufficient time to file a petition for review by the Tax Court.

c. Post-levy review

Courts have jurisdiction to review a notice of determination issued after a levy pursuant to section 6320(c) or 6330(f) when collection of tax is in jeopardy or the levy is on a state income tax refund. Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). Section 6330(f), stating "this section shall not apply," means that the section 6330(a) prelevy notice is not required, not that the court is divested of jurisdiction. *See* Bussell, et al. v. Commissioner, 130 T.C. No. 13 (2008) (levy where collection of tax is in jeopardy) and Clark v. Commissioner, 125 T.C. 108 (2005) (levy on state income tax refund).

3. Timely petition

A petition seeking review of a notice of determination must be filed within 30

days from the notice date. Sections 6320(c), 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). Stein v. Commissioner, T.C. Memo. 2004-124, n. 7. The 30 days are 30 calendar days, not 30 business days, and an appeal filed beyond the 30-calendar-day period will be dismissed for lack of jurisdiction. Guerrier v. Commissioner, T.C. Memo. 2002-3; Guy v. United States, 2002-2 USTC ¶ 50,633 (E.D.N.Y.). The statutory period cannot be extended by the filing of a request for reconsideration with Appeals or the taxpayer's failure to pick up the taxpayer's mail. McCune v. Commissioner, 115 T.C. 114 (2000). An untimely filing cannot be excused because the taxpayer is pro se. McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.). An untimely filing in an incorrect court does not extend the time to file in the correct court. McCune v. Commissioner, 115 T.C. 114 (2000) (because the complaint was untimely and improper in the district court, the petition is untimely in the Tax Court).

If the Tax Court petition, as reflected by the postmark, is mailed within 30 days from the notice date, the "timely mailing/timely filing" rule set forth in section 7502(a) applies, and the petition is timely even if filed after the 30-day period. *See, e.g.*, Montgomery v. Commissioner, 122 T.C. 1, 4 n.2 (2004); *but see* Sarrell v. Commissioner, 117 T.C. 122 (2001) (barring application of "timely mailing/timely filing" rule in the case of foreign postmarks).

a. Section 6015(e) exception

If a taxpayer seeks review of a notice of determination that includes a denial of relief under section 6015, the taxpayer must file an appeal within 30 days if the taxpayer also seeks review of other issues raised in the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F2, 301.6330-1(f)(2) Q&A-F2. If, however, a taxpayer seeks review of only the section 6015 determination, Tax Court jurisdiction can be established under section 6015(e) and the taxpayer must file an appeal with the Tax Court within 90 days of the notice of determination. *Id.*; Section 6015(e)(1)(A).

b. Section 6404(h) exception

Similarly, if a taxpayer seeks review of a notice of determination which includes a determination not to abate interest under section 6404(e), the taxpayer must file an appeal within 30 days if the taxpayer also seeks review of other issues raised in the CDP hearing. If, however, a taxpayer seeks review only of the denial of the request for abatement of interest, the taxpayer must file an appeal with the Tax Court within 180 days after the notice of determination is mailed. *See* Section 6404(h)(1).

4. Standard and scope of review

The standard of review applicable to an agency's decision determines how closely a reviewing court will scrutinize the decision for correctness. The standard applied depends upon the function the court is performing. If the underlying liability is properly at issue, the court reviews the liability de novo

and the other administrative determinations for an abuse of discretion. Jones v. Commissioner, 338 F.3d 463, 466 (5th Cir. 2003). If liability is not at issue, the court reviews the determination for an abuse of discretion. Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005).

The scope of review defines what a court is permitted to examine when applying a particular standard of review. The scope of review for the de novo standard of review in CDP cases is also de novo; the court may hold a trial and take evidence. The Tax Court has held that its review, as a general rule, is not limited to the administrative record, although as discussed *infra*, this position has been called into question and Counsel should continue to advocate limiting review to the administrative record.

a. Abuse of discretion standard of review

Two aspects of the CDP hearing process are reviewed for an abuse of discretion: (1) the appeals officer's determination with respect to the collection action, and determinations subsidiary to it; and (2) the procedures employed by the appeals officer in conducting the CDP hearing. The burden is on the taxpayer to show abuse of discretion. Carter v. Commissioner, T.C. Memo. 2007-25. *Cf*. Nuvio Corp. v. F.C.C., 473 F.3d 302 (D.C. Cir. 2006).

i. Determination with respect to the collection action

The court reviews the appeals officer's determination regarding the collection action for abuse of discretion. Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998).

In reaching the ultimate determination to sustain the proposed levy or NFTL filing, the appeals officer will make a number of subsidiary determinations, some legal, some factual and some judgmental. Each of these determinations subsidiary to the determination sustaining the collection action is also reviewed under an abuse of discretion standard. For example, the appeals officer will make the factual determination that the requirements of applicable law and administrative procedure have been met. *See, e.g.,* Nestor v. Commissioner, 118 T.C. 162, 166 (2002) (not an abuse of discretion to rely on Form 4340 for purposes of verifying validity of assessment). The appeals officer may have to decide whether the tax debt has been discharged by a bankruptcy court order, which may involve factual and legal determinations. *See, e.g.,* Swanson v. Commissioner, 121 T.C. 111, 119 (2003) (appeals officer's conclusion that the taxpayer had not received a bankruptcy discharge of the unpaid tax was subject to abuse of discretion review). The appeals officer may have to determine if the taxpayer qualifies for a collection alternative, such as an offer-in-compromise, which may involve factual and judgmental decisions. *See, e.g.,* Olsen v. United States, 414 F.3d 144, 153 (1st

Cir. 2005) (denial of offer-in-compromise subject to abuse of discretion review). The appeals officer will have to make the judgment whether the collection action balances the need for efficiency with the taxpayer's legitimate concerns with intrusion. *See, e.g.,* Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 627-628 (6th Cir. 2005) (balancing analysis subject to abuse of discretion review).

In reviewing the rejection of an offer-in-compromise for abuse of discretion, the court does not conduct an independent review of what would be an acceptable offer. The extent of the court's review is to determine whether the appeals officer's decision was arbitrary, capricious, or without sound basis in fact or law. Salazar v. Commissioner, T.C. Memo. 2008-38. Although the Secretary has discretion as to whether to accept or reject an offer-in-compromise, the Secretary's discretion is not unfettered because the IRS must follow statutory and regulatory criteria in exercising its discretion. The Eighth Circuit has, accordingly, rejected the argument that the Secretary's discretion is unreviewable, and we concur with the Eighth's Circuit's opinion. Speltz v. Commissioner, 454 F.3d 782 (8th Cir. 2006).

ii. Conduct of CDP hearing

Decisions made by the appeals officer relating to the conduct of the CDP hearing (*i.e.*, procedural decisions) are subject to abuse of discretion review. Cavanaugh v. United States, 93 A.F.T.R.2d 1522 (D.N.J. 2004) (appeals officer's refusal to grant taxpayer's request for face-to-face CDP conference was abuse of discretion); *See also* Reid & Reid, Inc. v. United States, 366 F. Supp.2d 284, 289 (D. Md. 2005); Lindsay v. Commissioner, T.C. Memo. 2001-285. Questions about whether certain procedures are legally required are legal issues determined de novo by the reviewing court. *See, e.g.*, Keene v. Commissioner, 121 T.C. 8 (2003) (holding that section 7521(a)(1) authorizes taxpayers to audio record in-person CDP conferences); Cox v. United States, 345 F. Supp.2d 1218, 1220 n. 1 (W.D. Okla. 2004) (issues of sufficiency of CDP telephone conference and impartiality of appeals officer under section 6330(b)(3) are procedural issues reviewed de novo).

iii. Abuse of discretion defined

Review by a court of a CDP determination under the abuse of discretion standard is deferential. Fifty Below Sales & Marketing, Inc. v. United States, 497 F.3d 828 (8th Cir. 2007); Kindred v. Commissioner, 454 F.3d 688 at n.16 (7th Cir. 2006); Robinette v. Commissioner, 439 F.3d 455, 459 (8th Cir. 2006); Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005); Orum v. Commissioner, 412 F.3d 819, 821 (7th Cir. 2005) ("[T]he Judicial Branch does not instruct the Executive Branch how to make executive decisions."); Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 631 (6th Cir.

2005) (standard is "clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS, as contemplated by Congress…").

In Fifty Below Sales & Marketing, Inc., the Eighth Circuit stated that "…we can say with assurance that where the IRS followed the statutes and regulations governing grants of relief … and the appeals officer took into account the taxpayer's proposed alternative and the statutory balancing test, followed the prescribed procedures, gave a reasoned decision, and did not rely on any improper criteria or facts that are contrary to the evidence, we may not reverse simply because we would have weighed the equities differently than the appeals officer did." 497 F.3d at 830. In Robinette, the Eighth Circuit held that CDP hearings should be accorded more deferential review than more formal agency proceedings, and such review should be for "… a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS … ." 439 F.3d at 459.

The Tax Court has described the abuse of discretion standard in CDP cases as "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." Robinette v. Commissioner, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). In Blondheim v. Commissioner, T.C. Memo. 2006-216, the Tax Court stated that, in consideration of Appeals' determination to reject an offer-in-compromise, it does not substitute its judgment for that of Appeals, nor does it decide independently what would be an acceptable offer amount. *See also* Murphy v. Commissioner, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); Salazar v. Commissioner, T.C. Memo. 2008-38.

iv. Questions of law

A reviewing court owes no deference to an appeals officer's legal conclusions made in connection with determinations reviewed for an abuse of discretion. Kendricks v. Commissioner, 124 T.C. 69, 75 (2005). If a determination is based on an erroneous legal conclusion (and the error is not harmless), then it must be rejected as an abuse of discretion. Swanson v. Commissioner, 121 T.C. 111, 119 (2003).

v. Harmless error

The harmless error rule applies to abuse of discretion review of CDP determinations. *See, e.g.,* Borchardt v. United States, 338 F. Supp.2d 1040, 1045 (D. Minn. 2004); Nestor v. Commissioner, 118 T.C. 162 (2002) (Halpern, J., concurring) (observing that the majority applied the harmless error rule in making its decision). The harmless error rule provides that a reviewing court should not find an abuse of discretion if the agency mistake causes no prejudice or does not affect the ultimate determination. The harmless error rule has been applied often when

Appeals would not permit the taxpayer to record a face-to-face CDP conference. Although the Tax Court has held that section 7521(a)(1) gives taxpayers the right to record a face-to-face CDP conference, the court has frequently decided a remand to allow recording is unnecessary if the taxpayer only makes frivolous arguments because it would not change the CDP determination under review. *See, e.g.,* Brandenburg v. Commissioner, T.C. Memo. 2005-249.

vi. Taxpayer precluded from raising issues not raised during CDP hearing

The taxpayer may only raise issues, including challenges to the underlying liability, that were properly raised in the CDP hearing. Giamelli v. Commissioner, 129 T.C. 107 (2007) (holding that the court does not have authority to consider liability issues that were not raised before the Office of Appeals). An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3. The court will not consider issues reviewable for abuse of discretion that were not raised during the CDP hearing process, because the court cannot find an abuse of discretion where there is no evidence that the appeals officer exercised any discretion at all. Magana v. Commissioner, 118 T.C. 488 (2002). However, the court will review whether appeals verified compliance with applicable law under section 6330(c)(1) without regard to whether the taxpayer raised the issue at the administrative hearing. Hoyle v. Commissioner, 131 T.C. No. 13 (2008).

b. Abuse of discretion scope of review

i. District court

As discussed, *supra*, district courts no longer have jurisdiction to review CDP determinations. Historically, however, district court review of CDP determinations for an abuse of discretion has been limited to the administrative record. Olsen v. United States, 414 F.3d 144, 155-156 (1st Cir. 2005).

Except in unusual circumstances, the court is not permitted to hear testimony or receive evidence outside the record. Camp v. Pitts, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). The administrative record may be supplemented, (1) if there is a "strong showing of bad faith or improper behavior" by agency decision makers (Overton Park, 401 U.S. at 420), (2) to include an additional explanation or clarification of the reasons for the agency decision, if it merely explains the existing record and does not add any new rationalizations (Camp v. Pitts, *supra*; Envir.

Defense Fund v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981)), or (3) to include documents adverse to the agency's position that were excluded from the record submitted by the agency (Kent County v. E.P.A., 963 F.2d 391, 395-396 (D.C. Cir. 1992)).

ii. Tax Court

Unlike district courts, the Tax Court has held that it is not required to limit its abuse of discretion review in CDP cases to the administrative record. Robinette v. Commissioner, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). *See also* Murphy v. Commissioner, 125 T.C. 301, at n.6 (2005), *aff'd on different grounds*, 469 F.3d 27 (1st Cir. 2006). The Tax Court in Robinette held that general administrative law principles and the APA do not apply to Tax Court proceedings, so the court is permitted to conduct a trial de novo in connection with its abuse of discretion review.

Two circuit courts have disagreed with the Tax Court and held that the administrative record rule does apply in Tax Court CDP cases. First, the Tax Court's decision in Robinette was reversed by the Eighth Circuit. Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006). The Eighth Circuit held that abuse of discretion review in Tax Court CDP cases must be limited to the administrative record (the record rule). The First Circuit has also held that judicial review in Tax Court CDP cases must generally be limited to a review of the administrative record. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006), *affirming on different grounds*, 125 T.C. 301 (2005).

The Tax Court has not yet ruled whether it will change its position in light of the First and Eighth Circuit opinions in Murphy and Robinette. It has, however, distinguished section 6330 from section 6015(f) in holding that the record rule does not apply to review of determinations under section 6015(f). The court noted that section 6015(f) gives it the authority to "determine," section 6330 provides for appeal of the agency's determination. The court was careful to state that no inference should be drawn, however, that it was changing its position with respect to CDP cases. Porter v. Commissioner, 130 T.C. No. 10, n. 6 (2008). *See also* Cox v. Commissioner, 126 T.C. 237 (2006), *rev'd on other grounds*, 513 F.3d 1119 (10th Cir. 2008) (Tax Court held that comprehensive administrative record was adequate for proper judicial review, expressly declining to address or reconsider the issue of whether its review was limited to the administrative record); Giamelli v. Commissioner, 129 T.C. 107 (2007) (Wherry, concurring) (stating that Robinette was correctly decided) and (Vasquez, dissenting) (stating that legislative history establishes that the court can consider evidence beyond the administrative hearing).

Note that the Tax Court in Murphy, while rejecting the argument that

the record rule was applicable, held that it would not admit testimony with respect to facts that were not presented to the appeals officer, since such testimony would not be relevant to the issue of whether the appeals officer abused her discretion. The taxpayer in Murphy had the opportunity to present the appeals officer with such information but failed to do so. *See also* Speltz v. Commissioner, 124 T.C. 165, 176-177 (2005); Blondheim v. Commissioner, T.C. Memo. 2006-216. Counsel should raise relevancy as an alternate ground for exclusion of evidence or testimony, where applicable.

Please coordinate with Branch 3 or 4, P&A, when issues involving the record rule arise.

iii. CDP administrative record

The Treasury Regulations provide that the administrative record for Tax Court review is the case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3). Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4, 301.6330-1(f)(2) Q&A F4.

iv. Exceptions to record rule

There are limited exceptions to the record rule permitting the submission of evidence outside the administrative record: .(1) If the record does not adequately describe the basis for the determination, or (2) if there is a dispute over what happened during the hearing process, the reviewing court is permitted to supplement the administrative record with testimony or other evidence outside the record. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006), *affirming on different grounds*, 125 T.C. 301 (2005) (evidence outside administrative record permissible if there is a failure to explain administrative action so as to frustrate effective judicial review); Robinette v. Commissioner, 439 F.3d 455, 461 (8th Cir. 2004) ("Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings.") (citations omitted). *See also* James Madison Ltd. By Hecht v. Ludwig, 82 F.2d 1085,1096 (D.C. Cir. 1996) (courts may "need to resolve factual issues regarding the process the agency used in reaching its decision. … Although these facts are usually established by the administrative record or are

otherwise undisputed, parties may occasionally raise an issue requiring district courts to engage in independent fact-finding.")

In cases where the agency's reasoning is unclear or incomplete, the remedy should ordinarily be to remand rather than to take new evidence into the record. See discussion at section V.I.4.a. The exception to the record rule should generally apply only to a situation where the court needs to hear evidence regarding what happened during the hearing process. Examples of factual disputes about the hearing process include a claim by a taxpayer that he requested a collection alternative despite the appeals officer's contrary finding in the notice of determination, and the taxpayer's claim that the appeals officer failed to inform him that the CDP hearing would be concluded if he failed to submit additional information by a certain date.

c. De novo standard and scope of review

When review is not precluded under section 6330(c)(2)(B), the court will determine the underlying tax liability de novo. Jones v. Commissioner, 338 F.3d 463, 466 (5th Cir. 2003); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998). *See* section IV.B.6.c.v, for a discussion of what constitutes "underlying tax liability." When the underlying liability is properly at issue, the court is not bound by the administrative record, but may conduct a trial. Although the parties may introduce evidence that was not submitted to the appeals officer, a court should not consider a challenge to liability if it was not raised during the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3; Giamelli v. Commissioner, 129 T.C. 107 (2007).

Similar to liability determinations, a reviewing court also applies a de novo standard of review to Appeals' determination that a taxpayer is precluded under section 6320(c) or 6330(c)(2)(B) from challenging the underlying liability. Sego v. Commissioner, 114 T.C. 604 (2000); Render v. Internal Revenue Service, 389 F. Supp.2d 808 (E.D. Mich. 2005). The court is not limited to the administrative record when deciding whether the taxpayer is precluded from challenging liability under section 6330(c)(2)(B). *See* Sego v. Commissioner, *supra*.

d. Determinations under section 6015

Section 6330(c)(2)(A)(i) specifically permits the taxpayer to raise "appropriate spousal defenses" at the CDP hearing. *See* section IV.B.6.b.i, *supra*. The appeals officer's determination concerning relief from joint and several liability is reviewed in the same manner as a section 6015 determination by the Service outside the CDP context. Denial of relief under section 6015(b) or (c) is reviewed de novo and the court is not bound by the administrative record. I.R.C. § 6015(e)(1)(A). The Service's denial of "equitable relief" under section 6015(f) is reviewed for abuse of discretion, and such review should accordingly be limited to the

administrative record. In Porter v. Commissioner, 130 T.C. No. 10 (2008), however, the Tax Court held, consistent with its holding in Robinette, that it is not limited to the administrative record in reviewing denials of relief under section 6015(f). **Please coordinate with Branch 1 or 2, P&A, when issues arise involving the administrative record rule as applied to section 6015(f) cases.**

E. Effect of Bankruptcy Filings on CDP

1. Notice of Intent to Levy and Notice of Federal Tax Lien Filing

When a taxpayer files for bankruptcy, the automatic stay prohibits many types of proceedings against the debtor and collection of pre-bankruptcy petition tax debts with respect to the taxpayer's property. See 11 U.S.C. § 362(a). The statute of limitations on collection is suspended during the pendency of the automatic stay, while the Service is prohibited from collecting the tax, and for six months after the stay terminates. See I.R.C. § 6503(h). Generally, the stay begins when the bankruptcy petition is filed and terminates when a discharge is granted or denied. See 11 U.S.C. § 362(c). For bankruptcy cases governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (filed on or after October 17, 2005), the automatic stay may not go into effect if the debtor filed two or more bankruptcy cases that were dismissed within one year before the current case was filed, or may terminate within 30 days if the debtor filed one bankruptcy case that was dismissed within one year before the instant case was filed. See 11 U.S.C. § 362(c)(3) and(4).

While the automatic stay is in effect, a NFTL for prepetition taxes should not be filed. Likewise, no levies should be proposed or made. These actions are precluded under section 362(a)(6) of the Bankruptcy Code, which prohibits any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case. (Refiling a NFTL is not considered a violation of the automatic stay.) *See* Beverly v. Commissioner, T.C. Memo. 2005-41 (issuance of CDP levy notice violated the automatic stay); In re Parker, 279 B.R. 596, 602-603 (Bankr. S.D. Ala. 2002) (same); In re Covington, 256 B.R. 463, 465-466 (Bankr. D.S.C. 2000) (issuance of final notice of intent to levy violated automatic stay). If a NFTL is filed in violation of the automatic stay, it should be withdrawn and the CDP lien notice rescinded. If a CDP levy notice is sent while the automatic stay is in effect, it should be rescinded and any levies made in violation of the stay should be released.

After the termination of the automatic stay, the Service may file NFTLs and issue CDP notices for taxes excepted from discharge under 11 U.S.C. § 523. Even if the taxes are discharged, the IRS may collect from pre-bankruptcy petition property to which the tax lien still attaches after discharge. *See* Isom v. United States, 901 F.2d 744 (9th Cir. 1990); Miles v. Commissioner, T.C. Memo. 2007-208 (discharge from personal liability in Chapter 7 bankruptcy

case does not extinguish prepetition tax lien). A lien does not continue to attach to exempt property unless a NFTL was filed before the bankruptcy petition. A lien remains attached to property excluded from the estate, such as an ERISA-qualified pension plan, even if a NFTL was not filed before the petition date.

2. CDP Hearing and notice of determination

a. General rule

i. Notice of determination—levy case

Continuing CDP proceedings and issuing a notice of determination while a taxpayer is in bankruptcy may violate the automatic stay. The Tax Court has held that the issuance of a notice of determination in a CDP levy case is the continuation of an administrative collection action against the petitioner that was or could have been commenced pre-petition and, thus, a violation of the automatic stay under section 362(a)(1) that renders the notice void. Smith v. Commissioner, 124 T.C. 36 (2005). Therefore, when the taxpayer files for bankruptcy prior to issuance of the notice of determination, and then files a Tax Court petition, the Tax Court will dismiss the case for lack of jurisdiction on the ground that the notice of determination is void rather than because the Tax Court petition was filed in violation of 11 U.S.C. § 362(a)(8). **Counsel should contact P&A Branch 5 when it is learned that the notice of determination was issued during the automatic stay and Smith cannot be distinguished.**

ii. Notice of determination—lien case

The Tax Court has not yet decided whether issuance of a notice of determination in a CDP lien case violates the stay. In a lien case, the collection action against the debtor, the filing of a NFTL, is complete before the CDP case and the bankruptcy commence. Thus, the Smith holding, that a notice of determination is a continuation of a proceeding against the debtor barred under section 362(a)(1), is inapplicable in a lien case.

3. Tax Court practice

a. Bankruptcy filed before notice of determination

i. Levy cases

If the notice of determination in a CDP levy case is issued during

the pendency of the automatic stay, and it does not satisfy the exception which allows such issuance, and the taxpayer subsequently files a Tax Court petition, Counsel should contact P&A Branch 5 for advice on how to proceed. If the Tax Court dismisses the case on the ground that the notice of determination violates the automatic stay under 11 U.S.C. § 362(a)(1) and is void pursuant to the authority of Smith v. Commissioner, 124 T.C. 36 (2005), the case should be returned to Appeals for continuation of the appeals hearing.

ii. Lien cases

The Tax Court did not address *lien* cases in Smith. A notice of determination sustaining the filing of a NFTL is not by itself a collection action that violates the automatic stay nor is it a continuation of an administrative proceeding against the debtor in violation of 11 U.S.C. § 362(a)(1). If a notice of determination in a CDP lien case is issued during the pendency of the automatic stay, the notice is not void. If the taxpayer subsequently files a Tax Court petition also during the pendency of the automatic stay, counsel should file a motion to dismiss for lack of jurisdiction pursuant to 11 U.S.C. § 362(a)(8).

b. Bankruptcy filed after notice of determination

11 U.S.C. § 362(a)(8) prohibits the commencement or continuation of a Tax Court proceeding while the stay is in effect (for individual debtors, the prohibition only extends to pre-bankruptcy petition taxes for bankruptcy cases filed on or after October 17, 2005 and subject to BAPCPA). *See* Prevo v. Commissioner, 123 T.C. 326 (2004) (automatic stay bars petition for review of section 6320 determination). Note that where the taxpayer files bankruptcy after issuance of a notice of determination but before filing a Tax Court petition, the taxpayer has fallen into a trap for the unwary: filing a Tax Court petition is barred while the automatic stay is in effect and there is no tolling provision that would allow for the filing of a timely Tax Court petition after the automatic stay is lifted or is no longer in effect. Thus, the period for filing a Tax Court petition may run while the automatic stay is in effect. *Id.*, 123 T.C. at 331. *See* CCDM for procedures for filing motions to lift the stay under 11 U.S.C. § 362(a)(8).

Note: Remember that for individual taxpayers filing a bankruptcy case on or after October 17, 2005, the automatic stay of 11 U.S.C. § 362(a)(8) does not extend to post-bankruptcy-petition taxes

c. Bankruptcy filed after Tax Court petition

If the bankruptcy petition is filed after the Tax Court petition is filed, then continuation of the Tax Court proceeding is prohibited by 11 U.S.C. § 362(a)(8). Counsel should prepare a Notice of Proceeding in Bankruptcy as detailed in CCDM 35.3.9.2.2, so the Tax Court will stay the proceeding. After the bankruptcy proceedings are concluded, further collection may be unnecessary or inappropriate. If the taxes have been paid, or if they have been discharged and the underlying assessments have been abated and there is no prebankruptcy property encumbered by the tax lien, counsel should move to dismiss on the ground of mootness. If the underlying assessments have not yet been abated, a stipulated decision document should instead be used. *See* sample at section VI.I.1.a. Even if the case is not moot, conditions may have changed so that settlement is appropriate. If the case cannot be settled, counsel should generally argue that the notice of determination be sustained based on the status of the case at the time of the CDP hearing; since the bankruptcy occurred after the CDP hearing, the Tax Court should not address any issues arising from the bankruptcy.

4. Jurisdiction over bankruptcy discharge issues

a. Tax Court jurisdiction

If a discharge has been entered in the bankruptcy case, the Tax Court has held it has jurisdiction to determine whether the tax liability at issue in the CDP hearing is excepted from discharge. Washington v. Commissioner, 120 T.C. 114 (2003); Woods v. Commissioner, T.C. Memo. 2006-38. *But see* Meadows v. Commissioner, 405 F.3d 949 (11th Cir. 2005) (holding that the Tax Court did not abuse its discretion in declining to exercise its jurisdiction over a complex bankruptcy issue involving whether tax payments violated automatic stay and the appropriate remedies for the violation thereof).

Note: The court reviews a CDP determination concerning collection issues, including dischargeability, for abuse of discretion. Swanson v. Commissioner, 121 T.C. 111, 119 (2003) (appeals officer's conclusion that the taxpayer had not received a bankruptcy discharge of the unpaid tax was subject to abuse of discretion review). The question for the court, then, is not whether the debtor's tax was discharged, but whether the appeals officer abused her discretion in determining the tax was discharged. The distinction may be of limited consequence,

since if the appeals officer applied an erroneous interpretation of the law, the court will find that she abused her discretion. *Id*. While the Tax Court applied the abuse of discretion standard to the issue of dischargeability in Swanson, as well as in Washington v. Commissioner, 120 T.C. 114 (2003), at least one memorandum decision has stated that the court has not resolved the proper standard of review for dischargeability issues. *See* Miles v. Commissioner, T.C. Memo. 2007-208.

b. Bankruptcy Court jurisdiction

In In re Otto, 311 B.R. 43 (Bankr. E.D. Pa. 2004), the court held it would not exercise its discretion to reopen a no-asset chapter 7 bankruptcy case to determine dischargeability of tax debts because the taxpayer had an alternative CDP forum to address those issues. Contrary to Otto, reopening a bankruptcy case to determine dischargeability should not generally be opposed by the Government just because the taxpayer can raise the discharge issue in CDP administrative and judicial proceedings (although there may be other grounds to oppose reopening). Judicial review of the CDP administrative determination is for abuse of discretion based on the administrative record and so is not the equivalent of the de novo consideration of the issue in bankruptcy court.

V. CDP Litigation Practice in Tax Court

A. Tax Court Rules

Title XXXII of the Tax Court Rules of Practice and Procedure, which encompasses T.C. Rules 330 through 334, applies to petitions brought under sections 6320 and 6330.

B. Applicability of Small Case Procedures

Section 7463(a) provides that a case concerning a redetermination of a deficiency is eligible for small tax case treatment if the amount in dispute does not exceed $50,000 for any one taxable year or period. In contrast, section 7463(f)(2) provides that a CDP case may be conducted under "S case" procedures with respect to "a determination in which the unpaid tax does not exceed $50,000." Therefore, unlike the "for any one year" rule for deficiency cases, section 7463(f)(2) requires that the total unpaid tax, not just the amount of tax in dispute, for all tax periods at issue as of the date of the determination must not exceed $50,000.00 for a CDP case to qualify for small case status. *See* Leahy v. Commissioner, 129 T.C. 71 (2007); Schwartz v. Commissioner, 128 T.C. 6 (2007). *Cf.* Petrane v. Commissioner, 129 T.C. 1 (2007) ($50,000.00 limit under section 7463(f)(1) for stand-alone section 6015(e) case refers to the total amount of relief sought in the petition, as of the date the petition is filed, rather

than the amount of relief sought for each individual year). In this context, the term "tax" includes all accrued and unassessed interest and penalties on the underlying tax liability, as well as all assessed interest and penalties. *See* Schwartz v. Commissioner, 128 T.C. 6, n.1 (2007); *see also* I.R.C. §§ 6601(e)(1) and 6665(a)(2). Amounts paid, credited, or assessed after the date of the determination should not be considered in determining eligibility.

When a field attorney receives a CDP case with a small tax case designation, the attorney must verify that the CDP case is actually eligible for the designation. If the field attorney determines that the case is not eligible for the designation because the amount of the total unpaid tax, interest and penalties, including all accruals, exceeded $50,000 as of the date of the determination, then the field attorney should file a motion to remove the small tax designation as soon as possible. *See* sample at section VI.B.

C. Motion to Change Caption

If a petition seeking review of a notice of determination is not marked with either an "L" or an "S," and the notice of determination was not attached to the petition, the notice of determination should be attached to the answer. If the filing of the answer does not cause the court to add the letter "L" to the case docket number, a joint motion to change the caption should be filed. *See* sample at Section VI.A.

D. Answers

T.C. Rule 333(a) provides that the Commissioner will file an answer or move with respect to the petition within the periods specified in T.C. Rule 36. If petitioner was previously involved in a judicial proceeding involving the same tax liabilities and years that are listed in the taxpayer's petition, the answer should raise the defense of res judicata or collateral estoppel, as appropriate, pursuant to T.C. Rule 39. Since the Commissioner generally has the burden to prove that liability is (or other issues are) precluded under sections 6330(c)(2)(B) or 6330(c)(4), issue preclusion under these provisions should also be affirmatively pleaded. Any other avoidance or affirmative defense should also be pled in the answer, in accordance with T.C. Rule 39.

The provisions of sections 6330(c)(2)(B) and 6330(c)(4) are similar to the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion), respectively. These doctrines are independent of the statutory provisions and should be affirmatively pleaded, if appropriate (in addition to the statutory provisions), when answering an appeal of a notice of determination. Section 6330(c)(2)(B) does not displace the doctrine of res judicata as to liability determinations. *See* Goodman v. Commissioner, T.C. Memo. 2006-220 (res judicata and section 6330(c)(2)(B) both apply to preclude relitigation of liability determined in prior stipulated tax court decision); Sparks v. United States, 2000-1 USTC ¶ 50,338 (Bankr. N.D. Ok.). *See also* Golden v. Commissioner, 548 F.3d 487 (6th Cir. 2008) (res judicata precludes raising statute of limitations on assessment).

If the tax liability is properly at issue and respondent has the burden of proof under T.C. Rule 36(b), the answer should include affirmative allegations as to every ground on which respondent relies.

If the CDP case has an "S" designation, field attorneys will now need to file an answer as T.C. Rule 173(b) was amended. Rule 173(b) now requires the filing of answers in all small tax cases brought pursuant to section 7463 in which the petition is filed after March 13, 2007. *See* Chief Counsel Notice 2007-009.

E. Replies

T.C. Rule 333(b) refers to T.C. Rule 37 for provisions relating to the filing of a reply and is applicable only if respondent makes an affirmative allegation under T.C. Rule 36(b). T.C. Rule 37(c) provides that where a reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the reply, shall be deemed to be admitted.

F. Additional Pleading in Cases Involving Section 6015

In any Tax Court proceeding, including a CDP case, in which petitioner seeks review of respondent's determination under section 6015, respondent, on or before 60 days from the date of the service of the petition, must serve notice of the filing of the petition on any nonparty spouse who filed the joint return for the years at issue and shall simultaneously file with the court a copy of the notice with an attached certificate of service. T.C. Rule 325. *See* CCDM 35.2.2.12.2 for further guidance.

G. T.C. Rule 331(b)(4) - Issues Not Raised

The Tax Court will address only those issues raised in the petition to the court and in the trial memorandum, and issues not raised will be deemed conceded. T.C. Rule 331(b)(4); Lunsford v. Commissioner, 117 T.C. 183 (2001). General allegations are not sufficient to raise an issue under T.C. Rule 331(b)(4). *See* Poindexter v. Commissioner, 122 T.C. 280 (2004) (taxpayer disagrees with income tax liability but fails to specify the basis of the disagreement); Davis v. Commissioner, T.C. Memo. 2001-87 (taxpayer claims only that she was denied due process); Lindsay v. Commissioner, T.C. Memo. 2001-285 (petition states only that the determination was not complete and was erroneous). T.C. Rule 331(b)(4) has been most strictly applied in cases involving frivolous arguments. *See*, *e.g.*, Stephens v. Commissioner, T.C. Memo. 2005-183.

H. Issues Not Raised in the CDP Hearing

The Tax Court generally considers only issues that were raised at the administrative hearing. Giamelli v. Commissioner, 129 T.C. 107 (2007). Treas. Reg. §§ 301.6320-1(f)(2) Q&A F3, 301.6330-1(f)(2) Q&A F3.; Robinette v. Commissioner, 123 T.C. 85 (2004), *rev'd on other grounds,* 439 F.3d 455 (8th Cir. 2006); Magana v. Commissioner, 118 T.C. 488, 493 (2002). However, the court will review whether appeals verified compliance with applicable law under section 6330(c)(1) without regard to whether the taxpayer raised the issue at the

administrative hearing. Hoyle v. Commissioner, 131 T.C. No. 13 (2008) (taxpayer can, for the first time in court, raise whether notice of deficiency was properly sent).

I. Pretrial Motions

Many CDP cases should be resolved by pretrial motion without trial, unless the taxpayer is properly contesting the underlying tax liability. It is therefore critical that Counsel attorneys file appropriate motions sufficiently in advance of the trial date.

Note: It is particularly important for Counsel attorneys to consider filing motions to permit levy under section 6330(e)(2) in cases involving a taxpayer who raises solely frivolous issues and in other appropriate cases whenever possible. *See* section V.I.7, below.

Note: As further discussed below, the Tax Court frequently requests certified Form 4340 transcripts in cases seeking summary judgment and in cases seeking dismissal for failure to state a claim upon which relief may be granted For this reason, we recommend that counsel attorneys include certified Form 4340 transcripts for all relevant periods with all dispositive motions. The Form 4340 should be reviewed thoroughly and any issues raised by entries on the Form 4340, or inconsistencies with other documents, should be explained in the motion. For example, the Tax Court has raised questions in a number of cases where the section 6651(a)(2) failure to pay penalty was shown on the Form 4340 as assessed following use of section 6020(b) substitute for return procedures, but did not appear on the statutory notice of deficiency . *See* CC Notice N(35)000-169, Application of Failure to Pay Addition to Tax to Returns Prepared Under IRC § 6020(b).

Note: In cases where Appeals indicates in the notice of determination that all or a portion of the underlying tax liability will be abated, Counsel attorneys should ensure that the abatement is made and reflected on the transcript prior to filing a pre-trial motion. Counsel attorneys will need to ask Appeals to input this adjustment manually.

1. Motion to dismiss on the ground of mootness

a. Liability is fully paid

If subsequent to the Appeals hearing the tax, including all interest and penalty accruals, is fully paid and the assessment abated, generally the case should be dismissed as moot. There is no tax liability to collect, the NFTL will be or has been released, the proposed levy will be abandoned, and there is therefore no case or controversy for the Tax Court to adjudicate. The Tax Court's jurisdiction under section 6330(d) is generally limited to reviewing whether the NFTL should remain filed or the proposed levy should proceed, and the court will dismiss as moot cases in which

there is no unpaid tax liability upon which the lien or the proposed levy could be based. Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006); Gerakios v. Commissioner, T.C. Memo. 2004-203; Chocallo v. Commissioner, T.C. Memo. 2004-152. Counsel attorneys should ensure that the NFTL is released prior to filing this motion. *See* sample motion at section VI.C. Where only some of the tax years at issue are fully paid and so the court retains jurisdiction with respect to one or more tax periods, the court can enter a decision addressing the unpaid years and declaring the paid years as moot. *See* Kelby v. Commissioner, 130 T.C. 79 (2008).

Note: Counsel attorneys should ensure that the underlying tax liability, including accruals, has been fully satisfied. The Form 4340 transcript may show a zero tax balance while there is still outstanding tax liability because it does not reflect unassessed interest accruals. *See* IRM 25.6.9.4.2 (explaining how the Service is not required to make a separate assessment of interest on an assessed liability in order to collect that interest and that the Service allows interest to accrue unassessed because the computer systems do not have the capacity to continually assess all interest accruals).

If the taxpayer is raising liability and requesting a refund, the CDP case is not the appropriate forum to resolve such issues because the Tax Court does not have refund jurisdiction in the CDP case and can only address the legality or appropriateness of the NFTL or proposed levy. Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006).

When the tax has been fully paid, a motion to dismiss for mootness is inappropriate if the notice of determination rejected interest abatement or spousal relief and the taxpayer would be entitled to a refund if interest abatement or spousal relief is granted, since the Tax Court has independent overpayment jurisdiction under sections 6404(h) and 6015(e). The case should proceed with only the interest abatement or spousal relief issues addressed.

b. Assessment has been abated

A motion to dismiss for mootness is also appropriate if subsequent to the Appeals hearing the assessment has been abated because it is invalid (*e.g.*, invalid notice of deficiency) or the IRS has decided to forgo collection after a bankruptcy discharge. If the assessment has not actually been abated yet, a stipulated decision would be appropriate in these situations. *See* sample Stipulated Decision at section VI.J.1.a.

Note: Not all bankruptcy discharge situations justify a motion to dismiss for mootness or a stipulated decision. If a taxpayer has received a bankruptcy discharge and the taxpayer's tax liabilities are dischargeable, the taxpayer is no longer personally liable for the taxes and the Service is enjoined from collecting the liability from the

taxpayer personally. However, the Service may collect a discharged liability from prebankruptcy assets if a NFTL was filed before the taxpayer's bankruptcy. Iannone v. Commissioner, 122 T.C. 287 (2004). The Service may also collect a discharged liability from pension assets excluded from the bankruptcy estate, even if a NFTL is not on file prepetition. *See* section IV.E, *supra*.

2. Motion to dismiss for lack of jurisdiction

a. No notice of determination for all or some taxes at issue

.

See discussion at IV.D.2, *supra*. Sample motions are attached at section VI.D.1 and 2.

b. Invalid notice of determination

See discussion at IV.D.2.b, *supra*. Sample motions are attached at section VI.D.3 and 4.

c. Late-filed petition

See discussion at IV.D.3, *supra*. A sample motion is attached at section VI.D.5.

Note: In order to establish the date on which a CDP lien or levy notice, or a notice of determination, was issued for purposes of a motion to dismiss for lack of jurisdiction, both a copy of the notice (if available) and a document proving mailing should be attached to the motion. Proof of mailing generally requires for ACS notices a copy of the IRS certified mailing list (or the USPS Form 3877), and for notices issued by field collection staff a stamped certified mail receipt (Postal Service Form 3800) or domestic return receipt (the "green card," Postal Service Form 3811). *See generally* Fong v. Commissioner, T.C. Memo. 2007-137. Certified mail lists for LT 11s and other CDP levy notices issued by ACS can be located by contacting the appropriate CDP coordinator. A list of ACS CDP coordinators can be found on SERP under the "Who/Where" tab. The certified mail lists for Letters 3172 are all retained at the Centralized Lien Unit at the Cincinnati Campus. To obtain a certified mail list for a Letter 3172, go to the "Automated Lien System (ALS) Units - Contacts" tab under SERP and send a secure e-mail request to the e-mail address listed for the state in which the NFTL is filed or contact the INTERNAL ONLY 1-800 number. The certified mail lists for notices of determination are located at the Appeals Processing Section units in the Fresno and Memphis Campuses.

d. Taxpayer-initiated motions to dismiss

Relying on Lunsford v. Commissioner, 117 T.C. 159 (2001), the Tax Court

will deny taxpayers' motions to dismiss for lack of jurisdiction when the basis for the motion is that the taxpayers were not provided with a procedurally-valid CDP hearing. *See, e.g.,* Stoewer v. Commissioner, T.C. Memo. 2002-167.

In Wagner v. Commissioner, 118 T.C. 330 (2002), the Tax Court held that a CDP case may be dismissed without prejudice upon motion by the taxpayer, distinguishing CDP cases from cases holding that taxpayers may not withdraw a petition under section 6213 to redetermine a deficiency. *See* Estate of Ming v. Commissioner, 62 T.C. 519 (1974); I.R.C. § 7459(d). Accordingly, if a taxpayer wishes to withdraw her CDP petition and have the case dismissed without prejudice, counsel attorneys should file a Notice of No Objection indicating that if the case is dismissed, the Service will take any appropriate collection action as provided by law. Upon dismissal of the case, counsel attorneys should make sure the case is immediately closed and returned to Collection to proceed with collection.

3. Motion to dismiss for failure to state a claim upon which relief can be granted

T.C. Rule 40 provides for the filing of a motion to dismiss for failure to state a claim upon which relief can be granted. Such motion must be filed within 45 days after the date of service of the petition. If such a motion is not filed within this 45-day period, then the attorney should consider a motion for judgment on the pleadings. The Tax Court's review of these motions is limited to the pleadings and any documents attached thereto. T.C. Rule 333(a) and T.C. Rule 36(a). Examples of when a motion to dismiss for failure to state a claim should be filed include: (1) taxpayer makes only frivolous arguments, and (2) taxpayer challenges only the existence or amount of the underlying liability, and admits in the petition that he received the statutory notice of deficiency for the liability. When the taxpayer states a nonfrivolous claim that can be properly raised in the CDP case (such as he was denied the right to a face-to-face conference, or the hearing was not otherwise conducted properly), a motion for summary judgment should be filed instead of a motion to dismiss for failure to state a claim, even if frivolous arguments are also made. Responses to frivolous arguments can be found on the P&A web page through the Developing Issues link under the heading "The Truth about Frivolous Tax Arguments."

While Tax Court review of these motions is limited to the pleadings, Counsel attorneys should also submit a certified copy of an updated Form 4340 transcript with all motions to dismiss for failure to state a claim. The Tax Court has been frequently requesting Form 4340 transcripts be filed in these cases. We disagree with the court's requests insofar as review of the Form 4340 requires going beyond the pleadings, which is not appropriate for a motion to dismiss for failure to state a claim. In view of the Tax Court's repeated request for these transcripts, however, we nevertheless recommend submitting them with each dispositive motion.

4. Motion to remand

   a. Grounds for remand

   When Appeals has abused its discretion or the taxpayer was not given a proper hearing, the Tax Court will remand the case to the Office of Appeals to hold a new hearing if a new hearing is necessary or will be productive. Kelby v. Commissioner, 130 T.C. 79 (2008); Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). If counsel determines that the appeals officer's exercise of discretion in conducting the hearing or making a determination on a nonliability issue can not be defended, and reconsideration of the case by Appeals is required because the error is not harmless, counsel should file a Motion for Remand to require Appeals to hold a supplemental hearing (if necessary) and issue a Supplemental Notice of Determination (Letter 3978). Informal consideration or reconsideration of an issue by Appeals while the case is pending in the Tax Court can lead to confusion as to whether and how the Tax Court should review the determination made as a result of the informal consideration or reconsideration, and should be avoided.

   Review for abuse of discretion requires an adequate administrative record including clear findings by the appeals officer on relevant issues so the court can determine whether the record supports the appeals officer's findings. The court should not be making findings but instead should be reviewing the appeals officer's findings for abuse of discretion and should give deference to those findings. *See* Olsen v. United States, 414 F.3d 144, 156 (1st Cir. 2005) ("In the event the administrative record is found inadequate for judicial review, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'") (citing Florida Power & Light Co. v. Lorian, 470 U.S. 729, 744 (1985); Robinette v. Commissioner, 439 F.3d 455, 459 (8th Cir. 2006) (" … in providing for CDP hearings on what is ordinarily a scant record, Congress … must have been contemplating a more deferential review of these tax appeals than of more formal agency decisions. …") (citing Olsen, *Id*.); *see also* Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 626 (6th Cir. 2005) ("Congress must have been contemplating a more deferential review of these tax appeals than of more formal agency decisions.").

   Accordingly, instead of trying to defend an erroneous or insufficient notice of determination at trial, Counsel attorneys should consider asking the court to remand the case to Appeals for a supplemental determination if (1) the appeals officer failed to address a relevant issue; (2) the appeals officer failed to make necessary findings of fact; (3) the appeals officer failed to perform an analysis that is necessary in making the determination; (4) the administrative record contains no indication of the documents or evidence the appeals officer considered in making the determination or the reasons for the determination; (5) the appeals officer's conduct of the hearing deprived the taxpayer of a procedural right

granted by statute or regulation, such as the right to an impartial appeals officer under section 6320(b)(3) or 6330(b)(3); or (6) the appeals officer did not give the petitioner an adequate opportunity to present evidence or arguments in support of relevant issues raised during the CDP hearing process.

Specific examples of cases when remand would be appropriate are: (1) taxpayer requested abatement of interest but the appeals officer failed to address this issue; (2) although taxpayer has a colorable argument for abatement of interest based on evidence that could show unreasonable delays by the IRS, the appeals officer summarily rejected abatement without any explanation; (3) the appeals officer rejected the taxpayer's offer-in-compromise without consideration of relevant financial information that was provided by the taxpayer; (4) the appeals officer's findings are confusing or contradictory (*e.g.*, a low installment agreement amount is rejected as not adequate, while a higher amount is rejected because the taxpayer cannot afford it); and (5) the appeals officer closed the hearing and issued the notice of determination prior to the expiration of the agreed upon deadline for the taxpayer to submit financial documentation.

> *Note*: Inadequate findings or discussion in the notice of determination do not always require remand. There might be sufficient explanation in the appeals officer's case activity notes or letters to the taxpayer, or the appeals officer may be able to clarify his findings in a Declaration or through testimony.

If Appeals erroneously failed to consider an underlying liability issue, remand is not necessary to develop an administrative record because the issue will be reviewed de novo by the court. On the other hand, if the taxpayer is raising nonfrivolous issues the case may be able to be resolved on remand without the necessity for trial. Furthermore, the Tax Court held in Giamelli v. Commissioner, 129 T.C. 107 (2007), that the court will not consider liability issues that are not raised at the administrative hearing before Appeals, stating that the "judicial consideration of such liabilities without some prior review by the Commissioner would frustrate the administrative review process created by section 6330." This suggests that the court will be receptive to remand where Appeals erroneously failed to consider liability. Unless the taxpayer's arguments are frivolous or the liability issue can be easily resolved before the court, counsel should consider remand for consideration of liability where it was not properly considered by Appeals.

When the court remands a case to Appeals, the further hearing is a supplement to the taxpayer's original section 6330 hearing. It is not a new hearing. Kelby v. Commissioner, 130 T.C. 79 (2008).

b. Remand not appropriate

In the absence of error by Appeals, counsel should not agree to a remand to Appeals for the consideration or reconsideration of any issue, including a collection alternative. For example, remand is not appropriate when a taxpayer wishes to submit a collection alternative during the Tax Court proceeding after having failed to take advantage of the opportunity to submit an alternative during the CDP hearing. This failure includes the failure to become eligible for a collection alternative (*e.g.*, by filing required returns) during the CDP hearing after being given an opportunity to become eligible.

If Appeals has not made an error requiring remand, counsel should not generally agree to have an issue considered by Collection, Examination or other IRS function to facilitate settlement of a case. However, there may be situations where consideration by an IRS function other than Appeals is necessary for the fair treatment of taxpayers or failure to settle the issue will result in undesirable legal precedent. For example, (1) there is a substantial adverse change in taxpayer's circumstances since the CDP hearing which if known would likely have altered Appeals' determination (e.g., offer in compromise may be acceptable because taxpayer's future income amount has become substantially lower after the taxpayer is diagnosed with life-threatening illness); (2) taxpayer did not respond to Appeals during the CDP hearing due to illness or travel; (3) taxpayer offers credible evidence affecting the amount of liability but Appeals did not consider liability because a liability challenge was precluded or if Appeals did consider liability the credible evidence was not discovered until after the notice of determination was issued; and (4) the taxpayer completes a bankruptcy case and receives a discharge for one or more periods subject to the CDP hearing—see sections IV.E.3.c and V.I.1.b. The Counsel attorney should notify the appeals officer who made the determination that the issue is being considered by Collection, Examination or other IRS function.

The court should uphold a determination where the appeals officer erred if the error does not affect the outcome of the case. As a consequence, any error should be evaluated to determine whether it is harmless. The harmless error rule is often applied where the taxpayer is only making frivolous arguments. For example, if the taxpayer was denied the right to record his conference but relies on frivolous or groundless arguments, the Tax Court will not remand the case. Frey v. Commissioner, T.C. Memo. 2004-87; Kemper v. Commissioner, T.C. Memo. 2003-195.

Some errors by Appeals on nonliability issues may not require reconsideration even if the error was not harmless, because the issue involves the application of law to uncontested facts. These issues may include whether the unpaid tax was discharged in bankruptcy, whether the statute of limitations has expired, or whether a notice of deficiency was

properly issued. If an issue that was wrongly decided by Appeals does not require further fact-finding or a determination by Appeals, in appropriate cases the notice of determination can be conceded in a stipulated decision. *See* section VI.J.1.

c. Remand procedure

A Motion for Remand should be filed as early as possible in the proceeding after the petition is answered. If the case is calendared, the Motion for Remand should be filed with a separate motion for continuance. If the case is not calendared, only a Motion for Remand should be filed. The Motion for Remand should explain the error in the determination or hearing that is to be remedied on remand. A sample motion is attached at section VI.E.

Prior to filing a Motion for Remand, attorneys should consult with Appeals and advise the appeals officer of the reasons for remand. After the case is remanded, the appeals officer should not issue a standard notice of determination using Letter 3193. Instead, a Letter 3978, Supplemental Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, should be issued to the taxpayer. This supplemental notice should not have the standard language concerning the right to file a petition with the court to appeal the determination, as the case is already docketed with the court. Following the issuance of the supplemental notice, a status report should be filed with the court attaching the supplemental determination. *See* discussion in the next section below for more information.

When a supplemental notice has been issued by Appeals after remand, the court will review only the supplemental notice, not prior determinations, if issuance of the supplemental notice makes it unnecessary for the court to review the Commissioner's position taken before the determination was supplemented. Kelby v. Commissioner, 130 T.C. 79 (2008).

d. Application of ex parte rules to remanded CDP cases

As further discussed in section IV.B.5.f, care should be taken in remanded cases to ensure that the appeals officer maintains the role of an independent officer. Therefore, it is imperative that guidelines similar to those stated in Rev. Proc. 2000-43, 2000-2 C.B. 404 (providing rules limiting ex parte communications in nondocketed cases) be applied in remanded cases. The following specific guidelines apply:

i. The Counsel attorney working the docketed case should prepare a written memorandum addressed to the Office of Appeals explaining the reasons why the court remanded the case to Appeals, any special requirements in the order (*e.g.*, whether and to what extent a new

conference should be held, and whether the case must be assigned to a new appeals officer), and what issues the court has ordered Appeals to address on remand in its supplemental notice of determination. A copy of the memorandum should be provided to the taxpayer or the taxpayer's representative.

A memorandum of this nature is not a prohibited ex parte communication because it merely furnishes instructions and legal advice regarding the court's order, and does not address the substance of the issues to be considered by the appeals officer on remand. Communications that are ministerial, administrative, or procedural in nature are also not prohibited ex parte contacts. For example, counsel may send the appeals officer an e-mail which sets forth time deadlines imposed by the Tax Court for conducting a further hearing.

The memorandum should not discuss the credibility of the taxpayer or the accuracy of the facts presented by the taxpayer. For example, the memorandum should not state that counsel believes that the taxpayer was not providing truthful testimony at trial.

ii. A request by an appeals officer for legal advice in connection with the remanded CDP case may be handled by the Counsel attorney who is handling the docketed Tax Court case, so long as that attorney did not give legal advice to an originating function (*e.g.,* Collection) concerning the same issue in the same case. If the Counsel attorney provided such advice, the request should be assigned to another Counsel attorney who has not provided advice to a Service office concerning the same issue in the same case. Any legal advice should be carefully tailored to answer the legal questions posed by Appeals and should not opine on the ultimate issues to be addressed by Appeals in the Supplemental Notice of Determination. **Requests for advice that raise novel collection issues should be coordinated with Branch 3 or 4, P&A.** Consistent with Q&A 11 of Rev. Proc. 2000-43, the advice does not have to be shared with the taxpayer or his representative at the time it is rendered. Also, neither the taxpayer nor his representative has a right to participate in any discussions between Appeals and counsel with respect to the advice. In the course of such discussions, counsel should also not address the credibility of the taxpayer or accuracy of the facts presented by the taxpayer.

iii. The Counsel attorney who is handling the docketed case should review the supplemental notice of determination before it is issued to the taxpayer. This review is for the limited purpose of ensuring compliance with the Tax Court's order.

Any questions concerning these issues should be addressed to Branch 3 or 4, P&A.

5. Motion for summary judgment

a. General matters

T.C. Rule 121(b) permits the court to grant summary judgment if the "pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with affidavits, if any, show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." Even if a summary judgment motion will not dispose of all of the issues, a motion for partial summary judgment may help narrow the issues for trial.

A summary judgment motion may be submitted at any time beginning 30 days after the pleadings have closed, but not within such time so as to delay trial. T.C. Rule 121(a). A summary judgment motion should not be submitted later than 30 days before trial. It is recommended that the motion be filed no later than 75 days prior to the call of the calendar.

When appropriate, counsel should consider filing a motion to permit levy under section 6330(e)(2) in connection with a motion for summary judgment. *See* section V.I.7, *infra*. **As discussed in section V.I.7, a section 6330(e)(2) motion should generally be filed in all cases involving frivolous taxpayers and in all cases in which we are seeking to impose a section 6673(a)(1) penalty.** A summary judgment motion and section 6330(e)(2) motion must be filed as separate motions and not joined together. T.C. Rule 54.

Also when appropriate, counsel should consider requesting the court to impose a section 6673(a)(1) penalty in connection with a motion for summary judgment. The penalty can be requested as part of the summary judgment motion.

b. Grounds for summary judgment

If the taxpayer is only raising frivolous or groundless arguments, and there is no need to go beyond the pleadings, a motion to dismiss for failure to state a claim upon which relief can be granted should be filed within 45 days after service of the petition or a motion for judgment on the pleadings should be filed beyond that time. In such cases, if the respondent needs to go outside the pleadings, a motion for summary judgment should generally be filed. A summary judgment motion should also be filed where the only issues raised by the taxpayer are precluded by section 6330(c)(2)(B) (preclusion of liability) or (c)(4) (preclusion due to prior proceedings) and there is no dispute as to material fact with respect to the facts supporting the preclusion. A sample summary judgment motion where section 6330(c)(2)(B) preclusion is at issue is attached at section VI.E.2. A full or partial summary judgment motion should also be considered if the petitioner raises an issue not raised in the administrative

hearing. *See* Magana v. Commissioner, 118 T.C. 488, 493 (2002).

Additionally, many cases involving nonfrivolous issues can be decided through summary judgment where there are no genuine issues of material fact. This is especially the case where the only issues in the case are reviewable for abuse of discretion. In such cases, the Tax Court should resolve the case based on the administrative record, and should be reviewing the appeals officer's findings for abuse of discretion rather than finding its own facts, *see* IV.D.4, *supra.* However, all non-frivolous factual and legal issues raised by the taxpayer must specifically be addressed and resolved in the motion. For example, if the taxpayer disputes the dollar amount that Appeals concluded must be paid under an offer in compromise, the motion must explain in detail the evidence Appeals relied upon and why the taxpayer's proposed amount was rationally rejected. It is not sufficient to summarily state that the appeals officer addressed all issues raised by the taxpayer and did not abuse his discretion. If the taxpayer denies receipt of a notice of deficiency, the motion must explain how the record evidence conclusively establishes receipt. Furthermore, all issues and problems raised by the transcripts or other record evidence must be addressed and explained (e.g., was a notice of deficiency properly issued? Did the appeals officer make reasonable attempts to contact the taxpayer? Were payments properly applied?). The court is unlikely to grant summary judgment in factually complex cases where there exists any doubt or question as to the correctness of the Notice of Determination or whether the taxpayer was fairly dealt with by the Service. The court is also unlikely to grant summary judgment where factual issues are raised that cannot be decided as a matter of law (e.g., taxpayer denies receipt of the notice of deficiency and the record evidence is insufficient to prove receipt).

In abuse of discretion cases, the fact that petitioner plans to introduce evidence at trial that was not presented to the appeals officer should not preclude summary judgment because the court must confine its review to the administrative record. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006); Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006). The Tax Court has not held that it will follow Murphy and Robinette, so in cases not appealable to the First or Eighth Circuit Courts of Appeal, the Tax Court's position is that its abuse of discretion review is not limited to the administrative record. Robinette v. Commissioner, 123 T.C. 85 (2004). However, in a number of these cases, the court has excluded evidence not submitted to the appeals officer because it was not relevant. *See, e.g.,* Murphy v. Commissioner, 125 T.C. 301 (2005). A sample motion for summary judgment, where only claims subject to abuse of discretion review are at issue, is attached at section VI.F.1.

In some cases, the court may also hear evidence where the taxpayer raises an issue as to how the administrative hearing was conducted. For example, the Tax Court may resolve issues of material fact with respect to

whether the appeals officer was impartial, refused to accept the submission of evidence, failed to consider issues raised by the taxpayer, or properly communicated to the taxpayer deadlines for the submission of evidence. Such issues are generally treated as involving exceptions to the record rule. *See generally* Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006); Murphy v. Commissioner, 469 F.3d 27, 31 (1st Cir. 2006). *See also* section IV.D.4.b.iv. As a result, a summary judgment motion will probably not be successful if the taxpayer disputes facts concerning the conduct of the CDP hearing, unless the taxpayer offers no support for the alleged factual dispute or respondent can demonstrate that the taxpayer's allegations are irrelevant.

c. Declaration

A declaration from the appeals officer making the determination should be filed with the summary judgment motion. The declaration should be filed with its own certificate of service (not as an attachment to the summary judgment motion). The declaration should authenticate and attach the documents that support the motion for summary judgment, *i.e.*, all documents which establish that no material facts are in dispute and the Commissioner is entitled to judgment as a matter of law. The entire administrative record does not need to be submitted to the court with a summary judgment motion and declaration, however all documents relied upon by the appeals officer and relevant to the issues to be resolved pursuant to the motion should be included. *See* sample at section VI.E.3.

The documents that support a motion for summary judgment in a CDP case will vary depending upon the facts and issues in each case. Section 6330(c)(3) requires that the notice of determination address the verification requirement, all issues raised by the taxpayer, and whether the collection action balances the need for efficient collection with the taxpayer's concern that the collection action be no more intrusive than necessary. Examples of documents relevant to these issues that should generally be attached to the declaration of the appeals officer in support of a motion for summary judgment are:

- The CDP lien or levy notice. Copies of levy notices sent by the ACS are not retained by the IRS and so they will generally not be in the administrative record unless the appeals officer can obtain a copy from the taxpayer. If Appeals cannot obtain a copy of the notice, the transcript relied upon to confirm the issuance of the notice should be attached.

- The CDP hearing request.

- The transcript of the taxpayer's account that was reviewed by the appeals officer (*e.g.*, TXMOD-A, Form 4340).

Note: A certified copy of an updated Form 4340 transcript should also be submitted with all summary judgment motions. The Form 4340 transcript has been consistently requested by Tax Court judges in summary judgment cases. Even though this transcript is prepared after the issuance of the notice of determination, submission of the Form 4340 is not a violation of the record rule because it generally contains the same information originally reviewed by the appeals or settlement officer in making the CDP determination. *See* Bowman v. Commissioner, T.C. Memo. 2007-114. The court should not consider, however, transactions reflected on the Form 4340 which occurred after the CDP hearing because these transactions are not part of the administrative record subject to abuse of discretion review. Because the Form 4340 is self-authenticating, it does not need to be attached to the declaration.

- The statutory notice of deficiency and any supporting documents the appeals officer relied upon to establish the notice of deficiency was sent to the taxpayer's last known address, and/or was received by the taxpayer, when these issues are raised by the taxpayer.

- Correspondence between the taxpayer and the appeals officer.

  Note: This includes e-mail correspondence. Attorneys should secure copies of e-mail correspondence from Appeals if these are not already printed out and placed in the CDP file.

- Copies of the taxpayer's bankruptcy petition and schedules and order of discharge (when the impact of the bankruptcy on the tax due is raised as an issue).

- A Form 656, Offer-in-Compromise, submitted by the taxpayer along with the taxpayer's supporting financial documents.

- Form 1040, Individual Income Tax Return, for the tax years at issue (if the taxpayer disputes the liability).

- The history notes of the appeals officer included in the Appeals case activity record.

- The Appeals Transmittal and Case Memo, and the Notice of Determination with attachments.

Among the documents that the appeals officer may rely upon are the printouts from Integrated Collection System or ACS screens; documents pertaining to the evaluation of collection alternatives, such as financial statements; and documents that establish that an issue raised in the CDP proceeding was previously raised in an administrative or judicial

proceeding in which the taxpayer participated meaningfully, for purposes of section 6330(c)(4).

Additionally, if any face-to-face or telephone conference between the appeals officer and the taxpayer was recorded, a copy of the tape or a transcript of the recording, made by accepted means by a licensed transcription agency (the latter is not required to be made) and authenticated by the appeals officer, should be submitted as part of the administrative record. If the taxpayer submits a transcript of the recorded conference, the appeals officer should authenticate the taxpayer's transcript only after comparing it to the tape recording made by the appeals officer.

The declaration should set forth the appeals officer's job position, that the appeals officer was assigned responsibility to handle the taxpayer's hearing request, and that, pursuant to this assignment, the appeals officer made the determination required under section 6330(c)(3). If any of the materials require interpretation (*e.g.*, transaction codes) or authentication, the declaration should include appropriate paragraphs.

Note: When the appeals officer failed to consider an issue raised or information submitted by the taxpayer, when the facts or reasoning relied upon by the appeals officer do not fully support the determination, or the reasoning in support of the determination is unclear or incomplete, a declaration is ordinarily not appropriate. A motion to remand is usually appropriate in such cases. See discussion at V.I.4.a.

6. Section 6673(a)(1) penalties

Section 6673(a)(1) authorizes the Tax Court to impose a penalty, not in excess of $25,000, on a taxpayer if the Tax Court finds that the taxpayer has instituted or maintained a CDP proceeding primarily for delay, or that the taxpayer's position in the proceeding is frivolous or groundless. Burke v. Commissioner, 124 T.C. 189 (2005); Pierson v. Commissioner, 115 T.C. 576 (2000); Forbes v. Commissioner, T.C. Memo. 2006-10 ($20,000 penalty imposed). Ordinarily, the penalty is asserted against taxpayers who take frivolous positions, and should be requested by counsel where appropriate in motions or at trial. When requesting the penalty, Counsel attorneys should advise the court about all prior communications with the taxpayer where the Service warned the taxpayer about the possibility of the imposition of the section 6673 penalty if the taxpayer continued to pursue frivolous or groundless arguments. For example, upon assignment of a CDP case, Appeals issues a form letter (Letter 3846) to taxpayers raising only frivolous claims which contains standard warning language. The Tax Court has, in some cases, declined to impose the section 6673 penalty where the taxpayer was not given a prior warning that the penalty may be imposed. *See* Olmos v. Commissioner, T.C. Memo. 2007-82; Belmont v. Commissioner, T.C.

Memo. 2007-68 (same).

If a Counsel attorney wishes to ask for a section 6673(a)(1) penalty against a taxpayer who instituted the proceeding primarily for delay but who is not making frivolous arguments, the attorney should be prepared to put forth substantial evidence to support the penalty.

The Chief Counsel Sanctions Officer must approve a motion or request for imposing a section 6673(a)(2)(A) penalty against an attorney or person admitted to practice before the Tax Court. **Contact Branch 1 or 2, P&A, to obtain approval of the Sanctions Officer in such situations.**

7. Levy during CDP levy cases in Tax Court

a. Section 6330(e)(2) motions (Motions to Permit Levy)

In CDP levy cases, Counsel attorneys should file motions to permit levy pursuant to section 6330(e)(2), generally in conjunction with dispositive motions such as motions for summary judgment or to dismiss for failure to state a claim. *See, e.g.*, Schneller v. Commissioner, T.C. Memo. 2008-196. *See* sample at section VI.G. **In general, a motion to permit levy should be considered in all CDP cases involving a taxpayer who raises solely frivolous arguments**. Suspension of the Service's levy authority in such cases serves no legitimate purpose. Even if the motion is not granted until the court enters its decision, it will have served a purpose because the Service will be able to levy immediately without having to wait for the expiration of the period for appeal, and for any appellate litigation to conclude.

Section 6330(e)(2) contains two criteria for obtaining relief from the suspension of levy. First, the underlying tax liability must not be at issue in the appeal. Second, there must be a showing of "good cause."

The underlying tax liability is not "at issue" merely because the taxpayer challenges it. Liability is not at issue, for example, if a taxpayer challenges underlying liability in the petition, but the court is precluded from considering that liability, pursuant to section 6330(c)(2)(B). Burke v. United States, 124 T.C. 189 (2005). Liability is also not at issue if the petition makes only frivolous arguments. Unless the challenge to liability is both allowed under section 6330(c)(2)(B) and bona fide, a motion to permit levy may be appropriate. Note that if the notice of determination contains multiple tax years and periods, but a taxpayer disputes only the tax liabilities (or interest or additions) for some of the periods, a section 6330(e)(2) motion may be brought with respect to the undisputed tax liabilities.

The primary focus of a section 6330(e)(2) motion should be the required showing of "good cause" not to suspend the levy during the pendency of

the judicial review period. A showing of good cause may be made in any case in which a taxpayer is using the CDP provisions in a manner inconsistent with or inappropriate to their purpose. The purpose of the CDP statutes, sections 6320 and 6330, is to provide taxpayers with a forum to raise relevant issues with respect to a proposed levy or NFTL. I.R.C. § 6330(c)(2)(A); H.R. Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998). A section 6330(e)(2) motion should be considered in all CDP levy cases which are not brought for this purpose, but are used solely as a forum for frivolous arguments or otherwise to delay collection action. Generally, good cause will be proven as part of the summary judgment or other dispositive motion filed with the motion to permit levy.

While good cause to permit levy during appeal will exist primarily in cases when a taxpayer raises solely frivolous issues, there may also be good cause for relief in other types of cases in the Tax Court, district courts, or appellate courts. For example, a section 6330(e)(2) motion may be appropriate in some cases involving the pyramiding of tax liabilities. *See* Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash) (court found "good cause" where taxpayer corporation repeatedly failed to pay employment taxes on time).

Section 6330(e)(2) motions filed with the Tax Court should be captioned as "Respondent's Motion to Permit Levy." The opening paragraph should state that respondent moves, pursuant to Tax Court Rule 50(a) and section 6330(e)(2), that the court remove the suspension of the levy under section 6330(e)(1) because the underlying liability is not at issue and respondent has shown good cause for the removal of the suspension of the levy. The body of the motion should set forth the background of the case and establish that the two criteria for relief from the stay have been met. The motion should conclude by requesting expedited handling by the court to minimize further unnecessary collection delays.

The section 6330(e)(2) motion may be filed at any point at which the court retains jurisdiction over the case. Of course, the motion and the accompanying dispositive motion should be filed as early in the case as possible to minimize delays in resuming collection. When filed with a summary judgment or other dispositive motion, two separate motions must be filed, in accordance with T.C. Rule 54.

> *Note*: Counsel attorneys should, as a general rule, consider filing section 6330(e)(2) motions in all cases involving taxpayers raising solely frivolous issues in which we are filing summary judgment motions and/or seeking imposition of the section 6673(a)(1) penalty. While these motions may be made up to the time a final decision is entered, Counsel attorneys should file these motions as soon as possible in all applicable cases. In the absence of an order permitting levy, a litigious taxpayer making frivolous arguments may delay collection for a significant period by appealing the tax court's decision

to the court of appeals.

Generally, the Tax Division of the Department of Justice will not file a section 6330(e)(2) motion with a court of appeals unless IRS counsel has filed the motion in the first instance with the Tax Court. In some limited circumstances, however, it may be appropriate to file a section 6330(e)(2) motion for the first time in the court of appeals where there are new circumstances justifying seeking relief. For example, we may discover after a case has been appealed to a court of appeals that a taxpayer is dissipating assets, placing collection in jeopardy. **Please contact the attorney in Branch 3 or 4, P&A, who is handling the case if there are grounds for requesting filing of a section 6330(e)(2) motion for the first instance with a court of appeals.**

Finally, since the purpose of a section 6330(e)(2) motion is to permit immediate levy, alert the Service before filing the motion, and immediately after the motion is granted, so that it will be prepared to proceed promptly with a levy. For cases which originate from the field, contact the group manager of the Revenue Officer who referred the case to Appeals. For cases that originate from ACS, contact the CDP coordinator for the state of taxpayer's residence.

b. Levy to collect non-CDP periods included in collection alternative rejected in CDP hearing

Taxpayers frequently submit offers-in-compromise or installment agreements as proposed collection alternatives during CDP hearings which not only include liabilities listed on the CDP notice which are properly part of the CDP hearing (CDP periods), but also include all other outstanding tax liabilities (non-CDP periods) due to the IRS requirement that all delinquent periods be included. If such an offer or agreement is rejected by Appeals, and the taxpayer contests the rejection upon appeal to the Tax Court, the Tax Court's jurisdiction only extends to the CDP periods.

In reviewing the notice of determination, however, the court may consider facts relating to non-CDP periods that are relevant to the offer or agreement. Sullivan v. Commissioner, T.C. Memo. 2009-4.

Consequently, when a taxpayer seeks judicial review of the rejection of an offer or installment agreement in a CDP proceeding, there is no prohibition under section 6331(k) on levy for the collection of tax periods included in the offer or installment agreement but not subject to the CDP hearing. We interpret the word "appeal" in the clause "during the period that such appeal is pending" in section 6331(k)(1)(B) and (k)(2)(B) to refer to the administrative appeal under section 7122(e)(2). Because the taxpayer has no right to administrative appeal with respect to the rejection of the offer or installment agreement under section 7122(e)(2), the levy

prohibition is lifted 30 days after the offer or installment agreement has been rejected in the CDP determination. At this point (30 days after the notice of determination is issued), the offer or installment agreement is no longer pending and the Service is free to collect the non-CDP periods, provided the taxpayer has been previously sent the required section 6331 and 6330 notices for those periods. The same reasoning applies to offers and installment agreements submitted in equivalent hearings and rejected in decision letters.

The levy prohibition in section 6330(e)(1) also does not apply in CDP levy cases to the non-CDP tax periods included in the offer or installment agreement. The prohibition only applies to the tax periods that are subject to the hearing. Treas. Reg. § 301.6330-1(g)(2) Q&A G3.

Based on this analysis, there is no legal preclusion from levying non-CDP periods included on a rejected offer or installment agreement that is at issue in a CDP levy case pending before the Tax Court. Should the court find that rejection of the offer or installment agreement was an abuse of discretion, and order a remand to Appeals for reconsideration of the offer or installment agreement, the court's decision would nullify Appeals' rejection of the offer or the installment agreement as of the date the decision is entered, and the offer or installment agreement is revived as of that date. Once the offer or installment agreement is revived, the levy prohibition will again apply to both CDP and non-CDP periods.

J. Trial Preparation

1. Discovery

Unless the taxpayer is raising only frivolous arguments, informal discovery should be conducted at a Branerton conference. The taxpayer should be provided with a copy of the complete administrative record. In addition, request for admissions and all formal discovery procedures are available in a CDP case. However, if the taxpayer is only disputing determinations that are reviewed for abuse of discretion, the need for formal discovery (interrogatories or requests for admission) should generally be limited to cases when there is a factual dispute over the contents of the administrative record (*e.g.*, taxpayer asserts he submitted financial documentation that was not considered by Appeals) or the conduct of the administrative hearing (*e.g.*, taxpayer disputes statement in notice of determination that he did not request a face-to-face conference, or did not request collection alternatives) .

For determinations subject to trial de novo (*i.e.*, liability determination or section 6015(b) or (c) relief), the full range of formal discovery tools may be used.

Any requests by the taxpayers to depose appeals officers or their managers should be opposed. Appeals officers and their managers are nonparty

witnesses. Therefore, T.C. Rule 75(b) applies to their depositions. The rule states that depositions of nonparty witnesses are permitted only in extraordinary circumstances where the information sought is not available through other, less extraordinary means. Additionally, anything the taxpayer wishes to know about the Appeals determinations can be found in the administrative record or obtained through interrogatories or requests for admission.

In the event the court permits a deposition, the scope of the testimony should be limited to circumstances where the court can review relevant evidence outside the administrative record. *See* section IV.D.4. In addition, inquiry into the mental processes of the agency decision maker is not permissible, except for the limited purpose of determining if the decision was a result of bad faith. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). The taxpayer, however, must make a "strong showing of bad faith or improper behavior" before any such inquiry will be permitted. *Id.*

2. Stipulation of facts

The stipulation should include facts and documents relevant to issues subject to trial de novo. The stipulation of facts should also attach the documents comprising the administrative record as discussed in section V.J.3, *supra*. If the taxpayer will not cooperate with the Counsel attorney on the stipulation of facts, the attorney should file, at least 45 days before trial, a motion under T.C. Rule 91(f) to compel stipulation.

If a stipulation of facts cannot be agreed to within sufficient time to file a motion to compel, Counsel should still prepare a stipulation of facts for submission to the Tax Court at the trial calendar call. Additionally, Counsel should prepare a declaration of the appeals officer who made the CDP determination to authenticate the administrative record. This is similar to the declaration that is prepared for a summary judgment motion. The Counsel attorney should send a copy of the declaration to the taxpayer, informing the taxpayer of respondent's plan to offer the documents into evidence. Under Fed. R. Evid. 902(11), the declaration permits the documents comprising the administrative record to be self-authenticating, provided written notice of respondent's intention to use the documents is given to the taxpayer and the records and declaration are made available for inspection sufficiently in advance to provide the taxpayer a fair opportunity to challenge them. By using this declaration, the appeals officer's live testimony is not necessary to authenticate the administrative record at trial. The hearsay exception for business records found in Fed. R. Evid. 803(6) also applies to permit admission of the declaration into evidence. In a non-CDP case, the Tax Court has approved the use of a declaration to admit a certified mail list into evidence, citing Fed. R.s Evid. 902(11) and 803(6). Clough v. Commissioner, 119 T.C. 183 (2002).

3. Submission of the administrative record at trial

Counsel should submit the administrative record to the Tax Court as part of the stipulation of facts, as outlined below. Submission of a standardized and comprehensive administrative record should decrease the need for testimony of the appeals officer in CDP cases and reduce the court's need to go beyond the administrative record. Although the Tax Court held in Robinette v. Commissioner, 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006), that it would consider evidence outside of the administrative record in CDP cases, the Tax Court was reversed by the Eighth Circuit. In addition, the First Circuit Court of Appeals has also held that abuse of discretion review in CDP cases should be limited to the administrative record. Murphy v. Commissioner, 469 F.3d 27, 31 (1st Cir. 2006), *aff'g on different grounds*, 125 T.C. 301 (2005). The Tax Court has not yet indicated that it will follow the First and Eighth Circuits' adoption of the record rule in other circuits. *See also* Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4, 301.6330-1(f)(2) Q&A F4.

Under well-settled principles of administrative law, the administrative record consists of the information an agency reviews when making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). In CDP cases, the administrative record consists of all of the documents in the case file. Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4, 301.6330-1(f)(2) Q&A F4. If a case is remanded to the Appeals office, additional materials, including documents submitted by the taxpayer and the supplemental notice of determination, become part of the administrative record.

The administrative record attached to the stipulation of facts should generally include the items described above that should be attached to a declaration filed with a motion for summary judgment. See section V.I.5.c, *supra*, which lists the minimum items which should comprise every administrative record.

When preparing the stipulation of facts, the Counsel attorney should place the items comprising the administrative record in the categories and order described in section V.I.5.c. If there is more than one document within a category, the items should be listed in chronological order (*e.g.*, the taxpayer's bankruptcy petition, the taxpayer's bankruptcy schedules, the bankruptcy court's order of discharge).

The stipulation should contain a paragraph stating that the specifically enumerated exhibits constitute the entire administrative record. Each item, labeled with a separate exhibit number, should be attached to the stipulation. If the item contains more than one page and is not otherwise numbered, the item should be paginated sequentially. A sample stipulation of facts attaching the administrative record is at section VI.H.

K. Trial

1. Objections to evidence not in the administrative record

As more fully discussed in section IV.D.4.b.ii, the Eighth Circuit in Robinette v. Commissioner, and the First Circuit in Murphy v. Commissioner, held that when reviewing issues in a CDP case for an abuse of discretion, the Tax Court must limit its review to the administrative record. The Tax Court has not yet held that it will follow Murphy and Robinette outside the First and Eighth Circuits. *See* Porter v. Commissioner, 130 T.C. No. 10, n. 6 (2008).

In those cases in which a trial of nonliability issues cannot be avoided by a motion for summary judgment, counsel should argue that the court should not consider either an issue or evidence that was not presented to Appeals during the administrative hearing. In the alternative, counsel should argue that evidence not in the administrative record is not relevant to the issue of whether Appeals abused its discretion because such evidence could not have had any bearing on Appeals' determination. *See* Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); Barnes v. Commissioner, T.C. Memo. 2006-150. *See also* Fed. R. Evid. 401, 402; Morlino v. Commissioner, T.C. Memo. 2005-203.

> *Note*: Presentation of evidence as to what happened during the CDP hearing may be permissible as an exception to the record rule. *See* section IV.D.4.b.iv.

In order to preserve the record rule issue for possible appeal in cases outside of the First and Eighth Circuits, counsel should make an evidentiary objection if the taxpayer attempts to testify as to matters not in the administrative record or otherwise offers evidence that was not made available to Appeals.

Attorneys should also consider filing a motion in limine objecting to the admission of the testimony or evidence. If the taxpayer will not stipulate to the administrative record, the motion in limine can be accompanied by a declaration of the appeals officer so as to place the administrative record before the court without calling the appeals officer to testify. The motion can seek to both affirmatively place the administrative record before the court and to prohibit admission of any evidence not presented to the appeals officer. A sample motion in limine is attached at section VI.I.

If the court denies the evidentiary objection or motion, or if the court reserves ruling on the objection or motion until after the trial, only then would it be appropriate to present any additional evidence not reviewed by the appeals officer that strengthens the respondent's case. With this evidence an alternative argument on brief can be made that the appeals officer's determination is not an abuse of discretion, even if the court allows evidence not available to Appeals during the administrative proceeding.

2. Appeals testimony

Appeals testimony should be kept at a minimum. On issues subject to abuse of discretion review, the general rule is that an appeals officer's live testimony is unnecessary because the court's review is limited to the administrative

record. If the taxpayer will not stipulate to the administrative record, the record can be authenticated and admitted by declaration as described *supra*. In Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd on different grounds*, 469 F.3d 27 (1st Cir. 2006), the Tax Court excluded appeals officer testimony that was not relevant to the appeals officer's determination. The Tax Court also excluded testimony with respect to the appeals officer's rejection of the taxpayer's offer-in-compromise, when such testimony was unnecessary as the record evidence provided adequate basis for the rejection.

In some cases an issue may arise involving the accuracy of the administrative record or whether the appeals officer conducted the hearing correctly. When these types of issues are present, the administrative record may be detailed enough so that Appeals testimony is unnecessary. For example, the notice of determination and supporting Case Activity Records may contain detailed summaries of the appeals officer's attempts to schedule a face-to-face conference. However, if the record is inaccurate, unclear or incomplete, counsel may determine that appeals officer testimony is necessary. *See* Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd on different grounds*, 469 F.3d 27 (1st Cir. 2006) (appeals officer testimony is necessary and admissible to explain notations and abbreviations in case activity report). As discussed at section IV.D.4.b.iv, *supra*, the record rule does not generally apply to issues involving the accuracy of the administrative record or the conduct of the hearing. Appeals testimony may also occasionally be necessary to rebut the taxpayer's evidence where the court permits the taxpayer to introduce evidence outside the administrative record over respondent's objection.

Appeals has agreed to permit Appeals employee testimony in these limited situations, but not on a routine basis. A joint memorandum from the Director, Technical Services and the Division Counsel SBSE dated March 23, 2005, details the circumstances under which Appeals employees will testify. All decisions to allow an Appeals employee to testify are made by the Appeals Area Director. Counsel should make requests for Appeals personnel to testify well in advance of the trial date, *i.e.*, soon after the first calendar call status report meeting or as soon as the taxpayer raises an issue necessitating the testimony. Pursuant to the March 23, 2005, memorandum, Appeals will pay for its personnel to testify at trial in those few cases where the testimony is necessary.

L. Stipulated Decision Documents

Based on common situations presented in CDP cases, sections VI.J.1 through 3 are sample stipulated decision documents. Individual cases will vary, of course, and the sample stipulated decision documents will need to be adapted to fit the particular facts of each case.

Issues in CDP cases can be grouped under two headings: nonliability issues, which are reviewed by the courts for abuse of discretion, and liability issues, which are reviewed de novo. "Liability" refers to the proper amount of tax imposed by the Internal Revenue Code. Nonliability issues include those

involving the Service's compliance with applicable law and administrative procedures, the conduct of the administrative hearing, collection alternatives, and the appeals officer's determination to proceed with collection. Additionally, all issues relating to the "unpaid tax" (*e.g.*, application of payments, discharge in bankruptcy, timeliness of assessment and whether procedural requirements for assessment were met) are nonliability issues.

Note: Where decision documents contain language indicating that the taxpayer waives restrictions in section 6330(e) prohibiting collection until the decision of the Tax Court becomes final, the suspension of the collection statute of limitations in section 6330(e) is also no longer in effect as of the date the decision is entered.

1. Nonliability issues

When, with respect to a nonliability issue, the appeals officer abused his discretion in conducting the hearing or in making the determination, and reconsideration of the case by Appeals is required because the error is not harmless, the attorney should generally file a Motion for Remand to Appeals to allow the appeals officer to correct the error and issue a supplement to the notice of determination. However, if the error was harmless, the notice of determination should be defended.

On the other hand, some nonliability issues may not require reconsideration by Appeals even if the error was not harmless, because the issue involves the application of law to uncontested facts. These issues may include whether the unpaid tax was discharged in bankruptcy, whether the statute of limitations has expired, or whether a notice of deficiency was properly issued. If an issue does not require further fact finding or a determination by Appeals, and the case is to be conceded and the tax abated, the decision document should state that the notice of determination is not sustained as in the sample decision at section VI.J.1.a. When the assessment is conceded as invalid but the assessment period is still open, the sample paragraph stating that respondent's right to reassess the tax liability is preserved should be included.

A motion to dismiss on ground of mootness, rather than a stipulated decision document, should be filed if the tax liability has been paid in full and no issues have been raised that would invoke the Tax Court's overpayment jurisdiction under sections 6404(h) or 6015(e). Similarly, a motion to dismiss on the ground of mootness should be filed if the assessment has been abated. Counsel attorneys should also ensure that the lien has been, or will be, released or the proposed levy will be abandoned before filing the motion. *See* section V.I.1, *supra*. If the Service has agreed to abate the assessment but the abatement has not been completed, a motion to dismiss on ground of mootness should not be filed. Instead, a stipulated decision document setting forth the basis for the abatement should be filed. (Sample decision in section VI.J.1.a.) If some, but not all, tax periods at issue have been paid or abated,

a stipulated decision can be filed stating that the issues associated with the pertinent tax periods are moot, and then separately addressing the unpaid periods.

If the taxpayer is conceding the case in full and the underlying tax liability is not at issue, then a stipulated decision document stating that the determinations are sustained in full should be filed. (Sample decision in section VI.J.1.b). If the taxpayer is conceding the case in full but a collection alternative has been agreed to outside CDP (in one of the circumstances described in section V.I.4.b), then the collection alternative should be referenced below the judge's signature as in Sample decision in section VI.J.1.c. An example would be when Appeals properly rejected an offer-in-compromise but after the notice of determination was issued the taxpayer experienced a substantial adverse change in circumstances making the offer in compromise acceptable. While the appeal to Tax Court is pending, the taxpayer submits financial documentation and this is forwarded with taxpayer's offer-in-compromise to the Collection function, which accepts the offer. The acceptance of the offer should not be referenced above the line because the offer was accepted outside of the CDP hearing and the court has no jurisdiction in connection with the offer. Note that if Appeals had erred in concluding that the financial documentation was not submitted, a motion for remand should generally be filed rather than a document not sustaining the determination.

2. Liability issues

When the taxpayer challenges the underlying tax liability (*i.e.*, the proper amount of tax imposed by the Internal Revenue Code), the attorney must first determine whether the challenge is precluded under section 6330(c)(2)(B). If the challenge to the underlying tax liability is not precluded, then the stipulated decision document must set forth the amount of the underlying tax liability, which is referred to in the decision document as the amount of tax imposed by the Internal Revenue Code. *See* sample at section VI.J.1.d. The amounts of the liability and additions to tax should be calculated as of the date the decision is entered. Stipulations as to interest should generally be below the line and state that interest accrues in accordance with law. If the amount of interest that accrued on the tax liability was specifically at issue, the amount of interest agreed to can be put above the line. Any stipulation as to overpayments should be placed below the line, because the Tax Court does not have jurisdiction under the CDP provisions to determine an overpayment or order its refund (unless the overpayment arises under section 6404(h) or 6015(e)). If the underlying tax liability is not properly at issue but adjustments are agreed to, the amount of the underlying tax liability should be set forth below the Judge's signature. *See* sample at section VI.J.1.e.

3. Sections 6404 and 6015 issues

CDP cases may involve claims for interest abatement under section 6404 or

relief from joint and several liability under section 6015. For sample decisions for cases in which the notice of determination addresses both CDP issues and interest abatement, see section VI.J.2 a and b. For sample decisions in which the notice of determination addresses both CDP issues and relief from joint and several liability, see section VI.J.3.a through d.

M. Appeal of Tax Court CDP Decision

Section 7482(b)(1) provides that a Tax Court decision is appealable to the Court of Appeals for the District of Columbia Circuit unless the decision is listed in one of the categories specified in section 7482(b)(1)(A)-(F). Although none of subparagraphs (A)-(F) expressly mentions a decision in a CDP case, we should not object to venue when a taxpayer appeals a CDP decision to the circuit court of appeals of the taxpayer's residence or principal place of business, which is the rule for deficiency cases. It is reasonable to believe that Congress intended the rules of section 7482(b)(1)(A)-(F) to apply to the appeal of CDP decisions, because section 6330(d)(1)(A) contemplates that the Tax Court should exercise jurisdiction over taxes being collected in the same manner as it exercises jurisdiction over deficiency cases.

Section 7485(a), requiring a taxpayer to post an appeal bond in order to stay collection, does not apply to CDP cases. By its terms, section 7485 applies only to the collection (and assessment) of deficiencies, not assessed liabilities that are the subject of a CDP case. In a CDP levy case, levy is suspended during the pendency of appeals, unless the IRS obtains a lifting of the suspension pursuant to section 6330(e)(2).

Please contact Procedure & Administration Branch 3 or 4, at 202-622-3600 or 202-622-3630 respectively, for assistance with any questions that arise in CDP cases.

_____***/s/***_____

Deborah A. Butler
Associate Chief Counsel
(Procedure and Administration)

VI. Exhibits

Note: The following are only sample motions. Your motion should reflect the specific facts and issues in your case and any new or more pertinent case law applicable to your case.

A. Joint Motion to Change Caption

JOINT 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 states:

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

2. The petition appears to be an appeal of a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued by respondent on ____, 200_, 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 informed respondent that he/she intended to seek review of the Notice of Determination as a levy [lien] action brought under section 6330(d) [6320(c) and 6330(d)].

WHEREFORE, it is prayed that this motion be granted.

B. Motion to Remove Small Tax Case Designation

MOTION TO REMOVE SMALL TAX CASE DESIGNATION

RESPONDENT MOVES, pursuant to Tax Court Rules 50 and 171(c), that the Court enter an order removing the small case designation from this case and that these proceedings be conducted under the Court's regular case procedures.

IN SUPPORT THEREOF, respondent respectfully states:

1. On or about _____, respondent sent petitioner a **(select the applicable letter)** [*A Final Notice-Notice of Intent to Levy and Notice of Your Right to Request a Hearing under I.R.C. § 6330*] [*Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320*] (CDP Notice). A copy of the CDP Notice is attached hereto as Exhibit A.

2. In response to the CDP Notice, petitioner timely submitted a Form 12153, Request for a Collection Due Process or Equivalent Hearing, which lists the taxable periods as [*list periods*]. A copy of the Form 12153 is attached hereto as Exhibit B.

3. Appeals issued a Notice of Determination covering the years listed on the hearing request. A copy of the Notice of Determination is attached hereto as Exhibit C. Petitioner subsequently filed a timely petition with the Court covering the years listed on the Notice of Determination.

4. Section 7463(f)(2) provides that a CDP case may be conducted under "S case" procedures with respect to "a determination in which the unpaid tax does not exceed $50,000." Section 7463(f)(2) requires that the total unpaid tax, not just the amount of tax in dispute, as of the date of the determination must not exceed $50,000.00 for a CDP case to qualify for small case status. Leahy v. Commissioner, 129 T.C. 71 (2007); Schwartz v. Commissioner, 128 T.C. 6 (2007). The term "tax" includes all accrued and unassessed interest and penalties on the underlying tax liability, as well as all assessed interest and penalties. See Schwartz v. Commissioner, 128 T.C. 6, n.1 (2007); see also I.R.C. §§ 6601(e)(1) and 6665(a)(2).

Select the paragraph 5 that applies to your case: Use the first paragraph when there is no question that the total unpaid tax as of the Determination exceeded $50,000. Use the second paragraph when the amount of total unpaid tax is close to $50,000 and so an INTST transcript must be obtained to establish the actual total unpaid tax as of the Determination.

5. As of the date listed on the CDP notice, the amount of unpaid tax for the year(s) at issue exceeded $50,000. See Exhibit A. Between the date the Internal Revenue Service calculated the amount due in Exhibit A and the date the Notice of Determination was issued, petitioner has **(select correct option)**[*made no payments toward the tax liabilities at issue*.] [*made payments in the amount of only $_____ toward the tax liabilities at issue*.] See Exhibit D, the transcript of account. **(Generally Forms 4340 are preferred, but if time does not permit obtaining certified transcripts, literal or IDRS transcripts should suffice.)** Thus, the total unpaid tax for the case at issue as of the date of the Notice of Determination was greater than $50,000.00, and this case is not eligible for small case designation.

5. Attached as Exhibit D is an INTST transcript for the year(s) at issue. According to the INTST transcript, the total unpaid tax for the case at issue as of the date of the Notice of Determination is $_____. Thus, this case is not eligible for small case designation.

6. Respondent contacted petitioner regarding this Motion, and petitioner said that he/she **(select one)** [*objects*] [*does not object*] to the granting of this Motion.

WHEREFORE, it is prayed that this Motion be granted.

C. Motion to Dismiss for Mootness

MOTION TO DISMISS ON GROUND OF MOOTNESS

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed as moot given that, subsequent to the filing of the petition, the tax liability for taxable year(s) [*insert year(s)*] has been paid in full and the proposed levy is no longer necessary.

IN SUPPORT THEREOF, respondent states:

1. On ___, 200_, respondent issued a Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing ("CDP Notice") to petitioner with respect to his/her income tax liabilities, including penalties and interest, for taxable year(s) [*insert year(s)*].

2. In response to the Final Notice, petitioner requested a collection due process ("CDP") hearing with respondent's Office of Appeals pursuant to I.R.C. § 6330(b)(1).

3. On __, 200_, 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 year(s) [*insert year(s)*].

4. On ___, 200_, petitioner filed a Petition for Lien or Levy Action under Code Section 6320(c) or 6330(d) in the present case.

5. Subsequently, petitioner [an offset pursuant to section 6402(a) of an overpayment from petitioner's taxable year(s) [*insert year(s)*] paid all outstanding income taxes, penalties, and interest with respect to taxable year(s) [*insert year(s)*]. Attached to this motion as Exhibit __ is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable year(s) [*insert year(s)*], that is current through [*insert date*] which reflects this payment.

6. As a result of the full payment of petitioner's liabilities subject to the Notice of Determination, respondent no longer needs nor intends to levy to collect petitioner's income tax liabilities for taxable year(s) [*insert year(s)*], which gave rise to the petition in the instant case. As there is no remaining case or controversy to sustain this Court's jurisdiction, this action is no longer justiciable. *See* Greene-Thapedi v. Commissioner, 126 T.C.1 (2006). Accordingly, this case is moot, and the petition should be dismissed.

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

WHEREFORE, it is prayed that this motion be granted.

D. Motions to Dismiss for Lack of Jurisdiction

1. No CDP notice of determination (and no notice of deficiency or other determination issued)

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, 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 petitioner for taxable year(s) [*insert year(s)*], nor has respondent made any other determination with respect to taxable year(s) *[insert year(s)*] that would confer jurisdiction on this Court.

IN SUPPORT THEREOF, respondent states:

1. Petitioner attached to the petition a Notice of Levy [*or state the type of notice regarding filing of notice of federal tax lien, levies, or collection actions*]. Such document, attached hereto as Exhibit A, may indicate that petitioner is seeking to invoke the Court's jurisdiction under I.R.C. § 6330(d) [§§ 6320(c) and 6330(d)] in this case.

2. The Tax Court cannot acquire jurisdiction with respect to a proposed levy [the filing of a notice of federal tax lien] unless, and until, there is a determination by respondent's Office of Appeals and the taxpayer seeks review of that determination within 30 days thereof. Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

3. Respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 was sent to petitioner with respect to taxable year(s) [*insert year(s)*]. Attached to this motion as Exhibit A is a Form 4340, Certificate of Assessments, Payments and Other Specified Matters for taxable year(s) [*insert year(s)*], that is current through [*insert date*].

Alternative Paragraphs where decision letter is attached to the petition:

1. Petitioner attached to the petition a Decision Letter Concerning Equivalent Hearing under Section 6320 and/or 6330 of the Internal Revenue Code. Such document, attached hereto as Exhibit B, may indicate that petitioner is seeking to invoke the Court's jurisdiction under section 6330(d) [sections 6320(c) and 6330(d). Petitioner was issued a Decision Letter, rather than a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, because he/she did not timely request a hearing under section 6330 [6320]. Treas. Reg. § 301.6330-1(i)(1). [Treas. Reg. § 301.6320-1(i)(1).]

2. A Final Notice-Notice of Intent to Levy and Notice of Your Right to Request a Hearing under I.R.C. § 6330 [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice") dated _____, 200_, was sent to petitioner by certified mail on _____, 200_, as shown by the postmark date stamped on the IRS certified mail list [United States Postal Service Form 3877]. Copies of the CDP Notice and IRS certified mail list [Postal Service Form 3877], showing the date the CDP Notice was delivered to the Post Office to be sent by certified mail, are attached as Exhibits C and D, respectively.

3. Respondent received petitioner's Request for a Collection Due Process Hearing on Form 12153 on ____, 200_, as evidenced by respondent's date stamp thereon. A copy

of petitioner's Request for a Collection Due Process or Equivalent Hearing is attached as Exhibit E.

4. Pursuant to section 6330(a)(3)(B) and Treas. Reg. § 301.6330-1(b)(1) petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the date of the CDP notice. [Pursuant to section 6320(a)(3)(B) and Treas. Reg. § 301.6320-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6320 within the 30-day period commencing the day after the end of the five day business period within which respondent is required to give notice of the lien filing.] Any written request for a CDP hearing should be filed with the IRS office at the address indicated on the notice. Treas. Reg. § 301.6330-1(c)(2) Q&A-C6 [301.6320-1(c)(2) Q&A-C6]. If the address on the CDP Notice is used and the written request is postmarked within the applicable 30-day response period, then in accordance with section 7502, the request will be considered timely even if it is not received by the correct IRS office until after the 30-day response period. Treas. Reg. § 301.6330-1(c)(2) Q&A-C4 [301.6320-1(c)(2) Q&A-C4].

5. Petitioner's request for hearing was not received within the 30-day period, and was not timely mailed. [*Describe the reasons why the request for hearing should be considered late.*]

6. A taxpayer who makes an untimely request for a CDP hearing under either section 6320 or section 6330 is not entitled to a CDP hearing. Treas. Reg. § 301.6330-1(i)(1)[301.6320-1(i)(1)]; Kennedy v. Commissioner, 116 T.C. 255 (2001). Because petitioner did not make a timely written request for a hearing under section 6330 [section 6320], the Office of Appeals properly held an equivalent hearing and issued a Decision Letter. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330[6320] and T.C. Rule 330.

****

4. Respondent has diligently searched respondent's records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

5. 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 section 6320(c) and/or 6330(d)(1).

6. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6320 or 6330 and T.C. Rule 330(b).

7. Petitioner objects to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

2. Petition includes taxes and/or periods not included in CDP notice of determination (and not included on any notice of deficiency or any other determination)

MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO STRIKE AS TO TAXABLE YEAR 1997

RESPONDENT MOVES, pursuant to T.C. Rules 52 and 53, that petitioner's claim with respect to taxable year 1997 be dismissed upon the ground that no notice of determination under I.R.C. § 6320 or 6330 was sent to petitioner for taxable year 1997, nor has respondent made any other determination with respect to taxable year 1997 that would confer jurisdiction on this Court, and that all references to taxable year 1997 be stricken from the petition.

IN SUPPORT THEREOF, respondent states:

1. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, which hereinafter is referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable years 19XX through and including 1996 [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable years 19XX through and including 1996], and that petitioner could receive a collection due process hearing with Appeals. A copy of the CDP Notice is attached hereto as Exhibit A.

2. Respondent has diligently searched respondent's records and has found no indication that any Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [any Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] was sent to petitioner with respect to taxable year 1997. Attached to this motion as Exhibit B is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable year(s) [*insert year(s)*], that is current through [*insert date*].

3. On ___, 200_, petitioner requested a collection due process hearing from respondent for taxable years 19XX through 1997. A copy of the Form 12153 Request for a Collection Due Process or Equivalent Hearing is attached hereto as Exhibit C.

4. On ____, 200_, respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, informing petitioner that he/she was not entitled to the relief requested. On the first page of the Notice of Determination, under the headings "Tax Type/Form Number" and Tax Period(s) Ended, income tax for taxable year 1997 is not included. Moreover, income tax for taxable year 1997 is not included in the attachment to the Notice of Determination, which describes the determinations of respondent's Office of Appeals with respect to collection of petitioner's tax liabilities by proposed levy [filing of notice of federal tax lien]. A copy of the Notice of Determination is attached hereto as Exhibit D.

5. On ___, 200_, petitioner timely commenced the above-entitled case by filing a petition with the Court pursuant to section 6330(d) [sections 6320(c) and 6330(d)] and T.C. Rule 331(a). In the petition, petitioner requests relief with respect to taxable years 19XX through 1997.

6. Respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 was sent to petitioner with respect to taxable year 1997.

7. Respondent has diligently searched respondent's records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

8. Petitioner has not demonstrated that a notice of determination sufficient to confer jurisdiction on this Court with respect to taxable year 1997 was issued by respondent's Office of Appeals as required by section 6330(d)(1) [sections 6320(c) and 6330(d)(1)].

9. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330 [6320] and T.C. Rule 330(b). See Freije v. Commissioner, 125 T.C. 14 (2005); Lister v. Commissioner, T.C. Memo. 2003-17.

10. Petitioner objects to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

3. Invalid notice of determination (because of late-filed request for hearing)

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the grounds that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 sent to petitioner for taxable year(s) [*insert year(s)*] is invalid, and, thus, it does not confer jurisdiction on this Court under section 6330(d) [sections 6320(c) and 6330(d)].

IN SUPPORT THEREOF, respondent states:

1. On [*insert date*], respondent mailed to petitioner by certified mail a Final Notice of Intent to Levy and Notice of Your Right to a Hearing under I.R.C. § 6330 [Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] ("CDP notice") with respect to petitioner's unpaid [*insert year and type*] tax liabilities. Copies of the CDP notice and a certified mail list, USPS Form 3877 [IRS certified mail list bearing a USPS date stamp or the initials of a postal employee], bearing petitioner's name and address and a postmark date of [*insert date*], are attached as Exhibits A and B, respectively.

2. Attached to this motion as Exhibit C is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable year(s) [*insert year(s)*], that is current through [*insert date*]. [The Form 4340 also confirms mailing of the CDP notice on [*insert date*]].

3. Respondent received petitioner's Form 12153, Request for a Collection Due Process or Equivalent Hearing ("CDP hearing request"), on [*insert date*], as evidenced by respondent's date stamp thereon. The envelope transmitting the CDP hearing request was postmarked [*insert date*]. Copies of the CDP hearing request and its transmittal envelope are attached hereto as Exhibits D and E, respectively.

4. Respondent's Office of Appeals conducted an administrative hearing and determined that the proposed collection action was appropriate. A copy of Appeals' written determination, entitled "Notice of Determination," is attached hereto as Exhibit F.

5. On [*insert date*], petitioner filed a Petition for Lien or Levy Action (Collection Action) and attached to the petition the written determination attached hereto as Exhibit G. This so-called Notice of Determination is invalid, however, and does not confer jurisdiction on this Court to consider the petition because petitioner did not timely request a hearing under section 6330.

6. Pursuant to section 6330(a)(3)(B) [6320(a)(3)(B)] and Treas. Reg. § 301.6330-1(b)(1) [Treas. Reg § 301.6320-1(b)(1)], a taxpayer must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the date of the notice [with respect to a CDP notice issued under section 6320 within the 30-day period that commences the day after the end of the five business day period within which the IRS is required to provide the taxpayer with notice of the filing of the NFTL]. The CDP hearing request should be filed with the IRS office at the address indicated on the notice. Treas. Reg. § 301.6330-1(c)(2) Q&A C6 [Treas. Reg. § 301.6320-1(c)(2) Q&A C6]. If the address on the CDP notice is used and the written request is postmarked within the applicable 30-day response period, then, in accordance with section 7502, the request will be considered timely even if it is not

received by the correct IRS office until after the 30-day response period. Treas. Reg. § 301.6330-1(c)(2) Q&A C4 [Treas. Reg. § 301.6320-1(c)(2) Q&A C4].

7. Here, respondent did not receive petitioner's CDP hearing request within the 30-day response period and the hearing request was not timely mailed. As indicated above, the date on the CDP notice was [*insert date*], meaning the last day for filing a timely request under section 6330(a)(3)(B) [6320(a)(3)(B)] was [*insert day and date*]. Respondent received petitioner's CDP hearing request on [*insert date*], and the postmark on the envelope transmitting the CDP notice to respondent was [*insert date*], which was [*insert number of days]* after the [*insert date*] deadline. The attachment to the Notice of Determination correctly recognizes that the hearing request was untimely and that the taxpayer was only entitled to an equivalent hearing.

8. The Tax Court is a court of limited jurisdiction that possesses only such jurisdiction as is expressly conferred upon it by Congress. *See* Freytag v. Commissioner, 501 U.S. 868, 870-71 (1991); Gati v. Commissioner, 113 T.C. 132, 133 (1999). "It is well settled that the [Tax] Court's jurisdiction in a collection review case under section 6330 depends on the issuance of a valid notice of determination and the filing of a timely petition for review." Smith v. Commissioner, 124 T.C. 38, 39 (2005).

9. The Tax Court cannot acquire jurisdiction under section 6330 with respect to a proposed collection action unless and until respondent's Office of Appeals has issued a valid Notice of Determination with respect to such collection action and the taxpayer has filed a timely petition for review of such determination with the Court. Offiler v. Commissioner, 114 T.C. 492, 498 (2000); Kennedy v. Commissioner, 116 T.C. 255, 260-61 (2001), Moorhaus v. Commissioner, 116 T.C. 263, 269 (2001). A valid Notice of Determination is a written determination issued by Appeals pursuant to section 6320(c) and/or 6330(b) and (c). *See* section 6330(d) ("a person may within 30 days of a determination *under this section*, appeal such determination") (emphasis added).

10. A taxpayer who makes an untimely request for a CDP hearing under either section 6320 or section 6330 is entitled neither to a hearing under 6320(c) and/or 6330(b) and (c) nor a determination incident to such a hearing. Treas. Reg. § 6330-1(i)(1) [Treas. Reg. § 6320-1(i)(1)]; Offiler, *supra* at 498; Kennedy, *supra* at 262; Moorhaus, *supra* at 270, n.5. Rather, pursuant to Treas. Reg. § 301.6330-1(i)(1) [Treas. Reg. § 6320-1(i)(1)], the taxpayer is entitled to an equivalent hearing, after which Appeals issues a Decision Letter containing its determination. A Decision Letter is not a "ticket to Tax Court" under section 6330(d), and thus, cannot form the basis for jurisdiction in this proceeding.

11. Where, as here, Appeals erroneously issued a written determination purporting to be a Notice of Determination to a taxpayer who filed an untimely CDP hearing request, such error does not convert the non-statutory equivalent hearing into a CDP hearing under sections 6320(c) and/or 6330(b) and (c) or a written determination issued incident to the equivalent hearing into a valid Notice of Determination under section 6330(c). The Notice of Determination is not a valid notice and this court does not have jurisdiction over this case. Wilson v. Commissioner, 131 T.C. No. 5 (2008).

12. In summary, because petitioner did not make a timely written request for an appeals hearing in accordance with section 6330 [6320], Appeals' written determination was not a valid Notice of Determination within the meaning of section 6330(c). Accordingly, the Tax Court lacks jurisdiction of this case under section 6330(d).

13. Petitioner objects to the granting of this motion.

WHEREFORE, Respondent requests that this motion be granted.

4. Invalid notice of determination (because no CDP lien or levy notice was issued for certain taxes and periods listed in notice of determination, and no notice of deficiency or other determination has been issued for such taxes and periods)

MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO STRIKE AS TO TAXABLE YEAR 1997

RESPONDENT MOVES, pursuant to T.C. Rules 52 and 53, on the grounds that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 sent to petitioner for taxable year 1997 is invalid and cannot confer jurisdiction on this Court under I.R.C. § 6320(c) or 6330(d), nor has respondent made any other determination with respect to taxable year 1997 that would confer jurisdiction on this Court, and that all references to taxable year 1997 be stricken from the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for 19XX through and including 1996, [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable years 19XX through and including 1996], and that petitioner could receive a hearing with respondent's Office of Appeals. A copy of the CDP Notice is attached hereto as Exhibit A.

2. Respondent has diligently searched respondent's records and has found no indication that any Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing [any Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] was sent to petitioner with respect to taxable year 1997. Attached to this motion as Exhibit B is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable year 1997 that is current through [*insert date*].

3. On _____, 200_, petitioner requested a collection due process hearing from respondent for taxable years 19XX through 1997. A copy of the Form 12153 Request for a Collection Due Process or Equivalent Hearing is attached hereto as Exhibit C.

4. On ____, 200_, respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, informing petitioner that he/she was not entitled to the relief requested. A determination with respect to the collection of petitioner's liability for taxable year 1997 was erroneously included in the Notice of Determination. The attachment to the Notice of Determination, however, recognizes that the CDP Notice was only for the tax years 19XX through 1996. A copy of the Notice of Determination is attached hereto as Exhibit D.

5. On _____, 200_, petitioner timely commenced the above-entitled case by filing a petition with the Court pursuant to section 6330(d) [sections 6320(c) and 6330(d)] and T.C. Rule 331(a).

6. Section 6330(c)(2)(A) [sections 6320(c) and 6330(c)(2)(A)] provide(s) that during the collection due process hearing (the "CDP hearing") with Appeals, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy...."

7. Treas. Reg. § 301.6330-1(e)(1) [301.6320-1(e)(1)] provides that the taxpayer may raise any relevant issue relating to the unpaid tax during the CDP hearing process and the taxpayer also may raise "challenges to the existence or amount of the tax liability for <u>any tax period shown on the CDP Notice</u> if the taxpayer did not receive a statutory

notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute that tax liability." (Emphasis added.)

8. Similarly, the legislative history of section 6330 [6320] indicates that Congress intended courts only to review liabilities properly at issue in the CDP hearing. See H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998) (Courts are to review the amount of tax liability on a de novo basis "where the validity of the tax liability was properly at issue in the [collection due process] hearing, and where the determination with regard to the tax liability is part of the [judicial] appeal....").

9. Thus, petitioner was not entitled to make any challenges with respect to taxable year 1997 on his/her Request for a Collection Due Process Hearing or as part of his/her CDP hearing, because that taxable year was not shown on the CDP Notice. The fact that the appeals officer erroneously included taxable year 1997 in the Notice of Determination, and made a determination with respect to this taxable year does not entitle petitioner to judicial review thereof. Cf. Treas. Reg. § 301.6330-1(e)(3) Q&A-E11 [301.6320-1(e)(3) Q&A-E11]; Behling v. Commissioner, 118 T.C. 572 (2002). *See also* Wilson v. Commissioner, 131 T.C. No. 5 (2008) (written determination purporting to be a Notice of Determination that could be petitioned to Tax Court was not subject to judicial review where the attached appeals case memorandum established that the taxpayer had received an equivalent hearing because of untimely hearing request and could not petition the Tax Court).

10. Because it was improper for petitioner to challenge in the CDP hearing the collection of his/her 1997 tax liabilities, this Court does not have jurisdiction over that taxable year in the judicial review of the Notice of Determination.

11. Respondent has diligently searched respondent's records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

12. Petitioner objects to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

5. Late-filed petition

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, 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) [I.R.C. §§ 6320(c) and 6330(d)] or § 7502.

IN SUPPORT THEREOF, respondent states:

1. The Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated ___, 200_, upon which the above-entitled case is based, was sent to petitioner at his/her last known address by certified mail on ___, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877 [IRS certified mail list bearing a USPS date stamp or the initials of a postal employee], 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*], ___, 200_, which date was not a legal holiday in the District of Columbia.

3. The petition was filed with the Tax Court on ___, 200_, which date is [*insert number of days*] days after the mailing of the Notice of Determination.

4. The copy of the petition served upon respondent bears a notation that the petition was mailed to the Tax Court on ___, 200_, which date is [*insert number of days*] days after the mailing of the Notice of Determination.

5. The petition was not filed with the Court within the time prescribed by sections 6330(d) [6320(c) and 6330(d)] or 7502.

6. Petitioner objects to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

E. Motion to Remand

MOTION TO REMAND

RESPONDENT MOVES, that the Court remand this Collection Due Process case to the respondent's Office of Appeals for further consideration. IN SUPPORT THEREOF, respondent states:

Sample Alternative paragraphs:

1. During the Collection Due Process (CDP) hearing, the petitioner requested a face-to-face conference at the Office of Appeals closest to his residence. The appeals [settlement] officer assigned to conduct the hearing instead conducted a telephone conference on _____, 200_. On ____, 200_, Appeals issued to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 upholding the [notice of federal tax lien filing/proposed levy]. The petitioner was not advised that the telephone conference constituted his opportunity to be heard, nor was he advised that his request for a face-to-face conference had been denied. Accordingly, the petitioner is entitled to a new CDP hearing, to be held as a face-to-face conference at the [*insert location*] Office of Appeals.

1. During the Collection Due Process (CDP) hearing, the petitioner submitted an offer-in-compromise. The appeals [settlement] officer assigned to conduct the hearing rejected the offer-in-compromise as she determined that the petitioner was not in compliance with filing of all required tax returns. The appeals [settlement] officer was incorrect, however, as petitioner was actually in full compliance with the filing requirements. Accordingly, this case should be remanded to the [*insert location*] Office of Appeals for a new CDP hearing during which petitioner's offer-in-compromise should be reconsidered.

1. During the Collection Due Process (CDP) hearing, the petitioner asked that the CDP conference be postponed to allow for him to consult with counsel. The appeals [settlement] officer from respondent's Office of Appeals refused to postpone the conference in violation of I.R.C. § 7521(b)(2). Section 7521(b)(2) provides a taxpayer with the right to suspend an interview with an Internal Revenue Service officer or employee for the purpose of consulting with an attorney or other authorized representative. The hearing was thereafter terminated by the appeals officer without any relevant issues having been advanced by the petitioner. Respondent issued the Notice of Determination from which the petitioner appeals without considering arguments which petitioner may have made had he consulted with his attorney.

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2. Where respondent has abused respondent's discretion, this Court may remand the case to the Office of Appeals to hold a new hearing, where a new hearing is necessary and will be productive. Lunsford v. Commissioner, 117 T.C. 183, 189 (2001); Lites v. Commissioner, T.C. Memo. 2005-206.

3. This case should be remanded to the Office of Appeals in order that the hearing prescribed by section 6330 may be conducted with the petitioner and/or a duly authorized representative.

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

WHEREFORE, respondent requests that this motion be granted.

F. Motions for Summary Judgment and Declaration

1. Motion for summary judgment (for issues subject to abuse of discretion review)

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
[AND TO IMPOSE A PENALTY UNDER I.R.C. § 6673]

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor upon all issues presented in this case.

[RESPONDENT FURTHER MOVES that the Court impose a penalty in an appropriate amount, pursuant to I.R.C. § 6673, as petitioner has instituted these proceedings primarily for the purpose of delay and petitioner's position in the present case is frivolous and groundless.]

IN SUPPORT THEREOF, respondent states:

1. The pleadings in this case were closed on ___, 200_. 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. T.C. Rule 121(a).

2. Filed with this motion is a declaration **[the declaration must be accompanied by its own certificate of service, pursuant to T.C. Rule 21(b)]** by _____, the appeals [settlement] officer in respondent's Office of Appeals who conducted petitioner's collection due process ("CDP") hearing, setting out the relevant documents contained in the administrative record from the CDP hearing.

3. Attached to this motion as Exhibit _ is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable year(s) [*insert year(s)*], that is current through [*insert date*].

Sample Alternative Paragraphs:

4. Petitioner filed income tax return(s) for taxable year(s) [*insert year(s*], but failed to pay all of the liability (ies) reported on the return(s). Respondent assessed the tax shown on the returns. Declaration Exhibit **_**.

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4. Petitioner filed income tax return(s) for taxable year(s) [*insert year(s)*]. Respondent conducted an examination of the return(s) for taxable year(s) [*insert year(s)*]. On ___, __, respondent sent a statutory notice of deficiency to petitioner, proposing a tax liability(ies). Declaration Exhibit _. As petitioner did not petition the Tax Court with respect to the proposed assessment(s), on ___, __, respondent assessed the tax liability (ies), along with additions to tax and interest. Declaration Exhibit ___.

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4. Petitioner failed to file his/her income tax return(s) for [*list year(s) involved*]. On ___, __, respondent sent a statutory notice of deficiency to petitioner, proposing a tax liability (ies). Declaration Exhibit **_**. As petitioner did not petition the Tax Court with respect to the proposed assessment(s), on ___, __, respondent assessed the tax liability(ies), along with additions to tax and interest. Declaration Exhibit_.

Continue with following paragraphs:

5. Respondent sent to petitioner a Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable year(s) [*insert year(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable year(s) [*insert year(s)*]], and that petitioner could receive a hearing with respondent's Office of Appeals. Declaration Exhibit ___.

6. On ___, 200_, petitioner submitted a Form 12153, Request for a Collection Due Process or Equivalent Hearing. Declaration Exhibit __.

7. On __, 200_, a face to face [telephone] conference was held between Appeals Officer ___ and petitioner [petitioner's representative]. Declaration Exhibit __.

8. [Prior to/at/after] the conference, the appeals officer provided petitioner [petitioner's representative] with a copy of the [type of transcripts provided] for petitioner's tax liabilities for taxable year(s) [*insert year(s)*]. Declaration Exhibit __.

9. On ___, 200_, Appeals issued to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330. Declaration Exhibit _.

10. On ___, 200_, petitioner filed with this Court a Petition for Lien or Levy Action under Code Section 6230(c) or 6330(d).

11. When the underlying tax liability is properly at issue, the Court decides the issue of liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). The Court reviews the Office of Appeals' administrative determination regarding nonliability issues for an abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000).

Sample paragraphs for where record rule is at issue.

12. The First and Eighth Circuits have held that judicial review of nonliability issues under section 6330(d) is limited to the administrative record. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 301 (2005); Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004). Respondent recognizes that in cases appealable to circuit courts of appeal other than the First and Eighth Circuit Courts of Appeal, the court's rejection of the record rule in Robinette v. Commissioner, 123 T.C. 85 (2004), is controlling. Nonetheless, respondent urges the Court to reconsider its holding in Robinette and adopt the record rule as enunciated by the First and Eighth Circuits in all cases arising under sections 6320 and 6330, including this case. See also Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4, 301.6330-1(f)(2) Q&A F4.

13. Testimony [*evidence*] outside of the administrative record may be admissible if the administrative record does not adequately explain the basis of the agency determination or if there is a dispute over what happened during the administrative hearing. Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006) (new evidence regarding an irregularity in the conduct of a hearing or some defect in the record may be presented at trial, even if the record rule is applicable). See also Robinette v. Commissioner, 439 F.3d 455, 461 (8th Cir. 2006) ("Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings.") (citation omitted). The administrative record in this case, however, not only completely discloses all of the factors that the appeals officer [*settlement officer*] considered in making his/her determination but also confirms that

he/she did not omit any relevant factor required to make such determination, and the petitioner has failed to allege material facts or otherwise make a prima facie showing that any exceptions to the record rule applies.

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Additional Sample Paragraphs:

16. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the validity of the notice of deficiency (Declaration Exhibit __) issued to him/her. Petitioner admits he/she received a notice of deficiency but contends that the notice was invalid because the Secretary did not sign the notice. There is no requirement that the notice of deficiency be signed and it may be issued by delegates of the Secretary. Nestor v. Commissioner, 118 T.C. 162 (2002).

17. In his/her petition, petitioner argues that the appeals officer erred in not providing him/her with documentation that established that the appeals officer verified that the requirements of any applicable law or administrative procedure were met. Section 6330(c)(1) [Sections 6320(c) and 6330(c)(1)] does not require the appeals officer to give petitioner a copy of the verification that the requirements of any applicable law or administrative procedure were met. Nestor v. Commissioner, 118 T.C. 162 (2002). Therefore, petitioner was not entitled to the production of the documents requested, including [*list documents requested*]. [Petitioner was provided with a MFTRA-X transcript of account [Form 4340].]

18. In his/her petition, petitioner argues that the appeals officer did not produce documents which show a valid assessment was made. The appeals officer, however, provided petitioner with a copy of a MFTRA-X transcript of his/her account [Form 4340]. Declaration Exhibit _. This transcript identifies the taxpayer, the character of the liability assessed, the taxable period and the amount of the assessment. Absent a showing of irregularity, transcripts which show this type of information are sufficient to establish that a valid assessment was made. Standifird v. Commissioner, T.C. Memo. 2002-245 (MFTRA-X); Schroeder v. Commissioner, T.C. Memo. 2002-190 (TXMOD-A); Wagner v. Commissioner, T.C. Memo. 2002-180 (IMF MCC - Individual Master File-Martinsburg Computing Center - transcript). [Absent a showing of irregularity, a Form 4340 is sufficient to establish that a valid assessment was made. Nestor v. Commissioner, 118 T.C. 162 (2002).] As petitioner does not allege that there were any irregularities in the assessment procedure, petitioner's argument that there was no valid assessment has no merit.

19. In his/her petition, petitioner claims he/she never received [was never sent] a notice and demand for payment, as required under section 6303. The TXMOD-A transcript of account, however, reviewed by the appeals officer showed that respondent sent to petitioner notice and demand for payment on ___. Declaration Exhibit _. An appeals officer may rely on a computer transcript to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Schaper v. Commissioner, T.C. Memo. 2002-203; Schroeder v. Commissioner, T.C. Memo. 2002-190. [The Form 4340 provided to petitioner by the appeals officer shows that respondent issued to petitioner notice(s) of balance due on ____. This notice of balance due constitutes notice and demand for payment within the meaning of section 6303(a). Thompson v. Commissioner, T.C. Memo. 2004-204; Henderson v. Commissioner, T.C. Memo. 2004-157; Standifird v. Commissioner, T.C. Memo. 2002-245. An appeals officer may rely on a

Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig v. Commissioner, 119 T.C. 252, 262-263 (2002).] Proof that notice and demand was issued is sufficient to satisfy the requirements of section 6303, and there is no requirement that respondent prove receipt of such notice. I.R.C. § 6303(a); Perez v. United States, 2002-1 USTC ¶ 50,259; United States v. Lisle, 92-1 USTC ¶ 50,286 (N.D. Cal.), citing Thomas v. United States, 755 F.2d 728 (9th Cir. 1985). As petitioner has failed to present any evidence that the notice and demand was not issued as reflected on the transcripts of account [Forms 4340], his/her argument has no merit.

20. In his/her petition, petitioner claims that the appeals officer erred in not considering his/her offer of a collection alternative, i.e., his/her offer to pay the tax liability (ies) if the appeals officer showed him/her the law which requires payment of tax. Petitioner's attempt to label this conditional offer as a "collection alternative" has no merit as the offer is based on the assumption that the Internal Revenue Code does not require petitioner to pay taxes. This Court has found this argument to be frivolous. Holliday v. Commissioner, T.C. Memo. 2005-240; Tolotti v. Commissioner, T.C. Memo. 2002-86; Rowlee v. Commissioner, 80 T.C. 1111 (1983).

21. Throughout the administrative and litigation process, the petitioner has advanced contentions and demands previously and consistently rejected by this and other courts. Carrillo v. Commissioner, T.C. Memo. 2005-290; Holliday v. Commissioner, T.C. Memo. 2005-240; Delgado v. Commissioner, T.C. Memo. 2005-186. Courts have acknowledged that there is no need to devote resources to refuting such arguments "… with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Id., citing Crain v. Commissioner, 737 F.2d 1417 (5th Cir. 1984).

22. The appeals officer did not abuse his [her] discretion in rejecting the offer-in-compromise [installment agreement] offered by the taxpayer. Acceptance of a proposed collection alternative is within the discretion of the appeals officer. The appeals officer followed all guidelines in the IRM in evaluating the offer-in-compromise [installment agreement]. Fifty Below Sales & Marketing, Inc. v. United States, 497 F.3d 828 (8th Cir. 2007) (where appeals officer followed all statutory and administrative procedures and gave a reasoned decision in rejecting a proposed installment agreement, the court cannot reverse simply because it might have weighed the equities differently from the appeals officer). [The appeals officer did not abuse her discretion in rejecting petitioner's offer-in-compromise, as petitioner failed to provide the necessary financial information during the CDP hearing. Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005).] [The appeals officer did not abuse her discretion in rejecting petitioner's installment agreement, as petitioner failed to provide the necessary financial information during the CDP hearing. Orum v. Commissioner, 412 F.3d 819, 820 (7th Cir. 2005).] [The appeals officer did not abuse her discretion in rejecting the proposed installment agreement [offer-in-compromise] as, during the CDP hearing, petitioner was not in compliance with the filing requirements for all required tax returns. Rodriguez v. Commissioner, T.C. Memo. 2003-153; McCorkle v. Commissioner, T.C. Memo. 2003-34.] [The appeals officer did not abuse her discretion in rejecting the proposed installment agreement [offer-in-compromise] as, during the CDP hearing, petitioner was not in compliance with the required employment tax deposits. Living Care Alternatives Inc. v. United States, 411 F.3d 621 (6th Cir. 2005).]

23. Pursuant to section 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, attached as Declaration Exhibit _, the appeals officer considered all three of these matters. The appeals officer fully responded to petitioner's challenge(s) to the proposed collection action at the collection due process hearing. Because the appeals officer fully complied with the requirements of section 6330(c)(3), particularly in responding to the issue(s) raised by petitioner, there was no abuse of discretion.

Sample paragraphs for Requesting the Section 6673 penalty.

24. Section 6673(a)(1) authorizes the Tax Court to impose a penalty, not in excess of $25,000, on a taxpayer, if it appears that the taxpayer has instituted or maintained a proceeding primarily for delay, or that the taxpayer's position in the proceeding is frivolous or groundless. I.R.C. § 6673(a). Section 6673(a)(1) applies to collection due process proceedings. Pierson v. Commissioner , 115 T.C. 576 (2000); Hoffman v. Commissioner, T.C. Memo. 2000-198. In collection due process proceedings, this Court has imposed the penalty when petitioner raises frivolous and groundless arguments with respect to the legality of the federal tax laws. Burke v. Commissioner, 124 T.C. 189 (2005); Forrest v. Commissioner, T.C. Memo. 2005-228; Yacksyzn v. Commissioner, T.C. Memo. 2002-99; Watson v. Commissioner, T.C. Memo. 2001-213; Davis v. Commissioner, T.C. Memo. 2001-87.

25. In his/her [request for a hearing/ petition/any other relevant pleadings], petitioner argues [*list arguments*]. These allegations establish that petitioner is using the collection due process proceedings as a vehicle to raise frivolous arguments against the federal income tax system. Petitioner was warned that the Tax Court may impose a penalty for such arguments by the appeals [settlement] officer in a letter sent to petitioner dated ____. Declaration Exhibit ___.

Conclude motion with the following paragraphs.

26. Respondent states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

27. Petitioner objects to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

2. Motion for summary judgment (section 6330(c)(2)(B))

a. Receipt of statutory notice of deficiency

MOTION FOR SUMMARY JUDGMENT

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor, because, pursuant to I.R.C. § 6330(c)(2)(B), petitioner's receipt of the statutory notice of deficiency precludes him/her from challenging the underlying tax liability for taxable year(s) [*insert year(s)*], the only error assigned in the petition.

IN SUPPORT THEREOF, respondent states:

1. The pleadings in this case were closed on ___, 200_. 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. T.C. Rule 121(a).

2. Filed with this motion is a declaration **[the declaration must be accompanied by its own certificate of service, pursuant to T.C. Rule 21(b)]** by _____, the appeals [settlement] officer in respondent's Office of Appeals who conducted petitioner's collection due process ("CDP") hearing, setting out the relevant documents contained in the administrative record from the CDP hearing.

3. Attached to this motion as Exhibit _ is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable year(s) [*insert year(s)*], that is current through [*insert date*].

4. Respondent sent to petitioner a Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable year(s) [*insert year(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable year(s) [*insert year(s)*]], and that petitioner could receive a hearing with respondent's Office of Appeals. Declaration Exhibit B.

5. Petitioner timely filed Form 12153, Request for a Collection Due Process or Equivalent Hearing, on ___, 200_. Declaration Exhibit C.

6. Respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated ___, 200_, with respect to petitioner's income tax liability for tax year(s) [*insert year(s)*]. Declaration Exhibit D.

7. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the existence of the underlying tax liability. Pursuant to section 6330(c)(2)(B), petitioner cannot raise during the CDP hearing the existence or amount of the underlying tax liability if petitioner received a statutory notice of deficiency for that tax liability.

8. Treas. Reg. § 301.6330-1(e)(3) Q&A-E2 [301.6320-1(e)(3) Q&A-E2] provides that receipt of a statutory notice of deficiency for purposes of section 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.

Alternative Paragraphs addressing receipt of the Notice of Deficiency:

9. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert*

year(s)]. A copy of the notice of deficiency for [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit _. Additionally, the examination file contains a letter from petitioner to Deborah Decker, Director of the Ogden Service Center, dated ___, __, acknowledging receipt of the notice of deficiency and raising frivolous objections. Declaration Exhibit _.

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9. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert year(s)*]. A copy of the notice of deficiency for [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit _. Petitioner admitted to Appeals Officer ____, the person in respondent's Office of Appeals who conducted petitioner's CDP hearing, that petitioner received the notice of deficiency. Declaration, ¶ __.

9. Respondent properly mailed the statutory notice of deficiency to the petitioner's last known address on ____,____. A copy of the notice of deficiency for taxable year(s) [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit __. Also attached is United States Postal Service Form 3877 [IRS certified mail list bearing a USPS date stamp or the initials of a postal employee] dated ____,____. Declaration Exhibit __. Respondent is entitled to rely upon presumptions of official regularity and delivery where the record reflects proper mailing of the statutory notice of deficiency. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Bailey v. Commissioner, T.C. Memo. 2005-241. See also Figler v. Commissioner, T.C. Memo. 2005-230; Carey v. Commissioner, T.C. Memo. 2002-209. There is no evidence that the statutory notice of deficiency was returned to the Service, nor has petitioner ever denied its receipt. Thus, the presumptions of official regularity and delivery have not been rebutted. Bailey v. Commissioner, supra. Accordingly, the appeals officer properly determined that the petitioner was precluded from disputing the underlying tax liability under section 6330(c)(2)(B).

****

10. Because respondent mailed the statutory notice of deficiency on ___, __ and petitioner received it on ___, __, 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(ies) to which the statutory notice of deficiency related.

11. Because it was improper for the taxpayer to challenge in the CDP hearing the existence or amount of petitioner's liability (ies) with respect to taxable year(s) [*insert year(s)*], the validity of petitioner's underlying tax liability is not properly at issue before this Court. Sego v. Commissioner, 114 T.C. 604 (2000).

12. The petition raises no issues other than challenges to petitioner's tax liability. Pursuant to T.C. Rule 331(b)(4), all other issues are deemed conceded. Lunsford v. Commissioner, 117 T.C. 183 (2001).

13. Respondent states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

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

WHEREFORE, it is prayed that this motion be granted.

b. Other “opportunity to dispute” liability: trust fund recovery penalty

MOTION FOR SUMMARY JUDGMENT

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor, because, pursuant to I.R.C. § 6330(c)(2)(B), petitioner’s prior opportunity to dispute the underlying liability precludes him/her from challenging the underlying tax liability for the trust fund recovery penalty under I.R.C. § 6672 for the taxable period(s) [*insert period(s)*], the only error assigned in the petition.

IN SUPPORT THEREOF, respondent states:

1. The pleadings in this case were closed on ___, 200_. 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. T.C. Rule 121(a).

2. Filed with this motion is a declaration **[the declaration must be accompanied by its own certificate of service, pursuant to T.C. Rule 21(b)]** by _____, the appeals [settlement] officer in respondent’s Office of Appeals who conducted petitioner’s collection due process (“CDP”) hearing, setting out the relevant documents contained in the administrative record from the CDP hearing.

3. Attached to this motion as Exhibit _ is a Form 4340, Certificate of Assessments, Payments, and Other Specified Matters for taxable period(s) [*insert period(s)*], that is current through [*insert date*].

4. Respondent sent to petitioner a Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the “CDP Notice”), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable period(s) [*insert period(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable period(s) [*insert period(s)*]], and that petitioner could receive a hearing with respondent’s Office of Appeals. Declaration Exhibit B.

5. Petitioner timely filed Form 12153, Request for a Collection Due Process or Equivalent Hearing, on ___, 200_. Declaration Exhibit C.

6. Respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated ___, 200_, with respect to petitioner’s trust fund recovery penalty tax liability for the tax period(s) [*insert period(s)*]. Declaration Exhibit D.

7. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the existence of the underlying tax liability. Pursuant to section 6330(c)(2)(B), petitioner cannot raise during the CDP hearing the existence or amount of the underlying tax liability if petitioner otherwise had an opportunity to dispute such tax liability.

8. Treas. Reg. § 301.6330-1(e)(3) Q&A-E2 [301.6320-1(e)(3) Q&A-E2] provides that an opportunity to dispute the underlying liability for purposes of section 6330(c)(2)(B) includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability.

Alternative paragraphs on receipt of Letter 1153:

9. Petitioner received a notice of a proposed trust fund recovery penalty

assessment (Letter 1153(DO)) for taxable period(s) [*insert period(s)*] which provided a pre-assessment opportunity for a conference with Appeals. A copy of the Letter 1153(DO) for [*insert period(s)*] sent to petitioner is attached hereto as Declaration Exhibit _. Additionally, the file contains a letter from petitioner to Appeals dated _____, ___, acknowledging receipt of the Letter 1153(DO) and raising objections to the proposed assessment. Declaration Exhibit _.

9. Petitioner received a notice of a proposed trust fund recovery penalty assessment (Letter 1153(DO)) for taxable period(s) [*insert period(s)*] which provided a pre-assessment opportunity for a conference with Appeals. A copy of the Letter 1153(DO) for [*insert period(s)*] sent to petitioner is attached hereto as Declaration Exhibit _. Petitioner admitted to Appeals Officer ____, the person in respondent's Office of Appeals who conducted petitioner's CDP hearing, that petitioner received the Letter 1153(DO). Declaration, ¶ __.

9. Respondent sent petitioner by certified mail a notice of a proposed trust fund recovery penalty assessment (Letter 1153(DO)) for taxable period(s) [*insert period(s)*] which provided a pre-assessment opportunity for a conference with Appeals. A copy of the Letter 1153(DO) for [*insert period(s)*] sent to petitioner is attached hereto as Declaration Exhibit _. Also attached is United States Postal Service Form 3877 [IRS certified mail list bearing a USPS date stamp or the initials of a postal employee] dated [*insert date*]. Declaration Exhibit_. Respondent is entitled to rely upon presumptions of official regularity and delivery where the record reflects proper mailing of the Letter 1153(DO). *Cf*. Sego v. Commissioner, 114 T.C. 604, 610 (2000) (respondent entitled to rely upon presumptions of official regularity and deliver to establish receipt of statutory notice of deficiency); Bailey v. Commissioner, T.C. Memo. 2005-241 (same). There is no evidence that the Letter 1153(DO) was returned to the Service, nor has petitioner ever denied its receipt. Thus the presumptions of official regularity and delivery have not been rebutted. Bailey v. Commissioner, supra. Accordingly, the appeals officer properly determined that the petitioner received the Letter 1153(DO).

Alternative paragraphs on opportunity to dispute:

10. Because the petitioner actually participated in a hearing with Appeals, he had a prior opportunity to challenge the underlying tax liabilities included on the Letter 1153(DO). Thus, during the subsequent CDP hearing with Appeals, it was improper for petitioner to challenge the underlying tax liability(ies) to which the Letter 1153(DO) related. Jackling v. IRS, 352 F. Supp. 2d 129, 132 (D.N.H. 2004); Pelliccio v. United States, 253 F. Supp. 2d 258, 261-62 (D. Conn. 2003); Dami v. IRS, 2002-1 USTC ¶ 50,433 (W.D. Pa.); Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000). *See* Lewis v. Commissioner, 128 T.C. 48 (2007) (prior opportunity to dispute the underlying tax liability for purposes of section 6330(c)(2)(B) includes an actual hearing with Appeals, even where a taxpayer has no right of judicial review of the Appeals determination).

10. Because the petitioner received the Letter 1153(DO), he had a prior opportunity to challenge the underlying tax liabilities included on the Letter 1153(DO) in a conference with Appeals, even though he did not actually participate in a hearing with Appeals. Thus, during the subsequent CDP hearing with Appeals, petitioner was precluded from

challenging the underlying tax liability(ies) to which the Letter 1153(DO) related. Jackling v. IRS, 352 F. Supp. 2d 129, 132 (D.N.H. 2004); Pelliccio v. United States, 253 F. Supp. 2d 258, 261-62 (D. Conn. 2003); Dami v. IRS, 2002-1 USTC ¶ 50,433 (W.D. Pa.); Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000); *cf.* Planes v. United States, 98 A.F.T.R. 2d 2006-7044 (M.D. Fla. 2006) (settlement officer properly allowed taxpayer to challenge trust fund recovery penalty when he did not receive notice of proposed assessment).

****

11. Because it was improper for the taxpayer to challenge in the CDP hearing the existence or amount of petitioner's liability (ies) with respect to taxable period(s) [*insert period(s)*], the validity of petitioner's underlying tax liability is not properly at issue before this Court. Sego v. Commissioner, 114 T.C. 604 (2000).

12. The petition raises no issues other than challenges to petitioner's tax liability. Pursuant to T.C. Rule 331(b)(4), all other issues are deemed conceded. Lunsford v. Commissioner, 117 T.C. 183 (2001).

13. Respondent states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

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

WHEREFORE, it is prayed that this motion be granted.

3. Declaration

DECLARATION OF [NAME OF APPEALS OFFICER]

I, [name of appeals officer], declare:

1. I am an appeals officer employed in the [name of specific Appeals office], Office of Appeals, Internal Revenue Service, Department of the Treasury, who was assigned to petitioner's appeal under I.R.C. § 6330 of the Service's proposed collection action with respect to petitioner's unpaid liabilities for taxable year(s) [*insert year(s)*].

2. Pursuant to this assignment, I made the determination under section 6330(c)(3) to permit the collection action to proceed. The reasons for, and the facts underlying, my determination are found in the Notice of Determination, dated _____, 200_, a true and correct copy of which is attached hereto as **Exhibit A**, and in the Appeals Transmittal Memorandum and Case Memo, a true and correct copy of which is attached hereto as **Exhibit B** [*attach only if applicable*].

3. My determination was made after a face-to-face conference [telephone conference] with petitioner on _____, 200_, and after reviewing the following documents, true and correct copies of which are marked as exhibits, and attached to this declaration:

Exhibit C: Letter 1058 [LT-11], Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing [Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320], dated ___, 200_, issued to petitioner for collection of his/her unpaid tax liabilities for taxable year(s) [*insert year(s)*].

Exhibit D: Form 12153, Request for a Collection Due Process or Equivalent Hearing, filed by petitioner and received by respondent on _____, 200_.

Exhibit E: Letter, dated _____, 200_, to petitioner scheduling a face-to-face [telephone] conference.

Exhibit F: TXMOD-A transcript, dated ____, 200_.

Exhibit G: [*continue attaching as exhibits all documents used by appeals officer in making his or her determination*].

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____

[Name of appeals officer]

G. Motion to Permit Levy

RESPONDENT'S MOTION TO PERMIT LEVY

THE RESPONDENT MOVES, pursuant to Tax Court Rule 50(a) and I.R.C. § 6330(e)(2), that the Court remove the suspension of the levy under I.R.C. § 6330(e)(1) as the underlying tax liability is not at issue and respondent has shown good cause for the removal of the suspension of the levy.

IN SUPPORT THEREOF, respondent states:

1. Respondent filed a Motion for Summary Judgment and to Impose a Penalty under I.R.C. Section 6673 on or about [*insert date*]. Petitioner was ordered to respond to the motion on or before [*insert date*]. On or about [*insert date*], petitioner filed a declaration with the Court. The motion for summary judgment was calendared for hearing at the [*insert City, State*] trial session of the Court commencing on [*insert date*]. A hearing was held before Judge [*insert name*] on [*insert date*], and the case was taken under advisement for opinion on the motion for summary judgment and damages.

2. Section 6330(e)(1) provides, in pertinent part, that, except as provided in paragraph (2), if a hearing is requested under section 6330(a)(3)(B), the levy actions which are the subject of the requested hearing "shall be suspended for the period during which such hearing, and appeals therein, are pending." Paragraph 2 of section 6330(e) provides that: "Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has good cause not to suspend the levy."

3. In the present case, the underlying tax liabilities for [*insert years*] are not at issue. Petitioner failed to file a valid tax return for [*insert years*] reporting his income. Petitioner received the Statutory Notice of Deficiency for [*insert years*] and petitioned the Tax Court. This case was dismissed for lack of prosecution in [*insert year*] in favor of respondent after petitioner raised frivolous arguments that labor/income is not taxable at [*insert case citation*].

4. In the present levy review (CDP or collection due process) case, petitioner has made only frivolous assertions challenging the validity of the assessments. The assessments with respect to the taxable years in this case were valid. Copies of the Forms 4340 were reviewed and provided to petitioner reflecting that assessments were properly made and notices and demands for payment were mailed to petitioner for each of the taxable years at issue.

5. Respondent submits that "good cause" clearly exists to remove the suspension upon levy in this case, in accordance with section 6330(e)(2). *See* Burke v. Commissioner, 124 T.C. 189 (2005); Howard v. Commissioner, T.C. Memo. 2005-100; *Cf.* Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash.) (court found "good cause" where taxpayer corporation repeatedly failed to pay employment taxes on time). The purpose of the collection due process statutes, sections 6320 and 6330, is to provide taxpayers with a forum to raise relevant issues with respect to a proposed levy or notice of federal tax lien. I.R.C. § 6330(c)(2)(A); Internal Revenue Service Restructuring and Reform Act of 1998, H.R. Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998). Petitioner is not using the collection due process statutes for this purpose. Rather, petitioner is using the collection due process statutes solely as a mechanism to delay collection. As noted *supra*, petitioner has continued to waste judicial resources, after numerous warnings, by continuing to pursue frivolous arguments which have been

rejected numerous times by this and other courts. Without relief from the stay upon collection in section 6330(e)(1), this subversion of the collection due process statutes will continue until all final judicial appeals have been exhausted.

6. In sum, all of the aforementioned facts establish good cause for the Court to issue an Order permitting levy under section 6330(e)(2). We request this motion be handled expeditiously, to minimize any further unnecessary delays in collection.

7. Respondent objects to this motion.

H. Stipulation of Facts Attaching Administrative Record

STIPULATION OF FACTS

In accordance with Tax Court Rule 91(e), the parties agree to this Stipulation of Facts pursuant to the general terms of this preamble, unless specifically expressed otherwise. All stipulated facts shall be conclusive. All stipulated exhibits shall be considered authentic. All copies shall be considered electronic reproductions of the originals and shall be treated as if originals. Any relevance or materiality objection may be made with respect to all or any part of this stipulation at the time of submission, but all other evidentiary objections are waived unless specifically expressed within this stipulation.

1. At the time of the filing of the Tax Court petition, the petitioner was a resident of [*insert city and state*].

2. From [*insert date*] through [*insert date*], the petitioner resided at [*insert address*].

3. On [*insert date*], a Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320 [*Letter 1058 or LT 11*], was sent to the petitioner for his [*insert date and type of tax liability*]. Attached and marked as Exhibit 1-J is a true and correct copy of the Letter 3172 [*Letter 1058 or LT11*].

4. On [*insert date*], respondent received a Form 12153, Request for a Collection Due Process or Equivalent Hearing, filed by the petitioner. Attached and marked as Exhibit 2-J is a true and correct copy of the Form 12153.

5. Attached and marked as Exhibit 3-J is an IMFOLT transcript [*Form 4340, TXMOD-A, MFTRA*-X] for petitioner's income tax liability for tax year [*insert year*] dated [*insert date*].

6. On [*insert date*], Appeals Officer [*insert name*] mailed a letter to the petitioner scheduling a hearing for [*insert date*]. Attached and marked as Exhibit 4-J is a true and correct copy of the [*insert date*] letter.

7. Attached and marked as Exhibit 5-J is a true and correct copy of a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, signed by the petitioner and dated [*insert date*].

8. On [*insert date*], the petitioner filed a Form 1040 Individual Income Tax Return, for the taxable year [*insert year*]. Attached and marked as Exhibit 6-J is a true and correct copy of the petitioner's Form 1040 for the taxable year [*insert year*].

9. On [*insert date*], a statutory notice of deficiency was sent to the petitioner for his taxable year [*insert year*]. Attached and marked as Exhibit 7-J is a true and correct copy of the statutory notice of deficiency sent to the petitioner for his taxable year [*insert year*]. Attached and marked as Exhibit 8-J is a true and correct copy of the certified mail list for the [*insert date*] statutory notice of deficiency.

10. On [*insert date*], a conference was held between the petitioner and Appeals Officer [*insert name*].

11. Attached and marked as Exhibit 9-J is a true and correct copy of the Appeals Case Activity Record dated [*insert dates*].

12. Attached and marked as Exhibit 10-J is a true and correct copy of the Appeals Transmittal and Case Memo dated [*insert date*].

13. On [*insert date*], a Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 and Attachment 3193 was sent to the petitioner. Attached and marked as Exhibit 11-J is a true and correct copy of the Notice of Determination.

14. Exhibits 1-J through 11-J constitute the administrative record in the above captioned case.

15. Attached and marked as Exhibit 12-J is a true and correct copy of a letter dated [*insert date*], mailed to petitioner from his personal physician, [*insert name*], discussing petitioner's present medical condition.

_____ _____

Counsel for Petitioner Counsel for Respondent

I. Motion in Limine

RESPONDENT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE NOT CONTAINED IN THE ADMINISTRATIVE RECORD

PURSUANT TO Tax Court Rules 50(a) and 143(a), respondent hereby moves that the Court not permit the admission of petitioner's exhibits [*list exhibits*] **OR** the testimony of [*name of person*] on the grounds that said exhibits **OR** [*name of person*']s testimony constitute(s) evidence outside of the administrative record and are not relevant as to whether the appeals officer abused his/her discretion.

IN SUPPORT THEREOF, respondent states:

1. On [*insert date*], respondent issued petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (hereinafter, "Notice of Determination"), which sustained the filing of a Notice of Federal Tax Lien [proposed levy] for petitioner's income tax liabilities for the years [*insert years*]. Petitioner timely filed a petition with the Tax Court on [*insert date*], contesting the Notice of Determination.

2. In his petition, petitioner does not challenge the underlying tax liabilities. Therefore, the Court reviews the Notice of Determination for an abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000).

3. The First and Eighth Circuits have held that Tax Court review of nonliability issues arising under sections 6320 and 6330 is limited to the administrative record. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 301 (2005); Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004). Respondent urges the Court to reconsider its holding in Robinette and adopt the record rule as enunciated by the First and Eighth Circuits in all collection due process cases in this Court, including this case.

4. The administrative record consists of the information that the agency reviewed in making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). In cases arising under section 6330 of the Internal Revenue Code, the administrative record consists of all of the information the appeals officer reviewed in making his/her determination. Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4; 301.6330-1(f)(2) Q&A F4. Attached as Exhibit __ to this motion is a declaration from the appeals officer attaching the complete administrative record in this case.

5. In this case, in petitioner's proposed Stipulation of Facts **OR** in the Stipulation of Facts, petitioner includes the following as exhibits:

[*list exhibits*]

None of these exhibits were presented to or considered by the appeals officer in this case.

OR

5. In this case, in his Trial Memorandum, petitioner lists [*name of person*] as a witness that petitioner expects to call at the trial in this case. Respondent anticipates that [*name of person*] will testify as to events and circumstances that occurred subsequent to the appeals officer's determination to proceed with collection in this case, or to facts and matters that were not considered by the appeals officer.

6. As petitioner's exhibits are not part of the administrative record, they should not

be admitted. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 301 (2005); Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004).

OR

6. As the testimony petitioner seeks to introduce from [*name of person*] constitutes evidence outside of the administrative record, it should not be admitted. Murphy v. Commissioner, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 301 (2005); Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004).

7. Testimony [*evidence*] outside of the administrative record may be admissible if the administrative record does not adequately explain the basis of the agency determination or if there is a dispute over what happened during the hearing process. Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006) (new evidence regarding an irregularity in the conduct of a hearing or some defect in the record may be presented at trial, even if the record rule is applicable); Robinette v. Commissioner, 439 F.3d 455, 461 (8th Cir. 2006) ("Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings.") (citation omitted). The administrative record in this case, however, not only completely discloses all of the factors that the appeals officer [*settlement officer*] considered in making his/her determination but also confirms that he/she did not omit any relevant factor required to make such determination, and the petitioner has failed to allege material facts or otherwise make a prima facie showing that any exceptions to the record rule applies.

8 The evidence offered by petitioner should also be excluded because it is not admissible under the Federal Rules of Evidence. In particular, the evidence is not relevant as required by Federal Rule of Evidence 401, as it does not have a tendency to make the existence of any fact that is of consequence in determining whether the appeals [settlement] officer abused his or her discretion more probable or less probable than it would be without the evidence. [Evidence that the petitioner had an opportunity to present but failed to produce at the CDP hearing is not relevant to the question of whether the appeals [settlement] officer abused her discretion.] *See* Murphy v. Commissioner, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006).

WHEREFORE, respondent requests that this motion be granted.

J. Stipulated Decision Documents

1. Notice of determination addresses only tax liability or collection issues (CDP issues)

a. Notice of Determination not sustained
- underlying tax liability or unpaid tax to be abated

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 under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are not sustained.

Judge.

Entered:

* * * * *

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

Insert the following paragraphs as applicable:

It is further stipulated that respondent will abate the [*insert type of tax*] tax liability for taxable year [*insert year*] on the basis that [*e.g., the assessment was not made within the applicable statute of limitations; the statutory notice of deficiency was not sent to petitioner's last known address and petitioner did not receive it in time to file a Tax Court petition.*]

It is further stipulated that respondent will abate the balance of petitioner's outstanding [*insert type of tax*] tax liability for taxable year [*insert year*] on the basis that [*e.g., the statute of limitations for collection has expired; the tax liability was discharged in bankruptcy.*]

It is further stipulated that respondent will take no further collection action with respect to the [*insert type of tax*] tax liability for taxable year [*insert year*].

If the statute of limitations for assessment has not expired include the following paragraph:

It is further stipulated that the above-referenced tax liability will be abated without prejudice to respondent's right to reassess the tax liability for taxable year [*insert year*]

pursuant to the deficiency procedures prescribed in the Internal Revenue Code, to the extent permitted by law.

b. Notice of Determination sustained in full
- underlying tax liability not at issue
- no abuse of discretion

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 under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are sustained in full.

Judge.

Entered:

* *** *

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

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the [*insert type of tax*] tax liability (plus statutory interest) until the decision of the Tax Court becomes final.

If Supplemental Notice is issued after remand:

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 under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, as supplemented by the Notice of Determination issued on *[insert date of supplemental notice*], are sustained in full.

c. Notice of Determination sustained in full
- no abuse of discretion
- tax liability not at issue
- IRS agrees to collection alternative outside CDP
(e.g., OIC, installment agreement)

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 under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*)], and upon which this case is based, are sustained in full.

Judge.

Entered:

* * * * *

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

It is further stipulated that the collection of petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] shall be closed as currently uncollectible for reason of economic hardship as provided under the conditions specified on Form 53, Report of Currently Not Collectible Taxes.

OR

It is further stipulated that collection of petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] shall be made in accordance with the terms of the [*insert date of installment agreement*] Installment Agreement entered into between the parties pursuant to the provisions of I.R.C. § 6159.

OR

It is further stipulated that collection of petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] shall be made in accordance with the terms of the [*insert date of offer-in-compromise*] Offer in Compromise entered into between the parties pursuant to the provisions of I.R.C. § 7122.

d. Underlying tax liability properly at issue, no abuse of discretion

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 under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year

[*insert year*], and upon which this case is based, are sustained [*insert "in full" if the underlying tax liability is not adjusted; insert "except as provided herein" if the underlying tax liability is adjusted*].

That the tax imposed on petitioner by the Internal Revenue Code for taxable year [*insert year*] is as follows :

Year	**[*Insert type* of tax] Tax**	**Addition to tax I.R.C. §**	**Addition to tax I.R.C. §**
-------	**$xxxx.xx**	**$xxxx.xx**	**$xxxx.xx**

Judge.

Entered:

* * * * *

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

It is further stipulated that interest is not included in the above-referenced tax liability, and that interest will be assessed as provided by law on the tax liability.

It is further stipulated that fees and collection costs related to the above referenced tax liability, and interest thereon, are not included in the tax liability and shall remain due and owing.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the tax liability (plus statutory interest) until the decision of the Tax Court becomes final.

Insert if applicable:

It is further stipulated that unassessed additions to tax under I.R.C. § [*insert applicable code section*] will be assessed as provided by law on the above-referenced tax liability.

Insert any of the following paragraphs as appropriate:

It is further stipulated that the above-referenced tax liability does not include a payment in the amount of [*insert amount*] that was made on [*insert date of payment*] and applied to petitioner's tax liability for taxable year [*insert year*].
It is further stipulated that the above-referenced tax liability does not include petitioner's withholding credits in the amount of [*insert amount*] for taxable year [*insert year*].

It is further stipulated that the above-referenced tax liability does not include an

advance payment of estimated tax in the amount of [*insert amount*] made by petitioner on [*insert day of payment*] for taxable year [*insert year*].
It is further stipulated that petitioner is entitled to an overpayment credit in the amount of [*insert amount*] from his [*insert year*] tax year which will be applied to petitioner's tax liability for taxable year [*insert year*].
It is further stipulated that there are no overpayments due to petitioner for taxable year [*insert year*].

It is further stipulated that the amount of petitioner's unpaid [*insert type of tax*] tax liability for taxable year [*insert year*] is [*insert amount*].

e. Underlying tax liability not at issue but adjusted, no abuse of discretion

DECISION

Pursuant to 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(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based are sustained, except as provided herein.

Judge.

Entered:

* * * * *

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

It is further stipulated that the tax imposed on petitioner by the Internal Revenue Code for taxable year [*insert year*] is as follows:

Year	**[*Insert type* of tax] Tax**	**Addition to tax I.R.C. §**	**Addition to tax I.R.C. §**
-------	**$xxxx.xx**	**$xxxx.xx**	**$xxxx.xx**

It is further stipulated that interest is not included in the above-referenced tax liability, and that interest will be assessed as provided by law on the tax liability.

It is further stipulated that fees and collection costs related to the above referenced tax liability, and interest thereon, are not included in the tax liability and shall

remain due and owing.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the tax liability (plus statutory interest) until the decision of the Tax Court becomes final.

Insert if applicable:

It is further stipulated that unassessed additions to tax under I.R.C. § [*insert applicable code section*] will be assessed as provided by law on the above-referenced tax liability.

Insert any of the following paragraphs as appropriate:

It is further stipulated that the above-referenced tax liability does not include a payment in the amount of [*insert amount*] that was made on [*insert date of payment*] and applied to petitioner's tax liability for taxable year [*insert year*].

It is further stipulated that the above-referenced tax liability does not include petitioner's withholding credits in the amount of [*insert amount*] for taxable year [*insert year*].

It is further stipulated that the above-referenced tax liability does not include an advance payment of estimated tax in the amount of [*insert amount*] made by petitioner on [*insert day of payment*] for taxable year [*insert year*].

It is further stipulated that petitioner is entitled to an overpayment credit in the amount of [*insert amount*] from his [*insert year*] tax year which will be applied to petitioner's tax liability for taxable year [*insert year*].

It is further stipulated that there are no overpayments due to petitioner for taxable year [*insert year*].

It is further stipulated that the amount of petitioner's unpaid [*insert type of tax*] tax for taxable year [*insert year*] is [*insert amount*].

2. Notice of Determination addresses CDP issues and interest abatement

a. No abuse of discretion in denial of abatement of interest

DECISION

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

ORDERED AND DECIDED:

[*Insert all appropriate paragraphs that are above the Court's signature in sample decisions I.1.a.-e. for the CDP issues*.]

That petitioner is not entitled to abatement of interest under I.R.C. ' 6404 with respect to taxable year [*insert year*].

Judge.

Entered:

* * * * *

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

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

b. Concession of abatement of interest

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(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of Notice of Determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are sustained except as provided herein.

[*Insert all appropriate paragraphs that are above the Court's signature in sample decisions I.1.a.-e. for the CDP issues*];

That interest assessed on petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] will be abated under I.R.C. ' 6404 for the period beginning [*insert date*], and ending [*insert date*].

OR

That interest will not be assessed on petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] for the period beginning [*insert date*], and ending [*insert date*].

Judge.

Entered:

* * * * *

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

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

3. Notice of Determination addresses CDP issues and innocent spouse relief

a. Innocent spouse relief denied

DECISION

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

ORDERED AND DECIDED:

[*Insert all appropriate paragraphs that are above the Court's signature in sample decisions I.1.a.-e. for the CDP issues.]*;

That petitioner is not entitled to relief under I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*] with respect to petitioner's joint and several income tax liability for taxable year [*insert year*].

Judge.

Entered:

* * * * *

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

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

b. Innocent spouse relief granted

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(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*] for petitioner's joint and several income tax liability for taxable year [*insert year*], and upon which this case is based, are not sustained;

That there is no income tax due from petitioner for taxable year [*insert year*], after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*];

That there are no additions to tax due from petitioner under the provisions of I.R.C. § [*insert applicable code section*] for taxable year [*insert year*] after application of I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*];

Insert as applicable:

That there is no overpayment in income tax due to petitioner for taxable year [*insert year*].

OR

That there is an overpayment in income tax for taxable year [*insert year*] in the amount of [*insert amount*], which was paid on [*insert date of payment*] and for which amount a Form 8857 (which was treated as a claim for refund) was filed on [*insert appropriate date*], which was within the period provided by I.R.C. ' 6511(b)(2).] [NOTE: If there is an overpayment, also add a stipulation providing the calculation of the overpayment.]

Judge.

Entered:

* * * * *

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

It is further stipulated that respondent will take no further collection action with respect to the income tax liability that was assessed against petitioner on [*insert date of assessment*] for taxable year [*insert year*].

c. Partial innocent spouse relief granted

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(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*] for petitioner's joint and several income tax liability for taxable year [*insert year*], upon which this case is based are sustained, except as provided herein.

That the amount of petitioner's liability for income tax and additions to tax for taxable year [*insert year*] after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*] is as follows :

		Addition to Tax
Year	**Income Tax**	**I.R.C. § xxxx**

That there are no overpayments in income tax due to petitioner for taxable year [*insert year*].

Judge.

Entered:

* * * * *

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

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

d. Innocent spouse relief granted, in whole or in part, for some years, but denied for other years

DECISION

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

ORDERED AND DECIDED:

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

That there is a liability in income tax and penalties due from the petitioner, before application of I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*], as follows:

Year	Income Tax	Penalty I.R.C. § xxxx

That the following liability in income tax and penalties are due from petitioner, after application of I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*]:

Year	Income Tax	Penalty I.R.C. § xxxx

That there are no overpayments in income tax due to petitioner for the taxable years [*insert years*].

Judge.

Entered:

* * * * *

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

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]