IRB No.: 2009-22
June 1, 2009

ACTION ON DECISION

Subject: Cox v. Commissioner, 514 F.3d 1119 (10th Cir. 2008), rev'g 126 T.C. 367 (2006).

Issue: Whether indirect consideration of a tax liability in conjunction with evaluating collection alternatives raised in a collection due process hearing for an earlier tax year disqualifies an appeals officer under section 6330(b)(3) from conducting a subsequent CDP hearing focusing on that liability?

Discussion: After receiving a notice of intent to levy and right to hearing with respect to their unpaid 2000 income tax liability, the taxpayers requested a CDP hearing. The appeals officer considered the taxpayers' failure to pay their 2001 and 2002 tax liabilities in determining that collection for 2000 should proceed. Because the taxpayers failed to pay their 2001 and 2002 taxes, the Service later issued a separate notice of intent to levy and right to hearing for those tax years. The taxpayers again requested a CDP hearing and the case was assigned to the same appeals officer who handled the earlier hearing. The taxpayers objected to the involvement of the same appeals officer, but, in reliance on the 2002 version of Treas. Reg. § 301.6330-1(d)(2), the appeals officer concluded that his prior involvement did not preclude the handling of the CDP hearing before him. The appeals officer then determined it was appropriate to levy for tax years 2001 and 2002, and the Tax Court sustained this determination.

On appeal to the Tenth Circuit, the taxpayers challenged the impartiality of the appeals officer, arguing that section 6330(b)(3) disqualified him from conducting their hearing for tax years 2001 and 2002. The Tenth Circuit agreed, holding that the hearing for tax year 2000 addressed the 2001 and 2002 tax years and so constituted prohibited "prior involvement" under section 6330(b)(3). Because it found the text of the statute to be a clear expression of the intent of Congress, the appellate court stated that its holding would, by implication, invalidate the 2006 version of the agency's regulation, which expressly excludes prior CDP hearings from the definition of "prior involvement." The Government filed a petition for panel rehearing urging the court to defer to the 2002 regulations and retract its statement in dicta invalidating the 2006 regulations. The petition was denied without comment.

The appellate court incorrectly concluded that the term "involvement" has a plain meaning. That term is not defined in the statute or in legislative history and is an inherently ambiguous term. In failing to give proper deference to the agency's construction of "involvement" in the 2002 regulations, the appellate court consequently erred.

An appeals officer is not legally precluded under the "no prior involvement" language found in section 6330(b)(3) from conducting a taxpayer's CDP hearing for a given tax year because he considered the taxpayer's compliance history when evaluating the taxpayer's eligibility for collection alternatives during a prior CDP hearing. Consistent with the construction of "prior involvement" reflected in the regulation, no disqualifying involvement arises when the same appeals officer holds consecutive CDP hearings for the same taxpayer who has accrued new, unpaid tax liabilities. Prior involvement refers, instead, to an appeals officer having considered the tax year at issue in a prior non-CDP context, such as when the appeals officer worked on the collection of the tax as a revenue officer.

Although we disagree with the opinion, we recognize the precedential effect of the decision on cases appealable to the Tenth Circuit, and therefore will adhere to it in cases within that circuit that cannot be meaningfully distinguished. We do not, however, acquiesce in the opinion and will continue to litigate our position in all other circuits.

Recommendation: Nonacquiescence

/s/
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Reviewers:

MSH
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