

Collection Due Process Deskbook

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Chapter One – Introduction

A. Purpose

This deskbook provides a summary of Collection Due Process (CDP) law current through July 31, 2014, as a research tool for Chief Counsel. This deskbook focuses on the case law interpreting sections 6320 and 6330. It includes the positions of Chief Counsel that are set forth in Actions on Decision and Chief Counsel Notices.

This deskbook is not binding legal authority and should not be used or cited as precedent. It is not a statement of the position of the Office of Chief Counsel on the statutes, regulations and cases cited therein. Procedural guidance for CDP cases can be found in Part 35 of the CCDM and in the Chief Counsel Notices accessible through the website of the Office of Chief Counsel. This deskbook does not provide all relevant case citations for any particular point of law but is intended to be a starting point for research. The attorneys in Branches 3 and 4 of Procedure and Administration are available to assist you when questions arise in particular cases.

B. Statutory Provisions

Sections 6320 and 6330 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. The Congressional report explaining the final version of sections 6320 and 6330 is H.R. REP. No. 105-599, at 263-267 (1998) (Conf. Rep.).

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.

On May 25, 2007, Congress passed the Small Business and Work Opportunity Act of 2007, Pub. L. 110-28, Title VIII, 121 Stat. 200 (2007). 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.

On September 27, 2010, the Small Business Jobs Act of 2010 was enacted. Section 2104 of the Act amends section 6330(f) to provide that the Service may levy on a

Federal contractor without providing pre-levy CDP rights. The Federal contractor will instead receive a post-levy CDP hearing. This applies to levies issued after the date of enactment.

C. Regulatory Provisions

Final regulations became effective January 18, 2002, and apply to notices of lien and levies issued on or after January 19, 1999. The Treasury Regulations implementing sections 6320 and 6330 are at Treas. Reg. §§ 301.6320-1 and 301.6330-1 (previously issued by Treasury Decisions 8979 and 8980, respectively, on January 17, 2002). The regulations are written primarily in a question and answer format. 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. See Treasury Decisions 9290 and 9291, published at 71 F.R. 60835 (Oct. 17, 2006) and 71 F.R. 60827 (Oct. 17, 2006).

The current regulations do not reflect the 2006, 2007 and 2010 amendments to sections 6320 and 6330.

D. Tax Court Rules

Rules 330 through 334 of Title XXXII of the Tax Court Rules of Practice and Procedure, apply to petitions brought under sections 6320 and 6330.

E. Manual Provisions

The Internal Revenue Manual (IRM) provisions addressing sections 6320 and 6330 are at IRM sections 5.1.9 (Collection Appeal Rights), 5.19.8 (same), and 8.22 (Collection Due Process).

The Chief Counsel Directives Manual (CCDM) provisions addressing the litigation of CDP cases are at:

- Issues requiring P&A review: **Exhs. 31.1.1-1 and 35.11.1-1** (identical)
- Small tax case procedures: **35.1.3.2.1**
- Initial review of CDP cases: **35.2.1.1.11**
- Answers in Collection Due Process (CDP) Cases under Sections 6320 and 6330: **35.2.2.13**
- Motions in Collection Due Process (CDP) Cases: **35.3.23**
- Discovery in Collection Due Process (CDP) Cases: **35.4.3.8**
- Closing Collection Due Process (CDP) cases: **35.9.3.6**
- Settlement of CDP case where DOJ jurisdiction over tax years: **35.5.3.5.2**
- Trial in Collection Due Process (CDP) Cases: **35.6.2.18**
- Stipulation of Facts and Submission of Administrative Record in Collection Due Process (CDP) Cases: **35.4.7.9**

- Stipulated Decision Documents in Collection Due Process (CDP) Cases: **35.8.6.4**
- Appeal bond: **36.2.6.2.1.2**
- Venue on Appeal: **36.2.5.8**
- Procedures for Getting CDP Cases Closed in the Office of Appeals After Tax Court Decision is Final: **36.2.6.2.5.5**

Sample Documents:

- **Exhs. 35.11.1-214 through 220**—stipulated decision documents in CDP cases
- **Exh. 35.11.1-223**—motion to dismiss for lack of jurisdiction in CDP cases where there is no CDP notice of determination
- **Exh. 35.11.1-224**—motion to dismiss for lack of jurisdiction in CDP cases where the petition includes periods not on the CDP notice of determination
- **Exh. 35.11.1-225**—motion to dismiss for lack of jurisdiction in CDP cases where there was no valid CDP notice
- **Exh. 35.11.1-226**—motion to dismiss for lack of jurisdiction in CDP cases where the petition was late-filed
- **Exh. 35.11.1-222**—motion to dismiss on grounds of mootness in CDP cases
- **Exh. 35.11.1-221**—motion to change caption in CDP cases
- **Exh. 35.11.1-172**—motion to remove small tax designation in CDP cases
- **Exh. 35.11.1-213**—motion to remand in CDP cases
- **Exh. 35.11.1-227**—remand memorandum to Appeals in CDP cases
- **Exh. 35.11.1-231**—motion to permit levy in CDP cases
- **Exh. 35.11.1-229**—motion for summary judgment on abuse of discretion issues in CDP cases
- **Exh. 35.11.1-228**—motion for summary judgment on liability issues in CDP cases
- **Exh. 35.11.1-230**—declaration used with motion for summary judgment in CDP cases
- **Exh. 35.11.1-212**—stipulation of facts attaching administrative record in CDP cases
- **Exh. 35.11.1-232**—motion in limine in CDP cases

Chapter Two – CDP Notices and the Right to a CDP Hearing

A. Notice of Federal Tax Lien Filing and Right to Hearing - Section 6320

Prior to January 19, 1999, there was no requirement in the Code that the Service notify the taxpayer, or provide a hearing, 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 NFTL and of that taxpayer's right to a CDP hearing not more than five business days after the filing of the first NFTL for a specific tax period. The right

provided by section 6320 is a right to notice and hearing after the NFTL is filed. 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.

B. Notice of Intent to Levy and Right to Hearing - Section 6330

Prior to January 19, 1999, taxpayers had a statutory right to a notice of intent to levy prior to levy under section 6331(d) (requiring that the Service provide the taxpayer with a notice of intent to levy 30 days before levy), but no statutory right to a hearing. RRA 1998, section 3401 added section 6330 to the Code, which requires the Service (except in the case of jeopardy levies, levies on State income tax refunds, disqualified employment tax levies, or levies on Federal contractors) 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 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 enacting section 6330, Congress did not eliminate the section 6331(d) notice requirement. A taxpayer may be given a non-CDP notice of intent to levy under section 6331(d) (referred to on literal transcripts or 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 (referred to as the “final” notice of intent to levy). Or the notices could be combined. The section 6331(d) notice must be given prior to levies that qualify as exceptions to the pre-levy hearing requirement under section 6330(f). However, the section 6331(d) notice does not give the taxpayer a right to a CDP hearing.

The taxpayer has the right to no more than two CDP notices, and two hearings, for every taxable period: a section 6320 notice and hearing after the filing of a NFTL, and a section 6330 notice and hearing prior to levy (or after levy in the case of jeopardy levies, levies on state tax refunds, disqualified employment tax levies, and levies on Federal contractors). The Service may combine hearings for NFTLs and levies as appropriate.

C. Exceptions to Pre-Levy Notice and Opportunity for a Hearing

Section 6330(f) provides four exceptions to the requirement that the taxpayer be given an opportunity for a hearing before levy: jeopardy levies, levies on state income tax refunds, disqualified employment tax levies, and levies on Federal contractors. Instead, the taxpayer shall be given the opportunity for a CDP hearing “within a reasonable period of time after the levy.” 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. After Appeals issues a Notice of Determination in the post-levy hearing, the taxpayer

may appeal that determination to the Tax Court. *Bussell v. Commissioner*, 130 T.C. 222 (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). *Ang v. Commissioner*, T.C. Memo. 2014-53 (rejecting the argument that section 7429 precludes the Tax Court from reviewing the reasonableness of a jeopardy levy, and stating that the court reviews appeals' verification that the jeopardy levy was reasonable for abuse of discretion). 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.

The Small Business and Work Opportunity Act of 2007 amended section 6330(f) to permit levy to collect employment taxes without first giving a taxpayer a pre-levy CDP notice if the levy is a "disqualified employment tax levy." I.R.C. § 6330(f)(3). The amendment is effective for disqualified employment tax levies served on or after September 22, 2007. This change was intended to limit opportunities for pre-levy CDP hearings where taxpayers pyramid employment tax liabilities and use the CDP process to delay collection.

A disqualified employment tax levy, as described in section 6330(h)(1), 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.

Section 6330(f) was amended on September 27, 2010, by section 2104 of the Small Business Jobs Act of 2010, to except Federal contractor levies from pre-levy notice and opportunity for a hearing. Section 2104 is titled "Application of Continuous Levy to Tax Liabilities of Certain Federal Contractors." "Federal contractor levy" is defined in section 6330(h)(2) as "any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor."

D. 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. *Minemyer v. Commissioner*, T.C. Memo. 2012-325 (case dismissed for lack of jurisdiction where CDP notice not mailed to taxpayer's last known address); *Buffano v. Commissioner*, T.C. Memo. 2007-32. The CDP levy notice (but not the CDP lien notice)

must also be sent return receipt requested. If the CDP notice is not properly sent, and the taxpayer fails to timely request a hearing, 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. 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. *Id.* A lien notice solely in the name of a deceased taxpayer is valid if the lien against the taxpayer as an individual is valid and if the notice was sent to the decedent's last known address. *Estate of Brandon v. Commissioner*, 133 T.C. 83 (2009).

E. 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. CDP rights are only available to the 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.). See also *Gillum v. Commissioner*, 676 F.3d 633 (8th Cir. 2012) (Tax Court does not have jurisdiction over alter-egos and nominees). *Cf. Dalton v. Commissioner*, 135 T.C. 393 (2010), *rev'd on other grounds*, 682 F.3d 149 (1st Cir. 2012) (Tax Court has jurisdiction to decide nominee interest issue insofar as it pertains to Service's rejection of an offer-in-compromise on the basis that the offer did not include taxpayer's nominee interest).

F. 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, *Administrative Collection of a Partnership's Employment Taxes from the Partners*.

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.

G. Owners of Single-Member LLCs

The court in *Litriello 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*, 488 F.3d 100 (2d Cir. 2007); *Kandi v. United States*, 295 Fed. Appx. 873 (9th Cir. 2008); *L&L Holding Co., LLC*, 2008 WL 1908840 (W.D. La. 2008); *Medical Practice Solutions, LLC v. Commissioner*, 132 T.C. 125 (2009), *aff'd*, 2010 WL 3565790 (1st Cir. 2010) (unpublished per curiam), *cert. denied* 131 S.Ct. 2974 (2011). The "check the box" 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 default rule is that the owner is no longer liable. Treas. Reg. § 301.7701-2(c)(iv).

Chapter Three – Requesting a CDP Hearing and the Effect of Requesting a Hearing

A. Hearing Requests

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 before the Office of Appeals 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 and one CDP levy hearing for each tax and tax period. See *Investment Research Associates, Inc. v. Commissioner*, 126 T.C. 183 (2006) (upholds regulations only allowing hearing from filing of first NFTL); *Shirley v. Commissioner*, T.C. Memo. 2014-10 (appeals did not abuse discretion by refusing to consider years for which petitioner received previous CDP hearings). 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. 1 (2008).

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 that is signed or alleged to have been signed on the 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 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. The disregarded portion will not be subject to any further administrative or judicial review. 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. The penalty will be abated if the taxpayer withdraws the frivolous submission 30 days after being notified by the Service that the submission is a specified frivolous submission. I.R.C. § 6702(b)(3). The current notice specifying frivolous positions under section 6702 is Notice 2010-33, 2010 WL 1347082.

In *Thornberry v. Commissioner*, 136 T.C. 356 (2011), the Tax Court held that it has jurisdiction to review the denial of a hearing under section 6330(g). In Chief Counsel Notice CC-2012-003, *Disregarding Frivolous CDP Hearing Requests under Section 6330*, the Office of Chief Counsel announced that it disagrees with *Thornberry* and will continue to argue that the Tax Court has no jurisdiction to review denials of hearings under section 6330(g). See also CCDM 35.3.23.5.1.

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 extends the time for filing 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 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

The Treasury Regulations provide that a taxpayer whose hearing request is untimely is not entitled to a CDP hearing under section 6320 or 6330, 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 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). However if the taxpayer files a timely hearing request but is nonetheless given an equivalent hearing based on Appeal's erroneous determination that the taxpayer's CDP hearing request was untimely, the Tax Court may treat the resulting decision letter as an appealable CDP determination for purposes of section 6330(d)(1). *Craig v. Commissioner*, 119 T.C. 252 (2002). A certified mailing list (USPS Form 3877, or the equivalent form prepared by the IRS) showing the date the CDP notice was sent establishes both the fact and date of mailing of the notice of the CDP notice. See *Walthers v. Commissioner*, T.C. Memo. 2009-139.

B. Effect of Requesting a CDP Hearing

1. 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. *Id.*

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.

2. 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. For good cause shown, 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. I.R.C. § 6330(e)(2). The Service must file a motion and the court must make a good cause determination before the Service may proceed with the levy. See CCDM 35.3.23.9. The Tax Court grants motions to permit levy in CDP cases involving taxpayers who raise solely frivolous arguments. See *Burke v. United States*, 124 T.C. 189 (2005); *Howard v. United States*, T.C. Memo. 2005-100.

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.

3. 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. 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 accepting voluntary payments of the tax, initiating judicial proceedings, offsetting overpayments from other periods, *Boyd v. Commissioner*, 451 F.3d 8 (1st Cir. 2006), *aff'd* 124 T.C. 296 (2005), and issuing a “lock-in” letter instructing taxpayer’s employer to adjust taxpayer’s withholding. *Cleveland v. Commissioner*, 600 F.3d 739 (7th Cir. 2010); *Davis v. Commissioner*, T.C. Memo. 2008-238.

Chapter Four – The CDP Hearing

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 *Dalton v. Commissioner*, 682 F.3d 149, 155 (1st Cir. 2012); *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) (CDP hearings must be recorded verbatim), *nonacq.*, AOD 2001-5 (nonacquiescence 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, 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*; *Nestor v. Commissioner*, 118 T.C. 162 (2002). Despite the informality of the hearing and the lack of a transcript, there must be a sufficient explanation of 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*, 439 F.3d at 461-62; *Living Care Alternatives*, 411 F.3d at 629; *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*, 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.

B. Concluding the Hearing and Submission Deadlines

While there is no period of time in 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. §§ 301.6320-1(e)(3) Q&A-E9, 301.6330-1(e)(3) Q&A-E9. 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. When an Appeals officer gives a

taxpayer an adequate timeframe to submit requested items, it is not an abuse of discretion to move ahead if the taxpayer fails to submit the items within that timeframe. *Glossop v. Commissioner*, T.C. Memo. 2013-208. See also *Dinino v. Commissioner*, T.C. Memo. 2009-284 (Appeals officer did not abuse discretion by declining to give taxpayer additional time to submit information); *Pisetzner v. Commissioner*, T.C. Memo. 2012-64 (taxpayer failed to timely reschedule a telephone conference; section 6330 only requires that a taxpayer be given a reasonable chance to be heard prior to issuance of a notice of determination). Cf. *Szekely v. Commissioner*, T.C. Memo. 2013-227 (Appeals abused discretion in closing case and sustaining NFTL where OIC was received shortly after the deadline set by Appeals); *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); *Judge v. Commissioner*, T.C. Memo. 2009-135 (settlement officer abused discretion in failing to grant brief extension of time to submit financial information). Appeals is not required to consider new information submitted after the Notice of Determination is issued. *Trainor v. Commissioner*, T.C. Memo. 2013-14.

C. Face-to-Face Conference Not Required

The regulations provide that a CDP hearing may consist of a face-to-face meeting, one or more written or oral communications, or some combination thereof. A face-to-face meeting is not required. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6; *Williams v. Commissioner*, 718 F.3d 89 (2d Cir. 2013). See *Katz v. Commissioner*, 115 T.C. 329 (2000) (combination of telephone calls and written letters); *Radeke v. Commissioner*, T.C. Memo. 2012-319 (“An informal telephone conference which gives the taxpayer the opportunity to discuss the merits of the case, settlement alternatives, and other issues related to the proposed levy is a proper hearing.”) 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 *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).

If a taxpayer fails to participate in an offered face-to-face or telephone conference, Appeals' determination 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).

D. When Face-to-Face Conference Is Not Offered

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. See *Williams v. Commissioner*, 718 F.3d 89 (2d Cir. 2013).

The TRHCA amended sections 6320(b)(1) and 6330(b)(1) 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. I.R.C. § 6330(g). Accordingly, 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. See *Stockton v. Commissioner*, T.C. Memo. 2009-186 (denial of face-to-face CDP conference not an abuse of discretion where petitioner made only a blanket request for collection alternatives, did not explain why he qualified for a specific collection alternative, and had not timely filed all required returns).

Appeals may, however, in its discretion, grant a face-to-face conference if 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 preclude the taxpayer from receiving any CDP hearing).

When a taxpayer raising only frivolous issues contests being denied a face-to-face conference, such denial is not an abuse of discretion because it would not be necessary

or productive to remand the case to an Appeals office for a new face-to-face hearing. *Williamson v. Commissioner*, T.C. Memo. 2009-188; *Stockton v. Commissioner*, T.C. Memo. 2009-186; *Clough v. Commissioner*, T.C. Memo. 2007-106. There is no abuse of discretion in the refusal of a face-to-face hearing when a taxpayer refuses to present nonfrivolous arguments, file past-due returns, and submit financial information. *Toth v. Commissioner*, T.C. Memo. 2010-227.

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.*

E. 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 need not remand to Appeals for a new recorded hearing if such a remand would be unnecessary or unproductive. *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 record a telephone CDP conference, as section 7521 only applied to “in-person interviews,” meaning face-to-face meetings between the interviewer and interviewee.

F. Impartial Appeals Officer or Employee

Sections 6320(b)(3) and 6330(b)(3) require that the hearing be conducted by an officer or employee in the Internal Revenue Service Office of Appeals who has had no prior involvement with respect to the same unpaid tax. The statute does not specify that any particular category or officer conduct the hearing; “an ‘appeals officer’ is any ‘officer or employee’ in the IRS Office of Appeals to whom is assigned the task of conducting a CDP hearing under section 6330(b)(3).” *Tucker v. Commissioner*, 135 T.C. 114, 155 (2010), *aff’d*, 676 F.3d 1129 (2012), *cert. denied*, 133 S.Ct. 646 (2012). In *Tucker*, the D.C. Circuit affirmed the Tax Court’s holding that such officers or employees are not inferior officers for purposes of the Appointments clause of the United States Constitution, and so are properly hired by the Commissioner of the Internal Revenue pursuant to section 7804(a). The D.C. Circuit held that Appeals employees are not inferior officers because they do not exercise sufficient authority over liability and collection matters; their discretion is constrained by the IRM and other guidelines, by requirements that they consult with counsel, and by supervision.

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. Thus, 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.

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. See also *Baber v. Commissioner*, T.C. Memo. 2009-30 (settlement officer had prior involvement due to activities relating to his work as an offer-in-compromise specialist). The court has also held that prohibited prior involvement occurs where the appeals officer considered taxpayer's appeal from a rejection of an OIC. *Moosally v. Commissioner*, 142 T.C. No. 10 (2014). In *Moosally*, the taxpayer requested a CDP hearing while the OIC appeal was still pending. The court held that Appeals could not assign the CDP hearing to the appeals officer handling the pre-CDP appeal, even though the reason for the assignment was so the pre-CDP appeal and the CDP hearing could be combined.

In *Cox v. Commissioner*, 514 F.3d 1119 (10th Cir. 2008), *rev'g* 126 T.C. 237 (2006), *nonacq.*, AOD 2009-01, 2009-22 I.R.B. 1, 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. In AOD 2009-01, the IRS announced that it does not acquiesce in this decision and will not follow it outside the Tenth Circuit.

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. To the contrary, example 4 in Treas. Reg. §§ 301.6320-1(d)(3) and 301.6330-1(d)(3) indicates that this situation would not constitute prior involvement because the employment tax and the section 6672 assessments involve different taxes.

In *Harrell v. Commissioner*, T.C. Memo. 2003-271, the Tax Court held that an 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.

There is no prohibition on the same Appeals personnel who worked on the original CDP hearing working on the supplemental hearing on remand. *Medical Practice Solutions, LLC v. Commissioner*, T.C. Memo. 2010-98. The hearing on remand is treated as a continuation of the original hearing.

G. Prohibition of Ex Parte Communications

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. In accordance with this directive, the Service has issued Revenue Procedure 2012-18, 2012-10 I.R.B. 455. This revenue procedure is effective for communications between Appeals employees and other IRS employees, including Counsel, that take place after May 15, 2012. Rev. Proc. 2012-18 replaces Rev. Proc. 2000-43, which was issued in October 2000. The term “ex parte communications” is defined in Rev. Proc. 2012-18 as any communication that takes place between any Appeals employee and employees of other IRS functions, without the taxpayer/representative being given an opportunity to participate in the communication. Section 2.02(1). Not all communications between Appeals employees and other personnel are prohibited; for example, communications regarding ministerial, administrative or procedural matters are permissible. Section 2.02(5).

Specific instructions are provided in Section 2.02(10) on CDP cases. Communications to verify compliance with legal and administrative procedures, and to verify assets/liabilities involving collection alternatives, fall within the ministerial, administrative or procedural matters exception. Section 2.02(10)(b). When a CDP case is remanded by the Tax Court, the counsel attorney should prepare a remand memo to Appeals explaining the reasons for the remand and any special requirements in the order, but the memorandum should not discuss the credibility of the taxpayer or the accuracy of facts presented by the taxpayer. A copy of this memorandum is provided to the taxpayer/representative. Section 2.02(10)(c)(i)(A). The counsel attorney handling the Tax Court case may provide legal advice to Appeals on remand, and such attorney should review the supplemental notice of determination before it is issued to the taxpayer for the limited purpose of ensuring compliance with the court’s order. Section 2.02(10)(c)(ii), (iii). See also Chief Counsel Notice CC-2012-10, *Update of Rules Governing Ex Parte Communications Between Chief Counsel Attorneys and Employees of Appeals*.

Applying guidelines issued under the now superseded revenue procedure on remands, Rev. Proc. 2000-43, 2000-43 I.R.B. 404, the court in *Hoyle v. Commissioner*, 136 T.C. 463 (2011), held that communications between the Chief Counsel attorney and the settlement officer concerning a remanded CDP case were permissible communications because they were solely procedural, ministerial, or administrative in nature. The court also held that it was permissible for counsel to provide legal advice to the settlement officer on remand, and it was also permissible for counsel to locate a certified mailing list and provide it to the settlement officer for inclusion in the administrative record on remand. See also *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).

In *Hinerfeld v. Commissioner*, 139 T.C. 277 (2012), the Tax Court held that IRS counsel's recommendation that an OIC be rejected was not a prohibited ex parte communication because the communication was in accordance with the mandate of I.R.C. § 7122(b) requiring counsel review. See also *Isley v. Commissioner*, 141 T. C. No. 11 (2013) (communications between IRS counsel and collection employees relating to counsel's review of OIC not prohibited ex parte communication because prohibition only extends to discussions between appeals and other Service functions).

Obtaining IRS transcripts from IRS employees to aid in verification is a permissible communication. *Medical Practice Solutions, L.L.C. v. Commissioner*, T.C. Memo. 2010-98.

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. Cf. *Hotchkiss v. Commissioner*, T.C. Memo. 2010-32 (communications between Appeals officer and special agent not prohibited where they did not address the substance of the issues in the case but were merely administrative and procedural).

In *Moore v. Commissioner*, T.C. Memo. 2006-171, *nonacq.*, 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, the IRS disagrees that the violations in *Moore* warranted a remand to Appeals and the deletions from the administrative record. According to the AOD, 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.

Chapter Five – Issues Considered at the CDP 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.

Conway v. Commissioner, 137 T.C. 209 (2011) (verifying issuance of notice and demand); *McCall v. Commissioner*, T.C. Memo. 2009-75 (where "quick" assessments were mislabeled on the transcripts as jeopardy assessments, no abuse of discretion because all procedures were followed to make quick assessments). The basic requirements that must be verified are the IRS's proper assessment of the liability, the taxpayer's failure to pay after notice and demand, and the IRS's giving of a CDP notice. *Dinino v. Commissioner*, T.C. Memo. 2009-284. The Notice of Determination must expressly state that Appeals verified the timeliness of assessments and other matters, specify what transcripts and transcript information Appeals relied upon, and include those transcripts in the administrative record. *Medical Practice Solutions, LLC v. Commissioner*, T.C. Memo. 2009-214 (remand where copies of transcripts not in the record).

If a tax can be assessed without the issuance of a notice of deficiency, Appeals must verify that a valid assessment was made, that notice and demand was issued, that the liability was not paid, and (in the case of a CDP levy hearing) that a CDP levy notice was properly issued to the taxpayer. *Ron Lykins, Inc. v. Commissioner*, 133 T.C. 87 (2009). Where assessment of the tax requires issuance of a notice of deficiency, Appeals must also obtain verification that either valid notices of deficiency were sent to the taxpayer at his or her last known address, or that an appropriate waiver was signed.

Hoyle v. Commissioner, 131 T.C. 197 (2008) (verifying that the assessment was preceded by a properly mailed notice of deficiency); *Marlow v. Commissioner*, T.C. Memo. 2010-113 (verifying that consent to assessment was signed by taxpayers); *Ulrich v. Commissioner*, 585 F.3d 1235 (9th Cir. 2009) (taxpayers signed consent to assessment and so waived their right to notices of deficiency). Appeals must similarly verify that the required preassessment notice (letter 1153) was properly sent to the taxpayer prior to assessment of the section 6672 trust fund recovery penalty. *Mason v. Commissioner*, 132 T.C. 301 (2009).

If a penalty is subject to the preassessment written management approval provision of section 6751(b)(1), appeals should address that as part of verification. See generally Chief Counsel Notice CC-2011-004, *Written Management Approval Required to Assess the Section 6702 Penalty for Frivolous Tax Submissions* (November 1, 2010) (concluding that section 6702 penalties for frivolous tax submissions are subject to managerial approval requirement) and Chief Counsel Notice CC-2014-004, *Written Supervisory Approval Not Required to Assess Certain Section 6702 Penalties* (May 20, 2014).

Appeals' verification duty arises regardless of whether the taxpayer raises any issues at the hearing. *Hoyle*, 131 T.C. at 202-203.

In *Conway v. Commissioner*, 137 T.C. 209 (2011), the court, relying on Treas. Reg. § 301.6303-1(a), which provides that failure to provide notice and demand within 60 days does not invalidate the notice, held the CDP levy notice sent to the taxpayer Nakano was a valid notice and demand under section 6303. However, the court held that the CDP lien notice sent to taxpayer Conway was not a valid notice and demand under section 6303, in part because the same notice cannot serve as both a section 6303 notice and demand and a post-lien notice under section 6320(a)(1). See also *Harris v. Commissioner*, T.C. Memo. 2012-275 (notice and demand requirement is satisfied by receipt of notices of balance due and the final levy notice).

1. Computer transcripts

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); *Best v. Commissioner*, T.C. Memo. 2014-12. Verification of many procedures and legal requirements can be obtained by the Appeals officer from the Service through its computer records and paper administrative files.

The Form 4340 is a computer-generated list of assessments, payments, and other activity on a taxpayer's account that appears in the official records of the IRS. *Oropeza v. Commissioner*, T.C. Memo. 2009-244. A presumption of official regularity attaches to the Forms 4340 because they are official, certified records of account activity. 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); *Battle v. Commissioner*, T.C. Memo. 2009-171 (verifying notice

and demand). “Form 4340 ‘is generally regarded as being sufficient proof, in the absence of evidence to the contrary, of the adequacy and propriety of notices and assessments that have been made.’” *Orum v. Commissioner*, 123 T.C. 1, 9 (2004) (quoting *Gentry v. United States*, 962 F.2d 555, 557 (6th Cir. 1992)). An Appeals officer may rely on a Form 4340 to verify the validity of an assessment, and to verify the taxpayer’s outstanding liability, unless the taxpayer can identify an irregularity in the assessment procedure or other irregularity. *McLaine v. Commissioner*, 138 T.C. 10 (2012); *Roberts v. Commissioner*, 118 T.C. 365 (2002). See generally *R.H. Stearns Co. v. United States*, 291 U.S. 54, 63 (1934) (official acts are entitled to a presumption of regularity that all required prerequisites have been complied with and official duties have been properly discharged); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (presumption is that public officials discharged their official duties properly, absent clear evidence to the contrary). But “if the taxpayer alleges that he did not receive a notice of deficiency and/or denies that he waived the restrictions on assessment, the Appeals officer will be required to do more than consult the computerized records; he must ‘examine underlying documents.’” *Marlow v. Commissioner*, T.C. Memo. 2010-113, slip. op. at 21 (citing *Hoyle v. Commissioner*, 131 T.C. 197, 205 n.7 (2008); *Meyer v. Commissioner*, T.C. Memo. 2013-268 (where taxpayer alleges no notice of deficiency was mailed, he has identified an irregularity, thereby requiring Appeals to do more than consult computerized records).

If the taxpayer asks Appeals for a copy of the record of assessment pursuant to section 6303, Appeals meets its obligation by giving the taxpayer a Form 4340 that reports the information described in Treas. Reg. § 301.6203-1. *Best v. Commissioner*, T.C. Memo. 2014-12.

Similarly, 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 or other procedures. *Clayton v. Commissioner*, T.C. Memo. 2009-114; *Cipolla v. Commissioner*, T.C. Memo. 2004-6. 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. *Meeh v. Commissioner*, T.C. Memo. 2008-282; *Williams v. Commissioner*, T.C. Memo. 2005-94. 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. *Kun v. Commissioner*, T.C. Memo. 2004-273.

2. Verifying the proper issuance of notices of deficiency

a. Generally

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 may be invalid. See *Hoyle v.*

Commissioner, 131 T.C. 197 (2008) (remanding to Appeals to clarify the record as to what it relied upon in determining that the notice of deficiency was properly sent); *Blocker v. Commissioner*, T.C. Memo. 2005-279 (assessment following return of undelivered notice of deficiency valid because sent to last known address). Verification requires independent confirmation of the validity of assessments, including determining whether the notice of deficiency was properly issued, even if the taxpayer does not raise the validity of the assessment as an issue. *Hoyle*, 131 T.C. at 202-203.

b. Proving notice of deficiency was issued

When the existence of a notice of deficiency is not in dispute, an Appeals officer may rely on a properly completed certified mailing list (Form 3877) to verify proper mailing. *Meyer v. Commissioner*, T.C. Memo. 2013-268. However if the form was not properly completed or there are other “red flags”, it is not an abuse of discretion for Appeals to find that the notice was properly issued if the administrative record shows that Appeals relied on other evidence, or explains the defects. *Id.* (remand where Appeals failed to inquire into and explain irregularities on the Form 3877, including whether the rectangular “IRS Ogden” stamp is an official USPS postmark).

When the Service shows that a notice of deficiency exists and produces a properly completed certified mailing list or its equivalent, it is entitled to a presumption of mailing. *Crain v. Commissioner*, T.C. Memo. 2012-97. This shifts the burden of going forward to the taxpayer and if the taxpayer fails to meet the burden, then the Service has successfully shown mailing. *O’Rourke v. United States*, 587 F.3d 537 (2d Cir. 2009). A postmarked certified mailing list that is missing some required information does not create a presumption of mailing. However, if the missing information is minor and there is evidence that the notice of deficiency existed, this imperfect certified mailing list may provide sufficient evidence of mailing. *O’Rourke, supra* (distinguishing the Third Circuit’s opinion in *Pietanza v. Commissioner*, 92 T.C. 729 (1989), *aff’d without published opinion*, 935 F.2d 1282 (3d Cir. 1991), because in *Pietanza* the Service failed to establish that a valid final notice of deficiency was ever prepared). When, however, a Form 3877 contains defects that are serious on their face, the “IRS would be well advised to submit additional evidence of mailing” such as habit testimony, supporting documents, or certified mail receipts. *O’Rourke*, 587 F.3d at 542. *See, e.g., White v. Commissioner*, T.C. Summ. Op. 2012-53 (where Form 3877 is incomplete, Service attempts to introduce printouts from United States Postal Service’s (USPS) “Track and Confirm” system; the printouts are inadmissible because Service failed to provide notice before trial that it intended to seek admission of the printouts as self-authenticating documents pursuant to rule 902(11) of the Federal Rules of Evidence).

In *Butti v. Commissioner*, T.C. Memo. 2008-82 (*Butti I*), 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 *Pietanza 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 (nonacquiescence in Tax Court's holding in *Pietenza*, stating that a presumption of regularity should be given to a certified mailing list despite the absence of a copy of the notice of deficiency). See also *Clayton v. Commissioner*, T.C. Memo. 2009-114 (distinguishing *Butti I* on the grounds that the taxpayer was given multiple opportunities to challenge the existence of the notice of deficiency and failed to take advantage of them). Cf. *Butti v. Commissioner*, T.C. Memo. 2009-198 (*Butti II*) (distinguishing *Butti I* and sustaining collection for subsequent tax years where a copy of the notice of deficiency was introduced); *Casey v. Commissioner*, T.C. Memo. 2009-131 (distinguishing *Butti I* where the Appeals officer documented in her case notes that she examined the notice of deficiency, which was later lost).

In *Rivas v. Commissioner*, T.C. Memo. 2012-20, the court held that the Service established a presumption of mailing in the absence of a certified mailing list, by introducing copies of the notices of deficiency and the returned envelopes containing the notices, and testimony from a USPS employee about USPS procedures for certified mail and explaining the stamps and marks on the envelopes.

Where the notice of deficiency is missing, the certified mailing list with other corroborating evidence may prove that the notice was properly issued. See *United States v. Ahrens*, 530 F.2d 781 (8th Cir. 1976) (relying on the presumption of official regularity, applicable to the official acts of public officers; "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"); *United States v. Zolla*, 724 F.2d 808 (9th Cir. 1984); *Follum v. Commissioner*, 128 F.3d 118, 121 (2d Cir. 1997). See also *Haag v. United States*, 485 F.3d 1 (1st Cir. 2007) (finding that CDP notice was sent based on computer records and a copy of taxpayer's signed certified mail receipt). The Eleventh Circuit has applied the presumption of official regularity to the Service's mailing of a notice of deficiency, even where the government could not produce any record of the mailing. *United States v. Dixon*, 672 F. Supp. 503 (M.D. Ala. 1987), *aff'd*, 849 F. 2d 1478 (11th Cir. 1988). See also *United States v. Chila*, 871 F.2d 1015, 1018 (11th Cir. 1989) (recognizing *Dixon* as binding precedent). *But see Bonaventura v. United States*, 428 Fed. Appx. 916 (11th Cir. 2011) (where records are missing, affirming district court's finding that Form 1153 was not sent).

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). A properly prepared USPS Form 3877 or the equivalent 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. *Barnes v. Commissioner*, T.C. Memo. 2010-30.

In *Magazine v. Commissioner*, 89 T.C. 321, 324-26 (1987), *nonacq.*, 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. See also *Webb v. Commissioner*, T.C. Memo. 1996-449 (production of certified mailing list with some corroborating evidence, such as testimony from Service employee on procedures surrounding preparation and mailing of the notices of deficiency was sufficient to prove existence of notice of deficiency). Cf. *Marlow v. Commissioner*, T.C. Memo. 2010-113 (where the Forms 4549 consents to assessment are lost, respondent may use secondary evidence such as computer records and testimony of IRS employees to prove the contents of the forms).

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). The same evidence that establishes that the Commissioner mailed a notice of deficiency to a taxpayer's last known address is sufficient to establish that the Commissioner properly sent a notice of a proposed TFRP assessment under section 6672(b)(1). *Orian v. Commissioner*, T.C. Memo. 2010-234.

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 include the following:

1. 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).

2. 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. Collection action not appropriate if levy causes economic hardship

In *Vinatieri v. Commissioner*, 133 T.C. 392 (2009), the Tax Court ruled that upholding a proposed levy that would prevent the taxpayer from meeting her living expenses was an abuse of discretion. The court reasoned that proceeding with the proposed levy would have been unreasonable because section 6343(a)(1)(D) would have required its immediate release given that the Appeals officer determined that the levy would cause an economic hardship due to the financial condition of the taxpayer. As stated in Chief Counsel Notice CC-2011-005, *Considering Economic Hardship in Determining the Appropriateness of a Levy*, Chief Counsel's position is that the Tax Court correctly held that Appeals abused its discretion, since if a levy will create an economic hardship under section 6343(a)(1)(D), it is not appropriate to levy. See also *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010) (in dicta, court states that where levy would cause taxpayer to be unable to pay his or her reasonable basic living expenses, taxes must be declared as currently not collectible and levy should not proceed); *Antico v. Commissioner*, T.C. Memo. 2013-35 (remand because Appeals failed to consider economic hardship). See also *Waldeigh v. Commissioner*, 134 T.C. 280 (2010) (remand to clarify record as to whether levy on retirement income would cause economic hardship) *But cf. Kyereme v. Commissioner*, T.C. Memo. 2012-174 (no abuse of discretion in sustaining filing of NFTL notwithstanding taxpayer's currently not collectible status and claim that the NFTL would force him to rely on public assistance).

b. 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, the lien continues to attach to prepetition property of the taxpayer that was exempt or abandoned from the estate once the bankruptcy is discharged. 11 U.S.C. § 522(c)(2)(B); *Waldeigh v. Commissioner*, 134 T.C. 280 (2010). 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. *United States v. Rogers*, 558 F. Supp. 2d 774 (N.D. Ohio 2008).

c. Criminal restitution cases

An award of criminal restitution does not bar the Service from assessing and collecting a civil tax liability from the taxpayer. *Gillum v. Commissioner*, T.C. Memo. 2010-280, *aff'd*, 676 F.3d 633 (8th Cir. 2012).

In *Creel v. Commissioner*, 419 F.3d 1135 (11th Cir. 2005), the Eleventh Circuit affirmed the Tax Court's unpublished Order and Decision holding that it was inappropriate to proceed with collection because the tax liability was satisfied by criminal restitution payments. The Eleventh Circuit recognized the general rule that the government can seek restitution through criminal proceedings and pursue recovery of excess civil tax liability in subsequent civil proceedings. The court, nevertheless, found based on the unique facts of this case that the restitution payments satisfied the civil tax liability. In Chief Counsel Notice CC-2007-008, *Litigating Cases Involving Criminal Restitution* (February 27, 2007), the Office of Chief Counsel concluded that *Creel* was wrongly decided. See also Chief Counsel Notice CC-2013-012, *Deficiency and Litigation Issues Concerning Tax Periods For Which Criminal Restitution Has Been Ordered* (July 31, 2013) (addressing the issues that arise when litigating Tax Court cases that include tax periods covered by a restitution order) and Chief Counsel Notice CC-2011-018, *The Assessment and Collection of Criminal Restitution* (August 26, 2011) (addressing the Service's authority to assess criminal restitution for failure to pay any tax under section 6201(a)(4)).

3. Collection alternatives generally

The taxpayer is allowed to raise collection alternatives as part of the CDP hearing. I.R.C. § 6330(c)(2)(A)(iii). 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 collection alternatives in lien cases include a proposal to withdraw the NFTL to facilitate the collection of the tax liability, subordination of the NFTL, and discharge of specific property from the NFTL. See *Alessio Azzari, Inc. v. Commissioner*, 136 T.C. 178 (2011) (Appeals erred in concluding that NFTL could not be subordinated). See also *Sullivan v. Commissioner*, T.C. Memo. 2012-337, n. 8 (treating Currently Not Collectible Status

as a collection alternative). Acceptance of an installment agreement does not necessarily preclude the filing of a NFTL. *Karakaedos v. Commissioner*, T.C. Memo. 2012-53.

The two most common statutorily authorized collection alternatives at issue in CDP cases are OICs pursuant to section 7122, and installment agreements authorized pursuant to 6159. The most common type of OIC is one based on doubt as to collectability premised on the taxpayer's inability to pay the tax liability in full. The most common type of IA is one that fully pays the tax in installments over an agreed period of time. Prior to 2004, an installment agreement had to provide for full payment of the tax liability, including interest and penalties. In 2004, Congress amended section 6159 to authorize the IRS to enter installment agreements that do not provide for full payment; such agreements are referred to as partial payment installments. *Watchman v. Commissioner*, T.C. Memo. 2012-113 (rejecting taxpayers' argument that their full payment installment agreement waived interest and penalties).

In determining whether to accept an offer-in-compromise or installment agreement, Appeals must determine the taxpayer's reasonable collection potential (RCP), which will establish the taxpayer's ability to pay the tax either in full at the present in time, or in installments over a period of time. The Service will not accept a compromise that is less than the RCP, absent a showing of special circumstances. *Johnson v. Commissioner*, 136 T.C. 475, 486 (2011), *aff'd*, 502 Fed. Appx. 1 (D.C. Cir. 2013). The Service may reject an offer-in-compromise because the taxpayer's ability to pay is greater than the amount he proposes to pay under the compromise proposal. *Id.* When Appeals determines that a taxpayer has dissipated assets in disregard of the taxpayer's outstanding tax liability, the dissipated assets may be included in the minimum amount that is to be paid under an acceptable offer-in-compromise. *Id.* Where a taxpayer's offer was substantially lower than the RCP, appeals did not abuse its discretion in failing to give the taxpayer an opportunity to amend the offer prior to rejection. *Bromback v. Commissioner*, T.C. Memo. 2012-265 (also holding that taxpayer failed to show special circumstances).

The Service relies on standardized guidelines to determine a taxpayer's RCP in order to evaluate collection alternatives. Section 7122(d)(2) requires the Service "to develop and publish schedules of national and local allowances designed to provide that taxpayers entering into a compromise have an adequate means to provide for basic living expenses." See also Treas. Reg. § 301.7122-1(c)(2)(i). National standards are used to determine a taxpayer's food, clothing, health care, personal care, and miscellaneous expenses. Local standards are used to determine a taxpayer's housing, utilities, and transportation expenses. See IRM 5.15.1.8 and 5.15.1.9. The Tax Court has sustained the Commissioner's use of the IRS's national and local allowances as guidelines for basic living expenses in evaluating the adequacy of proposed installment agreements and offer-in-compromises. *Beeler v. Commissioner*, T.C. Memo. 2009-266. See *Bromback v. Commissioner*, T.C. Memo. 2012-265 (appeals does not abuse its discretion by using local housing allowances lower than a taxpayer's actual housing expenses if the taxpayer has not shown that he will be harmed by having to live on the lesser amount); *Aldridge v. Commissioner*, T.C. Memo. 2009-276 (taxpayer has the

burden of providing information to Appeals to justify a departure from the local standards); *Gregg v. Commissioner*, T.C. Memo. 2009-19 (“Petitioner did not provide evidence demonstrating that she would not have adequate means to provide for her basic living expenses if the national standards were used. And where a taxpayer does not present this evidence, we have held that use of the national standards is not an abuse of discretion by the Commissioner.”); *Fernandez v. Commissioner*, T.C. Memo. 2008-210 (no abuse of discretion where the Appeals officer used the standard allowance instead of the taxpayer's actual housing and utilities expense). Where Appeals has followed the Commissioner's guidelines to ascertain a taxpayer's RCP and rejected the taxpayer's collection alternative on that basis, the Tax Court has found no abuse of discretion. *McClanahan v. Commissioner*, T.C. Memo. 2008-161. The Tax Court does not independently review whether an offer-in-compromise or other collection alternative is acceptable. *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006). The Tax Court's review is limited to whether the Appeals officer's rejection of the offer was arbitrary, capricious, or without sound basis in fact or law. *Id.*

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, e.g., *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). See also *Samuel v. Commissioner*, T.C. Memo. 2007-312 (Appeals erred in not giving taxpayer opportunity to revise offer-in-compromise); *Fairlamb v. Commissioner*, T.C. Memo. 2010-22 (remand because Appeals' rationale for rejecting the offer is unclear).

Acceptance of collection alternatives is generally within the discretion of the Service and Appeals acts within its discretion when it follows guidelines in the Treasury Regulations and IRM in evaluating the collection alternative. For example, IRM guidelines provide that an offer-in-compromise will be returned as not 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 determine that the taxpayer is ineligible for an offer if the taxpayer has not filed all required tax returns or is otherwise not in compliance with the tax laws. *Balsamo v. Commissioner*, T.C. Memo. 2012-109; *Huntress v. Commissioner*, T.C. Memo. 2009-161; Treas. Reg. §§ 6320-1(d)(2) Q&A-D8, 6330-1(d)(2) Q&A-D8. The failure to be current on payment of estimated taxes is a reasonable basis for rejecting an offer. *Christopher Cross, Inc. v. United States*, 461 F.3d 610 (5th Cir. 2006). See also *Keller v. Commissioner*, 568 F.3d 710 (9th Cir. 2009) (Appeals did not err when it looked at the facts and circumstances of each case and rejected the offers based on IRM guidelines); *Salazar v. Commissioner*, T.C. Memo. 2008-38 (Appeals did not abuse discretion in rejecting an offer-in-compromise that would risk collecting from a distribution in the taxpayer's bankruptcy case). On the other hand, the IRM does not have the force of law and does not confer

enforceable rights on taxpayers. *Fargo v. Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006); *Reed v. Commissioner*, T.C. Memo. 2014-41.

In *Alessio Azzari, Inc. v. Commissioner*, 136 T.C. 178 (2011), the court held that it was an abuse of discretion for Appeals to reject an installment agreement because the taxpayer was not current with employment tax deposits, where Appeals' erroneous refusal to consider subordination of the NFTL contributed to petitioner's falling behind on its tax deposits.

The taxpayer is required to submit financial information for consideration of a collection alternative. It is not an abuse of discretion for Appeals to reject a collection alternative because the taxpayer failed to submit requested financial information. *Tucker v. Commissioner*, T.C. Memo. 2014-103; *Huntress v. Commissioner*, T.C. Memo. 2009-161; *Ranuio v. Commissioner*, T.C. Memo. 2010-178 (Appeals may request financial information pertaining to the taxpayer's nonliable spouse in a community property state); *TGI Enterprises, Inc. v. Commissioner*, T.C. Memo. 2009-123; *Olsen v. United States*, 414 F.3d 144, 154 (1st Cir. 2005); *Kindred v. Commissioner*, 454 F.3d 688, 696 (7th Cir. 2006); *Orum v. Commissioner*, 412 F.3d 819, 820 (7th Cir. 2005). See also Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1) ("Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.") See also *Hartman v. Commissioner*, 638 F.3d 248 (3d Cir. 2011) ("[W]e agree with the Tax Court that the IRS did not abuse its discretion in sustaining the proposed levy where Hartmann failed to comply with the requirements for filing a proposed collection alternative."). Further, the taxpayer is expected to meet reasonable deadlines set by Appeals to submit requested information, and it is not an abuse of discretion to issue the determination if the taxpayer fails to submit the requested items within the reasonable timeframe given by Appeals. *Pough v. Commissioner*, 135 T.C. 344 (2010). The collection of information during a CDP hearing is not subject to the Paperwork Reduction Act, and so the lack of a control number on a Form 433A (Collection Information Statement) does not relieve the taxpayer of the consequences of failing to submit the form to Appeals. *Pitts v. Commissioner*, T.C. Memo. 2010-101.

In the absence of the taxpayer proving eligibility for a formal statutory collection alternative such as an OIC or IA, the taxpayer may be eligible for Currently Not Collectible (CNC) status, which is a non-statutory, reversible, administrative designation where the Service determines that collection will not proceed because the tax is currently not collectible or because of economic hardship. See generally IRM 5.16.1.

4. Offer-in-Compromise

Section 7122(a) authorizes the Secretary of the Treasury to compromise any civil or criminal case arising under the internal revenue laws before the case is referred to the Department of Justice. See also Treas. Reg. § 301.7122-1. This is the statutory authority for the Service's offer-in-compromise program. Section 7122(c) also sets out the requirements for making a partial payment or periodic payments along with the

offer-in-compromise. See *Tucker v. Commissioner*, T.C. Memo. 2014-103 (Appeals did not abuse its discretion in rejecting an OIC for failure to make required periodic payments). Where the OIC is properly processed and rejected in part based on collectability grounds, Appeals did not abuse its discretion in retaining the section 7122(c) partial payment in conjunction with its rejection of the OIC. *Isley v. Commissioner*, 141 T.C. No. 11 (2013). In *Isley*, the Tax Court held that where the taxes at issue in a CDP hearing were the subject of a referral to the Department of Justice, section 7122(a) requires that an appeals officer at a CDP hearing obtain prior approval by the Department of Justice of a proposed compromise. The court nonetheless held that section 7122(a) is not an absolute bar to appeals consideration of the OIC during the CDP hearing, but the OIC must be approved by Justice.

The regulations under section 7122 set forth three grounds for the compromise of a tax liability: doubt as to liability, doubt as to collectability, or promotion of effective tax administration. Treas. Reg. § 301.7122-1(b); *Moore v. Commissioner*, T.C. Memo. 2013-278.

a. 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 underlying 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 in a CDP administrative hearing 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).

b. Doubt as to collectability offer-in-compromise

Doubt as to collectability exists in any case where the taxpayer's assets and income are less than the full amount of the assessed liability. Treas. Reg. § 301.7122-1(b)(2). A doubt as to collectability offer-in-compromise must generally offer an amount equal to the taxpayer's reasonable collection potential, absent a showing of special circumstances. *Murphy v. Commissioner*, 125 T.C. 301 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006) (no abuse of discretion where Appeals officer rejected offer-in-compromise that was substantially less than reasonable collection potential); *Estate of Mangiardi v. Commissioner*, T.C. Memo. 2011-24 (in evaluating an offer-in-compromise for estate tax, the estate's reasonable collection potential includes the amount the Service may collect under section 6324(a)(2) from a beneficiary who had received nonprobate distributions). Appeals doesn't abuse its discretion by rejecting an offer-in-compromise that falls short of a taxpayer's RCP. *Bromback v. Commissioner*, T.C. Memo. 2012-265.

The Commissioner may accept an OIC based on doubt as to collectability that is less than the reasonable collection potential if special circumstances are present. *Anderson v. Commissioner*, T.C. Memo. 2013-261 (remand to consider petitioner's health

problems); *Antico v. Commissioner*, T.C. Memo. 2013-35 (remand because Appeals did not make findings as to special circumstances). See generally *Keller v. Commissioner*, 568 F.3d 710, 719 (9th Cir. 2009), *aff'g in part and vacating in part Ertz v. Commissioner*, T.C. Memo. 2007-15 (no abuse of discretion where Appeals officer rejected offer-in-compromise based on speculative future medical expenses); *Moore v. Commissioner*, T.C. Memo. 2013-278 (petitioner failed to show special circumstances).

The taxpayer is required to submit a written offer-in-compromise for consideration of the offer. Appeals does not abuse its discretion in failing to consider an offer that petitioner never made. *O'Neil v. Commissioner*, T.C. Memo. 2009-183 (taxpayer discussed an offer-in-compromise with Appeals officer on multiple occasions but failed to submit one in writing); *Huntress v. Commissioner*, T.C. Memo. 2009-161; *Kindred v. Commissioner*, 454 F.3d 688, 696 (7th Cir. 2006) (“Without an actual offer in compromise to consider, it would be most difficult for either the Tax Court or this court to conclude that the Appeals officer might have abused his discretion; for the Appeals officer could not mistakenly reject something which has not been presented to him.”).

In *Tucker v. Commissioner*, 676 F.3d 1129 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 646 (2012), the District of Columbia Circuit Court of Appeals affirmed the Tax Court’s holding that it was not an abuse of discretion for Appeals to include funds that the taxpayer had lost while “day trading” stock in the taxpayer’s reasonable collection potential as dissipated assets. It was also not an abuse of discretion for Appeals to reject the taxpayer’s deferred payment offer-in-compromise and to instead insist on a partial payment installment agreement where Appeals believed that the liability could be paid in full.

In *Dalton v. Commissioner*, 682 F.3d 149 (1st Cir. 2012), *rev'g* 135 T.C. 393 (2010), the First Circuit held that it was not an abuse of discretion to reject an offer-in-compromise on the ground that it did not include the value of a third-party’s property, concluding that the IRS’s determination that the taxpayer held an interest in the property under federal nominee law was reasonable.

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.

In *Reed v. Commissioner*, 141 T.C. No. 7 (2013), *reconsideration denied*, T.C. Memo. 2014-41, the Tax Court held that the Service cannot be required to reopen an OIC that was returned as nonprocessable a few years before the CDP hearing, since the old OIC would be based on outdated financial data, and the statutory scheme does not permit review of the Service’s return of an OIC. In denying reconsideration, the court also held that it is not an abuse of discretion to return an OIC because of a taxpayer’s failure to meet current tax obligations.

c. Effective tax administration offer-in-compromise

The Service has the authority to enter into an offer-in-compromise based on effective tax administration where the taxpayer can demonstrate that full collection would cause the taxpayer economic hardship, or if there are compelling public policy or equity considerations. *Anderson v. Commissioner*, T.C. Memo. 2013-261; Treas. Reg. § 301.7122-1(b)(3). The Service may not enter into a compromise to promote effective tax administration where doing so would undermine compliance with the tax laws. *Id.* The ability to make full payment is a prerequisite to an effective tax administration offer-in-compromise. Treas. Reg. § 301.7122-1(b)(3)(ii). Compromise based on compelling public policy or equity considerations is established when exceptional circumstances exist such that collection of the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner. Treas. Reg. § 301.7122-1(b)(3)(ii). See *Pomeroy v. Commissioner*, T.C. Memo. 2013-26 (factors to be considered include a taxpayer's long-term illness or medical condition that prevents him from earning a living and that will exhaust his financial resources); *Bogart v. Commissioner*, T.C. Memo. 2014-46 (remand to consider compromise based on public policy or equity circumstances where petitioners' bookkeeper embezzled funds from their S-corporation). This basis is not established by vague assertions that the imposition of the tax is unfair. See generally *Keller v. Commissioner*, 568 F.3d 710, 719 (9th Cir. 2009), *aff'g in part and vacating in part Ertz v. Commissioner*, T.C. Memo. 2007-15 (no abuse in discretion in rejecting offers based on taxpayers' argument that they were victimized by a tax shelter promoter). Cf. *Service Employees International Union, 100 v. United States*, 598 F.3d 1110 (9th Cir. 2010) (district court did not have discretion to reduce penalties for failure to timely file information returns).

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. The court stated that "[t]axpayers' hardship claim is particularly weak given that the relevant inquiry is only whether the Commissioner abused his discretion. Although one might find some ground upon which to quibble with the Commissioner's decision, it is impossible to hold that the Commissioner employed an erroneous view of the law or a clearly erroneous assessment of the facts." See also *Speltz v. Commissioner*, 454 F.3d 782 (8th Cir. 2006) (also affirming rejection of effective tax administration offer).

d. Terminated offer-in-compromise

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 (even 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. 239 (2008), the Tax Court adopted the express conditions analysis of the Eighth Circuit, holding that the IRS

did not abuse its discretion by terminating an offer after the taxpayer failed to file his returns and the IRS sent warning letters to him.

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 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. See *Callahan v. Commissioner*, 130 T.C. 44 (2008) (taxpayer may challenge frivolous return penalty under section 6702 because no notice of deficiency was issued and no Appeals conference was offered); *Alexander v. Commissioner*, T.C. Memo. 2012-75 (rejecting taxpayer's challenge to the section 6702 penalty on the merits). See also *Kuretski v. Commissioner*, - F.3d - (D.C. Cir. June 20, 2014) (taxpayers barred from arguing reasonable cause in defense of section 6651(a)(2) addition to tax where they failed to file a written statement explaining why they had reasonable cause for nonpayment); *Springer v. Commissioner*, 580 F.3d 1142 (10th Cir. 2009) (section 6330(c)(2)(B) does not bar taxpayer from challenging penalties that did not exist and thus were not at issue in the prior deficiency proceedings); *Brennan v. Commissioner*, T.C. Memo. 2013-123 (taxpayer cannot challenge additions to tax that were included on notice of deficiency, but could raise computational errors on an assessment made after issuance of the notice of deficiency).

Underlying tax liability means the tax imposed by the Internal Revenue Code. "Underlying tax liability" has also been defined by the court as "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 term "underlying tax liability" includes 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, 49-50 (2008); *Montgomery v. Commissioner*, 122 T.C. 1, 7-8 (2004). See also *Gray v. Commissioner*, 138 T.C. 295 (2012) (court's jurisdiction includes jurisdiction to review determination to abate a penalty where the penalty forms part of the underlying tax liability); *Farhoumand v. Commissioner*, T.C. Memo. 2012-131 (underlying liability includes all amounts assessed for the tax period for which the CDP notice was issued, even if not asserted on the notice; taxpayer can raise merits of section 6654(a) addition to tax that is not listed on the notice).

Whether or not issues concerning the validity of assessments and application of credits and payments are treated as liability or nonliability issues, will determine whether their consideration will be barred under section 6330(c)(2)(B). See, e.g., *Olender v. Commissioner*, T.C. Memo. 2008-205 (argument that assessment is invalid because it was made after the expiration of the statute of limitations on assessment is an underlying liability issue that is barred). Chief Counsel Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations*, states the Office of Chief Counsel's longstanding position that issues involving whether the Service has complied with all applicable legal and administrative procedural requirements involve nonliability issues that are not subject to preclusion under section 6330(c)(2)(B).

Nonliability issues include whether the assessment is valid (e.g., whether a notice of deficiency or letter 1153 was properly issued) and whether the assessment and collection statute of limitations were complied with. The notice similarly states the position that issues involving the amount of payments and overpayment credits the taxpayer has made and their proper application, are nonliability issues that are not subject to preclusion under section 6330(c)(2)(B). See discussion at Chapter 7, Section D.4 (Standard of review for verification, statute of limitation and application of payment issues).

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.

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).

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); *Golden v. Commissioner*, 548 F.3d 487 (6th Cir. 2008) (res judicata precludes raising statute of limitation on assessment for tax agreed to in stipulated decision). But see *Lykins, Inc. v. Commissioner*, 133 T.C. 87 (2009) (res judicata does not bar taxpayer from claiming net operating loss carrybacks and does not bar respondent from recapturing tentative refunds).

Section 6330(c)(2)(B) also does not displace other provisions in the Internal Revenue Code that preclude challenging the underlying liability in any proceeding. See, e.g., I.R.C. § 6201(a)(4)(C) (assessment of criminal restitution may not be challenged on the basis of the existence or amount of the underlying tax liability in any proceeding).

1. Self-reported taxes

In *Montgomery v. Commissioner*, 122 T.C. 1 (2004), *acq.*, AOD. 2005-03, 2005 WL 3451063, the Tax Court construed the term “underlying tax liability” under section 6330(c)(2)(B) to encompass the tax reported due on a self-filed tax return. The court accordingly held that the taxpayers 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. See Chief Counsel Notice CC-2006-05, *Change in Litigating Position Regarding Challenges to Self-Reported Liability in Collection Due Process Cases*; *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).

2. 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. See *Pough v. Commissioner*, 135 T.C. 344 (2010) (petitioner did not file amended tax returns during the hearing). 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 or provide requested information substantiating his liability challenge but the taxpayer failed to do so. See *Montgomery v. Commissioner*, 122 T.C. 1, 19-20 (2004) (Marvel, J. and Goeke, J., concurring); *Newstat v. Commissioner*, T.C. Memo. 2005-262. Taxpayers are not precluded from raising liability because they did not raise the issue in the Form 12153 hearing request; liability is properly raised if the taxpayers raise it at any time during the CDP hearing. *Fielder v. Commissioner*, T.C. Memo. 2012-284.

3. Receipt of a statutory notice of deficiency

If the taxpayer contests receipt of the notice of deficiency, respondent must introduce evidence of actual mailing. *Rivas v. Commissioner*, T.C. Memo. 2012-20. However, respondent must show that the notice of deficiency was received, not merely issued, in order to establish that taxpayer is precluded from raising liability. If respondent shows that the notice of deficiency was properly issued, then respondent has established that

the assessment was properly made. However respondent must go one step further to prove receipt in order to establish that the taxpayer cannot raise liability.

Receipt of a statutory notice of deficiency under section 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; *Butti v. Commissioner*, T.C. Memo. 2009-198; *Kuykendall 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).

Absent direct evidence that the taxpayer actually received the notice of deficiency or refused its delivery, respondent can rely on the presumptions of official regularity and delivery to meet his burden of proof. *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); *Bailey v. Commissioner*, T.C. Memo. 2005-241 (there is a strong presumption in the law that a properly addressed letter will be delivered, or offered for delivery, to the addressee).

The presumptions of regularity and delivery arise if the record reflects that the notice of deficiency was properly mailed to the taxpayer. *Sego, supra*; *Bailey v. Commissioner*, T.C. Memo. 2005-241. A properly completed Form 3877 (certified mailing list) reflecting the timely mailing of a notice of deficiency to a taxpayer's correct address, absent evidence to the contrary, establishes that the notice was properly mailed to the taxpayer. *Diamond v. Commissioner*, T.C. Memo. 2012-90. *But see JAG Brokerage, Inc. v. Commissioner*, T.C. Memo. 2012-315 (if taxpayer is a corporation, receipt by an individual authorized to act for the corporation would seem to be required).

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 was 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. *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. *Sego v. Commissioner*, 114 T.C. 604 (2000); *Lehmann v.*

Commissioner, T.C. Memo. 2005-90. The taxpayer may not decline to retrieve his mail when he was able to do so, and successfully deny receipt for purposes of prior opportunity. *Onyango v. Commissioner*, 142 T.C. No. 24 (2014).

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. *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). 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. *Rivas v. Commissioner*, T.C. Memo. 2012-20 (taxpayer did not explain why he failed to pick up the notices of deficiency after notification of delivery was placed in his post office box); *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); *Cyman v. Commissioner*, T.C. Memo. 2009-144 (preponderance of evidence showed that taxpayer refused delivery of notices of deficiency). See also *Klingenberg v. Commissioner*, T.C. Memo. 2012-292 (where notices of deficiency not returned to respondent as undeliverable, and taxpayer regularly received mail at address where notices were sent, presumption not rebutted); *Campbell III v. Commissioner*, T.C. Memo. 2013-57 (court finds based on certified mailing list and USPS testimony, that petitioner refused delivery, so he is deemed to have received notices); *Giaquinto v. Commissioner*, T.C. Memo. 2013-150 (court finds that petitioners deliberately failed to claim delivery of Letter 1153 where IRS showed it sent the letter by certified mail, accordingly petitioner precluded from contesting section 6672 liability). Cf. *Crouch III v. Commissioner*, T.C. Summ. Op. 2009-143 (presumption of delivery rebutted by credible testimony that notice was not received and taxpayer's history of promptly responding to tax-related notices).

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 did not impute the tax representative's receipt to the taxpayer. In *Lepore v. Commissioner*, T.C. Memo. 2013-135, the court held that the taxpayer could raise liability for the section 6672 penalty, finding taxpayer's testimony that he did not receive the letter 1153 to be credible even though the letter was delivered to his home but was apparently discarded or lost.

4. Other opportunity to dispute liability

a. Appeals hearing

A prior opportunity to dispute a liability includes an 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. A prior opportunity does not include a separate Appeals conference that was held concurrently with the CDP hearing. *Mason v. Commissioner*, 132 T.C. 301 (2009); *Perkins v. Commissioner*, 129 T.C. 58 (2007).

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 an Appeals hearing from which the taxpayer is not entitled to judicial review, is sufficient to prevent the taxpayer from raising the liability during CDP.

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. Thus, 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).

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. For example, a notice of a proposed trust fund recovery penalty assessment (Letter 1153) is a prior opportunity because it gives the taxpayer the right to an Appeals hearing. *Mason v. Commissioner*, 132 T.C. 301 (2009); *Orian v. Commissioner*, T.C. Memo. 2010-234. The same evidence that establishes that the Commissioner properly mailed a notice of deficiency should be sufficient to establish that the Commissioner properly sent a Letter 1153. *Mason*, 132 T.C. at 317-19.

b. 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; *Daniel v. Commissioner*, T.C. Memo. 2009-28. See also *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).

c. Audit reconsideration

An audit reconsideration conducted prior to the CDP hearing with the Examination function will not alone constitute a prior opportunity. *Crouch III v. Commissioner*, T.C. Summ. Op. 2009-143. However, an audit reconsideration 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.

d. 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); *Lance v. Commissioner*, T.C. Memo. 2009-129 (Form 870). Cf. *Marlow v. Commissioner*, T.C. Memo. 2009-129 (assessment invalid if IRS cannot prove the taxpayer signed consent).

e. 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). *Everett Associates, Inc. v. Commissioner*, T.C. Memo. 2012-143; *Salazar v. Commissioner*, T.C. Memo. 2008-38, *aff'd*, 338 Fed. Appx. 75 (2d Cir. 2009); *Kendricks v. Commissioner*, 124 T.C. 69, 77 (2005).

f. 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 is 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.

g. TEFRA proceedings

Section 6221 provides that the tax treatment of “partnership items” shall be determined at the partnership level, *i.e.*, either administratively pursuant to a TEFRA final partnership administrative adjustment (FPAA) or judicially pursuant to a timely petitioned Tax Court review of an FPAA. Section 6330(c)(2)(B) does not displace other statutory preclusions on challenging liability. *Goodman v. Commissioner*, T.C. Memo. 2006-220. Outside of a partnership-level proceeding, a taxpayer may not challenge a

liability to the extent that it would affect the tax treatment of a partnership item determined in an FPAA. *Crowell v. Commissioner*, 102 T.C. 683, 692-93 (1994). Thus, actual receipt of an FPAA in time to timely petition the Tax Court may not be relevant to whether a taxpayer can raise liability issues involving partnership items. Section 6221 does not, however, preclude a taxpayer from challenging a non-partnership item aspect of a tax liability or from raising a partner-level defense to a partnership-level penalty. See also *Keller v. Commissioner*, 568 F.3d 710 (9th Cir. 2009), *rev'g in part* T.C. Memo. 2007-15 (Ninth Circuit held that the Tax Court has jurisdiction in partner-level CDP proceedings to determine whether imposition of increased interest for tax-motivated transactions was warranted, where the partners had no prior judicial forum to raise the issues during the prior TEFRA partnership litigation).

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. 239 (2008); *Wadleigh v. Commissioner*, 134 T.C. 280 (2010) (remand for Appeals to determine whether levy on retirement income will cause economic hardship). Reviewing courts 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). Appeals 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. *Living Care Alternatives of Utica*, 411 F.3d at 628-29; *Kraft v. Commissioner*, 142 T.C. No. 14 (2014) (the inquiry of whether there is enough equity in property to be levied occurs later in the collection process). In *Kraft*, the court held that appeals did not abuse its discretion in rejecting the taxpayer's proposal that the IRS levy on a third-party trust in lieu of levying on other assets of the taxpayer.

E. Section 6330(c)(4)

Section 6330(c)(4)(A) provides 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)(A), it may not be raised in the Tax Court. *Isley v. Commissioner*, 141 T.C. No. 11 (2013) (offset issue considered in prior district court refund proceeding). In *Kovacevich v. Commissioner*, T.C. Memo. 2009-160, the court raised, without deciding, the issue of whether section 6330(c)(4)(A) is a matter that must be pleaded as an affirmative defense under Tax Court Rule 39.

“Previous administrative proceeding” in section 6330(c)(4)(A) 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)(A) 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).

Section 6330(c)(4)(B), added to the statute in 2006 along with section 6330(g), provides that the taxpayer is 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 current notice specifying frivolous positions under section 6702 is Notice 2010-33, 2010 WL 1347082.

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 finding 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).

G. Seizure and Sale Issue in Post-Levy CDP Proceeding

In *Zapara v. Commissioner*, 652 F.3d 1042, 1045 (9th Cir. 2011), *aff'g* 124 T.C. 223 (2005), *reconsideration denied*, 126 T.C. 215 (2006), the Ninth Circuit Court of Appeals affirmed the Tax Court's decision holding that in a post-levy hearing concerning a jeopardy levy, it had jurisdiction to review the Service's failure to sell property pursuant to section 6335(f). The Court of Appeals rejected the Government's argument that the section 6330 hearing, and judicial review of the hearing, must be focused on proposed levies and not actual levy and seizure actions. The Court of Appeals also held that the

Tax Court properly exercised its authority to fashion an equitable remedy in ordering the IRS to give a credit to the taxpayer of the value of the property, and that such relief was not precluded by the exclusivity provision in section 7433. The Service has issued an Action on Decision not acquiescing in this decision, on the basis that damages under section 7433 is the exclusive remedy for a violation of section 6335(f). AOD 2012-6; 2013-12 I.R.B. 657 (but agreeing that the taxpayer can raise issues regarding the sale of levied upon property at the CDP hearing).

Chapter Six – Determination by Appeals

A. 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: (A) verify that the requirements of any applicable law or administrative procedure have been met; (B) consider issues validly raised at the hearing under section 6330(c)(2); and (C) determine 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. See *also* Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E1, 301.6330-1(e)(3) Q&A-E1.

Typically, an Appeals or settlement officer conducts the hearing and drafts the determination, which is reviewed, approved and issued by an Appeals team manager. Section 6330 does not require that the Appeals officer making the determination be the same officer or employee that conducted the hearing. *Sullivan v. Commissioner*, T.C. Memo. 2009-4. The taxpayer has no right to comment on the settlement officer's report to her manager, nor does the taxpayer have a right to meet or interact with the manager. *Kuretski v. Commissioner*, - F.3d – (D.C. Cir. June 20, 2014).

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. See 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. The Commissioner submits the supplemental notice to the court with a status report.

B. 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)).

In *Tucker v. Commissioner*, 135 T.C. 114 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir.), *cert. denied*, 133 S.Ct. 646 (2012), the Tax Court stated that as a result of the retention of jurisdiction, collection personnel could not contradict Appeals' collection determination absent a change in circumstances. However, the court stated that Appeals itself could modify its determination. *Id.* at 141. More generally, both the Tax Court and the Court of Appeals held in *Tucker* that collection and liability determinations by Appeals in a CDP hearing are not necessarily final and binding determinations.

Retained jurisdiction is available only when the person has first exhausted all other administrative remedies. 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. See *Van Camp v. Commissioner*, T.C. Memo. 2012-336. The regulations provide that exercise of retained jurisdiction does not constitute a continuation of the original CDP proceeding. Accordingly, 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.

Chapter Seven – Judicial Review

A. 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. I.R.C. §§ 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 *Wagenknecht v. United States*, 533 F.3d 412 (6th Cir. 2008).

Pursuant to the amendment, the Tax Court now has jurisdiction over CDP cases previously within the sole jurisdiction of the district courts, including CDP cases involving collection of penalties and employment taxes that are not otherwise within the deficiency jurisdiction of the Tax Court. *Callahan v. Commissioner*, 130 T.C. 44 (2008) (frivolous return penalty); *Harry v. Commissioner*, T.C. Memo. 2009-206 (section 6700 penalty); *Salazar v. Commissioner*, T.C. Memo. 2008-38 (employment taxes). 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 deficiency cases, CDP litigation with respect to a particular tax liability does not necessarily preclude the Service from making an additional assessment for that same tax period. *Freije v. Commissioner*, 131 T.C. 1 (2008).

In *Kuretski v. Commissioner*, - F.3d – (D.C. Cir. June 20, 2014), the D.C. Circuit rejected the petitioner’s argument that the President’s right to remove Tax Court judges under section 7443(f) violated the Constitutional separation of powers. The D.C. Circuit reasoned that the Tax Court is not an Article III court, but is part of the Executive branch.

1. 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). See *Minhan v. Commissioner*, 138 T.C. 1(2012), *amended on reconsideration* 2012 WL 3338426 (2012) (before innocent spouse may be allowed a credit or refund, she must establish that she made an overpayment); *Cutler v. Commissioner*, T.C. Memo. 2013-119 (same).

2 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, or requested credit elect overpayments, that could be or should have been credited toward the liability at issue. The Tax Court has held 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. *Weber v. Commissioner*, 138 T.C. 348 (2012) (assuming, in footnote 5, that review of IRS's decision regarding crediting of overpayments is for abuse of discretion, and noting, in footnote 10, that there may be scenarios implicating years or issues so remote from the year at issue that they fall outside CDP jurisdiction); *Freije v. Commissioner*, 125 T.C. 14, 27 (2005); *Landry v. Commissioner*, 116 T.C. 60 (2001). Before a taxpayer can contend in a CDP case that overpayments ought to be applied to satisfy the liability at issue, he must show that he has satisfied the threshold requirements for claiming a refund. *Weber, Brady v. Commissioner*, 136 T.C. 422, 427-431 (2011).

While the Tax Court has jurisdiction under the above principles to determine the proper application of overpayments or credits, where the initial availability of the overpayment or credit has been determined or is not in dispute, the court does not have jurisdiction in a CDP case to determine a taxpayer's entitlement to a refund on the merits for a non-CDP year. *Weber* (declining to consider taxpayer's claim to credit for non-CDP section 6672 liability); *Precision Prosthetic v. Commissioner*, T.C. Memo. 2013-110. *Cf. Davis and Associates LLC v. Commissioner*, T.C. Memo. 2008-292 (distinguishing *Freije* and *Landry*, holding that court does not have jurisdiction to decide how payments under an offer-in-compromise should have been allocated among tax, penalty and interest for a CDP year).

Weber is consistent with Chief Counsel's position that the taxpayer may raise entitlement to a non-CDP period overpayment only if the taxpayer's claim does not involve an evaluation of the merits of the non-CDP period liability. Chief Counsel Notice CC-2011-21, *Tax Court Jurisdiction in Collection Due Process Cases to Consider Non-CDP Period Liability and Overpayment Issues*. Also, as stated in the Notice, 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.

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. In reviewing the notice of determination, although the court does not have jurisdiction over the non-CDP years, 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.

3. Jurisdiction over nominee and wrongful levy issues

The Tax Court has jurisdiction to decide the reasonableness of the Service's determination that the taxpayer owned property held by a third-party as a nominee for the taxpayer, and whether the Service's rejection of an offer-in-compromise on the basis that the offer did not include the nominee interest was an abuse of discretion. *Dalton v. Commissioner*, 682 F.3d 149 (1st Cir. 2012) (holding that the Service's decision to apply a balancing test and execution of the balancing test to resolve the nominee question was reasonable), *rev'g* 135 T.C. 393 (2010). On the other hand, the court will not consider the issue of whether a jeopardy levy on a third-party was improper because the taxpayer does not have standing to seek the return of property to the third-party. *Prince v. Commissioner*, 133 T.C. 270 (2009).

4. 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); *Pough v. Commissioner*, 135 T.C. 344 (2010). 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. 197 (2008); *Medical Practice Solutions, LLC v. Commissioner*, T.C. Memo. 2009-214.

B. Notice of Determination Required

Jurisdiction under section 6320 or 6330 is contingent upon both the issuance of 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. *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); *Salazar v. Commissioner*, T.C. Memo. 2006-7 (rejection of an offer-in-compromise not a notice of determination). A written notice to proceed with collection may, in some circumstances, constitute a determination conferring jurisdiction on the court even if not titled a notice of determination. *Craig v. Commissioner*, 119 T.C. 252 (2002) (decision letter after equivalent hearing confers jurisdiction, where hearing request was timely); *Thornberry v. Commissioner*, 136 T.C. 356 (2011) (letter disregarding taxpayer's frivolous request for a hearing confers jurisdiction). 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. 159 (2001). *But see Wilson v. Commissioner*, 131 T.C. 47, 53 n.8 (2008) (limiting *Lunsford* to nonjurisdictional defects in the hearing). A taxpayer has no right to judicial review of an Appeals determination made under the Collection Appeals Program (CAP). *Creditron Financial Corp. v. Commissioner*, T.C. Memo. 2013-217.

The Tax Court has jurisdiction to review a notice of determination issued after a levy pursuant to 6330(f). 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) pre-levy notice is not required, not that the court is divested of jurisdiction. *Bussell v. Commissioner*, 130 T.C. 222 (2008) (jeopardy levy); *Dorn v. Commissioner*, 119 T.C. 356 (2002) (jeopardy levy); *Clark v. Commissioner*, 125 T.C. 108 (2005) (levy on state income tax refund).

C. Timely Petition

A petition seeking review of a notice of determination must be filed within 30 days from the notice date. I.R.C. §§ 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, slip. op. 15 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. 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). The 30-day period is also not extended when a separate closing letter concerning penalty abatement is issued to the taxpayer after the notice of determination is issued. *Gray v. Commissioner*, 138 T.C. 295 (2012). The 30 day period applies even if underlying tax liability is at issue, since an assessed tax is not a deficiency. *Gray v. Commissioner*, 140 T.C. 163 (2013).

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. *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).

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.*; I.R.C. § 6015(e)(1)(A); *Gray v. Commissioner*, 138 T.C. 295 (2012).

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 I.R.C. § 6404(h)(1); *Gray v. Commissioner*, 138 T.C. 295 (2012); *Wright v. Commissioner*, 571 F.3d 215 (2d Cir. 2009). See also *Vercel v. Commissioner*, T.C. Memo. 2014-20 (petitioner cannot raise abatement of interest in CDP case where he fails to establish that he did not exceed net worth limits of section 7430(c)(4)(A)(ii)).

D. Standard and Scope of Review

The standard of review refers to how closely the Tax Court will scrutinize the IRS's determination. If the underlying liability is properly at issue, the Tax Court reviews the liability issue de novo and the other administrative determinations for an abuse of discretion. *Jones v. Commissioner*, 338 F.3d 463, 466 (5th Cir. 2003); *Craig v. Commissioner*, 119 T.C. 252, 260 (2002); *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). If liability is not at issue, the Tax Court reviews the entire determination for an abuse of discretion. *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005); *Callahan v. Commissioner*, 130 T.C. 44, 50-51 (2005); *Goza v. Commissioner*, 114 T.C. 176, 181-82 (2000); H.R. REP. NO. 105-599, at 266 (1998) (Conf. Rep.). The standard of review of questions of law makes no difference as the Tax Court must reject erroneous views of the law. *Best v. Commissioner*, T.C. Memo. 2014-12. The scope of review defines what evidence a court is permitted to examine when applying a particular standard of review. The scope of review for issues the court reviews de novo in CDP cases is also de novo. In other words, the court is not limited to reviewing the record before Appeals and may hold a trial and take new evidence and testimony. The scope of review of issues subject to abuse of discretion review in the Tax Court is a matter of controversy. The IRS's position, supported by the opinions of three circuit courts, is that review is generally limited to the administrative record. *Keller v. Commissioner*, 568 F.3d 710 (9th Cir. 2009); *Murphy v. Commissioner*, 469 F.3d 27 (1st Cir. 2006); *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006) (holding that the administrative record rule applies in Tax Court CDP cases), *rev'g* 123 T.C. 85 (2004). The Tax Court held in *Robinette* that its review, as a general rule, is not limited to the administrative record, although the court will often nonetheless limit review to the record

based on relevancy and the general principle that the taxpayer must raise issues before Appeals in order to preserve them for appeal. See, e.g., *Kovacevich v. Commissioner*, T.C. Memo. 2009-160.

Each item in the administrative record does not need to be independently admitted into evidence in the Tax Court. The Appeals Officer's testimony at trial that he relied on a document is sufficient to authenticate it as part of the administrative record. *Meyer v. Commissioner*, T.C. Memo. 2013-268.

1. Abuse of discretion standard of review

Nonliability issues subject to abuse of discretion review include all matters involving the Appeals officer's determination to proceed with collection, and all matters involving the conduct of the hearing. Since generally the taxpayer bears the burden of proving the Commissioner's determinations are incorrect, the burden is on petitioner to show that respondent abused his discretion. *Johnson v. Commissioner*, T.C. Memo. 2007-29, *aff'd in part and vacated in part on other grounds*, *Keller v. Commissioner*, 568 F.3d 710 (9th Cir. 2009).

The Tax Court will overturn a determination it reviews for abuse of discretion standard in CDP cases if the determination is "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." *Robinette v. Commissioner*, 123 T.C. 85, 93 (2004), *rev'd on other grounds*, 439 F.3d 455 (8th Cir. 2006).

Review of a CDP determination under the abuse of discretion standard is deferential. *Dalton v. Commissioner*, 682 F.3d 149 (1st Cir. 2012), *rev'g* 135 T.C. 393 (2010); *Fifty Below Sales & Marketing, Inc. v. United States*, 497 F.3d 828 (8th Cir. 2007); *Kindred v. Commissioner*, 454 F.3d 688, 694 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"); *Deyo v. United States*, 296 Fed. Appx. 157 (2d Cir. 2008). A court's job is not to review the Service's determinations anew but "simply to confirm that the IRS did not abuse its wide discretion and – as part and parcel of that inquiry – to ensure that the agency's subsidiary factual and legal determinations were reasonable." *Dalton*, 682 F.3d at 154. A reviewing court's role is the same regardless of whether it is reviewing a factual question, legal question, or mixed question of law and fact, and that role is "to evaluate the reasonableness of the IRS's subsidiary determination." *Id* at 10.

In *Fifty Below Sales & Marketing, Inc.*, the Eighth Circuit stated, "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 reviewing Appeals’ collection determinations, the Tax Court does not substitute its judgment for that of Appeals, nor does it decide independently what would be an acceptable offer amount. *Blondheim v. Commissioner*, T.C. Memo. 2006-216; *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. The court does not conduct an independent review and substitute its judgment for that of the settlement officer; rather, if the settlement officer follows all statutory and administrative guidelines and provides a reasoned, balanced decision, the Court will not reweigh the equities. *Estes v. Commissioner*, T.C. Memo. 2014-9. 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. *Speltz v. Commissioner*, 454 F.3d 782 (8th Cir. 2006).

The Tax Court does not independently review whether an offer-in-compromise or other collection alternative is acceptable. *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff’d*, 469 F.3d 27 (1st Cir. 2006). The Tax Court’s review is limited to whether the Appeals officer’s rejection of the offer was arbitrary, capricious, or without sound basis in fact or law. *Id.*

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.

It is not the role of a reviewing court to determine whether the Service applied the correct rule of law – it “need only determine whether the IRS applied a reasonable view of what the law is or might be.” *Dalton*, 682 F.3d 149, 159 (“[T]he question is whether the IRS’s determination, correct or not, falls within the wide universe of reasonable outcomes.”). *But see Kendrick v. Commissioner*, 124 T.C. 69, 75 (2005) (a reviewing court owes no deference to an Appeals officer’s legal conclusions made in connection with determinations reviewed for an abuse of discretion). 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). *See, e.g., Vinatieri v. Commissioner*, 133 T.C. 392 (2009).

The harmless error rule applies to abuse of discretion review of CDP determinations. *Perkins v. Commissioner*, 129 T.C. 58, 71 (2007) (remand not required where the Appeals Team Manager’s potential prior involvement in the case was harmless error). The harmless error rule provides that a reviewing court should not overturn an agency determination for abuse of discretion if the agency mistake causes no prejudice or does not affect the ultimate determination. *Keene v. Commissioner*, 121 T.C. 8, 21 (2003).

The harmless error rule has been applied 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 held that a remand to allow recording is unnecessary if the taxpayer only makes frivolous arguments, *Burke v. Commissioner*, 124 T.C. 189, 192 (2005); *Brandenburg v. Commissioner*, T.C. Memo. 2005-249. See also *Gillum v. Commissioner*, 676 F.3d 633 (8th Cir. 2012) (assuming that Appeals relied on evidence outside the administrative record, such error was harmless).

Under the *Chenery* doctrine, a reviewing court, in dealing with a determination which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. *Antico v. Commissioner*, T.C. Memo 2013-25 (citing to *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*) and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*)). In the CDP context, this means that the Tax Court cannot uphold a notice of determination on grounds other than those actually relied upon by the Appeals officer. *Id.* See *Salahuddin v. Commissioner*, T.C. Memo. 2012-141 (“[O]ur role under section 6330(d) is to review actions that the IRS took, not actions that it could have taken.”)

The Tax Court will find an abuse of discretion where the notice of determination is so permeated with errors and inconsistencies as to lack a sound basis in fact or law. *Meeh v. Commissioner*, T.C. Memo. 2009-180. However, errors that do not relate to relevant issues and that do not conflict with the administrative record do not amount to an abuse of discretion. *Liebold v. Commissioner*, T.C. Memo. 2012-210.

2. Abuse of discretion scope of review

Pursuant to general administrative law principles, a court reviewing an agency decision for abuse of discretion is limited to reviewing the administrative record developed in the agency proceeding. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”). However, 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, 313 n.6 (2005), *aff’d on different grounds*, 469 F.3d 27 (1st Cir. 2006). The Tax Court in *Robinette* held that the Administrative Procedures Act does not apply to Tax Court proceedings, and the court is permitted to conduct a trial de novo in connection with its abuse of discretion review.

Three circuit courts have disagreed with the Tax Court and held that the administrative record rule does apply in CDP cases. The Tax Court’s decision in *Robinette* was reversed by the Eighth Circuit. *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006). The First Circuit and Ninth Circuit have also held that abuse of discretion review in Tax Court CDP cases must be limited to the administrative record (the record rule). *Keller v. Commissioner*, 568 F.3d 710 (9th Cir. 2009), *aff’g in part and vacating in part on different grounds Ertz v. Commissioner*, T.C. Memo. 2007-15; *Murphy v. Commissioner*, 469 F.3d 27 (1st Cir. 2006), *aff’g on different grounds* 125 T.C. 301

(2005). See also *Olsen v. United States*, 414 F.3d 144, 155-156 (1st Cir. 2005) (district court review of CDP determinations for an abuse of discretion is limited to the administrative record).

The concurring opinions in the Tax Court decision in *Robinette* suggest in appropriate circumstances the court might restrict its review to the administrative record, such as where the taxpayer did not cooperate in presenting relevant evidence at the Appeals hearing. Wells, J., concurring at 114–15; Thornton, J., concurring at 116; Wherry, J., concurring, at 120. Consistent with the concurring opinions in *Robinette*, 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. Thus, under Tax Court precedent, relevancy is an acceptable ground for exclusion of evidence or testimony regarding abuse of discretion issues that is not in the administrative record. Respondent must make a relevancy objection to evidence at trial. *Kovacevich v. Commissioner*, T.C. Memo. 2009-160.

The Tax Court will follow the record rule in a case appealable to the First, Eighth or Ninth Circuit pursuant to the *Golsen* rule. See *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *affd.*, 445 F.2d 985 (10th Cir. 1971). 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).

There are exceptions to the record rule permitting the submission of evidence outside the administrative record, including the following: (1) If the record does not adequately describe the basis for the determination, and (2) if there is a dispute over what happened during the hearing process. *Murphy v. Commissioner*, 469 F.3d 27 (1st Cir. 2006) (evidence outside administrative record permissible if there is a showing of bad faith or improper behavior by the agency decision-maker, or 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. 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.”); *Gillum v. Commissioner*, 676 F.3d 633 (8th Cir. 2012) (settlement officer may testify at trial to give taxpayer opportunity to show that the settlement officer failed to adequately explain the reasons in his determination). See also *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (“[C]ourts 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.”). See also *Meyer v. Commissioner*, T.C. Memo. 2013-268, Slip. Op. at 12 n. 9 (citing Ninth Circuit case law, the record rule has exceptions (1) to determine whether the agency has considered all relevant factors and explained its decision, (2) the agency has relied on documents not in the record, (3) when necessary to explain technical terms or complex subject matter, or (4) there is a showing of agency bad faith (relying on the trial record only to determine how the Appeals Officer arrived at his decision and whether he considered all relevant factors)).

The Tax Court has held that respondent may introduce as evidence a certified mailing list that is not in the administrative record to refute petitioner’s argument that he did not receive a notice of deficiency, on the basis that the record may be supplemented if it does not adequately disclose the basis for the Commissioner’s determination. *Crain v. Commissioner*, T.C. Memo. 2012-97, at n. 2.

A reviewing court may admit testimony or evidence outside of the administrative record to provide explanatory background information to aid the court in understanding the agency’s decision. *Rosenbloom v. Commissioner*, T.C. Memo. 2011-140 (taking testimony to explain tax transcripts are allowed; otherwise they are “almost completely incomprehensible to one not skilled at interpreting the various numerical codes they use”); *Klingenberg v. Commissioner*, T.C. Memo. 2011-247 (allowing settlement officer to testify explaining on what basis and why he made his administrative determinations, and allowing USPS employee to testify to explain the mechanics of certified mail to the court); *Kreit Mechanical Associates, Inc. v. Commissioner*, 137 T.C. 123 (2011) (petitioner can introduce expert report to help court understand respondent’s administrative procedures and to understand the evidence). See also *Asarco, Inc. v. E.P.A.*, 616 F.2d 1153, 1160 (9th Cir. 1980) (“A satisfactory explanation of agency action is essential for adequate judicial review...”); *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 703-704 (9th Cir. 1996) (recognizing exception to record rule “when supplementing the record is necessary to explain technical terms or complex subject matter”). The court may look outside the record to determine whether the agency has considered all relevant factors and has explained its decision. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1980). See also *Bowman v. Commissioner*, T.C. Memo. 2007-114 (submission of Form 4340 Certificate of Assessments is not a violation of the record rule because it contains the same information reviewed by Appeals).

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.

3. 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. REP. NO. 105-599, at 266 (1998) (Conf. Rep.). Under the de novo standard of review applicability to underlying liability issues, the record rule does not apply, and the Tax Court considers all the relevant evidence introduced at trial. *Jordan v. Commissioner*, 134 T.C. 1 (2010). 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).

4. Standard of review for verification, statute of limitations and application of payment issues

Nonliability issues subject to abuse of discretion review include the verification requirement that appeals determine whether legal and administrative requirements have been met. *Meyer v. Commissioner*, T.C. Memo. 2013-268 (applying abuse of discretion review to Appeals' verification that notice of deficiency was properly issued, and thus whether assessment was valid). On the other hand, the Tax Court has held that challenges to the validity of the assessments are liability issues subject to de novo review. *Hoffman v. Commissioner*, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); *Mathia v. Commissioner*, T.C. Memo. 2009-120; *Marlow v. Commissioner*, T.C. Memo. 2010-113 (argument that assessment is invalid because taxpayers did not waive restrictions on assessment is a liability issue; also holding that Commissioner has burden of proving the existence and validity of signed waivers of restrictions on assessments). See also *Olender v. Commissioner*, T.C. Memo. 2008-205 (holding that challenge to assessment is accordingly barred under section 6330(c)(2)(B)). Compare *City Wide Transit v. Commissioner*, T.C. Memo. 2011-279 (issue of whether assessment statute was extended due to intent to evade tax is a liability issue that is reviewed de novo).

In *Kindred v. Commissioner*, 454 F.3d 688 (7th Cir. 2006), the Seventh Circuit stated 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 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). Cf. *Srivastava v. Commissioner*, 2011 TNT 249-9 (Order, December 23, 2011) (taxpayer's challenge to correctness of amount of tax due on transcripts is more of a challenge to verification than a liability challenge). See also *O'Brien v. Commissioner*, T.C. Memo. 2012-326 (treating issue of whether the section 6702(a) penalty was timely assessed as a liability issue; also holding the period of limitations for assessment cannot begin to run until the frivolous document is submitted to and received by the IRS).

The Tax Court has also held that the issue of whether the ten-year period of limitations on collection has expired is also a challenge to the underlying liability, and is therefore reviewed de novo. *Jordan v. Commissioner*, 134 T.C. 1 (2010) (also holding that the collection period of limitations is an affirmative defense for which petitioner has the burden of proof; if petitioner establishes prima facie case by showing normal ten year period has expired, Commissioner must prove that an exception applies, such as introducing a valid waiver extending the collection period); *Boyd v. Commissioner*, 117 T.C. 127 (2001). *But see Rosenbloom v. Commissioner*, T.C. Memo. 2011-140 (abuse of discretion review applied to issue of whether collection statute was properly extended); *Roberts v. Commissioner*, T.C. Memo. 2004-100 (same).

In *Dixon v. Commissioner*, 141 T.C. No. 3 (2013), the Tax Court noted that there is uncertainty in its precedent over whether the de novo or abuse of discretion standard of review applies to the issue of the proper application of credits and overpayments or remittances. It declined to address that issue because the Service's proposed collection action was impermissible under either standard. *See also Adell v. Commissioner*, T.C. Memo. 2014-89. *Compare Landry v. Commissioner*, 116 T.C. 60 (2001) (applying de novo standard of review to challenge to application of overpayment credits) with *Kovacevich v. Commissioner*, T.C. Memo. 2009-160 (applying abuse of discretion review to challenge to application of tax payments), *Concert Staging Services, Inc v. Commissioner*, T.C. Memo. 2011-231(same) and *Orian v. Commissioner*, T.C. Memo. 2010-234 (same).

Chief Counsel Notice CC 2014-002, *Proper Standard of Review for Collection Due Process Determinations*, states the Office of Chief Counsel's longstanding position that issues involving whether the Service has complied with all applicable legal and administrative procedural requirements involve nonliability issues that are subject to abuse of discretion review. Nonliability issues include whether the assessment is valid (e.g., whether a notice of deficiency or letter 1153 was properly issued) and whether the assessment and collection statute of limitations were complied with. This notice similarly takes the position that issues involving the amount of payments and overpayment credits the taxpayer has made and their proper application, are nonliability issues that are subject to abuse of discretion review.

5. Determinations under section 6015

Section 6330(c)(2)(A)(i) specifically permits the taxpayer to raise "appropriate spousal defenses" at the CDP hearing. 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 of CDP. Denial of relief under section 6015(b) or (c) is reviewed de novo (both the standard of review and the scope of review) and the court is not bound by the administrative record. I.R.C. § 6015(e)(1)(A). Denial of equitable relief under section 6015(f) is similarly reviewed de novo (both standard of review and scope of review). *Porter v. Commissioner*, 132 T.C. 203 (2009); *Wilson v. Commissioner*, 705 F.3d 980 (9th Cir. 2013), *aff'g* T.C. Memo. 2010-134 (relying on the specific language in section 6015(e)(1)(A) giving the Tax Court the authority to

“determine” the appropriate relief available). The Service acquiesced to *Wilson* in Action on Decision 2012-07, I.R.B. 2013-25, 2013 WL 2393067 (June 17, 2013).

Chapter Eight – Effect of Bankruptcy on CDP

The issuance of a CDP levy notice violates the automatic stay. *Beverly v. Commissioner*, T.C. Memo. 2005-41. *Cf. Haubrich v. Commissioner*, T.C. Memo. 2009-45 (CDP levy notice for postpetition tax does not violate automatic stay).

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. *Prince v. Commissioner*, 133 T.C. 270 (2009); *Bussell v. Commissioner*, 130 T.C. 222, 235 (2008); *In re Isom v. United States*, 901 F.2d 744 (9th Cir. 1990). 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. *Waldeigh v. Commissioner*, 134 T.C. 280 (2010).

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 11 U.S.C. § 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).

Section 362(a)(8) of Title 11 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). *Prevo v. Commissioner*, 123 T.C. 326 (2004) (automatic stay bars petition for review of section 6320 determination). Where the taxpayer files bankruptcy after issuance of a notice of determination but before filing a Tax Court petition, 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. If the taxpayer does not move the bankruptcy court to lift the stay for purposes of filing a Tax Court petition, the period for filing a Tax Court petition may run while the automatic stay is in effect. See *Prevo*, 123 T.C. at 331.

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). However, section 362(a)(8) does not prevent the Tax Court from granting the petitioner’s voluntary motion to dismiss the case. *Settles v. Commissioner*, 138 T.C. 372 (2012).

If a discharge has been entered in the bankruptcy case, the Tax Court has jurisdiction to determine whether the tax liability at issue in the CDP hearing is excepted from discharge. *Bussell v. Commissioner*, 130 T.C. 222, 235 (2008); *Washington v. Commissioner*, 120 T.C. 114 (2003). Cf. *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).

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.

Chapter Nine – CDP Litigation in Tax Court

Note: The Part 35 CCDM Provisions addressing the litigation guidelines for Chief Counsel attorneys handling CDP cases are listed in Chapter 1.

A. Small Case Status

Eligibility for small case status is determined differently for CDP cases than for deficiency cases. In deficiency cases, the rule is that the amount in dispute cannot exceed \$50,000 for any one taxable year or period at issue. 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. *Leahy v. Commissioner*, 129 T.C. 71 (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. *Schwartz v. Commissioner*, 128 T.C. 6, 7 n.1 (2007); see also I.R.C. §§ 6601(e)(1) and 6665(a)(2).

B. Issues Considered by Tax Court

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, since Appeals has the duty to verify compliance regardless of the issues the taxpayer raises. *Hoyle v. Commissioner*, 131 T.C. 197 (2008) (taxpayer can, for the first time in court, raise whether notice of deficiency was properly sent).

In *Macdonald v. Commissioner*, T.C. Memo. 2014-42, the court questioned whether the IRS has the standing to challenge portions of a Notice of Determination that the IRS disagrees with, but resolved the matter by remanding to Appeals to reconsider its findings that the assessments were invalid.

C. Dismissal for Mootness

The Tax Court's jurisdiction under section 6330(d) is limited to reviewing any issues relating to the NFTL or the proposed levy, 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); *Byers v. Commissioner*, 740 F.3d 668 (D.C. Cir. 2014). 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).

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). Cf. *Farhoumand v. Commissioner*, T.C. Memo. 2012-131 (court has jurisdiction to determine liability for penalty that was not listed on CDP notice because it was fully paid, where taxpayer seeks to reallocate payments for that penalty against another penalty for the same tax year). However the court has overpayment jurisdiction under section 6404(h)(2)(B) insofar as abatement of interest was raised at the CDP hearing and the notice of determination can be deemed a final determination under section 6404(h)(1). *Wright v. Commissioner*, 571 F.3d 215 (2d Cir. 2009).

D. Dismissal for Lack of Jurisdiction

The Tax Court is a court of limited jurisdiction, and its exercise of jurisdiction pursuant to section 6330 depends upon the issuance of a valid notice of determination and the filing of a timely petition for review. *Orum v. Commissioner*, 123 T.C. 1, 8 (2004), *aff'd*, 412 F.3d 819 (7th Cir. 2005); *Moorhous v. Commissioner*, 116 T.C. 263, 269 (2001). Any party, or the court sua sponte, may question jurisdiction at any time, even after the case has been tried and briefed. *Space v. Commissioner*, T.C. Memo. 2009-230.

If no notice of determination has been issued to the taxpayer, a motion to dismiss for lack of jurisdiction should be filed. *Kennedy v. Commissioner*, 116 T.C. 255 (2001). *Davis v. Commissioner*, T.C. Memo. 2008-238 (lock-in letter instructing taxpayer's employer to adjust taxpayer's withholding does not confer jurisdiction to the Tax Court). 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*, 123 T.C. at 11-12; *Moorhous*, 116 T.C. at 269-270; Treas. Reg. §§ 301.6320-1(i)(2), 301.6330-1(i)(2). 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). The Tax Court will similarly treat a letter denying a CDP hearing under section 6330(g) as a notice of determination that confers jurisdiction on the court. *Thornberry v. Commissioner*, 136 T.C. 356 (2011). *But see* Chief Counsel Notice CC-2012-003, *Disregarding Frivolous CDP Hearing Requests under Section 6330* (disagreeing with *Thornberry*). 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 may arise whether a proper CDP notice was ever mailed to the taxpayer. If a proper CDP notice was not mailed, the court may dismiss the case for lack of jurisdiction on that ground rather than because no notice of determination was issued. *Walthers v. Commissioner*, T.C. Memo. 2009-139 (court dismisses for lack of jurisdiction because respondent failed to prove, with a certified mailing list, that CDP notice was sent); *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). If, on the other hand, a proper CDP notice was mailed, the case can be dismissed on the ground that the taxpayer failed to timely request a hearing. *Space v. Commissioner*, T.C. Memo. 2009-230.

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. 47 (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*, and it did not 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).

A petition seeking review of a notice of determination must be filed within 30 days from the notice date. I.R.C. §§ 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. The 30 days are 30 calendar days, not 30 business days, and a petition filed beyond the 30-calendar-day period will be dismissed for lack of jurisdiction. *Guerrier v. Commissioner*, T.C. Memo. 2002-3.

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. *Lunsford v. Commissioner*, 117 T.C. 159 (2001).

E. Voluntary Dismissals

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 also *Settles v. Commissioner*, 138 T.C. 372 (2012).

F. Remand

When Appeals has abused its discretion, the taxpayer was not given a proper hearing, or the administrative record is insufficient for the Tax Court to properly evaluate the case, the Tax Court will remand the case to the Office of Appeals. *Waldeigh v. Commissioner*, 134 T.C. 280 (2010); *Kehoe v. Commissioner*, T.C. Memo. 2013-63; *Churchill v. Commissioner*, T.C. Memo. 2011-182. See, e.g., *Synergy Environmental, Inc. v. Commissioner*, T.C. Memo. 2014-140 (remand where appeals officer failed to consider OIC in the CDP hearing because he addressed in a separate appeal from a pre-CDP rejection); *Jones v. Commissioner*, T.C. Memo. 2012-274 (remand because administrative record does not adequately disclose Appeals' analysis in rejecting OIC, and because taxpayers not afforded meaningful opportunity to substantiate asset valuation); *Anderson v. Commissioner*, T.C. Memo. 2013-261 (remand because record is unclear as to whether Appeals considered petitioner's health problems in rejecting OIC); *Pomeroy v. Commissioner*, T.C. Memo. 2013-26 (remand to supplement and clarify record as to taxpayer's medical condition which bears on whether he is entitled to an effective tax administration offer); *Dickes v. Commissioner*, T.C. Memo. 2013-210 (remand where Appeals did not give taxpayer an opportunity to submit an OIC after denying penalty abatement request); *Lane v. Commissioner*, T.C. Memo. 2013-121 (remand where Appeals rejected OIC but did not properly explain calculation of reasonable collection potential, and did not consider whether petitioner would suffer economic hardship if offer was rejected); *Macdonald v. Commissioner*, T.C. Memo. 2014-42 (remand where IRS argued that Appeals erroneously determined that assessments were invalid); *Uribe v. Commissioner*, T.C. Memo. 2014-116 (remand because Appeals failed to ask for taxpayer's financial information in connection with consideration of installment agreement).

The court will only remand when a new hearing is necessary or will be productive, and should uphold a determination if Appeals' error is harmless. *Lunsford v. Commissioner*, 117 T.C. 183, 189 (2001). For example, if the taxpayer was denied the right to record his conference but makes only 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.

When the reasons given in the determination for rejecting an offer-in-compromise are inadequate for the court to determine whether Appeals abused its discretion, the court will remand for further consideration and clarification. *Leago v. Commissioner*, T.C. Memo. 2012-39 (Appeals should consider any new collection alternatives proposed by taxpayer, and any changed circumstances, on remand). The court will remand where Appeals failed to make sufficient efforts to contact the taxpayer on the scheduled date of a telephone hearing. *Bridgmon v. Commissioner*, T.C. Memo. 2012-322. See also *Alessio Azzari, Inc. v. Commissioner*, T.C. Memo. 2012-310 (remand where Appeals rejected OIC without giving taxpayer opportunity to amend offer).

The court will remand when there has been a material change in taxpayer's factual circumstances between the time of the hearing and the time of trial. *Churchill v. Commissioner*, T.C. Memo. 2011-182 ("[W]hen there is a question of 'changed circumstances' raised on appeal, well-established principles of administrative law will generally require the issue to be remanded back to the agency for its consideration." (citation omitted)); *Van Camp v. Commissioner*, T.C. Memo. 2012-336 (finding no changed circumstances); *Harrell v. Commissioner*, T.C. Memo. 2003-271 (remand where the law affecting the taxpayer's case changed between the CDP hearing. Cf. *Trainor v. Commissioner*, T.C. Memo. 2013-14 (no remand where taxpayer could have brought matter to the attention of Appeals during the CDP hearing). In Chief Counsel Notice CC-2013-002, *Remands to Appeals in CDP Cases When There is a Post-Determination Change in Circumstances*, Chief Counsel took the position that remand may be appropriate in rare circumstances where there has been a change in circumstances that is material and affects the core issues in the case that, if known at the time of the Appeals hearing, would likely have altered Appeals' determination.

When the case is remanded, the Tax Court retains jurisdiction over the case. The resulting hearing on remand provides the parties with an opportunity to complete the initial hearing while preserving the taxpayer's right to receive judicial review of the ultimate administrative determination. *Waldeigh*, 134 T.C. at 299.

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). When a supplemental notice has been issued by Appeals after remand, the court will generally review the supplemental notice, and will admit new evidence considered by Appeals during the hearing on remand. *Hoyle v. Commissioner*, 136 T.C. 463 (2011).

See Rev. Proc. 2012-18, *Ex Parte Communications Between Appeals and Other Internal Revenue Service Employees*, at Section 2.02(10)(c), and Chief Counsel Notice 2012-010, *Updates of Rules Governing Ex Parte Communications Between Chief Counsel Attorneys and Employees of Appeals*, for the guidelines on how Chief Counsel attorneys should handle remanded cases.

G. Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). The Court may grant summary judgment if there is no genuine issue of material fact and a decision may be rendered as a matter of law. T.C. Rule 121(b); *Craig v. Commissioner*, 119 T.C. 252, 259-60 (2002); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of proving that there is no genuine issue of material fact and the court will view any factual inferences in a light most favorable to the nonmoving party. *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985). If the moving party properly makes and supports a motion for summary judgment, “an adverse party may not rest upon the mere allegations of denials of such party’s pleading” but “must set forth specific facts showing that there is a genuine issue for trial.” T.C. Rule 121(d); *Arede v. Commissioner*, T.C. Memo. 2014-29.

H. 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. *Wnuck v. Commissioner*, 136 T.C. 498 (2011); *Best v. Commissioner*, T.C. Memo. 2014-12. The Tax Court will ordinarily not address frivolous arguments. *Wnuck*. The Tax Court has declined to impose the section 6673 penalty when 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.

Chapter 10 – Appellate Litigation

A. Venue for Appeal

In *Byers v. Commissioner*, 740 F.3d 668 (D.C. Cir. 2013), the D. C. Circuit held that the proper venue for an appeal from a CDP decision of the Tax Court, in a case where the taxpayer is not seeking a redetermination of liability, is the D.C. Circuit pursuant to the flush language of section 7482(b). Where, however, the taxpayer is challenging liability, venue lies in the circuit of the taxpayer’s residence pursuant to section 7482(b)(1)(A). The court therefore denied the Commissioner’s motion to transfer a collection case filed by a Minnesota taxpayer in the D.C. Circuit, to the Eighth Circuit. The court stated, however, that it is not deciding whether a taxpayer who is seeking review of a CDP

decision on a collection method may file in a court of appeals other than the D.C. Circuit. See *Boulware v. Commissioner*, T.C. Memo. 2014-80 at n. 4 (noting the uncertainty as to appellate venue in light of *Byers*).

B. Standard of Review

The courts of appeals review decisions of the Tax Court in the same manner as they review decisions of the district court in civil actions without a jury. Section 7482(a)(1); *Williams v. Commissioner*, 718 F.3d 89 (2d Cir. 2013). Hence, a court of appeals reviews de novo a grant of summary judgment by the Tax Court. *Id.* The court of appeals reviews the underlying liability de novo, and reviews nonliability determinations by appeals for abuse of discretion. *Id.*; *Byers v. Commissioner*, 740 F.3d 668 (D.C. Cir. 2013); *Jones v. Commissioner*, 338 F.3d 463 (5th Cir. 2003); *Dalton v. Commissioner*, 682 F.3d 149, 154 (1st Cir. 2012) (“Where, as here, the amount of the underlying tax liability is not in dispute, we review the IRS’s disposition of an offer in compromise following a CDP hearing for abuse of discretion, ceding no special deference to the Tax Court’s intermediate review”).