

LR
#13

STANDARD OF REVIEW: Amend IRC § 6330(d) to Provide for a De Novo Standard of Review of Whether the Collection Statute Expiration Date is Properly Calculated by the IRS

PROBLEM

Collection Due Process (CDP) hearings were created by the IRS Restructuring and Reform Act of 1998 (RRA 98).¹ CDP hearings provide taxpayers with an independent review by the IRS Office of Appeals of the decision to file a Notice of Federal Tax Lien (NFTL) or the IRS's proposal to undertake a levy action. At the hearing, the Appeals officer is required to "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met."² One element of the analysis is verifying that the calculation of the collection statute expiration date (CSED) is accurate.

The taxpayer may appeal an unfavorable CDP hearing determination to the U.S. Tax Court.³ How the court reviews the determination depends on whether the taxpayer contests the underlying liability. The Tax Court applies the abuse of discretion standard to determinations made by Appeals that deal with issues other than the underlying liability.⁴ Under this standard, the court must give deference to an IRS Office of Appeals determination unless it is "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law."⁵ When the taxpayer is raising arguments related to the underlying liability, the Tax Court applies the *de novo* standard of review.⁶

Legislative history does not address whether CSED issues under Internal Revenue Code (IRC) § 6330(c)(1) relate to the taxpayer's underlying liability. In a series of decisions, the Tax Court has held that issues related to IRC § 6330(c)(1) can be both related and not related to the underlying liability.⁷ This inconsistency creates a situation where similarly situated taxpayers are treated differently. Recently, the IRS Office of Chief Counsel issued guidance stating that verification of CSED calculation should receive abuse of discretion review, which is limited in its scope, based on the premise that CSED does not affect the underlying liability.⁸

1 RRA 98, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998).

2 IRC § 6330(c)(1).

3 *Id.*

4 *Jones v. Comm'r*, 338 F.3d 463, 466 (5th Cir. 2003); *Craig v. Commis'r*, 119 T.C. 252, 260 (2002); *Sego v. Comm'r*, 114 T.C. 604, 610 (2000); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998) ("Where the liability is not properly at issue, the appeals officer's determinations should be reviewed for an abuse of discretion.")

5 See *Duarte v. Comm'r*, T.C. Memo 2014-176 at *10. See, e.g., *Bartley v. United States*, 343 F. Supp. 2d 649, 652 (N.D. Ohio 2004); *Robinette v. Comm'r*, 123 T.C. 85, 93 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006); *Woodral v. Comm'r*, 112 T.C. 19, 23 (1999); *Blondheim v. Comm'r*, T.C. Memo. 2006-216.

6 H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998) ("Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is a part of the appeal ... [t]he amount of the liability will in such cases be reviewed by the appropriate court on a de novo basis.")

7 See, e.g., *Rosenbloom v. Comm'r*, T.C. Memo. 2011-140, at *22-23 (holding that since the taxpayer was not challenging the underlying liabilities, the court would review with the abuse of discretion standard); *Roberts v. Comm'r*, T.C. Memo. 2004-100, at *11-12 (holding that a petitioner's challenge to the expiration of the CSED does not challenge the underlying liability and will receive abuse of discretion review); *Jordan v. Comm'r*, 134 T.C. 1, 15-16 (2010) (holding that since a challenge to the CSED is a challenge to the underlying liability and the petitioners did not have a previous opportunity to raise the issue, the court would review the validity of a signature on Form 900, Tax Collection Waiver, with the *de novo* standard); *Boyd v. Comm'r*, 117 T.C. 127 (2001) (where the taxpayer raises an argument that the IRS is time barred from collecting a tax liability, the court will review the matter *de novo*).

8 Office of Chief Counsel, Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* 4 (May 5, 2014).

The Tax Court's review under the abuse of discretion standard is generally limited to what is in the taxpayer's administrative file, which will include issues raised at the CDP hearing. However, taxpayers do not have easy access to records related to the calculation of their CSED, as this information is held by the IRS. Although Appeals is required to verify the accuracy of the CSED, taxpayers may not know how to bring particular concerns about the CSED to the Appeals officer's attention. Additionally, the IRS's CSED calculation is not always accurate.⁹ Moreover, a review of the CDP program by the Treasury Inspector General for Tax Administration (TIGTA) in 2013 found that approximately 21 percent of CSED calculations were not accurate because Appeals did not accurately input the CSED suspension code related to the CDP hearing.¹⁰ The incorrect calculation of the CSED has the potential to result in unlawful collection activity against taxpayers.

The limited review of CSED issues based on the abuse of discretion standard and the inconsistency of Tax Court treatment of CSED issues as both related and not related to the underlying liability impairs the *right to a fair and just tax system*, which among other things, recognizes the right "to expect the tax system to consider facts and circumstances that might affect [a taxpayer's] underlying liabilities."¹¹ The deferential abuse of discretion standard of review may be detrimental to the full exercise of *the right to challenge the IRS's position and be heard*, which in part includes "the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions."¹² If the taxpayer does not have easy access to the records, then he or she cannot make an effective objection. *The right to pay no more than the correct amount of tax* may be violated when the CSED has expired but the CDP hearing upholds a proposed levy or lien. In this situation the taxpayer is paying more than is legally due. It also violates the *right to finality* because the CSED imposes a set period of time within which the IRS can collect the tax. Lastly, the *right to appeal an IRS decision in an independent forum* is negatively affected because the taxpayer cannot adequately develop a case. By itself, this provision affects half of the rights afforded to taxpayers in the Taxpayer Bill of Rights and as such, this recommendation will go a long way in acknowledging taxpayer rights.

EXAMPLE

Taxpayer A reported a \$1,000 liability on his 2002 return and entered into an installment agreement but could not keep up with the payments. He then submitted an offer in compromise (OIC), the processing of which extended the CSED. While the IRS was considering his offer, Taxpayer A deployed to a combat zone for a brief period, which suspended his CSED. Following his return, the IRS rejected his offer and eventually proposed a levy on his wages.

Taxpayer A requested a CDP hearing. Unbeknownst to Taxpayer A, an error occurred in the IRS's calculation of his CSED, but because of the miscalculation, the IRS continued to collect the debt. In fact, the CSED had expired and Taxpayer A no longer owed this debt. Taxpayer A, who is unrepresented, did not know that he should question the collectability of the unpaid tax. When Appeals reviewed his transcript, it did not detect anything amiss with the accuracy of the CSED. Taxpayer A filed a petition in Tax Court

9 See *Reinhart v. Comm'r*, T.C. Memo 2014-218 (applying *de novo* standard of judicial review the court held that the IRS was time barred from collecting a trust fund recovery penalty and filing a Notice of Federal Tax Lien because of CSED expiration; CSED was not suspended because the taxpayer did not live outside of the United States).

10 This number is projected based on a statistically valid sample of CDP and equivalent hearing cases closed between October 1, 2011 and September 30, 2012. Based on the review, TIGTA determined that 10,151 of the 47,855 CDP cases closed in FY 2012 may have had an incorrect CSED. TIGTA, Ref. No. 2013-10-103, *The Office of Appeals Continues to Experience Difficulties in the Handling of Collection Due Process Cases 4* (Sept. 17, 2013).

11 IRS, Publication 1, *Your Rights as a Taxpayer* (June 2014).

12 *Id.*

and retained *pro bono* representation through a Low Income Taxpayer Clinic,¹³ but because the CSED is reviewed with the abuse of discretion standard, the court will limit its review to the administrative record, which does not contain an argument or any evidence from Taxpayer A with respect to that issue.

RECOMMENDATION

To address the inequity faced by taxpayers whose CSEDs have expired but who may face an enforced collection action based on miscalculated statutes of limitations and to enhance taxpayer protections contemplated by the Taxpayer Bill of Rights, the National Taxpayer Advocate recommends that Congress:

Amend IRC § 6330(d) to provide for a *de novo* standard of review by the Tax Court of whether the CSED is properly calculated by the IRS pursuant to IRC § 6330(c)(1).

PRESENT LAW

Once a tax liability is assessed, the IRS generally has ten years to collect the tax, which is known as the collection statute expiration date (CSED).¹⁴ Calculating the correct CSED is not always an easy task. Many events can extend the CSED, including:

- Litigation;¹⁵
- Pending installment agreement or offer in compromise;¹⁶
- CDP appeal;¹⁷ and
- Military-related service conducted in a combat zone¹⁸

In every CDP hearing, the Appeals officer is required to “obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure with respect to the proposed levy have been met.”¹⁹ Ensuring that the CSED has not expired is a legal requirement that

13 Low Income Taxpayer Clinics (LITCs) represent low income individuals in disputes with the Internal Revenue Service, including audits, appeals, collection matters, and federal tax litigation. LITCs can also help taxpayers respond to IRS notices and correct account problems. These services are offered for no more than a nominal fee. See IRC § 7526.

14 IRC § 6502.

15 See, e.g., IRC §§ 6502(a)(2); 6503(h).

16 IRC § 6331(k)(3).

17 The statute of limitation is extended from the date a timely hearing is requested until the date the IRS receives the taxpayer's written withdrawal of the request for a CDP hearing by Appeals or the determination resulting from the CDP hearing becomes final by expiration of the time for seeking judicial review or the exhaustion of the right of judicial review, including review by a federal court of appeals. Treas. Reg. 301.6330-1(g)(3).

18 IRC § 7508(a)(1)(I).

19 See Treas. Reg. § 301.6330-1(e)(1). See also Treas. Reg. § 301.6320-1(e)(1). The Collection function is responsible for sending the case file to Appeals. IRM 8.22.4.2.1(3) (Nov. 5, 2013). It is the job of the Appeals officer to review part 5 of the IRM (Collecting Process) “to verify whether administrative procedures were followed in issuing a Notice of Intent to Levy and/or filing a Notice of Federal Tax Lien (NFTL).” IRM 8.22.4.2.1(5) (Nov. 5, 2013). Appeals officers also receive guidance on CSED issues. For example, see IRM 8.21.5.1.2 (Apr. 20, 2012).

the Appeals officer must consider under IRC § 6330(c)(1).²⁰ This is in addition to any issues that the taxpayer may raise.²¹

Verifying the CSED under § 6330(c)(1) does not require the IRS to rely on a particular document.²² In fact, Appeals may use transcripts of the account to satisfy the verification requirement under IRC § 6330(c)(1) unless the taxpayer can identify an irregularity in the assessment process or other irregularity.²³

Standards of Review Used by the Tax Court

Generally, the court will only review issues that the taxpayer raises in the CDP hearing; however, Appeals' verification under IRC § 6330(c)(1) that all legal and administrative requirements have been satisfied are reviewed by the court in all cases even if the taxpayer does not raise a verification issue during the hearing.²⁴ How a court will review a particular CDP determination depends on the applicable standard of review. When the existence or amount of underlying tax liability is properly at issue under section 6330(c)(2)(B), the court will review the issue *de novo*,²⁵ which means the court will conduct a trial "as if there had been no trial in the first instance."²⁶ However, in order for a court to consider an issue related to the underlying liability or a relevant issue under section 6330(a)(2)(A), it must also be raised during the CDP hearing.²⁷ A taxpayer is also limited to raising issues related to the underlying liability only if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."²⁸

When the validity of the underlying liability is not at issue, the court reviews the determination for abuse of discretion.²⁹ Unlike *de novo* review, reviewing for abuse of discretion means the extent of the court's review is limited to determining whether the Appeals officer's decision was "arbitrary, capricious, or without sound basis in fact or law."³⁰

20 See *Beeler v. Comm'r*, T.C. Memo. 2009-266, at *6, vacated and remanded on other grounds, 434 Fed. Appx. 41 (2d Cir. 2011).

21 IRC § 6330(c)(2)(A). The taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy," including appropriate spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives. IRC § 6330(c)(2)(A). Additionally, if the taxpayer has not already received a notice of deficiency or otherwise have an opportunity to dispute the liability, he or she may raise issues at the hearing that challenge the existence or amount of the underlying liability. IRC § 6330(c)(2)(B).

22 *Roberts v. Comm'r*, 118 T.C. 365, 371 (2002).

23 See, e.g., *McLaine v. Comm'r*, 138 T.C. 10 (2012); *Clayton v. Comm'r*, T.C. Memo. 2009-114.

24 *Hoyle v. Comm'r*, 131 T.C. 197, 201-202 (2008); *Crites v. Comm'r*, T.C. Memo 2012-267.

25 *Sego v. Comm'r*, 114 T.C. 604, 610 (2000).

26 A trial *de novo* will consider both questions of fact and issues of law. *Black's Law Dictionary* (9th ed. 2009).

27 Treas. Reg. 301.6330-1(f), Q&A-F3. See also, *Giamelli v. Comm'r*, 129 T.C. 107 (2007).

28 IRC § 6330(c)(2)(B).

29 Non-liability issues are reviewed for an abuse of discretion. *Jones v. Comm'r*, 338 F.3d 463, 466 (5th Cir. 2003); *Craig v. Comm'r*, 119 T.C. 252, 260 (2002); *Sego v. Comm'r*, 114 T.C. 604, 610 (2000); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998).

30 *Murphy v. Comm'r*, 125 T.C. 301, 320 (2005).

Some Tax Court decisions have held that an Appeals officer's IRC § 6330(c)(1) verification regarding CSED does not relate to the underlying liability.³¹ Other decisions have held that CSED issues do relate to the underlying liability.³²

Recently, IRS Counsel issued a notice indicating that the proper standard of review for CDP determinations related to statutes of limitations is abuse of discretion. Counsel concluded that “[t]he existence or amount of an underlying tax liability, an issue the taxpayer may raise in appropriate circumstances in a CDP hearing, does not encompass procedural requirements, such as assessment, necessary for administrative collection.”³³ As a result, the Counsel notice advises attorneys to argue that CSED verification and other procedural requirements under IRC § 6330(c)(1) should be reviewable for abuse of discretion.³⁴ To treat a CSED issue as affecting the taxpayer's underlying liability, the CSED issue would receive *de novo* review by the court, but this review would only be available to taxpayers who did not previously receive a statutory notice of deficiency or otherwise have an opportunity to dispute the liability.³⁵ Taxpayers would also have to raise the issue themselves or otherwise the CSED would not be part of the administrative record review.

REASONS FOR CHANGE

Procedural issues such as CSED go to the heart of the case. In particular, IRC § 6330(c)(1) requires that “The appeals officer *shall* at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met” (emphasis added).³⁶ This makes sense because if a CSED has expired, there is no longer a liability to collect. Given the importance of this verification to the case, it should be reviewed by the court and it should receive *de novo* review.

Despite the CSED being critical to a case, the calculation of the CSED is not always exact. In fact, employees are informed that the “CSED reflected on ICS and IDRS may not always be correct because, at times, actions that suspend or extend the CSED occur simultaneously, increasing the complexity of computing the CSED and requiring manual recalculation.”³⁷

Under the new guidance, Counsel attorneys will not argue that a taxpayer who received a notice of deficiency or had a previous opportunity to raise a CSED argument should be barred from raising a CSED challenge during litigation, because the guidance does not treat the CSED as an issue pertaining to the underlying liability.³⁸ However, Counsel attorneys may object to taxpayer attempts to introduce evidence

31 *Beeler v. Comm'r*, T.C. Memo. 2009-266, at *6, vacated and remanded on other grounds, 434 Fed. Appx. 41 (2d Cir. 2011). See also, *Rosenbloom v. Com'r*, T.C. Memo. 2011-140, at *5-6; *Roberts v. Comm'r*, T.C. Memo. 2004-100, at *11-12.

32 *Jordan v. Comm'r*, 134 T.C. 1, 15-16 (2010) (holding that since a challenge to the CSED is a challenge to the underlying liability and the petitioners did not have a previous opportunity to raise the issue, the court would review the validity of a signature on Form 900, *Tax Collection Waiver*, with the *de novo* standard). See also, *Boyd v. Comm'r*, 117 T.C. 127 (2001) (where the taxpayer raises an argument that the IRS is time barred from collecting a tax liability, the court will review the matter *de novo*).

33 Office of Chief Counsel, Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* 3 (May 5, 2014).

34 *Id.* at 4.

35 See IRC § 6330(c)(2)(B).

36 Also, the court in *Crites* commented “[W]e held that issues that an Appeals officer has to consider under section 6330(c)(1) are the issues raised at the hearing, even if it's the Code and not the taxpayer that raises them.” *Crites v. Comm'r*, T.C. Memo 2012-267 at 8 (Sept. 17, 2012) (citing *Hoyle v. Comm'r*, 131 T.C. 197, 201-202 (2008)).

37 IRM 5.1.19.1.1(3) (Nov. 22, 2013). IDRS is the IRS's Integrated Data Retrieval System, ICS is the Integrated Collection System.

38 Office of Chief Counsel, Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* 4 (May 5, 2014).

outside of the administrative record.³⁹ Moreover, the court's review will focus on whether the Appeals officer's determination was arbitrary, capricious, or without sound basis in fact or law, and not whether calculation of the CSED was correct.

The abuse of discretion standard is deferential to the government and requires the court to limit its review of CSED issues to the administrative record, regardless of its accuracy. However, as noted above, a miscalculated CSED is not unheard of.⁴⁰

In addition, the CSED records are in the custody of the IRS. It is not information that is readily available to taxpayers for review. If the court is limited to the abuse of discretion standard of review, this error may never be uncovered, much less corrected.

It is also important to address inconsistent treatment by the Tax Court. In some cases, the Tax Court views the CSED as affecting the underlying liability and in other cases it does not.⁴¹ This may leave similarly situated taxpayers receiving different levels of review by the court. If all CSED issues obtained *de novo* review, there would be a uniform standard for review enhancing existing taxpayer protections and the *right to fair and just tax system* from the Taxpayer Bill of Rights recently adopted by the IRS.

The current system may impose a burden on taxpayers who have an incorrect CSED calculation and may lead to unfair determinations for those who do not know to raise this argument. This result also would impact the taxpayer's *right to challenge the IRS's position and be heard*, which requires, among other things, that taxpayers have the right "to raise objections and provide additional documentation in response to formal IRS actions or proposed actions."⁴² When taxpayers cannot fully develop their cases, *the right to appeal an IRS decision in an independent forum* is eroded. *The right to pay no more than the correct amount of tax* is violated when the CSED has expired but the CDP hearing upholds a proposed levy or lien. In this situation the taxpayer is paying more than is legally allowed. It also violates the *right to finality* because the CSED imposes a set period of time within which the IRS can collect the tax.

EXPLANATION OF RECOMMENDATION

As described in *Reinhart v. Comm'r* and the TIGTA report, it is possible that the calculation of a CSED is not always accurate.⁴³ Requiring that verification of the CSED calculation receive *de novo* review will protect taxpayers from IRS errors. Without this review, errors in the administrative file may never be realized and the IRS may be permitted to take unlawful actions to collect unenforceable tax liabilities. When

39 Office of Chief Counsel, Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations 4* (May 5, 2014). If the administrative file does not contain sufficient evidence or inadequate information regarding a CSED issue, Counsel is advised to consider a motion to remand. Office of Chief Counsel, Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations 4* (May 5, 2014).

40 IRC § 7433(a) allows taxpayers to bring civil actions for damages when "any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." Taxpayers could consider this option when the IRS collects on a liability with an expired CSED. However, relying on this option is a burden to taxpayers and the IRS because it creates a second round of expensive (and unnecessary) litigation. Other options include requesting return of levy proceeds under IRC §6343(d)(2)(D) or filing a refund claim with Form 843-A, *Claim for Refund and Request for Abatement*. The recommendation here provides an efficient resolution, since the parties are already before the court.

41 See footnote 7, *supra*.

42 IRS, Pub. 1, *Your Rights as a Taxpayer* (June 2014).

43 See *Reinhart v. Comm'r*, T.C. Memo 2014-218. See also TIGTA, Ref. No. 2013-10-103, *The Office of Appeals Continues to Experience Difficulties in the Handling of Collection Due Process Cases 4* (Sept. 17, 2013).

the court uses the abuse of discretion standard of review, it is less likely to discover such errors. Without discovery, there is no reliable remedy in the CDP proceeding.

This legislative change will allow the Tax Court to review the IRS CSED calculations based on the *de novo* standard and will allow taxpayers to raise objections or provide additional evidence regarding the proper calculation of CSED in CDP cases. The *de novo* standard will enhance and make meaningful core taxpayer rights such as the *right to challenge the IRS's position and to be heard*, the *right to appeal an IRS decision in an independent forum*, and the *right to a fair and just tax system*.