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#4**COLLECTION DUE PROCESS (CDP): Amend IRC § 6330 to Allow the Tax Court Jurisdiction to Determine Overpayments****TAXPAYER RIGHTS IMPACTED<sup>1</sup>**

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

**PROBLEM**

Taxpayers have the fundamental *right to pay no more than the correct amount of tax*. Internal Revenue Code (IRC) §§ 6320 and 6330 provide taxpayers the protection of an administrative hearing, known as a collection due process (CDP) hearing, before the IRS proceeds to collect an assessed deficiency by lien or levy. At the conclusion of the CDP hearing, the Tax Court has jurisdiction under IRC § 6330 to review the IRS's determination to proceed with a lien or levy. The Tax Court may review issues that were properly at issue in the CDP hearing, including, in certain circumstances, challenges to the underlying liability.

Review of the taxpayer's underlying liability could show that a taxpayer has actually *overpaid* his or her tax liability for the period at issue.<sup>2</sup> However, unlike in deficiency cases under IRC § 6512(b), IRC § 6330 does not confer jurisdiction to the Tax Court in CDP cases to determine the extent to which the taxpayer has made an overpayment and is entitled to a refund or credit for the tax period at issue.<sup>3</sup> To receive a refund or credit, the taxpayer will be required to take the additional steps of filing a separate administrative refund claim with the IRS and, if unsuccessful, bringing a refund suit in a United States district court or the Court of Federal Claims. This limitation on the Tax Court's jurisdiction to determine an overpayment and order a refund in CDP cases prevents taxpayers from obtaining resolution of their tax disputes for a given tax year in one forum and places unnecessary financial and administrative burden for taxpayers and the court system.

**EXAMPLE**

Taxpayer received a CP 504, *Notice of Intent to Seize (Levy) Your Property or Rights to Property* from the IRS, informing her that the IRS proposed to collect by levy unpaid tax for tax year 2013. Taxpayer was confused, as she had not received a statutory notice of deficiency and did not believe she owed the amount shown on the CP 504.

1 See Taxpayer Bill of Rights (TBOR), [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 The IRC does not define "overpayment." However, the Supreme Court stated that an overpayment occurs "when a taxpayer pays more than is owed, for whatever reason or no reason at all." *U.S. v. Dalm*, 494 U.S. 596, 609 n. 6 (1990). See also, *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

3 See *Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006); *Willson v. Comm'r*, 805 F.3d 316 (D.C. Cir. 2015).

Taxpayer promptly called the number provided on the CP 504 to review her account with an IRS representative and to attempt to resolve the matter. The IRS representative informed her that a statutory notice of deficiency had been sent even though taxpayer had never received it. Because the taxpayer didn't respond to the notice of deficiency by timely petitioning the Tax Court, judicial review was not available at that point. The IRS proceeded with its intent to levy, and Taxpayer next received a Letter 1058, *Final Notice Reply Within 30 Days*.

Taxpayer immediately filed a Form 12153, *Request for a Collection Due Process or Equivalent Hearing*. Since taxpayer had not received a statutory notice of deficiency or a prior opportunity to question the amount the IRS proposed to assess, at the CDP hearing taxpayer challenged her underlying tax liability pursuant to IRC § 6330(c)(2)(B). Specifically, she sought to demonstrate that her income tax withholding and estimated tax payments for the year at issue had already overpaid her tax liability for that year. The IRS Appeals officer disagreed and determined to proceed with a levy to collect taxpayer's alleged outstanding income tax liability.

Taxpayer timely petitioned the Tax Court pursuant to IRC § 6330(d)(1), seeking a determination that a collection action by the IRS was improper because her income tax withholding and estimated tax payments for the year at issue had already overpaid her tax liability for that year. Because the underlying liability was at issue, the Tax Court's review was *de novo*, rather than for an abuse of discretion. The Tax Court agreed with taxpayer, and the IRS conceded. Thus, the issue of whether to levy was moot. However, the Tax Court concluded it lacked jurisdiction to determine an overpayment or order a refund for taxpayer. Taxpayer's only avenue for obtaining a refund is to file an administrative refund claim with the IRS and if that claim is denied, bring suit in a United States district court or the Court of Federal Claims.

## RECOMMENDATION

To allow for a more efficient resolution of tax disputes and promote the taxpayers' *right to pay no more than the correct amount of tax*, the National Taxpayer Advocate recommends that Congress amend IRC § 6330 to grant the Tax Court jurisdiction to determine overpayments for the tax periods at issue and to order refunds or credits if the court determines the amount of the taxpayer's underlying tax liability for a taxable year is less than the amounts paid or credited for that year.

## PRESENT LAW

### Tax Court Has Jurisdiction to Determine Overpayments in Deficiency Cases

The Tax Court has jurisdiction to determine the amount of any deficiency. IRC § 6211(a) defines "deficiency" as "the amount by which the correct tax exceeds the excess of: (1) the sum of the amount reported on the taxpayer's return for such tax if a return was filed and an amount of tax was reported on the return plus amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of any rebate."

When the Board of Tax Appeals, the predecessor of the Tax Court, was created in 1924, it lacked jurisdiction to determine whether a taxpayer had overpaid his or her tax liability at issue in a deficiency proceeding in most circumstances.<sup>4</sup> The Revenue Act of 1926 provided the Board jurisdiction to

<sup>4</sup> *Comm'r v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 421 n. 7 (1943).

determine an overpayment in a deficiency proceeding, but the Board still lacked authority to order payment of any resulting refund.<sup>5</sup>

Recognizing the additional burden this limitation placed on taxpayers who were required to seek enforcement of Tax Court overpayment determinations in an alternate forum, Congress enacted IRC § 6512(b) as a part of the Technical and Miscellaneous Revenue Act of 1988 to extend the Tax Court's jurisdiction.<sup>6</sup> IRC § 6512(b) provides the Tax Court the jurisdiction to determine “an overpayment of income tax for the same calendar year or calendar quarter, [or] of estate tax in respect of the same decedent.” When the Tax Court does determine that the taxpayer has made an overpayment, it has jurisdiction to order a refund or credit of that overpayment if the Secretary fails to do so.<sup>7</sup> The Tax Court still has no jurisdiction to review the merits of any credit or offset that would reduce the amount of a determined liability.<sup>8</sup> Thus, “the Tax Court may order payment of a determined refund, but the Commissioner may apply the refund against other outstanding liabilities of the taxpayer free from Tax Court review.”<sup>9</sup>

### The Tax Court's Jurisdiction Does Not Include Determining Overpayments in CDP Cases

The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) created procedures for CDP, designed to “increase fairness to taxpayers” by requiring the IRS to “afford taxpayers adequate notice of collection activity and a meaningful hearing” before depriving them of their property.<sup>10</sup> After a CDP hearing, the taxpayer has the additional protection of petitioning the Tax Court to review the determination before the IRS can undertake any collection action.<sup>11</sup> The Tax Court is the primary pre-payment forum for taxpayers to challenge perceived abuses in the IRS's exercise of its administrative collection powers.<sup>12</sup>

IRC § 6330(d)(1) provides that a taxpayer “may, within 30 days of a determination under this section, petition the Tax Court for review of such determination,” but does not clarify the scope of the Tax Court's review in such cases. The extent of the Tax Court's authority to review such CDP determinations has been developed through case law.

5 The Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9 (1926).

6 Harold Dubroff & Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2014); see also S. REP. No.100-309, at 17 (1988).

7 IRC § 6512(b)(2).

8 IRC § 6512(b)(4). IRC § 6402 gives the Secretary the authority to issue refunds or offset tax liability at his or her discretion.

9 Harold Dubroff & Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2014).

10 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746; S. REP. No. 105-174, at 67 (1998). See also J. COMM. ON TAX'N, *General Explanation of Tax Legislation Enacted in 1998*, JCS-6-98, 81 (Nov. 24, 1998). As discussed below, the statutes provide for a hearing before the IRS (a CDP hearing) and for Tax Court review of the IRS's determination that results from that hearing before the IRS takes enforced collection action. IRC §§ 6320(b), (c); 6330(b)-(e).

11 IRC § 6330(d)(1). The Tax Court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing. An issue is not properly raised if the taxpayer fails to request Appeals consideration of the issue or the taxpayer requests consideration but fails to present any evidence regarding that issue after being given a reasonable opportunity. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3.

12 Harold Dubroff & Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2014).

## Case Law

Following the passage of RRA 98, the Tax Court struggled to determine the scope of its jurisdiction to review determinations made under IRC § 6330. The court initially viewed IRC § 6330 as providing taxpayers a broad opportunity for remedy in the Tax Court. In *Montgomery v. Commissioner*, the Tax Court held the “substantive and procedural protections contained in IRC § 6320 and IRC § 6330 reflect congressional intent that the Commissioner of Internal Revenue should collect the correct amount of tax, and do so by observing all the applicable laws and administrative procedures.”<sup>13</sup> In a concurring opinion, Judge Gale suggested that the lack of limiting language in IRC § 6330 indicated a wide grant of jurisdiction to the Tax Court in reviewing a taxpayer’s underlying liability.<sup>14</sup> In another concurring opinion, however, Judge Goeke noted that the majority opinion did not reach the question of whether the Tax Court had authority to order a refund if the taxpayers establish that they have overpaid their tax liability.<sup>15</sup>

In *Greene-Thapedi v. Commissioner*, the Tax Court answered that question and held it did not have jurisdiction to determine an overpayment for the tax year at issue or to order a refund or credit even though the amount of the taxpayer’s underlying tax liability for the year at issue in the CDP proceeding was less than the amounts paid for that year.<sup>16</sup> The court compared the specific language used in IRC § 6512 circumscribing the Tax Court’s overpayment jurisdiction for deficiency cases with the lack of such limiting language in IRC § 6330.<sup>17</sup> The Tax Court held that such jurisdiction to determine an overpayment and order a refund in CDP cases could not arise by inference alone without explicit statutory authority.<sup>18</sup> Dissenting in *Greene-Thapedi*, Judge Vasquez criticized the “unfair results” produced by the majority’s restrictive interpretation, saying, “[t]o narrowly interpret the statute to prevent the Tax Court from deciding an overpayment exists frustrates our congressionally conferred jurisdiction.”<sup>19</sup>

In *Willson v. Commissioner*,<sup>20</sup> the D.C. Circuit reached a similar holding that the Tax Court’s authority to review a taxpayer’s underlying liability in a CDP case did not extend to ordering the IRS to return funds improperly received from the taxpayer. During the course of proceedings in the Tax Court, the IRS abated the assessment against the taxpayer but did not refund payments the taxpayer had already made on the liability.<sup>21</sup> The D.C. Circuit affirmed the Tax Court’s dismissal of the case as moot, holding that the removal of the levy was “all the relief that section 6330 authorizes the tax court to grant him.”<sup>22</sup>

13 *Montgomery v. Comm’r*, 122 T.C. 1, 21-22 (2004).

14 *Id.* at 122 T.C. at 15-17 (Gale, J, concurring).

15 *Montgomery*, 122 T.C. at 20 (Goeke, J, concurring).

16 *Greene-Thapedi v. Comm’r*, 126 T.C. 1, 11 (2006).

17 *Id.* at 126 T.C. at 12 (noting IRC § 6511 and IRC § 6512 include limits to refund jurisdiction in a deficiency case, including restricting the time period for filing a claim for a refund).

18 *Greene-Thapedi*, 126 T.C. at 11.

19 *Greene-Thapedi*, 126 T.C. at 24 (Vasquez, J., dissenting).

20 *Willson v. Comm’r*, 805 F.3d 316 (D.C. Cir. 2015).

21 *Id.* at 320.

22 *Id.* at 321.

## REASONS FOR CHANGE

### The Tax Court's Jurisdiction in Deficiency and CDP Cases That Involve a Challenge to a Taxpayer's Underlying Liability Should Be Consistent

The benefits of allowing the Tax Court to determine an overpayment and order a refund in deficiency cases also apply to CDP cases. The Senate explained its rationale for legislating IRC § 6512(b)(2) as follows:

“The committee believes that if the Tax Court determines that a taxpayer is due a refund and the IRS fails to issue that refund, the taxpayer should not have to incur the additional time, trouble, and expense of enforcing the Tax Court's decision in another forum. Rather, the taxpayer should be able to enforce the decision in the court that entered the decision.”<sup>23</sup>

Where a taxpayer's underlying liability is at issue, the same rationale for resolving the dispute in one forum, as identified by the Senate, is present. Therefore, as in deficiency cases, the taxpayer “should be able to enforce the decision in the court that entered the decision” in CDP cases as well.<sup>24</sup>

Furthermore, the Tax Court's review in CDP cases involving a challenge to a taxpayer's underlying liability mirrors that in deficiency proceedings where there is jurisdiction to determine an overpayment. Where the underlying liability is at issue, the Tax Court's review in both deficiency and CDP cases is *de novo*, which affords no deference to the IRS's determination.<sup>25</sup> As in deficiency cases, the *de novo* standard in CDP cases requires the Tax Court take a fresh look at the underlying facts and circumstances to determine the taxpayer's underlying liability. In CDP cases, this type of holistic review requires the Tax Court to consider whether the taxpayer has satisfied his or her underlying tax liability in order to determine whether the IRS can proceed with a collection action. Therefore, as it already does in deficiency cases, the Tax Court should be able to determine an overpayment and order a refund because the Tax Court would have already calculated this amount in reaching its decision.

### The Current Limitations of the Tax Court's Overpayment Jurisdiction Place an Unnecessary Burden on Taxpayers Seeking Finality in Their Disputes With the IRS and May Result in Taxpayers Paying More Than the Correct Amount of Tax

As explained above, under the current jurisdictional framework, taxpayers seeking an overpayment determination in a CDP case may be foreclosed from having their tax liability disputes completely resolved before the Tax Court. The inability to order a refund in overpayment cases undercuts the Tax Court's value as a pre-payment forum and the primary venue for CDP review. Through CDP jurisdiction, the Tax Court offers taxpayers the important benefit of being able to challenge a collection action before the tax is collected. Without jurisdiction in overpayment cases, a taxpayer's “only remedy may be to fully pay the tax, file a refund claim, and if unsuccessful, institute a tax refund suit in Federal District Court or the Court of Federal Claims.”<sup>26</sup>

23 S. REP. No.100-309, at 17 (1988).

24 *Id.*

25 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. REP. No. 105-599, at 266. See also IRS Chief Counsel Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* (May 5, 2014). The term *de novo* means anew. BLACK'S LAW DICTIONARY (10th ed. 2014).

26 *Greene-Thapedi v. Comm'r*, 126 T.C. at 14 (Colvin, J., concurring).

Forcing a taxpayer to resolve a single tax controversy in multiple forums undermines the taxpayers' *right to finality* and creates unnecessary costs and delay while impeding the efficient use of judicial resources. For a taxpayer claiming to have already paid the IRS too much, the unplanned expense of trying to get a refund in another forum could cause serious economic harm. Furthermore, the Tax Court as a forum may feel more comfortable for taxpayers, as the Tax Court's procedures are more informal in recognition that most taxpayers there proceed without representation.<sup>27</sup> The limitations of the Tax Court's jurisdiction for overpayment determinations in CDP cases create "a trap for the unwary."<sup>28</sup>

## EXPLANATION OF RECOMMENDATION

Under this recommendation, the Tax Court would have the authority in a CDP case to not only order the IRS halt a collection action, but to also order a refund if it determines the amount a taxpayer has paid the IRS exceeds the taxpayer's liability. The Tax Court would follow the procedures already established to determine an overpayment in deficiency cases under IRC § 6512. This change would not create additional cases, as it would only apply to cases properly before the Tax Court involving challenges to a taxpayer's underlying liability.<sup>29</sup> Instead, this recommendation will likely conserve judicial resources by allowing taxpayers to seek complete resolution of overpayment disputes in Tax Court without having to bring cases in multiple forums. Amending IRC § 6330 to explicitly grant the Tax Court the authority to determine overpayments and issue refunds in CDP cases will protect taxpayer rights, reduce taxpayer burden, and better ensure the IRS collects the correct amount of tax.

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- 27 See National Taxpayer Advocate 2016 Annual Report to Congress 364, 374 (Legislative Recommendation: *Collection Due Process (CDP): Amend Internal Revenue Code § 6330 to Provide That the Standard and Scope of Tax Court Review in CDP Cases Is De Novo Regardless of Whether the Underlying Liability Is at Issue*) ("For example, pursuant to agreements with some Low Income Taxpayer Clinics (LITCs) and other student tax clinics, the Tax Court sends taxpayers who do not already have representation in a docketed case a "stuffer" or notice that informs them LITC assistance may be available.").
- 28 *Greene-Thapedi*, 126 T.C. at 26 (Vasquez, J., dissenting) ("Particularly as section 6330 cases involve a prepayment posture and an opportunity to contest collection of the amount of tax owed, and the tax must be paid in full as a prerequisite to commencement of a refund suit brought in U.S. District Court or the U.S. Court of Federal Claims, lack of jurisdiction to decide an overpayment in section 6330 cases would leave taxpayers in a "Catch-22" where their tax was overpaid but the period of limitations on claiming the refund may have run, the look-back rules of section 6511(b) may limit or eliminate the amount of the refund, or res judicata may bar their claim.").
- 29 In general, requests for CDP hearings and resulting petitions to Tax Court have decreased since 2012. See National Taxpayer Advocate 2017 Annual Report to Congress (Most Litigated Issue: *Appeals from Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330*), *supra*.