

**Legislative Recommendation #44****Authorize the Tax Court to Order Refunds or Credits in Collection Due Process Proceedings Where Liability Is at Issue****SUMMARY**

- *Problem:* In most Tax Court cases, the court has the authority to determine that a taxpayer made an overpayment of tax and order the IRS to allow a refund or credit. Where the Tax Court considers the IRS's determination of liability in a Collection Due Process (CDP) hearing, however, the Tax Court does not have the authority to order a refund or credit – even where the taxpayer did not have a prior opportunity to challenge the liability. This restriction on the Tax Court's authority imposes financial costs and time burdens on taxpayers who must sue for a refund or credit in other federal courts. It also creates judicial inefficiencies by requiring the filing of multiple causes of action.
- *Solution:* Allow the Tax Court to order a refund or credit in all cases in which it is authorized to determine a taxpayer's tax liability.

**PRESENT LAW**

IRC § 6512(b) grants the Tax Court jurisdiction in deficiency suits to determine that a taxpayer made an overpayment of income tax for the period at issue and that such amount must be refunded or credited to the taxpayer.<sup>1</sup> IRC § 6511(a) generally requires a taxpayer to file a claim for credit or refund by the later of three years from the time a return was filed or, if no return was filed, two years from the time the tax was paid.

IRC § 6330 allows a taxpayer to challenge the underlying liability in a CDP proceeding 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.”<sup>2</sup> However, several courts have concluded that the Tax Court in CDP cases, unlike in deficiency cases, does not have jurisdiction to determine the extent to which a taxpayer has made an overpayment and is entitled to a refund or credit.<sup>3</sup>

The reasoning for this conclusion is that IRC § 6330(d)(1) “gives the Tax Court jurisdiction ‘with respect to such matter’ as is covered by the final determination in a requested hearing before the Appeals Office.”<sup>4</sup> The Appeals determination is required to address (1) “the verification ... that the requirements of any applicable law or administrative procedure have been met,”<sup>5</sup> (2) any relevant issues raised by the taxpayer “relating to the unpaid tax or the proposed levy” including “the existence or amount of the underlying tax liability” 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,”<sup>6</sup> and (3) whether the proposed collection action “balances the need for efficient collection of taxes with the legitimate concerns of [the taxpayer] that any collection action be no more intrusive than necessary.”<sup>7</sup> Based on these considerations, the Appeals Officer is supposed to make a determination “regarding the legitimacy of the proposed levy [or filing of notice of federal tax lien] and,

1 IRC § 6401 provides that the term “overpayment” includes “that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.” The Supreme Court has stated that an overpayment occurs “when a taxpayer pays more than is owed, for whatever reason or no reason at all.” *United States v. Dalm*, 494 U.S. 596, 609 n.6 (1990). See also *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

2 IRC § 6330(c)(2)(B).

3 See *Greene-Thapedi v. Comm’r*, 126 T.C. 1 (2006); *Willson v. Comm’r*, 805 F.3d 316 (D.C. Cir. 2015); *McLane v. Comm’r*, T.C. Memo. 2018-149, *aff’d*, 24 F.4th 316 (4th Cir. 2022); *Brown v. Comm’r*, 58 F.4th 1064 (9th Cir. 2023), *aff’g* T.C. Memo. 2021-112.

4 *Greene-Thapedi v. Comm’r*, 126 T.C. 1, at 6 (2006).

5 IRC § 6330(c)(1), 6330(c)(3)(A).

6 IRC § 6330(c)(2), 6330(c)(3)(B).

7 IRC § 6330(c)(3)(C).

if relevant, the amount and/or existence of the unpaid tax liability.”<sup>8</sup> Because the existence or nonexistence of an overpayment is not pertinent to this determination by the Office of Appeals, the Tax Court lacks jurisdiction to review the issue.

## REASONS FOR CHANGE

The 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 in a single forum and imposes unnecessary financial and administrative burdens on taxpayers and the court system.

The Tax Court, unlike other federal courts, is a prepayment forum that ordinarily allows taxpayers to dispute their liabilities without having to first pay them in full. In a CDP proceeding, only taxpayers who did not otherwise have an opportunity to dispute their underlying liabilities are permitted to contest them.

Taxpayers who are allowed to challenge the existence of a liability in CDP can do so because they did not receive a notice of deficiency or did not otherwise have a previous opportunity to dispute the liability. When taxpayers do not “receive a notice of deficiency,” it generally means that either they were issued a notice of deficiency but did not actually receive it, or a type of tax was assessed against them that is not subject to deficiency procedures. A prior opportunity to dispute the liability means a prior opportunity for a conference with Appeals offered either before or after the assessment of the tax.<sup>9</sup> Therefore, if a taxpayer is allowed to challenge the liability in CDP, it means that the taxpayer has not had a prior opportunity to go to court or to Appeals.

Under these circumstances, the inability of the Tax Court to order a refund or credit seems not only unfair but inefficient. For a taxpayer in a CDP proceeding to receive a refund, the taxpayer must fully pay the assessed tax for the taxable year(s) at issue, file a timely administrative refund claim with the IRS under IRC § 6511 and, if the claim is denied, timely file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. It would be much more efficient to allow the taxpayer to claim the refund in the CDP case and to allow the court that is already familiar with the facts of the case to determine whether an overpayment exists.

CDP taxpayers who may challenge the existence or amount of an underlying tax liability pursuant to IRC § 6330(c)(2)(B) should, similar to taxpayers in deficiency proceedings, have the opportunity to obtain a refund in a prepayment forum, rather than be required to full-pay the asserted liability and then incur additional time and expense to dispute the liability in another forum. Amending IRC § 6330 to explicitly grant the Tax Court the authority to determine overpayments and order refunds in CDP cases will protect taxpayers’ *right to finality*, reduce taxpayer burden, and better ensure the IRS collects the correct amount of tax. The Tax Court could apply to CDP proceedings its long-established procedures for determining an overpayment in deficiency cases, so new procedures would not be required.

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<sup>8</sup> *Willson v. Comm’r*, 805 F.3d at 316.

<sup>9</sup> Treas. Reg. § 301.6330-1(e)(3), Q&A E2.