Department of the Treasury

Internal Revenue Service

Office of Chief Counsel

Notice

CC-2003-016

May 29, 2003

Subject: Collection Due Process Cases

Cancel Date: Upon Incorporation into the CCDM

Purpose

This Notice updates and replaces CC-2001-038, known as the Collection Due Process (CDP) Handbook, which provided guidance on the handling of CDP cases arising under I.R.C. §§ 6320 (liens) and 6330 (levies). These sections are a codification of section 3401, the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 685 (1998). The CDP provisions became effective January 19, 1999. Final regulations became effective January 18, 2002, and apply to all liens and levies on or after January 19, 1999. The text that follows will appear as an item on the Procedure and Administration Website. As new cases are decided, they will be digested on the Procedure and Administration Website.

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I. Background Material

Sections 6320 and 6330; Treas. Reg. § 301.6320-1, and Treas. Reg. § 301.6330-1; H.R. Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998); General Explanation of Tax Legislation Enacted in 1998 (Blue Book), Staff of the Joint Committee on Taxation (1998).

II. Coordination of CDP Cases with the National Office

Chief Counsel Notice CC-2003-016, dated May 29, 2003 (superseding Chief Counsel Notice CC-2002-034) requires pre-review by Procedure and Administration of certain documents to be filed with the Tax Court and defense letters to the Department of Justice. *See* CC Notice -2003-__ for a detailed discussion.

Field attorneys seeking informal advice regarding CDP may contact Branch 1 of Collection, Bankruptcy & Summonses (CC:PA:CBS), at 202-622-3610. Additionally, an IVT on "How to Conduct a CDP Case in Tax Court" was given on July 19, 2002. Each Associate Area Counsel, Small Business/Self-Employed (SBSE), office should have a videotape of this IVT. If not, contact Adrienne Anderson, Chief Counsel Training and Communications, for a copy.

III. Assisting Appeals in Reducing CDP Inventory

Chief Counsel Notice N(30)000-337a, dated May 24, 2000, announced a Chief Counsel program to assist the Office of Appeals in its efforts to reduce its significant CDP inventories. The program entails providing a dedicated counsel resource to Appeals offices in resolving legal questions arising in CDP hearings. Each SBSE Associate Area Counsel designates experienced attorneys to be available to provide prompt oral or written legal advice in resolving CDP issues. SBSE Division Counsel, in turn, coordinates complicated or novel issues with National Office CDP experts. In order to ensure the uniformity of advice being given, SBSE Division Counsel and Appeals should identify recurring legal issues, and SBSE Division Counsel should forward copies of any advice given on such issues to CC:PA:CBS:1.

IV. Sections 6320 and 6330

A. CDP Notice Requirements

1. Notice of federal tax lien - section 6320

Prior to January 19, 1999, there was no requirement in the Code that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) was filed against him or her. RRA section 3401 added section 6320 which requires the Service to provide written notification (CDP Notice) to the taxpayer of the filing of the NFTL and of his or

her right to a CDP hearing not more than five business days after the filing of the NFTL. 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.

2. Prior to levy - section 6330

RRA section 3401 also added section 6330 to the Code which requires the Service (except in the case of jeopardy levies or levies on State income tax refunds) 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 his or her right to a CDP hearing. In practice, this notification is given by 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 Your Notice of Right to a Hearing. For jeopardy levies or levies on State income tax refunds, section 6330(f) provides that section 6330 is not applicable except that the taxpayer shall be given the opportunity for a CDP hearing "within a reasonable period of time after the levy."

3. Validity

A CDP Notice is invalid if not given in person, left at the taxpayer's dwelling, or delivered to his or her last known address by certified mail. Kennedy v. Commissioner, 116 T.C. 255 (2001); Lopez v. Commissioner, T.C. Memo. 2001-228. If the CDP notice is invalid, the taxpayer is entitled to a substitute notice. Treas. Reg. §§ 301.6320-1(a)(2)Q&A-A12, 301.6330-1(a)(2)Q&A-A10. A section 6320 notice (Letter 3172) is valid even if given before the NFTL is actually filed. Muldavin v. Commissioner, T.C. Memo. 2002-182. Failure to provide an explanation of the appeals and collection process with the CDP Notice is not harmful or prejudicial if the taxpayer knows of and pursues his or her right to administrative and judicial review. Klawonn v. Commissioner, T.C. Memo. 2002-27.

B. Collection Due Process Hearing

1. One hearing per tax and period

Sections 6320(b)(2) and 6330(b)(2) each provides that a taxpayer is entitled to one CDP hearing with respect to the tax and tax period(s) covered by the CDP Notice. Section 6320(c)(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.

2. Procedures for requesting a CDP hearing

A Form 12153, Request for a Collection Due Process 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 the request must be in writing and include the taxpayer's name, address, and daytime telephone number, and be dated and signed by either the taxpayer or the taxpayer's authorized representative. Treas. Reg. §§ 301.6320-1(c)(2)Q&A-C1, 301.6330-1(c)(2)Q&A-C1. The section 6320 hearing request must be submitted no later than 30 days after the expiration of five business days commencing the date the NFTL is filed. Treas. Reg. § 301.6320-1(b)(1). 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). A taxpayer whose timely hearing request was signed by an unauthorized representative, including a spouse, may ratify such request. Treas. Reg. §§ 301.6320-1(c)(2)Q&A-C1(iv), 301.6330-1(c)(2)Q&A-C1(iv).

Generally, any written request for a CDP hearing should be filed with the Service's office that issued the CDP Notice at the address indicated on the notice. 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 by the Service's office that issued the CDP notice 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 applies 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 address on the notice (*e.g.*, if it is sent to Appeals instead), it must be received by the office issuing the notice within the 30-day period in order to be timely. I.R.C. § 7502(a)(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.

A taxpayer whose hearing request is untimely is not entitled to a CDP hearing, but may receive an "equivalent hearing." Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1). A taxpayer may not appeal to a court any decision (issued in the form of a decision letter) made by an appeals officer as a result of an equivalent hearing. Treas. Reg. §§ 301.6320-1(i)(2)Q&A-I5, 301.6330-1(i)(2)Q&A-I5; Moorhous v. Commissioner, 116 T.C. 263 (2001); Johnson v. Commissioner, 2000-2 USTC ¶ 50,591 (D. Ore. 2000).

3. Effect of requesting a CDP hearing

a. 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 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, the determination resulting from the CDP hearing becomes final by expiration of the time for seeking review, or the exhaustion of any right of appeal following judicial review. 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).

b. Levy action and injunctive relief

A timely CDP hearing request also suspends any levy action to collect liabilities listed on the CDP Notice for the period during which the hearing and appeals therein are pending, plus 90 days. I.R.C. § 6330(e)(1). A levy will not be suspended while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Service has shown good cause not to suspend the levy. I.R.C. § 6330(e)(2). The Service must file a motion with the court requesting a good cause determination before proceeding with the levy. "Good cause" has been found where the taxpayer corporation had repeatedly failed to pay employment taxes on time, and had failed since the beginning of the CDP process to make any payment of the employment tax liabilities that were the subject of the CDP proceeding, despite having obtained financing during this period. Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash.).

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). As a result, only district courts may enjoin a levy occurring after a timely request for hearing and prior to the appeal of the notice of determination.

c. 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 have been satisfied. Treas. Reg. §§ 301.6320-1(g)(2)Q&A-G3, 301.6330-1(g)(2)Q&A-G3. The Service has administratively decided that, except for jeopardy and state income tax refund levies, it will not levy to collect taxes that are the subject of a CDP lien hearing. In addition, nothing in section 6320 or 6330 prohibits the filing of a notice of federal tax lien. If a taxpayer requests a CDP hearing under section 6320 or 6330, the Service may file an NFTL for the same tax and periods at another recording office or an NFTL for tax periods or taxes not covered by the CDP Notice. Other non-levy collection actions are also permitted, including initiating judicial proceedings, offsetting overpayments from other periods, and accepting voluntary payments of the tax. Id.; *see also* Bullock v. Commissioner, T.C. Memo. 2003-5; Karara v. United States, 2002-2 USTC ¶ 50,667 (M.D. Fla.).

4. Definition of hearing

The Code does not define what constitutes a CDP hearing. The regulations provide that a CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications, or some combination thereof. Treas. Reg. §§ 301.6320-1(d)(2)Q&A-D6, 301.6330-1(d)(2)Q&A-D6; *see also* Katz v. Commissioner, 115 T.C. 329 (2000) (combination of telephone calls and written letters); Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (MD. Fla. 2000) (solely written correspondence if the taxpayer consents). 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).

If a taxpayer requests a face-to-face meeting, the regulations provide that he or she should be offered one at the Appeals office closest to his or her residence or, if the taxpayer is a corporation, 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 also* Katz v. Commissioner, 115 T.C. 329 (2000). The regulations do not require Appeals to offer the taxpayer a face-to-face or telephone conference in the absence of a request. Loofbourrow v. Commissioner, 208 F. Supp. 2d 698 (S.D.

Tex. 2002). *But see* Meyer v. Commissioner, 115 T.C. 417 (2000) (appeals officer erred in failing to offer a conference either in person or by telephone), *overruled on other grounds*, Lunsford v. Commissioner, 117 T.C. 159 (2001). Nevertheless, Appeals offers taxpayers a face-to-face or telephone conference in each CDP hearing. Taxpayers who fail to avail themselves of an offered face-to-face or telephone conference cannot complain that the CDP hearing requirements were not satisfied. Moore v. Commissioner, T.C. Memo. 2003-1.

5. Hearing requirements

a. Conduct of hearing

A CDP hearing is informal and the formal hearing requirements of the Administrative Procedure Act, 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* Davis v. Commissioner, 115 T.C. 35 (2000). Accordingly, verbatim recordings of telephone or face-to-face conferences are not required. Rennie v. Internal Revenue Service, 216 F. Supp. 2d 1078, 1079 n. 1 (E.D. Cal.). To the extent that the opinion in Mesa Oil, Inc. v. United States, 2001-1 USTC ¶ 50,130 (D. Colo. 2000) holds that CDP hearings must be recorded verbatim, we disagree. *See* 2001 AOD LEXIS 5. It is also our position that the taxpayer does not have a right to make a verbatim recording of his or her CDP hearing. Appeals issued a memorandum on May 2, 2002, which stated that audio and stenographic recordings of any Appeals conference would no longer be allowed. Videotaping of an Appeals conference has never been allowed.

Taxpayers do not have the right to subpoena and examine witnesses. Treas. Reg. §§ 301.6320-1(d)(2)Q&A-D6, 301.6330-1(d)(2)Q&A-D6. 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, Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000), 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. Nestor v. Commissioner, 118 T.C. 162 (2002); Gillett v. United States, 233 F. Supp. 2d 874, 883-884 (W.D. Mich. 2002); Danner v. United States, 208 F. Supp. 2d 1166 (E.D. Wash. 2002) (applying 5 U.S.C. § 555(c) and section 6330); Reinhart v. Internal Revenue Service, 2002 U.S. Dist. LEXIS 13741 (E.D. Cal.). The Court in Nestor wrestled with but did not decide whether an appeals officer is required by section 6203 to give

a taxpayer a copy of his or her transcript of account, if the taxpayer requests one. Since the Nestor opinion was issued, Appeals has decided to give a MFTRA-X (literal) transcript to each taxpayer who requests one.

b. Impartial appeals officer

Sections 6320(b)(3) and 6330(b)(3) require that the hearing be conducted by an officer or employee who has had no prior involvement in a non-CDP hearing with respect to the same unpaid tax. An appeals officer or employee will be considered to have had prior involvement with respect to the same tax if the taxpayer, the type of tax, and the tax period involved in the prior non-CDP hearing is identical to the taxpayer, the type of tax, and the tax period involved in the CDP hearing. In MRCA Information Services, Inc. v. Commissioner, 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. We do not agree with the holding in MRCA. A section 6672 penalty and employment taxes are separate and distinct liabilities.

6. Matters considered at hearing

a. Section 6330(c)(1) verification

Sections 6320(c) and 6330(c)(1) requires 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(e)(1), 301.6330(e)(1). The requirements the appeals officer is verifying are those things that the Code, regulations, and the Internal Revenue Manual require the Service to do before collection can take place. 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). Verification is obtained by the appeals officer from the Service through its computer records and paper administrative files. The Automated Collection System or Field Compliance is responsible for providing Appeals with all the information necessary to conduct the verification required by section 6330(c)(1).

i. Computer transcripts

Most (but not necessarily all) of the legal and administrative procedural requirements can be verified by reviewing computer transcripts. The Form 4340 and TXMOD-A transcripts currently provide verification of assessment of the liability and the sending of collection notices. The current version of the MFTRA-X (literal) transcript provides verification of the assessment but not the sending of collection notices.

Unless the taxpayer can identify an irregularity in the assessment procedure or procedures related to other information contained in a Form 4340, 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). An appeals officer may rely on a Form 4340 to verify the validity of an assessment. Nestor v. Commissioner, 118 T.C. 162 (2002). An appeals officer may rely on a Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig v. Commissioner, 119 T.C. 252, 262-263 (2002).

Similarly, unless the taxpayer can identify an irregularity in the assessment procedure, or procedures related to other information contained in the computer transcript (other than Form 4340), the appeals officer does not abuse his or her discretion by relying on such transcript for verification, if the transcript relied upon contains the information required in Treas. Reg. § 301.6203-1. *See, e.g.,* Standifird v. Commissioner, T.C. Memo. 2002-245. 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. *See, e.g.,* Schroeder v. Commissioner, T.C. Memo. 2002-190; Hoffman v. United States, 209 F. Supp. 2d 1089, 1094 (W.D. Wash. 2002). 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. *See, e.g.,* Schaper v. Commissioner, T.C. Memo. 2002-203.

ii. Other methods of verification

Verification of other requirements may be satisfied by review of the examination or collection files, or entries in the Integrated Collection System or Automated Collection System screens.

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 including the following.

i. 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 in a prior judicial proceeding that has become final, the doctrine of res judicata and the exception contained in section 6015(g)(2) 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; Treas. Reg. § 1.6015-1(e).

ii. Challenges to appropriateness of collection action

Pursuant to section 6330(c)(2)(A)(ii), a taxpayer may also challenge whether the collection action is appropriate, including the following.

(A) Bankruptcy discharge

Taxes not discharged in bankruptcy may be collected from the taxpayer personally and from his or her property. If a taxpayer has received a bankruptcy discharge and his or her 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. If, however, the Service filed an NFTL before the bankruptcy petition date, then after the bankruptcy the lien continues to attach to prepetition property of the taxpayer that was exempt or abandoned from the estate. *See* Isom v. United States, 901 F.2d 744 (9th Cir. 1990); *see also* Johnson v. Home State Bank, 501 U.S. 78 (1991).

(B) Currently not collectible

The taxpayer may seek to have his or her liabilities administratively classified as currently not collectible. *See* Lister v. Commissioner, T.C. Memo. 2003-17.

iii. Offers of collection alternatives

Section 6330(c)(2)(A)(iii) and Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E6, 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.
- withholding collection action to facilitate future payment.

c. Section 6330(c)(2)(B) liability challenges

Sections 6320(c) and 6330(c)(2)(B) provide that a taxpayer may challenge the existence or amount of the underlying tax liability at the hearing if the taxpayer did not receive a statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability. The term "underlying tax liability" means the amount of a taxpayer's liability for tax under the Internal Revenue Code for a particular taxable year.

If a taxpayer is precluded by section 6320(c) or 6330(c)(2)(B) from challenging his or her liability in a CDP hearing, he or she is also precluded from doing so in the judicial review proceeding under section 6330(d). Goza v. Commissioner, 114 T.C. 176 (2000). This preclusive effect does not define the scope of the reviewing court's jurisdiction but defines only when a taxpayer can challenge his or her liability. Van Fossen v. Commissioner, T.C. Memo. 2000-163. Section 6330(c)(2)(B) does not apply to claims for spousal relief under section 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.

i. Receipt of a statutory notice of deficiency

Receipt of a statutory notice of deficiency 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. In CDP cases, 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). However, respondent may rely on the presumptions of official regularity and delivery or circumstantial evidence in order to prove receipt under section

6320(c) or 6330(c)(2)(B). Sego v. Commissioner, 114 T.C. 604 (2000); Carey v. Commissioner, T.C. Memo. 2002-209.

(A) Presumptions of official regularity and delivery

Unless respondent can show by direct evidence that the taxpayer actually received the deficiency notice or refused its delivery (s*ee, e.g.,* Baxter v. Commissioner, T.C. Memo. 2001-300), he will have to rely on the presumptions of official regularity and delivery to satisfy the requirements of section 6330(c)(2)(B). If the notice of deficiency has been properly mailed, the presumptions of official regularity and delivery arise so that it is presumed the notice was sent and attempts to deliver were made in the manner contended by respondent. Sego v. Commissioner, 114 T.C. 604 (2000); Carey v. Commissioner, T.C. Memo. 2002-209. For the presumptions of official regularity and delivery to arise in the CDP context, respondent must show that the statutory notice of deficiency has been sent by certified mail to petitioner's last known address. Sego v. Commissioner, 114 T.C. 604 (2000). Such proof should be accomplished by presenting a copy of the statutory notice and a certified copy of USPS Form 3877, certified mail list. Id., *citing* Pietanza v. Commissioner, 92 T.C. 729 (1989); *see also* Magazine v. Commissioner, 89 T.C. 321 (1987). The USPS Form 3877 must be stamped or initialed by the Post Office. Cf. Massie v. Commissioner, T.C. Memo. 1995-173. The presumption of delivery includes the presumption that the Postal Service attempted delivery of the certified mail to petitioner. Carey v. Commissioner, T.C. Memo. 2002-209.

(B) Rebuttal of presumptions

Once the presumptions of official regularity and delivery arise, the burden is on the taxpayer to prove non-receipt. The presumptions are rebutted if the certified mail is returned as undeliverable. In addition, the presumptions can be rebutted by credible testimony. *Cf.* Nunley v. City of Los Angeles, 52 F.3d 792, 796-797 (9th Cir. 1995). However, the presumptions are not rebutted by testimony denying receipt where sufficient contrary evidence exists that the taxpayer refused to accept delivery of the notice of deficiency. Sego v. Commissioner, 114 T.C. 604 (2000); Carey v. Commissioner, T.C. Memo. 2002-209. The presumptions are also not rebutted where the taxpayer admits receiving the USPS Form 3849 but fails to pick up the certified mail. *See* Baxter v. Commissioner, T.C. Memo. 2001-300.

(C) Frivolous challenges to liability

The section 6330(c)(2)(B) preclusion issue should be conceded if the taxpayer is only making frivolous arguments to challenge their

liabilities and proof of receipt of the statutory notice of deficiency will be difficult. Under such circumstances, defeating the frivolous challenge will be easier than proving receipt.

ii. Other opportunity to dispute liability

Other than receipt of a deficiency notice, the Code does not define what constitutes an "opportunity to dispute" the tax liability. We interpret the opportunity to dispute a tax liability as generally the opportunity to challenge it in an administrative hearing before Appeals or in a judicial proceeding.

(A) Appeals hearing

An opportunity to dispute a liability includes a prior opportunity for a hearing with Appeals that was 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. The taxpayer or his or her representative must receive the letter which provides the opportunity for a hearing with Appeals (or actually have participated in such a hearing) in order to preclude the taxpayer from contesting the liability at the CDP hearing.

(1) 30-day letter in deficiency case

Receipt of a 30-day letter preceding a notice of deficiency is not an opportunity to dispute a tax under section 6330(c)(2)(B). If it were, it would render meaningless the requirement that the taxpayer have received a statutory notice of deficiency before being barred from disputing the liability in a CDP hearing.

(2) Other pre-assessment letters

An opportunity to dispute a tax 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), the trust fund recovery penalty. Each of the following is an example of an opportunity to dispute the liability because the notice received by the taxpayer informs him or her of the right to go to Appeals.

- notice of a proposed excise tax assessment (Letter 955). Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.).
- notice of a proposed trust fund recovery penalty assessment (Letter 1153(DO)). Dami v. Internal Revenue Service, 2002-1 USTC ¶ 50,433 (W.D. Pa.); Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000).

- notice that a section 6682 penalty will be assessed. Adams v. United States, 2002-1 USTC ¶ 50,295 (D. Nev.).
- notice of proposed employment tax assessment (Letter 950).
- notice of proposed return preparer penalty assessment (Letter 1125(DO).

We do not agree with, and will not follow, the decision in Kintzler v. United States, 2001-2 USTC ¶ 50,696 (D. Nev.), which held that a letter giving the taxpayer a chance to submit a correct return to avoid the frivolous income tax penalty under section 6702 constituted an opportunity to dispute the penalty. In order for a taxpayer to have an administrative opportunity to dispute the liability, the taxpayer must have had an opportunity to contest the liability before Appeals.

(3) Letter disallowing refund claim

A letter (*e.g.*, Letter 105C) notifying a taxpayer that his or her refund claim is disallowed would be a prior opportunity to dispute the tax if the letter gives the taxpayer an opportunity to dispute the disallowance in Appeals.

(4) Prior CDP notice

If the taxpayer received a prior CDP notice under section 6320 or 6330 for the same tax and period, whether or not he or she requested a hearing, he or she has had an opportunity to dispute the existence and amount of the tax liability. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E7, 301.6330-1(e)(3)Q&A-E7.

(B) Judicial proceedings

An opportunity to dispute the tax liability may also include the opportunity to contest the tax in a prior judicial proceeding.

(1) Waiver of receipt of notice of deficiency

If a taxpayer signed a form (*e.g.*, Form 4549), consenting to the immediate assessment and collection of the underlying tax liability, he or she has made a choice not to receive a notice of deficiency and, therefore, is precluded from contesting the tax liability. Aguirre v. Commissioner, 117 T.C. 324 (2001) (Form 4549); Perez v. Commissioner, T.C. Memo. 2002-274 (Form CP-2000); *see also* Sillavan v. United States, 2002-1 USTC ¶ 50,236 (N.D. Ala.).

(2) Bankruptcy proceedings

The taxpayer may be precluded from contesting his or her liability if he or she has filed a petition for protection under the Bankruptcy

Code. The extent to which a taxpayer is precluded under section 6330(c)(2)(B) depends on the filing of a proof of claim by the Service, the taxpayer's standing to contest the liability in the bankruptcy proceeding and the likelihood the bankruptcy court would exercise jurisdiction. Contact PA:CBS:2 for assistance.

(3) District court cases

A tax lien foreclosure suit or a suit to reduce assessments to judgment involving the tax liability covered by the CDP hearing would be a prior opportunity under section 6330(c)(2)(B), because the taxpayer was entitled to challenge the liability in the suit. *See* MacElvain v. Commissioner, T.C. 2000-320.

(C) Math error notice

A notice of a math error does not constitute an opportunity to dispute the tax liability, because the ability of the taxpayer to obtain abatement of the increase under section 6213(b)(2)(A) is not mentioned in the form notice and is only alluded to in one of the enclosures sent with the notice.

d. Section 6330(c)(4)

Sections 6320(c) and 6330(c)(4) 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). The requirements of section 6330(c)(4) also applies to CDP judicial review proceedings. Magana v. Commissioner, 118 T.C. 488 (2002). Because section 6330(c)(2)(B) explicitly applies to challenges to tax liability, section 6330(c)(4) with its more stringent requirement of meaningful participation applies to non-liability issues.

For example, a taxpayer is precluded under section 6330(c)(4) from relitigating a statute of limitations defense that was previously raised and adjudicated in a district court proceeding. Magana v. Commissioner, 118 T.C. 488 (2002). If a bankruptcy court has determined that the taxpayer did not receive a discharge of the taxes to be collected, section 6330(c)(4) prevents the taxpayer from raising the discharge issue.

Section 6330(c)(4) does not apply to spousal defenses under sections 66 and 6015. Treas. Reg. §§ 301.6320-1(e)(2), 301.6330-1(e)(2).

e. Consideration of precluded issues by Appeals

An appeals officer may, in his or her sole discretion, consider issues precluded under sections 6015(g)(2), 6330(c)(2)(B), or 6330(c)(4). Consideration of any precluded issue does not allow a reviewing court to consider the matter in the CDP case. 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).

7. Department of Justice jurisdiction

Once a case is referred to the Department of Justice for defense or prosecution, only the Department of Justice has the authority to compromise the case, including the collection of those liabilities. This includes CDP cases that are referred to the Department of Justice. If a CDP hearing is held while a suit involving the same liabilities is pending, Appeals cannot consider any issue (such as the existence of the tax liability) that is part of the suit. Appeals may proceed with those issues that are not part of the suit, or choose to suspend the CDP hearing until the suit is concluded. Once a CDP case is referred to the Department of Justice, only the Department has the authority to settle the underlying liabilities of the taxpayer. A taxpayer who makes settlement overtures to the IRS regarding an underlying liability should be immediately referred to the Department of Justice.

If a liability has been reduced to judgment by the Department of Justice, Appeals must get the Department of Justice's approval of any offer in compromise submitted to resolve collection of the liability. No Department of Justice approval is required for Appeals to enter into an installment agreement under section 6159 providing for full payment of the liability.

C. Determination by Appeals

Delegation Order No. App 8-a authorizes appeals and settlement officers 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 or settlement officer is required to take into consideration: (A) verification that the requirements of any applicable law or administrative procedure have been met; (B) issues raised under section 6330(c)(2)(A); and (C) 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. S*ee also* Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E1, 301.6330-1(e)(3)Q&A-E1. 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, either as Letter 3193 or 3194, which informs the taxpayer of his or her right to judicial review by the

Tax Court or district court, respectively. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E8, 301.6330-1(e)(3)Q&A-E8. 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.

D. Judicial Review

1. Generally

The Tax Court or district court in a CDP case performs four functions: (a) it reviews the appeals officer's determination on collection matters; (b) it rules on alleged procedural defects in the CDP hearing; (c) it determines the underlying liability, unless precluded from doing so under section 6330(c)(2)(B); and (d) it may determine whether the taxpayer is entitled to spousal relief under section 6015. As more fully explained *infra*, at IV.D.5, the standard of review and evidentiary basis for the court's determination with respect to the first function is limited. The court reviews the appeals officer's determination for abuse of discretion, based on the same material (the administrative record) that the appeals officer considered. To rule on alleged procedural defects in the CDP hearing, the court reviews the administrative record de novo. When the underlying liability properly is at issue, the court may conduct a trial and will decide the issue of liability de novo. The applicable standard of review for spousal relief depends on the type of relief sought, in the same manner as it would in non-CDP contexts.

2. 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, or, if the Tax Court does not have jurisdiction over the underlying tax liability, to a district court of the United States. I.R.C. §§ 6320(c), 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F3, 301.6330-1(f)(2)Q&A-F3. Courts also have jurisdiction to review a notice of determination issued pursuant to section 6320(c) or 6330(f) after a jeopardy levy or levy on a state income tax refund. Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). *See* Dorn v. Commissioner, 119 T.C. 356 (2002).

a. Tax Court

i. Income, estate, gift and certain excise taxes

In general, the Tax Court's jurisdiction is limited to redeterminations of income, estate, gift, and certain excise taxes (Subtitle D, Chapts. 41-44). *See* I.R.C. §§ 6211, 6213(a). Therefore, the Tax Court has jurisdiction over petitions to review CDP notices of determination involving the collection of income, estate, gift, or certain excise tax liabilities. Moore v. Commissioner, 114 T.C. 171, 175 (2000); *see*

also Glass v. Internal Revenue Service, 2001-2 USTC ¶ 50,747 (9th Cir.); Diefenbaugh v. Weiss, 2000-2 USTC ¶ 50,839 (6th Cir.); Hart v. Internal Revenue Service, 2000-1 USTC ¶ 50,328 (E.D. Pa. 2001), aff'd 281 F.3d 221 (3d Cir. 2002).

The Tax Court has jurisdiction whether or not the assessed taxes were subject to deficiency procedures. Downing v. Commissioner, 118 T.C. 22 (2002). In light of Downing, we do not follow the opinions in Stephen C. Loadholt Trust v. Commissioner, T.C. Memo. 2000-349, and Samuel and Bernice Boone Trust v. Commissioner, T.C. Memo. 2000-350 (erroneous income tax refunds summarily assessed under section 6201(a)(3)).

ii. Additions to tax and interest

The Tax Court also has jurisdiction over additions to tax, such as those imposed under section 6651, 6654, 6655 or 6657, relating to the type of taxes over which the Court typically has jurisdiction. Downing v. Commissioner, 118 T.C. 22 (2002). Although there is no Tax Court decision on the subject, we believe the Court has jurisdiction to review a notice of determination where only additions to tax or interest are unpaid as long as the additions or interest relate to taxes over which the Tax Court typically has jurisdiction.

Tax Court review of interest is limited. For example, the Tax Court may review denials of interest abatement under sections 6404(h) and the redetermination of interest under section 7481(c). Katz v. Commissioner, 115 T.C. 329 (2000). When an interest abatement issue is raised and decided at a CDP hearing and the taxpayer subsequently files a petition with the Tax Court, the case must be considered as both a lien or levy action and an interest abatement action. Id. The Tax Court has yet to decide whether it has jurisdiction to redetermine interest in a CDP proceeding, similar to its jurisdiction under section 7481(c).

iii. Employment taxes

Section 7436 permits the Tax Court to determine the proper amount of employment taxes in connection with its classification of workers as employees. If the Tax Court has jurisdiction to review employment taxes in a CDP case, it is limited to employment tax liabilities resulting from the reclassification of independent contractors to employees, as set out in the Notice of Worker Determination issued under section 7436.

iv. No overpayment jurisdiction

The Tax Court has jurisdiction to determine a taxpayer's liability in a CDP case. The Court does not have jurisdiction to determine an

overpayment of the liability being collected or order a refund of any amounts paid, because there is no statutory provision (as in section 6512) that grants the Tax Court the authority to determine an overpayment or order a refund in a CDP case. If, however, the notice of determination includes a determination with respect to a spousal defense raised under section 6015, the Tax Court has overpayment jurisdiction under section 6015(g)(1).

In some cases, petitioner may claim that his or her liability for a tax year not in suit is less than the amount he or she paid, and that he or she is entitled to an overpayment that could be credited toward the liability at issue. The Tax Court does not have jurisdiction to make any determination with respect to the amount of liability for a tax period that the Service is not trying to collect, much less overpayment jurisdiction. The Court's jurisdiction is limited to determining the amount of petitioner's liability for the tax sought to be collected if properly raised.

b. District Court

i. Jurisdiction in general

District court subject matter jurisdiction to hear CDP cases is derived from section 6330(d)(1) and 28 U.S.C. § 1340.

ii. Employment and certain excise taxes

The district courts have jurisdiction to review CDP notices of determination involving the collection of FICA/Social Security and withheld income taxes (Form 941) and unemployment taxes (Form 940). Dogwood Forest Rest Home, Inc. v. United States, 181 F. Supp. 2d 554, 558 n. 3 (M.D. N.C. 2001); Anderson v. Commissioner, T.C. Memo. 2000-311. District court jurisdiction also includes review of determinations involving excise taxes other than ones found in Subtitle D, Chapts. 41-44. *See, e.g.,* Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.).

iii. Assessable penalties

All appeals of notices of determination involving assessable penalties (*i.e.*, those not subject to deficiency procedures and not defined as additions to tax) must be filed in district court. This jurisdiction includes notices involving the assessment of: (a) a trust fund recovery penalty under section 6672 (Sillavan v. United States, 2002-1 USTC ¶ 50,236 (N.D. Ala.), Moore v. Commissioner, 114 T.C. 171 (2000)); (b) false withholding information penalty under section 6682 (Adams v. United States, 2002-1 USTC ¶ 50,295 (D. Nev. 2002), Barnhill v. Commissioner, T.C. Memo. 2002-116); and (c) frivolous return penalty under section 6702 (Myrick v. United States, 217 F.

Supp. 2d 979 (D. Ariz. 2002), Johnson v. Commissioner, 117 T.C. 202 (2001)). Jurisdiction over other assessable penalties remains unlitigated.

iv. Additions to tax and interest

District courts also have jurisdiction over notices of determination involving the collection of additions to tax (*e.g.*, section 6656 or 6657) and interest that relate to the type of tax over which the Tax Court does not have jurisdiction, even if the underlying tax has been fully paid. At least one district court, though, has held that it does not have jurisdiction to review the denial of a request for abatement of interest in a CDP case. Dogwood Forest Rest Home, Inc. v. United States of America, 181 F. Supp. 2d 554, 558 (M.D. N.C. 2001).

v. No overpayment jurisdiction

Section 6330(d)(1) does not confer jurisdiction on district courts to hear a refund claim.

c. Improper court

If a petition to the Tax Court or a complaint filed in district court involves a tax over which the court does not have jurisdiction, a motion to dismiss for lack of jurisdiction should be filed. A motion to dismiss should be filed even if the notice of determination directed the taxpayer to the wrong court (although the mistake should be noted in the motion to dismiss). The taxpayer has 30 days from the court's dismissal to file in the correct court.
I.R.C. §§ 6320(c), 6330(d)(1); *see also* Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F4, 301.6330-1(f)(2)Q&A-F4. The 30-day period begins on the day after the later of the district court's dismissal for lack of jurisdiction or the court's denial of a timely-filed Fed. R. Civ. P. 59(e) motion for reconsideration. Hickey v. Commissioner, T.C. Memo. 2003-76.

3. Notice of determination required

Jurisdiction under section 6320 or 6330 is contingent upon the issuance of both a timely petition for review and a "valid notice of determination." Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

a. No notice of determination

If a notice of determination has not been issued to the taxpayer, a motion to dismiss for lack of jurisdiction should be filed. Similarly, if the notice of determination does not include a particular tax and period listed in the petition, a motion to dismiss for lack of jurisdiction should be filed as to that tax and period, unless the taxpayer timely

requested a CDP hearing for that tax and period and it was listed on the CDP notice. *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. Moorhous v. Commissioner, 116 T.C. 263 (2001); Van Gaasbeck v. United States, 2002-1 USTC ¶ 50,309 (D. Nev.); Johnson v. Commissioner, 2000-2 USTC ¶ 50,591 (D. Ore.). If a taxpayer shows that he was entitled to a CDP hearing because his or her 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).

b. Invalid notice of determination

A motion to dismiss for lack of jurisdiction should also be filed if a notice of determination is invalid. An invalid determination is one that is issued under such fundamentally deficient circumstances that it is inadequate to provide a basis for the reviewing court's jurisdiction. It is not a determination that reflects an erroneous disposition of a particular issue or omits discussion of a required issue.

A notice of determination issued to a taxpayer who filed a late request for CDP hearing would be invalid. The taxpayer is not legally entitled to a CDP hearing if his or her request for hearing is late. Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1). The mere fact the taxpayer was issued a notice of determination, rather than a decision letter, cannot confer jurisdiction on the Tax Court or district court any more than a decision letter issued to the taxpayer can deprive the court of jurisdiction under section 6330(d)(1). See Kennedy v. Commissioner, 116 T.C. 255 (2001).

Similarly, the portion of a notice of determination with respect to taxes and periods for which no CDP notice was ever issued would not be valid. If a taxpayer includes in his or her request for hearing taxes and periods that are not listed on the CDP notice, only the portion of the notice of determination making a determination under section 6320 or 6330 with respect to collection of the liabilities listed on the CDP notice is valid. Any determination with respect to the liabilities not listed on the CDP notice is not subject to judicial review. Finally, a notice of determination that is undated or sent to the wrong address may not be valid. *Cf.* King v. Commissioner, 857 F.2d 676 (9th Cir. 1988) (notice of deficiency invalid if it was sent to the incorrect address and not actually received by the taxpayer).

4. Timely petition/complaint

A petition or complaint for 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). 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; Guy v. United States, 2002-2 USTC ¶ 50,633 (E.D. N.Y.). The statutory period cannot be extended by the filing of a request for reconsideration by Appeals or the taxpayer's failure to pick up his or her mail. McCune v. Commissioner, 115 T.C. 114 (2000). An untimely filing cannot be excused because the taxpayer is pro se. McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.). An untimely filing in an incorrect court does not extend the time to file in the correct court. McCune v. Commissioner, 115 T.C. 114 (2000). Because the complaint was untimely in the district court, the petition is untimely in the Tax Court. Id.

a. Tax Court

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. Guerrier v. Commissioner, T.C. Memo. 2002-3, n. 6. The "timely mailing/timely filing" rule does not apply if the petition's postmark is a foreign postmark. Sarrell v. Commissioner, 117 T.C. 122 (2001). Section 7503 applies if the last day of the 30-day period falls on a weekend or legal holiday.

i. Section 6015(e) exception

If a taxpayer seeks review of a notice of determination that includes a denial of relief under section 6015(e), he or she 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 only of the denial of relief under section 6015, the taxpayer must file an appeal with the Tax Court within 90 days of the notice of determination. Id.; *see* I.R.C. § 6015(e)(1)(A). If the notice of determination denies relief under section 6015 and the taxpayer has not filed an appeal within the 30-day period, the Tax Court's review of the appeal is limited to the section 6015 claim. Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F2, 301.6330-1(f)(2)Q&A-F2; Raymond v. Commissioner, 119 T.C. 191 (2002).

ii. Section 6404(h) exception

Similarly, if a taxpayer seeks review of a notice of determination which includes a determination not to abate interest under section 6404(h), 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).

b. District court

Section 7502 does not apply to complaints in district court. I.R.C. § 7502(d)(1); McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.). The date the complaint is filed with the district court controls, not the date it was mailed. Trotter v. Chater, 1996 U.S. App. LEXIS 7708 (7th Cir. 1996); Akram Al-Wardi v. Comand Airways/American Eagle, 1994 U.S. App. LEXIS 29944 (1st Cir. 1994). *Cf.* Reynolds v. Hunt Oil Company, 643 F.2d 1042, 1043 (5th Cir. 1981) (notice of appeal). Fed. R. Civ. P. 6(a) applies if the last day of the 30-day period falls on a weekend or legal holiday. The 30-day limit cannot be extended by Fed. R. Civ. P. 6(e). McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.).

5. Standards of review

a. Generally

As explained *supra*, at IV.D.1., the standard of review depends upon which of the four functions the reviewing court is performing. First, the court reviews the appeals officer's determination regarding the collection action for abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000); Gillett v. United States, 233 F. Supp. 2d 874, 882 (W.D. Mich. 2002); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. at p. 266 (1998). Its review is confined to the material considered by the appeals officer, the administrative record.

Second, the court also reviews the administrative record when determining whether CDP procedures have been followed. Except where CDP procedures leave a matter to the discretion of the appeals officer (for example, the amount of time to allow a taxpayer to submit requested documentation), determination of CDP procedural issues is de novo. *See, e.g.,* Sego v. Commissioner, 114 T.C. 604 (2000).

Third, when the underlying liability is properly at issue, the court is not bound by the administrative record. It may conduct a trial and will decide the issue of liability de novo. Sego v. Commissioner, 114 T.C.

604, 610 (2000); Lemieux v. United States, 230 F. Supp. 2d 1143, 1146 (D. Nev. 2002); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998).

Finally, when spousal relief is properly at issue, the standard of review depends on the type of relief sought.

b. Administrative Procedure Act

CDP determinations are informal adjudications. See Treas. Reg. §§ 301.6320-1(d)(2)Q&A-D6, 301.6330-1(d)(2)Q&A-D6; *see also* Davis v. Commissioner, 115 T.C. 35 (2000); Kelly v. United States, 209 F. Supp. 2d 981, 989 (E.D. Mo. 2002). The judicial review provisions of the Administrative Procedure Act (APA), specifically 5 U.S.C. § 706, apply to CDP cases. Lunsford v. Commissioner, 117 T.C. 159 (2001), Halpern, J., concurring; *see also* MRCA Information Services, Inc. v. Commissioner, 145 F. Supp. 2d 194,199 n. 8 (D. Conn. 2000). Because the Tax Court as a whole has not acknowledged the APA's applicability to its review of CDP cases, and because the manner in which the APA's provisions should be applied is unsettled, questions concerning the APA should be coordinated with CC:PA:CBS:1 until the decisional law is further developed.

Section 706(2) of the APA permits a reviewing court to set aside an agency's actions, findings and conclusions if they are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) (not applicable to CDP cases because it is applicable only to the review of formal rulemaking and adjudication); or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Informal adjudications are reviewed under section 706(2)(A), (B), (C), and (D). Section 706(2)(E) applies only to formal adjudications. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-415 (1971). Section 706(2)(F) permits a trial de novo of an informal adjudication where provided by other applicable law. Peoples v. United States Dep't of Agriculture, 427 F.2d 561, 565 (D.C. Cir. 1970) (trial de novo provided by Food Stamp Act for review of agency

determinations of Act violations by distributors shows that section 706(2)(F) applies). Section 706(2)(B) should rarely be relevant to review of CDP determinations, because the federal tax lien and levy scheme has been held to be constitutional. Commissioner v. Shapiro, 424 U.S. 614, 630-633 (1975); Michigan v. United States, 317 U.S. 338, 340 (1943). Section 706(2)(C), which focuses on the authority of an agency to make a challenged decision, should also be of limited relevance. The authority of Appeals to determine whether a filed notice of federal tax lien or a proposed levy should be sustained is provided by sections 6320(c) and 6330(c).

c. Review of the CDP determination with respect to collection action for abuse of discretion

i. Determination with respect to the collection action

In reaching the ultimate determination to sustain the proposed levy or notice of lien filing, the appeals officer will make a number of subsidiary determinations, some legal, some factual and some judgmental. For example, the appeals officer will make the factual determination that the requirements of applicable law and administrative procedure have been met. In doing so, he or she may have to make the legal determination whether the law requires some step asserted by the taxpayer to have been omitted. He or she may have to decide whether the tax debt has been discharged by a bankruptcy court order, which may involve factual and legal determinations. He or she will have to make the judgment whether the collection action balances the need for efficiency with the taxpayer's legitimate concerns with intrusion.

ii. Review of the determination with respect to the collection action

The court reviews the appeals officer's determination to sustain the collection action for abuse of discretion. It conducts its review on the administrative record. Except in unusual circumstances, the court is not permitted to hear testimony or receive evidence outside the record. Camp v. Pitts, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). The administrative record may only be supplemented to include an additional explanation of the reasons for the agency decision, where a contemporaneous explanation of the decision exists (Camp v. Pitts, 411 U.S. at 142)) or to include documents adverse to the agency's position that were excluded from the record submitted by the agency (Kent County v. E.P.A., 963 F.2d 391, 395-396 (D.C. Cir. 1992)). The taxpayer may only contest issues that were raised in the CDP hearing. Treas. Reg. §§ 301.6320-

1(f)(2)Q&A-F5, 301.6330-1(f)(2)Q&A-F5. The court will not consider issues 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); The Inner Office, Inc. v. United States, 2001 U.S. Dist. LEXIS 20617 (N.D. Tex.).

The court should not review determinations subsidiary to the determination sustaining the collection action under a separate standard. For example, if the appeals officer determines that the tax debt was not discharged by a bankruptcy court order, the court would decide whether, on the evidence before him or her, the appeals officer abused his or her discretion in coming to that conclusion. Of course, the court would find an abuse of discretion if the appeals officer misapplied the law in a way that affected the determination. See Washington v. Commissioner, 120 T.C. No. 8 at 26 (2003), Halpern, J., concurring, *citing* Abrams v. Interco, Inc. 719 F.2d 23, 28 (2d Cir. 1983) ("It is not inconsistent with the discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law.").

iii. Abuse of discretion standard defined

In Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-286 (1974)(internal citations omitted), the Supreme Court defined the application of section 706(2)(A) abuse of discretion standard as follows:

> A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'.... While we may not supply a reasoned basis for the agency's action that the agency itself has not given..., we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

iv. CDP administrative record

No court has defined what the administrative record is for CDP cases. Case law under the APA defines the administrative record as the information the agency reviewed in making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The basis of review of a notice of determination is the evidence that was before the appeals officer. Thus, the administrative record in a CDP case typically includes the following:

- CDP lien or levy notice.
- request for a CDP hearing.

- notice of determination.
- "Appeals Transmittal Memorandum and Case Memo" (if applicable).
- transcript of the taxpayer's account reviewed by the appeals officer (*e.g.*, TXMOD-A).
- correspondence between the taxpayer and the appeals officer.
- history notes of the appeals officer.
- documents submitted by the taxpayer after the date of the hearing request up until the date of the notice of determination.
- tape recordings or legitimate transcriptions of face-to-face or telephone conferences between the appeals officer and the taxpayer.

d. Review of CDP procedures

The court will decide questions of CDP procedural compliance de novo. *See, e.g.,* Sego v. Commissioner, 114 T.C. 604 (2000). Generally, this review is limited to the administrative record. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416-420 (1971). CDP procedural compliance does not include determining whether the IRS has complied with the legal and regulatory requirements necessary for assessment and collection. Such matters are determined by the appeals officer, whose determination is reviewed for abuse of discretion. *See, supra,* at IV.D.5.c. Procedural decisions made by the appeals officer, for which there is no legal or regulatory requirement (*e.g.*, setting a deadline for submission of additional information), are subject to abuse of discretion review. *Cf.* Wolfe v. Marsh, 835 F.3d 354, 357-358 (D.C. Cir. 1987); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980). Procedural decisions subject to de novo decision include the following:

i. Whether the taxpayer was provided a "hearing" within the meaning of section 6320(b)(1) or 6330(b)(1).

ii. Whether the appeals officer meets the impartiality standard of section 6320(b)(3) or 6330(b)(3). MRCA Information Services, Inc. v. Commissioner, 145 F. Supp. 2d 194 (D. Conn. 2000).

iii. Whether the taxpayer is precluded under section 6320(c) or 6330(c)(2)(B) from challenging the underlying liability. Sego v. Commissioner, 114 T.C.

604 (2000); Adams v. United States, 2002-1 USTC ¶ 50,295 (D. Nev.); Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.); Dami v. Internal Revenue Service, 2002-1 USTC ¶ 50,433 (W.D. Pa.).

iv. Whether section 6330(c)(4) precludes a taxpayer from raising a non-liability issue.

For example, a taxpayer may allege that an appeals officer's failure to provide him or her with a requested face-to-face conference violates CDP procedural requirements. Although such failure violates the CDP regulations, such violation may be a harmless error if the taxpayer was provided with a telephone conference and the court determines that a face-to-face meeting would not have changed the CDP determination under review.

e. Harmless error

The APA requires that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Courts have interpreted this statutory language as requiring the application of the harmless error rule. *See, e.g.,* Intercargo Ins. Co. v. United States, 83 F.3d 391, 394 (Fed. Cir. 1996). *See also* Nestor v. Commissioner, 118 T.C. 162 (2002), Halpern, J, concurring (observing that the majority applied the APA's harmless error rule in making its decision). "A mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination." Sierra Club v. Slater, 120 F.3d 623, 637 (6th Cir. 1997).

f. Trial de novo of underlying liability

Where review is not precluded, I.R.C. § 6330(c)(2)(B), the court will determine the underlying tax liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Lemieux v. United States, 230 F. Supp. 2d 1143, 1146 (D. Nev. 2002); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998). The court may hold a trial and take evidence. It is not bound by the administrative record. Although the parties may introduce evidence that was not submitted to the appeals officer, a court will not consider a challenge to liability if it was not raised during the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F5, 301.6330-1(f)(2)Q&A-F5; Miller v. Commissioner, 115 T.C. 582, 589 n. 2 (2000); Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.).

In this context, the "underlying liability" is the tax "on which the Commissioner based his assessment." Washington v. Commissioner, 120 T.C. No. 8 at 23 (Halpern, J., concurring). It is

the tax that the taxpayer would be precluded from contesting in the CDP proceeding if he "receive[d] a statutory notice of deficiency . . . or . . .otherwise . . . [had] an opportunity to dispute such tax liability." I.R.C. § 6330(c)(2)(B). It should be distinguished from the "unpaid tax," which is the unpaid portion of the assessed tax. Washington, 120 T.C. No. 8 at 23-24. The court reviews issues affecting the "unpaid tax," such as application of credits and payments, bankruptcy discharge, or statute of limitations, by reviewing the appeals officer's determination of the issue on the administrative record for abuse of discretion. Id. at 25-26. *But see* Hoffman v. Commissioner, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject de novo review), Boyd v. Commissioner, 117 T.C. 127 (2001) (claim that collection statute of limitations has expired is a liability challenge subject to de novo review, as is the claim that the taxpayer had already paid the liabilities at issue); Landry v. Commissioner, 116 T.C. 60 (2001) (dispute as to IRS application of credits is a liability challenge subject to de novo review).

g. Determinations under section 6015(b) or (c)

Section 6330(c)(2)(A)(i) specifically permits the taxpayer to raise "appropriate spousal defenses" at the CDP hearing. See IV.B.6.b.i., *supra*. The appeals officer's determination concerning innocent spouse relief is reviewed in the same manner as an innocent spouse determination by the Service outside the CDP context. Denial of relief under section 6015(b) or (c) is reviewed de novo 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 reviewed for abuse of discretion. Butler v. Commissioner, 114 T.C. 276 (2000).

6. Res judicata and collateral estoppel

The provisions of sections 6330(c)(2)(B) and 6330(c)(4) are similar to the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion), respectively. These doctrines are independent of the statutory provisions and should be affirmatively pleaded, where appropriate (in addition to the statutory provisions), when answering an appeal of a notice of determination. Section 6330(c)(2)(B) does not displace the doctrine of res judicata as to liability determinations. *See* Sparks v. United States, 2000-1 USTC ¶ 50,338 (Bankr. N.D. OK). There is some question, though, as to whether section 6330(c)(4) statutorily replaces the doctrine of res judicata as to non-liability issues.

7. Reconsideration of docketed cases by Appeals

On March 8, 2002, the Director, General Appeals Operating Unit, issued a memorandum setting forth the circumstances under which Appeals would reconsider docketed CDP cases. Appeals will only reconsider a case if Appeals significantly erred, abused its discretion, or did not consider relevant issues (including liability properly at issue), or if the court remands or does not sustain the notice of determination.

8. Remand

a. Tax Court

In Lunsford v. Commissioner, 117 T.C. 183 (2001), the Tax Court indicated that it has the authority to remand a CDP case back to Appeals. We believe the Tax Court may exercise remand power in certain limited circumstances. The Court may order a remand without entering a decision if there has been a non-harmless procedural error in connection with the hearing. *See, e.g.,* Order dated March 27, 2002, in Nestor v. Commissioner, Docket No. 5372-00L (remand of two of petitioner's tax years to the Commissioner for the purpose of providing an opportunity for a hearing for those years). The Court may also remand where the appeals officer failed to consider an issue raised or information submitted by petitioner or where the facts or reasoning relied upon by the appeals officer do not fully support the determination and must be clarified. *See, e.g.,* Tatum v. Commissioner, T.C. Memo. 2003-115; Rivera v. Commissioner, T.C. Memo. 2003-35. Under these circumstances, we recommend that the Counsel attorney move to continue a calendared case in order to give Appeals an opportunity to correct the procedural error or revise the notice of determination. If the case has not been calendared, the case should be sent back to Appeals for procedural correction or revision of the notice of determination. Please note that this procedure does not apply to those instances where the appeals officer merely failed to explain adequately the facts or reasons for his or her determination. This failure can be corrected in a declaration attached to a motion for summary judgment. *See* discussion at IV.D.5.c.ii., *supra*, and V.H.4.d., *infra*. If a Counsel attorney has a case where there appears to be an abuse of discretion or a procedural error, please call CC:PA:CBS:1 for assistance.

b. District court

Several district courts have held they have the authority to remand a CDP case to the Office of Appeals. *See, e.g.,* MRCA Information Services, Inc. v. Commissioner, 145 F. Supp. 2d 194 (D. Conn.

2000). The United States has filed a motion to remand a CDP case when the taxpayer was not provided a requested face-to-face conference, Ahee v. United States, 89 AFTR2d ¶ 1247 (D. Nev. 2001), and when the taxpayer did not receive a hearing on the merits of the tax liability, Rennie v. Internal Revenue Service, 2001 U.S. Dist. LEXIS 18954 (E.D. Cal.).

9. No jury trial available

Taxpayers are not entitled to a jury trial in a district court CDP case. *See, e.g.,* Brown Bros. Concrete, Inc. v. United States, 2002-2 USTC ¶ 50,581 (M.D. Fla.). Jury trials are not available in Tax Court. Phillips v. Commissioner, 283 U.S. 589, 599 n. 9 (1931); Lonsdale v. Commissioner, 661 F.2d 71, 72 (5th Cir. 1981); Woods v. Commissioner, 91 T.C. 88 (1988).

E. Effect of Bankruptcy Filings on CDP Procedures

1. Bankruptcy filing prior to CDP notice

When a taxpayer files for bankruptcy, the automatic stay prohibits many types of collection activities. *See* 11 U.S.C. § 362(a). While the automatic stay is in effect, generally, an NFTL for prepetition taxes should not be filed. Likewise, no levies should be proposed. *See, e.g.,* In re Covington, 256 B.R. 463 (Bankr. D. S.C. 2000). If an NFTL is filed in violation of the automatic stay, it should be withdrawn; if a levy is proposed, it should be abandoned. Additionally, any CDP Notices issued during the pendency of the automatic stay should be rescinded.

2. Bankruptcy filing after CDP notice

If a taxpayer requests a CDP hearing before or after filing a petition for bankruptcy relief, the impact of the automatic stay is not clear. A CDP lien or levy hearing may be considered an administrative proceeding to recover a prepetition claim against the debtor. 11 U.S.C. § 362(a)(1). Acceptance of payment as part of an agreement reached in a CDP hearing could be construed as a stay violation if the payment is from estate property. 11 U.S.C. § 362(a)(3). In any event, holding a CDP hearing or issuing a notice of determination is inconsistent with the purpose of the bankruptcy laws to provide a single forum for resolving all claims against a debtor, including tax claims.

3. Bankruptcy filing after issuance of notice of determination

If the taxpayer has filed a bankruptcy petition, or has had an involuntary petition filed against him or her, and a discharge has not been granted, then under 11 U.S.C. § 362(a)(8), the taxpayer is

prohibited from filing a petition with the Tax Court for review of the notice of determination. If a bankruptcy petition is filed after the Tax Court petition is filed, the Tax Court CDP case should be suspended until the automatic stay is terminated or lifted. The taxpayer may file a complaint with a district court, however, or continue a previously filed district court proceeding for review of a notice of determination. 11 U.S.C. § 362(a)(1) .

F. Retained Jurisdiction of Appeals

Under section 6330(d)(2), Appeals retains jurisdiction to review collection actions taken or proposed under section 6330, but only if the taxpayer claims a change in circumstances and after he or she has exhausted all administrative remedies (attempted to resolve the matter with Compliance). I.R.C. § 6330(d)(2); Treas. Reg. §§ 301.6320-1(h)(1), 301.6330-1(h)(1). A "change in circumstances" should be limited to situations where there has been an economic disruption (such as job loss) in the taxpayer's life. Appeals will not exercise retained jurisdiction while the notice of determination is subject to judicial review.

A court does not have the authority to order Appeals to reconsider a notice of determination under retained jurisdiction based on "changed circumstances." TTK Management v. United States, 2001-1 USTC. ¶ 50,185 (C.D. Cal.). If another hearing is held under section 6330(d)(2) and Appeals issues a decision, the taxpayer may not seek judicial review of the decision in either the Tax Court or the district court. Treas. Reg. §§ 301.6320-1(h)(2)Q&A-H2, 301.6330-1(h)(2)Q&A-H2.

V. CDP Litigation Practice in Tax Court

A. Tax Court Rules

Title XXXII of the Tax Court Rules of Practice and Procedure, which encompasses Interim T.C. Rules 330 through 334, applies to petitions brought under sections 6320 and 6330.

B. Applicability of Small Case Procedures

Section 7463(f) permits small case ("S") designation in CDP cases "in which the unpaid tax does not exceed $50,000." The Tax Court rules have not been amended to specify whether "unpaid tax" includes additions to tax, penalties or interest. Questions as to whether an "S" designation is proper in a CDP case should be referred to CC:PA:CBS:1.

C. Motion to Change Caption

If a petition seeking review of a notice of determination is not marked with either an "L" or an "S", and the notice of determination was not attached to the petition, the notice of determination should be attached to the answer. If the

filing of the answer does not cause the Court to add the letter "L" to the case docket number, a joint motion to change the caption should be filed. *See* sample at Exhibit A.

D. Answers

Interim T.C. Rule 333(a) provides that the Commissioner will file an answer or move with respect to the petition within the periods specified in T.C. Rule 36. If petitioner was previously involved in a judicial proceeding involving the same tax liabilities and years that are listed in his or her petition, the answer should raise the defense of res judicata or collateral estoppel, as appropriate, pursuant to T.C. Rule 39. If section 6330(c)(2)(B) or 6330(c)(4) precludes the taxpayer from challenging an issue, the statutory defense should be affirmatively pleaded in the answer, in addition to res judicata or collateral estoppel. Any other avoidance or affirmative defense should also be pled in the answer, in accordance with T.C. Rule 39. If the tax liability is properly at issue and respondent has the burden of proof under T.C. Rule 36(b), the answer should include affirmative allegations as to every ground on which respondent relies. If the CDP case has an "S" designation, then pursuant to T.C. Rule 175(b) there is no need to answer the petition unless respondent has the burden of proof under T.C. Rules 36(b) and 39 and must make affirmative allegations.

E. Replies

Interim T.C. Rule 333(b) refers to T.C. Rule 37 for provisions relating to the filing of a reply and is applicable only if respondent makes an affirmative allegation under T.C. Rule 36(b). T.C. Rule 37(c) deems admitted all affirmative allegations not expressly admitted or denied in a reply.

F. Additional Pleading in Section 6015(e) Cases

In any Tax Court proceeding, including a CDP case, in which petitioner seeks review under section 6015(e), respondent must serve notice of the petition on any non-party spouse who filed the joint return for the years at issue. Interim T.C. Rule 325. Certification that the notice was served must be concurrently filed with the Court, even if no answer is required to be filed. Chief Counsel Notice N(35)000-173 (October 17, 2000).

G. Interim T.C. Rule 331(b)(4) - Issues Not Raised

The Tax Court will address only those issues raised in the petition to the Court and in the trial memorandum, and issues not raised will be deemed conceded. Interim T.C. Rule 331(b)(4); Lunsford v. Commissioner, 117 T.C. 183 (2001). General allegations are not sufficient to raise an issue under Interim T.C. Rule 331(b)(4). *See* Davis v. Commissioner, T.C. Memo. 2001-87 (petitioner claims only that she was denied due process); Lindsay v. Commissioner, T.C. Memo. 2001-285 (petition states only that the determination was not complete and was erroneous); *see also* Tabak v.

Commissioner, T.C. Memo. 2003-4. Interim T.C. Rule 331(b)(4) has been most strictly applied in cases involving frivolous contentions. *See, e.g.,* Lunsford v. Commissioner, 117 T.C. 183 (2001).

H. Pretrial Motions

In general, CDP cases should be resolved without trial, unless the taxpayer is properly contesting the underlying tax liability. Most cases should be disposed of on pretrial motion. It is therefore critical that Counsel attorneys file appropriate pretrial motions sufficiently in advance of the trial date to permit the court to dispose of the case without trial.

1. Motion to dismiss on the ground of mootness

a. Payment or abatement of tax

If the tax is paid by offset or voluntary payment, or abated (other than because of an invalid assessment for which the statute of limitations is still open - *see* V.I.5.c., *infra*), generally the case should be dismissed as moot, *i.e.*, as there is no tax liability to collect, the NFTL will be released or the proposed levy abandoned. The Counsel attorney should file a motion to dismiss on the ground of mootness. A motion to dismiss for mootness is inappropriate if petitioner is disputing the existence or amount of the liability, or is requesting interest abatement or relief under section 66 or 6015. Even if the liability has been paid, petitioner may still dispute the liability (if not precluded under section 6330(c)(2)(B)) or request an abatement of interest or relief under section 66 or 6015. *Cf.* McGowan v. Commissioner, 67 T.C. 599 (1976). *See* sample Motion to Dismiss on the Ground of Mootness at Exhibit B.1.

b. Bankruptcy discharge or expiration of collection statute of limitations

If a taxpayer has received a bankruptcy discharge and his or her tax liabilities are dischargeable, he or she is no longer personally liable for the taxes and the Service is enjoined from collecting the liability from the taxpayer personally. The Service may collect a discharged liability from prebankruptcy assets, however, if a NFTL was filed before the taxpayer's bankruptcy. *See* Isom v. United States, 901 F.2d 744 (9th Cir. 1990). If, after the notice of determination is issued, the Service determines that there is no prebankruptcy property to which the tax lien attaches, there would no longer be any need for enforced collection through lien or levy. Similarly, if the collection statute of assessment has expired, the lien must be released pursuant to section 6325(a)(1) or the proposed levy abandoned. The case should be dismissed as moot by filing a motion to dismiss on the ground of mootness. *See* sample Motion to

Dismiss on the Ground of Mootness at Exhibit B.2. If petitioner wants to dispute the liability, the case should still be dismissed as moot because a liability determination is pointless. The discharge injunction prevents collection from petitioner and there is no prepetition property to which a tax lien is attached. Similarly, the expiration of the collection statute of limitations prevents collection.

2. Motion to dismiss for lack of jurisdiction

a. Improper court

See discussion at IV.D.2.c., *supra*. A sample motion is attached as Exhibit C.1.

b. No notice of determination

See discussion at IV.D.3.a., *supra*. Two sample motions are attached as Exhibits C.2. and C.3.

c. Invalid notice of determination

See discussion at IV.D.3.b., *supra*. Two sample motions are attached as Exhibits C.4. and C.5.

d. Late-filed petition

See discussion at IV.D.4.a., *supra*. A sample motion is attached as Exhibit C.6.

e. Petitioner-initiated motion to dismiss for lack of jurisdiction

Relying on Lunsford v. Commissioner, 117 T.C. 159 (2001), the Tax Court will deny petitioners' motions to dismiss for lack of jurisdiction when the basis for the motion is that petitioners were not provided with a procedurally-valid CDP hearing. *See, e.g.,* Stoewer v. Commissioner, T.C. Memo. 2002-167.

3. Motion to dismiss for failure to state a claim upon which relief can be granted

T.C. Rule 40 provides for the filing of a motion to dismiss for failure to state a claim upon which relief can be granted. Such motion must be filed within 45 days after the date of service of the petition. Interim T.C. Rule 333(a) and T.C. Rule 36(a). A motion to dismiss for failure to state a claim should be filed only where petitioner challenges only the existence or amount of the liability, and either makes frivolous arguments or admits in the petition that he or she received the statutory notice of deficiency for the liability. Responses to frivolous

arguments can be found on the P&A web page under the heading "Taxpayer Arguments (Constitutional and Other Challenges)."

4. Motion for summary judgment

A summary judgment motion may be submitted at any time beginning 30 days after the pleadings have closed, but not within such time so as to delay trial. T.C. Rule 121(a). Generally, a summary judgment motion should be submitted no later than 30 days before trial. T.C. Rule 121(b) permits the Court to grant summary judgment if the "pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with affidavits, if any, show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." Even if a summary judgment motion will not dispose of all of the issues, a motion for partial summary judgment may help narrow the issues for trial.

Unless a unique or complicated issue has been raised, it is preferable that a motion for summary judgment be prepared as one document rather than as a motion supported by a memorandum of law, but both are acceptable.

a. Abuse of discretion review

If petitioner is only disputing determinations that are subject to an "abuse of discretion" review, a motion for summary judgment should be filed, because the Tax Court's review is limited to the administrative record. For example, where petitioner is alleging that the verification requirements of section 6330(c)(1) were not met, the Tax Court has granted summary judgment to respondent. *See* Roberts v. Commissioner, 118 T.C. 365 (2002). A sample motion for summary judgment, where only claims subject to abuse of discretion review are at issue, is attached as Exhibit D.1.

b. Procedural claims

A summary judgment motion may also be filed if petitioner is claiming that the CDP hearing procedures required by law were not satisfied. Generally, the Court's review is limited to the administrative record. If a dispute arises as to what happened during the CDP hearing (*e.g.*, whether petitioner submitted a collection alternative), or whether the appeals officer correctly found that the taxpayer was precluded from challenging his or her liability or another issue, then evidence obtained through discovery may be submitted in support of the summary judgment motion. A sample summary judgment motion where section 6330(c)(2)(B) preclusion is at issue is attached as Exhibit D.2. If there is a dispute as to material fact, then a summary judgment will not be successful.

c. Trial de novo

Factual disputes may arise where a court is conducting a trial de novo. *See* discussion at IV.D.5.f. and g., *supra*. The need for the court to find facts does not automatically prevent summary judgment from being granted. The T.C. Rule 121 standard is that summary judgment can be granted only where there is no dispute as to material fact. A summary judgment motion can be successful if discovery reveals no dispute of material fact. Generally, however, if the existence or amount of the tax liability is properly at issue in a CDP case, a motion for summary judgment will not be appropriate because there is likely to be a dispute of material fact requiring live testimony.

d. Declaration

A declaration from the appeals officer making the determination should be filed with the summary judgment motion. The declaration should authenticate and attach all of the documents comprising the administrative record. *See* sample at Exhibit D.3. If the appeals officer has not adequately explained the facts and reasoning that led him or her to the CDP determinations, it may be necessary to include in the declaration the required explanation. *See* discussion at IV.D.5.c.ii., *supra*. Please note that where the appeals officer failed to consider an issue raised or information submitted by petitioner or where the facts or reasoning relied upon by the appeals officer do not fully support the determination, a declaration is not the appropriate method of supplementing the administrative record. *See* procedure described at IV.D.8.a., *supra*. For example, a declaration would be appropriate if the notice of determination did not discuss any reason for the rejection of an installment agreement, but the appeal officer's case history suggests that failure to file returns could have served as the reason for rejecting an installment agreement. A declaration would not be appropriate if the appeals officer had rejected the installment agreement after applying the Service's local standard for housing expenses, but petitioner had in fact substantiated a lower amount that would have made him or her eligible for the agreement. Other declarations may also be necessary, such as one by the assigned Counsel attorney to authenticate copies of documents from examination files or a Form 4340.

I. Trial Preparation

1. Discovery

a. By respondent

Unless petitioner is raising only frivolous arguments, informal discovery should be conducted at a Branerton conference. Petitioner should be provided with a copy of the administrative record. In addition, request for admissions and all formal discovery procedures are available in a CDP case. Where the Court is reviewing only for abuse of discretion, the need for formal discovery (interrogatories or requests for admission) should be limited to ascertaining whether there is a factual dispute over the contents of the administrative record (*e.g.*, to determine if the taxpayer asked for a face-to-face conference). For determinations subject to trial de novo (*i.e.*, liability determination or section 6015(b) or (c) relief), the full range of formal discovery tools may be used.

b. By petitioner

If petitioner is only disputing the determinations that are reviewed for abuse of discretion, any discovery beyond obtaining the CDP administrative file is generally not permitted. *See* Carroll v. United States, 217 F. Supp. 2d 852, 858 (W.D. Tenn. 2002). Discovery beyond the administrative record by petitioner would be appropriate with respect to those issues subject to a trial de novo.

Any requests by petitioners to depose appeals officers or their managers should be opposed. We take the position that the appeals officers and their managers are non-party witnesses. Therefore, T.C. Rule 75(b) applies to their depositions. The rule states that depositions of non-party witnesses are permitted only in extraordinary circumstances where the information sought is not available through other, less extraordinary means. Anything petitioner wishes to know about the Appeals CDP determinations can be found in the CDP administrative file or obtained through interrogatories or requests for admission.

In the event the Court permits a deposition, the scope of the testimony should be limited to the circumstances described in IV.D.5.c.ii., *supra*. In addition, inquiry into the mental processes of the agency decision maker is not permissible, except for the limited purpose of determining if the decision was a result of bad faith. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). Petitioner, however, must make a "strong showing of bad faith or improper behavior" before any such inquiry will be permitted. Id.

2. Stipulation of facts

The stipulation should include facts and documents relevant to issues subject to trial de novo. If procedural claims subject to de novo review or issues subject to abuse of discretion review are also raised in the petition, the stipulation of facts also should include the notice of determination and all documents that the appeals officer considered or prepared in making his or her determinations. If petitioner will not cooperate with the Counsel attorney on the stipulation of facts, the attorney should file at least 45 days before trial a motion under T.C. Rule 91(f) to compel stipulation.

If the trial is less than 45 days away, prepare a declaration of the appeals officer who made the determinations to authenticate the administrative record. *See* sample at Exhibit D.3. The Counsel attorney should send a copy of the declaration to petitioner, informing him or her of respondent's plan to offer the documents into evidence. Under Fed. R. Evid. 902(11), the declaration permits the documents comprising the administrative record to be self-authenticating, provided written notice of respondent's intention to use the documents is given to petitioner and the records and declaration are made available for inspection sufficiently in advance to provide petitioner a fair opportunity to challenge them. By using this declaration, the appeals officer's testimony is not necessary to authenticate the administrative record at trial. The hearsay exception for business records found in Fed. R. Evid. 803(6) also applies to permit admission of the declaration into evidence. In a non-CDP case, the Tax Court has approved the use of a declaration to admit a certified mail list into evidence, citing Fed. R. Evid. 902(11) and 803(6). Clough v. Commissioner, 119 T.C. 183 (2002).

3. Trial memorandum

A trial memorandum should address only those issues raised in the petition and any affirmative allegations or defenses raised by respondent in his answer. Generally, the appeals officer should not be listed as a witness in the trial memorandum. On issues subject to abuse of discretion review, appeals officer's live testimony should be unnecessary because the Court's review is limited to the administrative record and the record can be authenticated and admitted by declaration as described at V.I.2., *supra*. On liability issues, the appeals officer's testimony is irrelevant. *See* Ruth v. United States, 823 F.2d 1091 (7th Cir. 1987); Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324 (1974). Appeals officer testimony may be necessary if the administrative record fails to explain the basis for a determination, there is a dispute as to the content of the administrative record (such as where petitioner claims an issue unaddressed in the administrative record was raised during the

hearing process or a submitted document was not considered), or where there is a dispute as to whether proper CDP hearing procedures were followed. If appeals officer testimony is needed, prior approval of the General Appeals Area Director is required. *See* March 8, 2002 memorandum from the Director, General Appeals Operating Unit. The need for appeals officer testimony should be raised with Appeals as early as possible in the proceedings.

4. Joint motion to dismiss

A joint motion to dismiss (dismissal without prejudice agreed to by the parties) should not be used in Tax Court filings. Should it be determined that the facts of a case are identical to those in Wagner v. Commissioner, 118 T.C. 330 (2002) (petitioners paid the tax in full in order to pursue the liability challenge in a refund suit in district court), coordination with CC:PA:CBS:1 should occur in order to determine the correct document, if any, to be filed with the Tax Court.

5. Stipulated decision documents

a. Generally

Before conceding a case or returning a notice of determination to Appeals for reconsideration, a Counsel attorney must coordinate with CC:PA:CBS:1. All stipulated decisions not sustaining a notice of determination must be pre-reviewed by CC:PA:CBS:1. *See* Chief Counsel Notice CC-2003-016, dated May 29, 2003.

b. Abuse of discretion or procedural error

On occasion, the appeals officer may have failed to consider an issue raised or information submitted by petitioner. The appeals officer may have reached factual conclusions or employed reasoning that do not fully support the CDP determination. There might be a non-harmless procedural error, as for example, when the hearing has been conducted by an appeals officer who is not impartial as required by section 6320(b)(3) and petitioner has not waived that requirement. If the Counsel attorney believes the appeals officer's exercise of discretion or the procedural error cannot be defended, the case should be returned to Appeals for reconsideration. If a revised notice of determination or correction of the procedural error will render the exercise of discretion defensible, then use the procedure described in IV.D.8.a., *supra*. In some cases, the Court may not accept the revised notice of determination or the correction of the procedural error. In other instances, a revision to the notice of determination cannot render it defensible, such as where petitioner was erroneously denied a guaranteed or streamlined installment agreement. In either of these circumstances, use a decision document stating that the

CDP notice of determination is not sustained. *See* sample at Exhibit E.1.

c. Concession of procedurally invalid assessment

Counsel attorneys may discover a fatal defect in the assessment – for example that the assessment was erroneously made under the math error procedures rather than the deficiency procedures or that a notice of deficiency was not sent to petitioner's last known address. If respondent concedes that the assessment is procedurally invalid, and the assessment statute of limitations period has expired, use a decision document stating that the notice of determination is not sustained. *See* sample at Exhibit E.1. This form of decision document is used because the appeals officer abused his or her discretion in determining that the assessment was valid.

If the assessment period has not expired, Counsel should advise the Service to issue a statutory notice of deficiency immediately. Because the entry of a decision document could preclude future assessment due to its potential res judicata effect, Counsel should ask for a continuance of the CDP case to permit petitioner to file a deficiency petition. Once filed, the deficiency and CDP cases should be consolidated. For further guidance, please contact CC:PA:CBS:1.

d. No abuse of discretion and no procedural error

i. Tax liability at issue

If the tax liability is properly at issue, the decision document should include a liability determination for res judicata purposes. The amounts of the liability and additions to tax should be calculated as of the date the decision is entered. Because we are uncertain at this time whether the Tax Court has jurisdiction over redetermination of interest in CDP cases, stipulations as to interest should be below the line and state that interest accrues in accordance with law. If the Court determines that it does have jurisdiction to redetermine interest, or the taxpayer claims he or she is entitled to interest abatement under section 6404 (discussed below), then any stipulation as to interest would go above the line. Any stipulation as to overpayment should be placed below the line, because the Tax Court does not have jurisdiction to determine an overpayment or order its refund.

(A) No change to liability

If petitioner accepts the appeals officer's liability determination despite initially disputing the amount in his or her petition, and also concedes there was no abuse of discretion or procedural error, the decision document should state the amount of liability and that the

notice of determination is sustained in full. *See* sample at Exhibit E.2.

(B) Liability adjusted

If the liability is adjusted, and petitioner concedes there was no abuse of discretion or procedural error, the decision document should state that the notice of determination is sustained in full "except as provided herein," and then state the adjusted amount of the liability. *See* sample at Exhibit E.3. If, as a result of the adjustment to liability, there is no longer any unpaid tax, file a motion to dismiss on the ground of mootness. *See* sample at Exhibit B.1.

ii. Tax liability not at issue

If petitioner does not dispute the liability and concedes there was no abuse of discretion, the decision document should state that the notice of determination is sustained in full. *See* sample at Exhibit E.4.

e. Interest abatement

i. No abuse of discretion

If a request for abatement of interest under section 6404 was properly raised at the Appeals hearing, but petitioner concedes on appeal there was no abuse of discretion in denying interest abatement, the decision document should state that petitioner is not entitled to interest abatement. If petitioner also concedes there was no abuse of discretion with respect to the CDP determinations, the decision document should also state that the notice of determination is sustained in full. If petitioner contests other components of his or her tax liability, the decision document should list the amount of liability for res judicata purposes. *See* sample at Exhibit E.5.

ii. Abuse of discretion

See discussion at V.I.5.b., *supra*.

f. Spousal relief - section 6015(b) and (c)

If petitioner has properly raised a spousal defense under section 6015(b) or (c), the decision document should state whether and to what extent petitioner is entitled to relief. If petitioner is entitled to an overpayment due to full or partial relief under section 6015(b), see sample section 6015 decision documents on P&A web page under "Developing Issues."

i. Full relief, no overpayment

If petitioner is entitled to full relief, the decision document should state that relief is granted in full, and that the notice of determination is not sustained. *See* sample at Exhibit E.6.

ii. Partial relief, no overpayment, no abuse of discretion

There may be occasions where the Counsel attorney concludes that petitioner is entitled to partial relief (*e.g.*, spousal relief for one tax year but not another). If respondent concedes that petitioner is entitled to partial relief, and petitioner concedes there was no abuse of discretion with respect to the other determinations, the decision document should state that the notice of determination is sustained in full "except as provided herein," and then state the amount of liability after the relief is granted. *See* sample at Exhibit E.7.

iii. No relief, no abuse of discretion

If petitioner concedes there is no basis for relief, and that there was no abuse of discretion with respect to other determinations, the decision document should also state that the notice of determination is sustained in full. *See* sample at Exhibit E.8.

iv. No relief or partial relief, abuse of discretion

If petitioner is not entitled to any relief, or only partial relief, but the Counsel attorney believes the appeals officer's exercise of discretion with respect to other determinations cannot be defended, the case should be returned to Appeals for reconsideration. If further explanation or clarification via a revised notice of determination will render the exercise of discretion defensible, then use the procedure described in IV.D.8.a., *supra*. If the revision of the notice of determination cannot render it defensible, use a decision document stating the section 6015(b) or (c) relief to which petitioner is entitled, and that the CDP notice of determination is not sustained. *See* sample at Exhibit E.9. Please call CC:PA:CBS:1 for assistance.

g. Spousal relief - section 6015(f)

i. No abuse of discretion

If a request for section 6015(f) equitable relief is properly at issue, and petitioner concedes there was no abuse of discretion with respect to denial of spousal relief or other determinations, the stipulated decision document should state that petitioner is not entitled to section 6015 relief and that the notice of determination is sustained in full. *See* sample at Exhibit E.8.

ii. Abuse of discretion

See discussion at V.I.5.b., *supra*.

h. Collection alternative accepted

Occasionally, petitioner will propose a new collection alternative after the notice of determination is issued, or petitioner's circumstances will change. If the appeals officer did not abuse his or her discretion in denying the collection alternative presented during the hearing, but SBSE compliance has accepted a collection alternative not presented to Appeals, or SBSE Compliance has classified the subject liabilities as currently not collectible, use a stipulated decision document stating the determination is sustained in full. *See* sample at Exhibit E.4. If liability is properly at issue, the decision document should list the amount of liability for res judicata purposes. *See* samples at Exhibits E.2. and E.3. The acceptance of the collection alternative or classification of accounts as currently not collectible should be stated below the line. Where liability is not properly at issue, the liability amount as well as payment terms of any collection alternative should generally not be included in the decision document, but if necessary should be placed below the line. If petitioner will not agree to a decision document sustaining the notice of determination, then the case should be defended.

If, on the other hand, the Counsel attorney believes the appeals officer's exercise of discretion cannot be defended, and SBSE Compliance has classified the subject liabilities as currently not collectible, use a decision document stating that the notice of determination is not sustained. *See* sample at Exhibit E.1.

If the Counsel attorney believes the appeals officer's exercise of discretion cannot be defended, and the SBSE Compliance has accepted a collection alternative, use a decision document stating that collection will take place in accordance with the concurrently-filed stipulation. *See* sample at Exhibit E.10. The stipulation should state in detail the terms of the collection alternative, and that upon default by petitioner of the terms of the collection alternative, the Service may take collection action.

J. Section 6673 Penalty

Section 6673(a)(1) authorizes the Tax Court to impose a penalty, not in excess of $25,000, on a petitioner if the Tax Court finds that petitioner has instituted or maintained a CDP proceeding primarily for delay, or that petitioner's position in the proceeding is frivolous or groundless. Pierson v. Commissioner, 115 T.C. 576 (2000). Ordinarily, the penalty has been asserted against taxpayers who take frivolous positions. If a Counsel

attorney wishes to ask for a section 6673(a)(1) penalty against a petitioner or attorney who instituted the proceeding primarily for delay but who is not making frivolous arguments, the attorney should be prepared to put forth substantial evidence to support the penalty. The Chief Counsel Sanctions Officer must approve a motion or request for imposing a section 6673(a)(1) or 6673(a)(2)(A) penalty against an attorney or person admitted to practice before the Tax Court. Contact CC:PA:APJP:3 to obtain approval of the Sanctions Officer, Deborah Butler.

K. Appeal of Tax Court CDP Decision

Section 7482(b)(1) provides that a Tax Court decision is appealable to the Court of Appeals for the District of Columbia Circuit unless the decision is listed in section 7482(b)(1)(A)-(F). Although none of subparagraphs (A)-(F) expressly mentions a decision in a CDP case, we should not object when a petitioner appeals a CDP decision to the circuit court of appeals specified for deficiency decisions in section 7482(b)(1)(A)-(B) (residence or principal place of business). It is reasonable to believe that Congress intended the rules of section 7482(b)(1)(A)-(B) to apply equally to the appeal of CDP decisions, because section 6330(d)(1)(A) contemplates that the Tax Court should exercise jurisdiction over taxes being collected in the same manner as it exercises jurisdiction over deficiency cases.

Section 7485(a), requiring a petitioner to post an appeal bond in order to stay collection, does not apply to CDP cases. By its terms, section 7485 applies only to the collection (and assessment) of deficiencies, not assessed liabilities that are the subject of a CDP case.

/s/ Deborah A. Butler
DEBORAH A. BUTLER
Associate Chief Counsel
(Procedure and Administration)

VI. Exhibits

A. Joint Motion to Change Caption

JOINT MOTION TO CHANGE CAPTION

RESPONDENT MOVES that the Court enter an order correcting the caption in the above-entitled case by changing the docket number to read [*insert docket number*]"L" and designating this case as a Lien or Levy Action provided for in I.R.C. § 6320(c) or 6330(d) and Interim T.C. Rules 330 through 334.

IN SUPPORT THEREOF, respondent respectfully states:

1. [*Describe something in the petition from which it appears that petitioner is challenging a Notice of Determination under Section 6320 and/or 6330, such as a reference to lien or levy or collection or section 6320 or 6330.*]

2. The petition appears to be an appeal of a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued by respondent on ____, 200_, a copy of which is attached as Exhibit A.

3. The copy of the petition served on respondent does not include an "L" in the docket number.

4. Petitioner has informed respondent that he/she intended to seek review of the Notice of Determination as a levy [lien] action brought under section 6330(d) [6320(c) and 6330(d)].

WHEREFORE, it is prayed that this motion be granted.

B. Motions to Dismiss for Mootness

1. *Mootness with respect to proposed levy where tax is fully paid and petitioner does not challenge liability.*

MOTION TO DISMISS ON GROUND OF MOOTNESS

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed as moot given that, subsequent to the filing of the petition, the tax liability for taxable year(s) [*insert year(s)*] has been paid in full and the proposed levy is no longer necessary.

IN SUPPORT THEREOF, respondent respectfully states:

1. On ___, 200_, respondent issued a Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing ("CDP Notice") to petitioner with respect to his/her income tax liabilities, including penalties and interest, for taxable year(s) [*insert year(s)*].

2. In response to the Final Notice, petitioner requested a collection due process ("CDP") hearing with respondent's Office of Appeals pursuant to I.R.C. § 6330(b)(1).

3. On __, 200_, Appeals issued a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 approving the proposed levy to collect the liabilities arising with respect to taxable year(s) [*insert year(s)*].

4. On ___, 200_, petitioner filed a Petition for Lien or Levy Action under Code Section 6320(c) or 6330(d) in the present case.

5. Subsequently, petitioner [an offset pursuant to section 6402(a) of an overpayment from petitioner's taxable year(s) [*insert year(s)*] paid all outstanding income taxes, penalties, and interest with respect to taxable year(s) [*insert year(s)*].

6. As a result of the full payment of petitioner's liabilities subject to the Notice of Determination, respondent no longer needs nor intends to levy to collect petitioner's income tax liabilities for taxable year(s) [*insert year(s)*], which gave rise to the petition in the instant case. In addition, petitioner does not challenge the existence or amount of his/her liabilities in his/her petition. Accordingly, the Notice of Determination is moot, and the petition should be dismissed.

7. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

2. *Mootness with respect to notice of federal tax lien where petitioner granted bankruptcy discharge of taxes subject to proceeding.*

MOTION TO DISMISS ON GROUND OF MOOTNESS

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed as moot given that, subsequent to the filing of the petition, petitioner was granted a discharge in bankruptcy and respondent released all the notices of federal tax liens filed against petitioner at issue in this case.

IN SUPPORT THEREOF, respondent respectfully states:

1. On or about ___, 200_, respondent sent petitioner a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under I.R.C. § 6320 with respect to income tax for tax year(s) [*insert year(s)*].

2. On ___, 200_, respondent received a timely request for a collection due process hearing with respect to the notice of federal tax lien filed.

3. On ___, 200_, respondent's Office of Appeals issued petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, determining that a notice of federal tax lien with respect to income tax for tax year(s) [*insert year(s)*] should not be withdrawn.

4. On ___, 200_, petitioner filed his/her petition in this case.

5. On ___, 200_, petitioner filed a petition in bankruptcy under 11 U.S.C. Chapter 7.

6. On ___, 200_, petitioner was granted a discharge under 11 U.S.C. § 727, which included a discharge of petitioner's income tax liability for taxable year(s) [*insert year(s)*].

7. On ___, 200_, respondent released all notice(s) of federal tax lien filed against petitioner with respect to petitioner's income tax liability for taxable year(s) [*insert year(s)*], including the notice of federal tax lien subject to the Notice of Determination.

8. As a result of respondent's release of the notice(s) of federal tax lien, respondent's filing of the notice of federal tax lien giving rise to this proceeding is no longer at issue. Accordingly, the Notice of Determination is moot, and the petition should be dismissed.

9. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

C. Motions to Dismiss for Lack of Jurisdiction

1. *Action in incorrect court*

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the ground that the United States Tax Court does not have jurisdiction of the underlying tax liability in this matter.

IN SUPPORT THEREOF, respondent respectfully states:

1. Petitioner herein seek review of the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 that respondent's Office of Appeals issued on ____, 200_. A copy of the Notice of Determination is attached as Exhibit A.

2. The Notice of Determination instructs petitioner to file a complaint in the appropriate federal district court if petitioner disputes the Notice of Determination.

3. The Notice of Determination identifies the tax type as [*insert type of tax liability, e.g., a Trust Fund Recovery Penalty*] and the attachment to the Notice shows that the type of tax for which the Notice of Determination was issued is [*insert type of tax liability*].

4. Moreover, the Final Notice-Notice of Intent to Levy and Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320], which led to the issuance of the Notice of Determination in this case, relates to collection of [*insert type of tax liability*]. A copy of the Final Notice-Notice of Intent to Levy and Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] is attached as Exhibit B.

5. I.R.C. § 6330(d)(1)(A) provides that the Tax Court shall have jurisdiction to hear an appeal of a determination made under section 6330 [section 6320] if it has jurisdiction of the underlying tax liability. If the Tax Court does not have jurisdiction of the underlying tax liability, a district court of the United States shall have jurisdiction to hear the matter. I.R.C. § 6330(d)(1)(B); see also Treas. Reg. § 301.6330-1(f)(2)Q&A-F3 [301.6320-1(f)(2)Q&A-F3].

6. The Tax Court has interpreted section 6330(d)(1) to provide for Tax Court jurisdiction except where the Court does not normally have jurisdiction over the underlying liability. Moore v. Commissioner, 114 T.C. 171 (2000).

7. The Tax Court does not have jurisdiction to determine liability for the [*insert type of tax liability*].

8. Because the Tax Court does not have jurisdiction over liability for the [*insert type of tax liability*], the Tax Court does not have jurisdiction over the petition seeking review of the Notice of Determination in this case.

9. Should the Court grant this motion, petitioner will have 30 days after this Court's determination to file an appeal with the correct court under I.R.C. § 6330(d)(1).

10. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

2. *No CDP notice of determination (and no notice of deficiency or other determination issued)*

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the grounds that no notice of determination under I.R.C. § 6320 or 6330 was sent to petitioner for taxable year(s) [*insert year(s)*], nor has respondent made any other determination with respect to taxable year(s) *[insert year(s)*] that would confer jurisdiction on this Court.

IN SUPPORT THEREOF, respondent respectfully states:

1. Petitioner attached to the petition a Notice of Levy [*or state the type of notice regarding filing of notice of federal tax lien, levies, or collection actions*]. Such document, attached hereto as Exhibit A, may indicate that petitioner is seeking to invoke the Court's jurisdiction under I.R.C. § 6330(d) [§§ 6320(c) and 6330(d)] in this case.

2. The Tax Court cannot acquire jurisdiction with respect to a proposed levy [the filing of a notice of federal tax lien] unless, and until, there is a determination by respondent's Office of Appeals and the taxpayer seeks review of that determination within 30 days thereof. Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

3. Respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 was sent to petitioner with respect to taxable year(s) [*insert year(s)*].

For decision letters attached to the petition, insert the following instead of the three paragraphs above.

1. Petitioner attached to the petition a Decision Letter Concerning Equivalent Hearing under Section 6320 and/or 6330 of the Internal Revenue Code. Such document, attached hereto as Exhibit A, may indicate that petitioner is seeking to invoke the Court's jurisdiction under section 6330(d) [sections 6320(c) and 6330(d). Petitioner was issued a Decision Letter, rather than a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, because he/she did not timely request a hearing under section 6330 [6320]. Treas. Reg. § 301.6330-1(i)(1). [Treas. Reg. § 301.6320-1(i)(1).]

2. A Final Notice-Notice of Intent to Levy and Notice of Your Right to Request a Hearing under I.R.C. § 6330 [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice") dated _____, 200_, was sent to petitioner by certified mail on _____, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877. Copies of the CDP Notice and Postal Service Form 3877, showing the date the CDP Notice was delivered to the Post Office to be sent by certified mail, are attached as Exhibits B and C, respectively.

3. Respondent received petitioner's Request for a Collection Due Process Hearing on Form 12153 on ____, 200_, as evidenced by respondent's date stamp

thereon. A copy of petitioner's Request for Collection Due Process Hearing is attached as Exhibit D.

4. Pursuant to section 6330(a)(3)(B) and Treas. Reg. § 301.6330-1(b)(1) petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the date of the CDP notice. [Pursuant to section 6320(a)(3)(B) and Treas. Reg. § 301.6320-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6320 within the 30-day period commencing the day after the end of the five day business period within which respondent is required to give notice of the lien filing.] Any written request for a CDP hearing should be filed with the IRS office that issued the CDP notice at the address indicated on the notice. Treas. Reg. § 301.6330-1(c)(2)Q&A-C6 [301.6320-1(c)(2)Q&A-C6]. If the address on the CDP Notice 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 by the IRS office that issued the CDP Notice until after the 30-day response period. Treas. Reg. § 301.6330-1(c)(2)Q&A-C4 [301.6320-1(c)(2)Q&A-C4].

5. Petitioner's request for hearing was not received within the 30-day period, and was not timely mailed. [*Describe the reasons why the request for hearing should be considered late*.]

6. A taxpayer who makes an untimely request for a CDP hearing under either section 6320 or section 6330 is not entitled to a CDP hearing. Treas. Reg. § 301.6330-1(i)(1)[301.6320-1(i)(1)]; Kennedy v. Commissioner, 116 T.C. 255 (2001). Because petitioner did not make a timely written request for a hearing under section 6330 [section 6320], the Office of Appeals properly held an equivalent hearing and issued a Decision Letter. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330[6320] and Interim T.C. Rule 330.

End decision letter insert.

4. Respondent has diligently searched his records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

5. Petitioner has not demonstrated that a Notice of Determination sufficient to confer jurisdiction on this Court with respect to tax year(s) [*insert year(s)*] was issued by Appeals as required by section 6320(c) and/or 6330(d)(1).

6. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6320 or 6330 and Interim T.C. Rule 330(b).

7. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

3. *Petition includes taxes and/or periods not included in CDP notice of determination (and not included on any notice of deficiency or any other determination)*

MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO STRIKE AS TO TAXABLE YEAR 1997

RESPONDENT MOVES, pursuant to T.C. Rules 52 and 53, that petitioner's claim with respect to taxable year 1997 be dismissed upon the ground that no notice of determination under I.R.C. § 6320 or 6330 was sent to petitioner for taxable year 1997, nor has respondent made any other determination with respect to taxable year 1997 that would confer jurisdiction on this Court, and that all references to taxable year 1997 be stricken from the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, which hereinafter is referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable years 19XX through and including 1996 [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable years 19XX through and including 1996], and that petitioner could receive a collection due process hearing with Appeals. A copy of the CDP Notice is attached hereto as Exhibit A.

2. Respondent has diligently searched his records and has found no indication that any Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [any Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] was sent to petitioner with respect to taxable year 1997.

3. On ___, 200_, petitioner requested a collection due process hearing from respondent for taxable years 19XX through 1997. A copy of the Form 12153 Request for Collection Due Process Hearing is attached hereto as Exhibit B.

4. On ____, 200_, respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, informing petitioner that he/she was not entitled to the relief requested. On the first page of the Notice of Determination, under the headings "Tax Type/Form Number" and Tax Period(s) Ended, income tax for taxable year 1997 is not included. Moreover, income tax for taxable year 1997 is not included in the attachment to the Notice of Determination, which describes the determinations of respondent's Office of Appeals with respect to collection of petitioner's tax liabilities by proposed levy [filing of notice of federal tax lien]. A copy of the Notice of Determination is attached hereto as Exhibit C.

5. On ___, 200_, petitioner timely commenced the above-entitled case by filing a petition with the Court pursuant to section 6330(d) [sections 6320(c) and 6330(d)] and Interim T.C. Rule 331(a). In the petition, petitioner requests relief with respect to taxable years 19XX through 1997.

6. Respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 was sent to petitioner with respect to taxable year 1997.

7. Respondent has diligently searched his records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

8. Petitioner has not demonstrated that a notice of determination sufficient to confer jurisdiction on this Court with respect to taxable year 1997 was issued by respondent's Office of Appeals as required by section 6330(d)(1) [sections 6320(c) and 6330(d)(1)].

9. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330 [6320] and Interim T.C. Rule 330(b). See Lister v. Commissioner, T.C. Memo. 2003-17.

10. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

4. *Invalid notice of determination (because of late-filed request for hearing)*

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the grounds that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 sent to petitioner for taxable year(s) [*insert year(s)*] is invalid, and therefore cannot confer jurisdiction on this Court under section 6330(d) [sections 6320(c) and 6330(d)].

IN SUPPORT THEREOF, respondent respectfully states:

1. The Tax Court cannot acquire jurisdiction under section 6330(d) [sections 6320(c) and 6330(d)] with respect to a proposed levy [the filing of a notice of federal tax lien] unless and until, there is a valid notice of determination by respondent's Office of Appeals and a timely petition for review has been filed with the Court. Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

2. Petitioner filed a timely petition for review under section 6330(d) [sections 6320(c) and 6330(d)] and attached to the petition a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, attached hereto as Exhibit A. Petitioner, however, should not have been issued a Notice of Determination, but instead should have been issued a Decision Letter Concerning Equivalent Hearing under Section 6320 and/or 6330 of the Internal Revenue Code, because he did not timely request a hearing under section 6330 [6320]. Treas. Reg. § 301.6330-1(i). [Treas. Reg. § 301.6320-1(i).]

3. A Final Notice-Notice of Intent to Levy and Notice of Your Right to Request a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice") dated _____, 200_, was sent to petitioner by certified mail on _____, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877. Copies of the CDP Notice and Postal Service Form 3877, showing the date the CDP Notice was delivered to the Post Office to be sent by certified mail, are attached as Exhibits B and C, respectively.

4. Respondent received petitioner's Request for a Collection Due Process Hearing on Form 12153 on ____, 200_, as evidenced by respondent's date stamp thereon. A copy of petitioner's Request for Collection Due Process Hearing is attached as Exhibit D.

5. Pursuant to section 6330(a)(3)(B) and Treas. Reg. § 301.6330-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the date of the CDP notice. [Pursuant to section 6320(a)(3)(B) and Treas. Reg. § 301.6320-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the end of the five day business period within which respondent is required to give notice of the lien filing.] Any written request for a CDP hearing should be filed with the IRS office

that issued the CDP notice at the address indicated on the notice. Treas. Reg. § 301.6330-1(c)(2)Q&A-C6 [301.6320-1(c)(2)Q&A-C6]. If the address on the CDP Notice 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 by the IRS office that issued the CDP Notice until after the 30-day response period. Treas. Reg. § 301.6330-1(c)(2)Q&A-C4 [301.6320-1(c)(2)Q&A-C4] .

6. Petitioner's request for hearing was not received within the 30-day period, and was not timely mailed. [*Describe the reasons why the request for hearing should be considered late.*]

7. A taxpayer who makes an untimely request for a CDP hearing under either section 6320 or section 6330 is not entitled to a CDP hearing. Treas. Reg. § 6330-1(i)(1) [6320-1(i)(1)]; Kennedy v. Commissioner, 116 T.C. 255 (2001). Even if Appeals erroneously issued a notice of determination to a taxpayer who filed his/her hearing request late, the mere fact the taxpayer was issued a notice of determination cannot confer jurisdiction on the Tax Court or district court any more than a decision letter issued to the taxpayer can deprive the court of jurisdiction under section 6330(d). See Craig v. Commissioner, 119 T.C. 252 (2002). Because petitioner did not make a timely written request for a hearing under section 6330 [section 6320], Appeals should not have issued a Notice of Determination. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330(d) [sections 6320(c) and 6330(d)] and Interim T.C. Rule 330(b).

8. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, Respondent requests that this motion be granted.

5. *Invalid notice of determination (because no CDP lien or levy notice was issued for certain taxes and periods listed in notice of determination, and no notice of deficiency or other determination has been issued for such taxes and periods)*

MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO STRIKE AS TO TAXABLE YEAR 1997

RESPONDENT MOVES, pursuant to T.C. Rules 52 and 53,on the grounds that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 sent to petitioner for taxable year 1997 is invalid and cannot confer jurisdiction on this Court under I.R.C. § 6320(c) or 6330(d), nor has respondent made any other determination with respect to taxable year 1997 that would confer jurisdiction on this Court, and that all references to taxable year 1997 be stricken from the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for 19XX through and including 1996, [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable years 19XX through and including 1996], and that petitioner could receive a hearing with respondent's Office of Appeals. A copy of the CDP Notice is attached hereto as Exhibit A.

2. Respondent has diligently searched his records and has found no indication that any Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [any Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] was sent to petitioner with respect to taxable year 1997.

3. On _____, 200_, petitioner requested a collection due process hearing from respondent for taxable years 19XX through 1997. A copy of the Form 12153 Request for Collection Due Process Hearing is attached hereto as Exhibit B.

4. On ____, 200_, respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, informing petitioner that he/she was not entitled to the relief requested. A determination with respect to the collection of petitioner's liability for taxable year 1997 was erroneously included in the Notice of Determination. A copy of the Notice of Determination is attached hereto as Exhibit C.

5. On _____, 200_, petitioner timely commenced the above-entitled case by filing a petition with the Court pursuant to section 6330(d) [sections 6320(c) and 6330(d)] and Interim T.C. Rule 331(a).

6. Section 6330(c)(2)(A) [sections 6320(c) and 6330(c)(2)(A)] provide(s) that during the collection due process hearing (the "CDP hearing") with Appeals, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy...."

7. Treas. Reg. § 301.6330-1(e)(1) [301.6320-1(e)(1)] provides that the taxpayer may raise any relevant issue relating to the unpaid tax during the CDP hearing process and the taxpayer also may raise "challenges to the existence or amount of the tax liability for any tax period shown on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute that tax liability." (Emphasis added.)

8. Similarly, the legislative history of section 6330 [6320] indicates that Congress intended courts only to review liabilities properly at issue in the CDP hearing. See H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998) (Courts are to review the amount of tax liability on a de novo basis "where the validity of the tax liability was properly at issue in the [collection due process] hearing, and where the determination with regard to the tax liability is part of the [judicial] appeal....").

9. Thus, petitioner was not entitled to make any challenges with respect to taxable year 1997 on his/her Request for a Collection Due Process Hearing or as part of his/her CDP hearing, because that taxable year was not shown on the CDP Notice. The fact that the appeals officer erroneously included taxable year 1997 in the Notice of Determination, and made a determination with respect to this taxable year does not entitle petitioner to judicial review thereof. Cf. Treas. Reg. § 301.6330-1(e)(3)Q&A-E11 [301.6320-1(e)(3)Q&A-E11]; Behling v. Commissioner, 118 T.C. 572 (2002).

10. Where a levy has not been proposed nor a notice of federal tax lien filed for the collection of a particular tax liability, a notice of determination erroneously listing such tax liability cannot confer jurisdiction on a court, any more that a statutory notice of deficiency that erroneously lists a tax period for which a deficiency has not been proposed can confer jurisdiction. Cf. Saint Paul Bottling Co. v. Commissioner, 34 T.C. 1137 (1960); Commissioner v. Forest Glen Creamery Co., 98 F.2d 968 (7th Cir. 1938); Wilkens & Lange v. Commissioner, 9 B.T.A. 1127 (1928).

11. Because it was improper for petitioner to challenge in the CDP hearing the collection of his/her 1997 tax liabilities, this Court does not have jurisdiction over that taxable year in the judicial review of the Notice of Determination.

12. Respondent has diligently searched his records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

13. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

6. *Late-filed petition*

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the ground that the petition was not filed within the time prescribed by I.R.C. § 6330(d) [I.R.C. §§ 6320(c) and 6330(d)] or § 7502.

IN SUPPORT THEREOF, respondent respectfully states:

1. The Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated ___, 200_, upon which the above-entitled case is based, was sent to petitioner at his/her last known address by certified mail on ___, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877, a copy of which is attached hereto as Exhibit A.

2. The 30-day period for timely filing a petition with this Court from the Notice of Determination expired on [*insert day of the week*], ___, 200_, which date was not a legal holiday in the District of Columbia.

3. The petition was filed with the Tax Court on ___, 200_, which date is [*insert number of days*] days after the mailing of the Notice of Determination.

4. The copy of the petition served upon respondent bears a notation that the petition was mailed to the Tax Court on ___, 200_, which date is [*insert number of days*] days after the mailing of the Notice of Determination.

5. The petition was not filed with the Court within the time prescribed by sections 6330(d) [6320(c) and 6330(d)] or 7502.

6. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

D. Motions for Summary Judgment and Declaration

1. *Motion for summary judgment (for issues subject to abuse of discretion review)*

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [AND TO IMPOSE A PENALTY UNDER I.R.C. § 6673]

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor upon all issues presented in this case.

[RESPONDENT FURTHER MOVES that the Court impose a penalty in an appropriate amount, pursuant to I.R.C. § 6673, as petitioner has instituted these proceedings primarily for the purpose of delay and petitioner's position in the present case is frivolous and groundless.]

IN SUPPORT THEREOF, respondent respectfully states:

1. The pleadings in this case were closed on ___, 200_. This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay the trial. T.C. Rule 121(a).

2. Attached to this motion is a declaration by _____, the appeals [settlement] officer in respondent's Office of Appeals who conducted petitioner's collection due process ("CDP") hearing, setting out the relevant documents contained in the administrative file from the CDP hearing.

Insert the appropriate paragraph 3.

3. Petitioner filed income tax return(s) for taxable year(s) [*insert year(s*], but failed to pay all of the liability (ies) reported on the return(s). Accordingly, respondent assessed the unpaid amounts. Declaration Exhibit _.

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3. Petitioner filed income tax return(s) for taxable year(s) [*insert year(s)*]. Respondent conducted an examination of the return(s) for taxable year(s) [*insert year(s)*]. On ___, __, respondent sent a statutory notice of deficiency to petitioner, proposing a tax liability (ies). Declaration Exhibit _. As petitioner did not petition the Tax Court with respect to the proposed assessment(s), on ___, __, respondent assessed the tax liability (ies), along with additions to tax and interest. Declaration Exhibit ___.

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3. Petitioner failed to file his/her income tax return(s) for [*list year(s) involved*]. On ___, __, respondent sent a statutory notice of deficiency to petitioner, proposing a tax liability (ies). Declaration Exhibit _. As petitioner did not petition the Tax Court with respect to the proposed assessment(s), on ___, __, respondent assessed the tax liability(ies), along with additions to tax and interest. Declaration Exhibit_.

Continue with following paragraphs.

4. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable year(s) [*insert year(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable year(s) [*insert year(s)*]], and that petitioner could receive a hearing with respondent's Office of Appeals. A copy of the CDP Notice is attached hereto as Declaration Exhibit ___.

5. On ___, 200_, petitioner submitted a Form 12153, Request for a Collection Due Process Hearing. Declaration Exhibit __.

6. On __, 200_, a face to face [telephone] conference was held between Appeals Officer ___ and petitioner [petitioner's representative]. Declaration Exhibit __.

7. [Prior to / at / after] the conference, the appeals officer provided petitioner [petitioner's representative] with a copy of the [type of transcripts provided] for petitioner's tax liabilities for taxable year(s) [*insert year(s)*]. Declaration Exhibit __.

8. On ___, 200_, Appeals issued to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330. Declaration Exhibit _.

9. On ___, 200_, petitioner filed with this Court a Petition for Lien or Levy Action under Code Section 6230(c) or 6330(d).

10. When the underlying liability is properly at issue, the court decides the issue of liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). The court reviews the appeals officer's determinations regarding the collection action for an abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000). The judicial review provisions of Administrative Procedure Act (APA), specifically 5 U.S.C. § 706, limit a court's review for an abuse of discretion to the administrative record. The APA judicial review provisions apply to CDP cases. Lunsford v. Commissioner, 117 T.C. 159 (2001), Halpern, J., concurring; *see also* MRCA Information Services, Inc. v. Commissioner, 145 F. Supp. 2d 194,199 n. 8 (D. Conn. 2000). When a court reviews for an abuse of discretion, its review may not go beyond the administrative record. Camp v. Pitts, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). The administrative record is the information the agency reviewed in making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The U.S. Supreme Court defines the application of the abuse of discretion standard under 5 U.S.C. § 706(2)(A) as follows: "A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'.... While we may not supply a reasoned basis for the agency's action that the agency itself has not given..., we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-286 (1974) (internal citations omitted).

Insert argument(s) below as appropriate.

11. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the validity of the notice of deficiency (Declaration Exhibit __) issued to him/her. Petitioner admits he/she received a notice of deficiency but contends that the notice was invalid because the Secretary did not sign the notice. This Court rejected this argument in Nestor v. Commissioner, 118 T.C. 162 (2002), and held that the Secretary's authority to issue notices of deficiency had been delegated to the District Director(s) as well as to the Service Center Director(s). In this case, the notice of deficiency was issued by the District Director [Director of the Service Center].

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11. In his/her petition, petitioner argues that the appeals officer erred in not providing him/her with documentation that established that the appeals officer verified that the requirements of any applicable law or administrative procedure were met. Section 6330(c)(1) [Sections 6320(c) and 6330(c)(1)] does not require the appeals officer to give petitioner a copy of the verification that the requirements of any applicable law or administrative procedure were met. Nestor v. Commissioner, 118 T.C. 162 (2002). Therefore, petitioner was not entitled to the production of the documents requested, including [*list documents requested*]. [Petitioner was provided with a MFTRA-X transcript of account [Form 4340].]

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11. In his/her petition, petitioner argues that the appeals officer did not produce documents which show a valid assessment was made. The appeals officer, however, provided petitioner with a copy of a MTRA-X transcript of his/her account [Form 4340]. Declaration Exhibit _. This transcript identifies the taxpayer, the character of the liability assessed, the taxable period and the amount of the assessment. Absent a showing of irregularity, transcripts which show this type of information are sufficient to establish that a valid assessment was made. Standifird v. Commissioner, 2002-245 (MFTRA-X); Schroeder v. Commissioner, T.C. Memo. 2002-190 (TXMOD-A); Wagner v. Commissioner, T.C. Memo. 2002-180 (IMF MCC - Individual Master File-Martinsburg Computing Center - transcript). [Absent a showing of irregularity, a Form 4340 is sufficient to establish that a valid assessment was made. Nestor v. Commissioner, 118 T.C. 162 (2002).] As petitioner does not allege that there were any irregularities in the assessment procedure, petitioner's argument that there was no valid assessment has no merit.

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11. In his/her petition, petitioner claims he/she never received [was never sent] a notice and demand for payment, as required under section 6303. The TXMOD-A transcript of account, however, reviewed by the appeals officer showed that respondent sent to petitioner notice and demand for payment on ___. Declaration Exhibit _. [*Describe how "status 21" in the notice section of a TXMOD-A transcript shows that a notice and demand was sent to the taxpayer at his/her last known address.*] Declaration Exhibit _. 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. Schaper v. Commissioner, T.C. Memo. 2002-203; Schroeder v. Commissioner, T.C. Memo. 2002-190. [The Form 4340 provided to petitioner by the appeals officer shows that respondent issued to petitioner notice(s) of balance due on ____. This notice of balance due constitutes notice and demand for payment within the

meaning of section 6303(a). Standifird v. Commissioner, T.C. Memo. 2002-245; Newman v. Commissioner, T.C. Memo. 2002-125; Coleman v. Commissioner, T.C. Memo 2002-132. An appeals officer may rely on a Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig v. Commissioner, 119 T.C. 252, 262-263 (2002).] Proof that notice and demand was issued is sufficient to satisfy the requirements of section 6303, and there is no requirement that respondent prove receipt of such notice. I.R.C. § 6303(a); United States v. Lisle, 92-1 USTC ¶ 50,286 (N.D. Cal.), citing Thomas v. United States, 755 F.2d 728 (9th Cir. 1985). As petitioner has failed to present any evidence that the notice and demand was not issued as reflected on the transcripts of account [Forms 4340], his/her argument has no merit.

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11. In his/her petition, petitioner claims that the appeals officer erred in not considering his/her offer of a collection alternative, i.e., his/her offer to pay the tax liability (ies) if the appeals officer showed him/her the law which requires payment of tax. Petitioner's attempt to label this conditional offer as a "collection alternative" has no merit as the offer is based on the assumption that the Internal Revenue Code does not require petitioner to pay taxes. This Court has found this argument to be frivolous. Tolotti v. Commissioner, T.C. Memo. 2002-86; Rowlee v. Commissioner, 80 T.C. 1111 (1983); Roth v. Commissioner, T.C. Memo. 1982-563.

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11. Petitioner's contention that the appeals officer erred in not having the Tax Code at the conference has no merit. There is no provision in the statute or in the regulations which require an appeals officer to have a copy of the Code at a collection due process conference. See, generally, Wylie v. Commissioner, T.C. Memo 2001-65.

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11. Petitioner's argument that because there is no listing for a 1040 tax, he/she cannot be liable for a 1040 tax, has been rejected by this Court. Lindsay v. Commissioner, T.C. Memo 2001-285.

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11. Petitioner argues that the appeals officer erred in finding that respondent is not prevented from collecting the subject tax liabilities because [he/she was granted a bankruptcy discharge of those liabilities][the assessment [collection] statute of limitations expired before the request for CDP hearing was filed][he/she has made payments that are not shown on IRS transcripts but if applied would pay the liabilities in full]. The Tax Court reviews an appeals officer's findings with respect to this allegation for an abuse of discretion. This issue is not one relating to the underlying liability, but is one relating to the collection of the "unpaid tax." I.R.C. § 6330(c)(2)(B). In this context, the "underlying liability" is the tax "on which the Commissioner based his assessment." Washington v. Commissioner, 120 T.C. No. 8 at 23 (Halpern, J., concurring). It is the tax that the taxpayer would be precluded from contesting in the CDP proceeding if he/she"receive[d] a statutory notice of deficiency . . . or . . .otherwise . . . [had] an opportunity to dispute such tax liability." I.R.C. § 6330(c)(2)(B). It should be distinguished from the "unpaid tax," which is the unpaid portion of the assessed tax.

Washington, 120 T.C. No. 8 at 23-24. The Court reviews issues affecting the "unpaid tax," such as [bankruptcy discharge] [statute of limitations] [application of credits and payments] by reviewing the appeals officer's determination of the issue on the administrative record for abuse of discretion. Id. at 25-26. [*Describe what documents the appeals officer reviewed and how he/she reached his/her conclusion.*]

End insert.

12. Pursuant to section 6330(c)(3), the determination of an appeals officer must take into consideration (A) the verification that the requirements of applicable law and administrative procedures have been met, (B) issues raised by the taxpayer, and (C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary. As stated in the attachment to the Notice of Determination, attached as Declaration Exhbit _, the appeals officer considered all three of these matters. The appeals officer fully responded to petitioner's challenge(s) to the proposed collection action at the collection due process hearing. Because the appeals officer fully complied with the requirements of section 6330(c)(3), particularly in responding to the issue(s) raised by petitioner, there was no abuse of discretion.

Insert the following if Motion includes Request for Section 6673 penalty.

13. Section 6673(a)(1) authorizes the Tax Court to impose a penalty, not in excess of $25,000, on a taxpayer, if it appears that the taxpayer has instituted or maintained a proceeding primarily for delay, or that the taxpayer's position in the proceeding is frivolous or groundless. I.R.C. § 6673(a). Section 6673(a)(1) applies to collection due process proceedings. Pierson v. Commissioner , 115 T.C. 576 (2000); Hoffman v. Commissioner, T.C. Memo. 2000-198. In collection due process proceedings, this Court has imposed the penalty when petitioner raises frivolous and groundless arguments with respect to the legality of the federal tax laws. Yacksyzn v. Commissioner, T.C. Memo 2002-99; Watson v. Commissioner, T.C. Memo. 2001-213; Davis v. Commissioner, T.C. Memo 2001-87.

14. In his/her [request for a hearing/ petition/any other relevant pleadings], petitioner argues [*list arguments*]. These allegations establish that petitioner is using the collection due process proceedings as a vehicle to raise frivolous arguments against the federal income tax system.

Conclude motion with the following paragraphs.

15. Respondent respectfully states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

16. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

2. Motion for summary judgment (section 6330(c)(2)(B))

MOTION FOR SUMMARY JUDGMENT

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor, because, pursuant to I.R.C. § 6330(c)(2)(B), petitioner's receipt of the statutory notice of deficiency precludes him/her from challenging the underlying tax liability for taxable year(s) [*insert year(s)*], the only error assigned in the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. The pleadings in this case were closed on ___, 200_. This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay the trial. T.C. Rule 121(a).

2. Respondent sent to petitioner a Final Notice - Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable year(s) [*insert year(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable year(s) [*insert year(s)*]], and that petitioner could receive a hearing with respondent's Office of Appeals. A copy of the CDP Notice is attached hereto as Declaration Exhibit B.

3. Petitioner timely filed Form 12153, Request for Collection Due Process Hearing, on ___, 200_, a copy of which is attached as Declaration Exhibit C.

4. Respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated ___, 200_, with respect to petitioner's income tax liability for tax year(s) [*insert year(s)*]. The Notice of Determination is attached as Declaration Exhibit D.

5. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the existence of the underlying tax liability. Pursuant to section 6330(c)(2)(B), petitioner cannot raise during the CDP hearing the existence or amount of the underlying tax liability if petitioner received a statutory notice of deficiency for that tax liability.

6. Treas. Reg. § 301.6330-1(e)(3)Q&A-E2 [301.6320-1(e)(3)Q&A-E2] provides that receipt of a statutory notice of deficiency for purposes of section 6330(c)(2)(B) means receipt in time to petition the Tax Court for a redetermination of the deficiency asserted in the notice of deficiency.

Insert one of the following paragraphs as appropriate.

7. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert year(s)*] that respondent mailed to petitioner's last known address on ____. A copy of United States Postal Service Form 3849, proof of receipt, for the notice of deficiency is attached as Exhibit __ to the Declaration of _____. This receipt bears the signature of the addressee-petitioner and reflects a delivery date of ___, __.

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7. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert year(s)*]. A copy of the notice of deficiency for [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit _. Additionally, the examination file contains a letter from petitioner to Deborah Decker, Director of the Ogden Service Center, dated ___, __, acknowledging receipt of the notice of deficiency and raising frivolous objections. Declaration Exhibit _.

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7. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert year(s)*]. A copy of the notice of deficiency for [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit _. Petitioner admitted to Appeals Officer ____, the person in respondent's Office of Appeals who conducted petitioner's CDP hearing, that petitioner received the notice of deficiency. Declaration, ¶ __.

End insert.

8. Because respondent mailed the statutory notice of deficiency on ___, __ and petitioner received it on ___, __, petitioner received it in sufficient time to petition the Tax Court. Thus, during the subsequent CDP hearing with Appeals, it was improper for petitioner to challenge the tax liability (ies) to which the statutory notice of deficiency related.

9. Because it was improper for the taxpayer to challenge in the CDP hearing the existence or amount of petitioner's liability (ies) with respect to taxable year(s) [*insert year(s)*], the validity of petitioner's underlying tax liability is not properly at issue before this Court. Sego v. Commissioner, 114 T.C. 603 (2000).

10. The petition raises no issues other than challenges to petitioner's tax liability. Pursuant to Interim T.C. Rule 331(b)(4), all other issues are deemed conceded. Lunsford v. Commissioner, 117 T.C. 183 (2001).

11. Respondent respectfully states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

12. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

3. *Declaration*

DECLARATION OF [NAME OF APPEALS OFFICER]

I, [name of appeals officer], declare:

1. I am an appeals officer employed in the [name of specific Appeals office], Office of Appeals, Internal Revenue Service, Department of the Treasury, who was assigned to petitioner's appeal under I.R.C. § 6330 of the Service's proposed collection action with respect to petitioner's unpaid liabilities for taxable year(s) [*insert year(s)*].

2. Pursuant to this assignment, I made the determination under section 6330(c)(3) to permit the collection action to proceed. The reasons for, and the facts underlying, my determination are found in the Notice of Determination, dated _____, 200_, a true and correct copy of which is attached hereto as **Exhibit A**, and in the Appeals Transmittal Memorandum and Case Memo, a true and correct copy of which is attached hereto as **Exhibit B** [*attach only if applicable*].

3. My determination was made after a face-to-face conference [telephone conference] with petitioner on _____, 200_, and after reviewing the following documents, true and correct copies of which are marked as exhibits, and attached to this declaration:

Exhibit C: Letter 1058 [LT-11], Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing [Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320], dated ___, 200_, issued to petitioner for collection of his/her unpaid tax liabilities for taxable year(s) [*insert year(s)*].

Exhibit D: Form 12153, Request for a Collection Due Process Hearing, filed by petitioner and received by respondent on _____, 200_.

Exhibit E: Letter, dated _____, 200_, to petitioner scheduling a face-to-face [telephone] conference.

Exhibit F: TXMOD-A transcript, dated ____, 200_.

Exhibit G: [*continue attaching as exhibits all documents used by appeals officer in making his or her determination*].

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____

[Name of appeals officer]

E. Stipulated Decision Documents

1. *Abuse of discretion or procedural error*

DECISION

Pursuant to the agreement of the parties in the above-entitled case, it is

ORDERED and DECIDED: That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner(s) on ___, 200_ for petitioner's(s') [*insert type of tax*] tax liability (ies) for taxable year(s) [*insert year(s)*], and upon which this case is based, are not sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

2. *Tax liability at issue - no change to liability, no abuse of discretion*

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner(s) on ___, 200_ for petitioner's(s') [*insert type of tax*] tax liability (ies) for taxable year(s) [*insert year(s)*], and upon which this case is based are sustained in full.

That as of the date of the entry of this decision the following income tax liabilities and additions to tax are due from petitioner(s):

Year	**Income Tax**	**Addition to tax I.R.C. §**	**Addition to tax I.R.C. §**
19__	$xxxx.xx	$xxxx.xx	$xxxx.xx
19__	$xxxx.xx	$xxxx.xx	$xxxx.xx

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that interest is not included in the above-referenced amounts of income tax, additions to tax and penalties and that interest will be assessed as provided by law on the liabilities due from petitioner(s).

It is further stipulated that fees and collection costs related to the above-referenced amounts of income tax, additions to tax and penalties, and interest thereon, shall remain due and owing.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner(s) waive(s) the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the liabilities (plus statutory interest) until the decision of the Tax Court becomes final.

3. *Tax liability at issue - liability adjusted, no abuse of discretion*

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner(s) on ___, 200_for petitioner's(s') [*insert type of tax*] tax liability (ies) for taxable year(s) [*insert year(s)*], and upon which this case is based are sustained, except as provided herein.

That as of the date of the entry of this decision the following income tax liabilities and additions to tax are due from petitioner(s):

Year	**Income Tax**	**Addition to tax I.R.C. §**	**Addition to tax I.R.C. §**
19__	$xxxx.xx	$xxxx.xx	$xxxx.xx
19__	$xxxx.xx	$xxxx.xx	$xxxx.xx

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that interest is not included in the above-referenced amounts of income tax, additions to tax and penalties and that interest will be assessed as provided by law on the liabilities due from petitioner(s).

It is further stipulated that fees and collection costs related to the above-referenced amounts of income tax, additions to tax and penalties, and interest thereon, shall remain due and owing, notwithstanding any adjustment to the liabilities.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner(s) waive(s) the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the liabilities (plus statutory interest) until the decision of the Tax Court becomes final.

4. *Liability not at issue, no abuse of discretion*

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED and DECIDED: That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner(s) on ___, 200_ for petitioner's(s') [*insert type of tax*] tax liability (ies) for taxable year(s) [*insert year(s)*], and upon which this case is based, are sustained in full.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner(s) waive(s) the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the liabilities (plus statutory interest) until the decision of the Tax Court becomes final.

5. *No abatement of interest under section 6404, no abuse of discretion as to CDP determinations*

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That with respect to taxable year(s) [*insert year(s)*] petitioner(s) [is] [are] not entitled to an abatement of interest under Code Section 6404.

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner(s) on ___, 200_ for petitioner's(s') [*insert type of tax*] tax liability (ies) for taxable year(s) [*insert year(s)*], and upon which this case is based, are sustained in full.

Judge.

Entered:

* * * * *

It is stipulated that the Court may enter the foregoing decision.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner(s) waive(s) the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the liabilities (plus statutory interest) until the decision of the Tax Court becomes final.

6. *Full I.R.C. § 6015(b) or (c) relief granted, no overpayment*

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

That there are no income taxes due from petitioner for taxable year(s) [*insert year(s)*], after application of I.R.C. § 6015 [*insert applicable subsection (b) or (c)*].

That there are no additions to tax due from petitioner under the provisions of I.R.C. § 6651(a) [6654] for taxable year(s) [*insert year(s)*], after application of I.R.C. § 6015 [*insert applicable subsection (b) or (c)*].

That there are no overpayments in income tax due to petitioner for taxable year(s) [*insert year(s)*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

7. *Partial I.R.C. § 6015(b) or (c) relief granted, no overpayment, no abuse of discretion*

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on ___, 200_ with respect to petitioner's joint and several income tax liability for taxable year(s) [*insert year(s)*], and upon which this case is based are sustained, except as provided herein.

That the following income tax liabilities and additions to tax are due from petitioner after the application of I.R.C. § 6015 [*insert applicable subsection (b) or (c)*]:

		Addition to Tax
Year	**Income Tax**	**I.R.C. §xxxx**
19__	$xxxx.xx	$xxxx.xx
19__	$xxxx.xx	$xxxx.xx

That there are no overpayments in income tax due to petitioner for taxable year(s) [*insert year(s)*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that interest is not included in the above-referenced amounts of income tax and penalties and that interest will be assessed as provided by law on the liabilities due from petitioner.

It is further stipulated that fees and collection costs related to the above-referenced amounts of income tax and penalties, and interest thereon, shall remain due and owing, notwithstanding the adjustments made pursuant to I.R.C. § 6015 [*insert applicable subsection (b) or (c)*].

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner(s) waive(s) the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the liabilities (plus statutory interest) until the decision of the Tax Court becomes final.

8. *No I.R.C. § 6015(b), (c) or (f) relief granted, no abuse of discretion*

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

That petitioner is not entitled to relief under I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*] with respect to income tax liabilities for taxable year(s) [*insert year(s)*];

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on ___, 200_ with respect to petitioner's joint and several income tax liability for taxable year(s) [*insert year(s)*], and upon which this case is based, are sustained in full.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the liabilities (plus statutory interest) until the decision of the Tax Court becomes final.

9. *No or partial I.R.C. § 6015(b) or (c) relief granted, abuse of discretion*

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

Insert one of the following paragraphs.

That petitioner is not entitled to relief under I.R.C. § 6015 [*insert applicable subsection (b) or (c)*] with respect to income tax liabilities for taxable year(s) [*insert year(s)*].

Or

That the following income tax liabilities and penalties are due from petitioner after the application of I.R.C. § 6015 [*insert applicable subsection (b) or (c)*]:

Year	Income Tax	Addition to Tax I.R.C. §xxxx
19__	$xxxx.xx	$xxxx.xx
19__	$xxxx.xx	$xxxx.xx

That there are no overpayments in income tax due to petitioner for taxable year(s) [*insert year(s)*].

End insert.

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on ___, 200_ with respect to petitioner's joint and several income tax liability for taxable year(s) [*insert year(s)*], and upon which this case is based, are not sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that interest is not included in the above-referenced amounts of income tax and penalties and that interest will be assessed as provided by law on the liabilities due from petitioner. [*Use paragraph only if the liability amounts are listed above*.]

It is further stipulated that fees and collection costs related to the above-referenced amounts of income tax and penalties, and interest thereon, shall remain due and owing, notwithstanding the adjustments made pursuant to I.R.C. § 6015 [*insert applicable subsection (b) or (c)*]. [*Use paragraph only if the liability amounts are listed above*.]

10. *Installment Agreement/Offer in Compromise stipulated decision if petitioner(s) will not concede that there was no abuse of discretion*

DECISION

Pursuant to the stipulation of the parties in this case, and incorporating herein the terms of said stipulation, it is

ORDERED AND DECIDED: That the collection of petitioner's (s') income tax liabilities for taxable year(s) [*insert year(s)*], inclusive, which is the subject of the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner(s) on ___, 200_ upon which this case is based, shall be made in accordance with the terms of the stipulation of the parties filled concurrently herewith.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.