COLLECTION DUE PROCESS (CDP)
(Revised 9/09)

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INTRODUCTION

Prior to January 19, 1999, there was no requirement that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) had been filed and provide the taxpayer with a hearing. Prior to January 19, 1999, there was no requirement that the Service provide a hearing to a taxpayer before the first levy for a particular tax and tax period is made. Collection Due Process refers to the Code provisions and process established to provide such notification, hearing, and subsequent court review. The Code provisions only apply to collection actions occurring after January 19, 1999.

OBJECTIVES

At the end of this lesson, you will be able to:

1. Identify the Collection Due Process (CDP) provisions.

2. Understand your role in the CDP process.

3. Understand the meaning of the following Due Process concepts:

   - CDP Notice
   - CDP Request
   - CDP Hearing
   - Notice of Determination
   - Equivalent Hearing
   - Retained Jurisdiction

4. Recognize the Appeals procedure and court review available to taxpayers who exercise their rights under those provisions.

BACKGROUND MATERIAL

Sections 6320 and 6330; Treas. Reg. § 301.6320-1, and Treas. Reg. § 301.6330-1; H.R. 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); and IRM chapters 5.1.9 and 8.7.2. Amendments to the Treasury Regulations became effective November 16, 2006, and apply to requests for CDP or equivalent hearings made on or after November 16, 2006.

An excellent resource is the Collection Due Process Handbook on the P&A home page on the Chief Counsel website.

YOUR ROLE

1. Coordination of CDP Cases with the National Office.

Chief Counsel Notice CC-2006-019, dated August 18, 2006 (superseding Chief Counsel Notice 2003-016) requires pre-review by Procedure and Administration of certain documents to be filed with the Tax Court. Primary responsibility for all judicial matters arising in CDP cases lies with Branches 3 and 4 (P&A).

Currently, pre-review is required for:

- Briefs, motions, defense letters, and other Tax Court documents, including motions for summary judgment, raising novel or significant issues. See the CDP handbook for examples of issues that are considered to be novel or significant.
- Stipulated decision documents require review only where there is a significant departure from the sample decision documents in the CDP handbook.
- Requests for Sanctions under section 6673(a)(2).
- Responses to Requests for Sanctions against Chief Counsel attorneys

2. Assisting Appeals in Reducing CDP Inventory.

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 Associate Area Counsel, Small Business/Self-Employed, 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 to Branches 3 & 4 (P&A), copies of any advice given on such issues.

OVERVIEW OF CDP

1. Notice of Federal Tax Lien - Section 6320.

Section 6320 provides that the Service must notify in writing the taxpayer against whom a NFTL has been filed and provide the taxpayer, an opportunity for a CDP hearing before an impartial appeals officer. The post-lien filing notification (CDP Notice) under section 6320 may be given in person, left at the taxpayer's dwelling or usual place of business, or sent to the taxpayer by certified or registered mail to the taxpayer's last known address not more than five business days after the day the NFTL is filed. Among other things, the notification must inform the taxpayer of the right to request a hearing before the 31st day after the end of the five-business-day period in which the Service has to send the taxpayer a CDP Notice. Treas. Reg. § 301.6320-1(c)(2) Q&A-C3. This notification is given by Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under I.R.C. § 6320. The taxpayer is entitled to one such hearing per tax period before an appeals officer who has had no prior involvement with respect to that tax period. CDP hearings with respect to liens may be held in conjunction with hearings under section 6330, involving levies. The period of limitations on collection with respect to that tax period is suspended while the CDP hearing and any appeal of that hearing are pending.

A taxpayer who does not request a CDP hearing under section 6320 within the 30-day period is not entitled to a CDP hearing, but is entitled to an equivalent hearing with Appeals as described in Treas. Reg. § 301.6320-1(i). A taxpayer may judicially appeal a determination resulting from a CDP hearing. A taxpayer, however, may not appeal to a court any decisions made by an appeals officer at an equivalent hearing. In *Johnson v. Commissioner*, 2000-2 USTC ¶ 50,591 (D. Or.), the taxpayer did not timely request a CDP hearing and was given an 'equivalent' hearing under Treas. Reg. § 301.6330-1(i). The court held that there was no provision for judicial review of the Service's determination in an equivalent hearing.

2. Prior to Levy - Section 6330.

Section 6330 provides that (except in the case of jeopardy levies, levies on State tax refunds and disqualified employment tax levies, all of which are discussed below) no levy may be made on any property or right to property of any taxpayer unless the Service sends the taxpayer a CDP Notice at least 30 days before the levy is made which provides the taxpayer with an opportunity for a CDP hearing. In jeopardy situations and in cases where a levy is made on a State tax refund, a CDP Notice is not required to be given until the levy action has actually occurred. The CDP Notice under section 6330 may be given in person, left at the taxpayer's dwelling or usual place of business, or sent to the taxpayer by certified or registered mail, return receipt requested, to the taxpayer's last known address. Among other things, the CDP Notice must include a statement of the taxpayer's right to request a hearing during the 30-day period that commences the day after the date of the CDP Notice. 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.

A taxpayer who does not request a CDP hearing under section 6330 within the 30-day period is not entitled to a CDP hearing, but is entitled to an equivalent hearing with Appeals as described in Treas. Reg. §301.6320-1(i). A taxpayer may judicially appeal a determination resulting from a CDP hearing. A taxpayer, however, may not appeal to a court any decisions made by an appeals officer at an equivalent hearing.

3. Post-levy – section 6330.

A. Jeopardy levies and state income tax refunds. For jeopardy levies or levies on state income tax refunds, the requirement that the taxpayer be given a pre-levy hearing is not applicable. Instead, the taxpayer shall be given the opportunity for a CDP hearing "within a reasonable period of time after the levy." Section 6330(f). Thus, if the taxpayer has not previously been given CDP levy rights at the time of the levy, the taxpayer has a right to a hearing after the levy. If Appeals sustains the levy in the post-levy hearing, the taxpayer may appeal that determination to the Tax Court. *Dorn v. Commissioner*, 119 T.C. 356 (2002); *Clark v. Commissioner*, 125 T.C. 108 (2005).

With respect to jeopardy levies, hearing rights may be available under section 7429, as well as under section 6330(f), depending upon the timing of the jeopardy levy. A jeopardy levy subject to section 7429 appeal rights includes a levy made in connection with a jeopardy assessment, and also a levy made before the requirements of sections 6331(a) and (d) are satisfied (requiring ten days to pass after notice and demand, and thirty days to pass after the giving of a notice of intent to levy). See Treas. Reg. § 301.7429-1. Hearing rights for such jeopardy levies are available under sections 7429 and 6330(f). If the prerequisites for levy under section 6331 have been met, and levy is made either before the section 6330(a) CDP notice has been issued, or before the 30-day period for requesting a CDP hearing has passed, no review rights are available under section 7429. However, the taxpayer will be entitled to a post-levy CDP notice and hearing. If the jeopardy levy is made after the CDP hearing has been requested but while the hearing is still pending or on appeal, the taxpayer is not entitled to any additional notice or hearing under sections 6330(f) or 7429.

B. Disqualified employment tax levies. The "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007" amended I.R.C. § 6330(f) to permit (but not require) levy to collect employment taxes without first giving a taxpayer a pre-levy CDP notice if the levy is a "disqualified employment tax levy" (DETL). If a DETL is served, then the taxpayer shall be given an opportunity for CDP hearing "within a reasonable period of time after the levy." The taxpayer may seek judicial review in the Tax Court of the determination

resulting from the section 6330(f) post-levy hearing. This amendment is effective for DETLs served on or after September 22, 2007. This change in section 6330 should address the problem of taxpayers who pyramid employment tax liabilities and use the CDP process to delay collection, by limiting their opportunity for pre-levy CDP hearings.

A "disqualified employment tax levy," as described in new section 6330(h), is a levy to collect a taxpayer's employment tax liability if that taxpayer or a predecessor requested a CDP hearing under section 6330 for unpaid employment taxes arising in the two-year period prior to the beginning of the taxable period for which the levy is served. A disqualified employment tax levy (DETL) is comprised of three components: (1) it's a levy served to collect an employment tax liability; (2) the levy is for taxes owed by a taxpayer or a predecessor who previously requested a CDP levy hearing; and (3) the prior CDP hearing request must have properly included employment tax liabilities that arose during a quarter that ended within two-years before the beginning of the period for which the levy is to be served.

The prior request for a CDP hearing refers to a timely CDP hearing request. Even if the request is subsequently withdrawn, it qualifies as a prior hearing request. Requests for an equivalent hearing or untimely requests for CDP hearings do not satisfy the prior-hearing-request requirement. Thus, if the taxpayer requests an equivalent hearing or submits an untimely request for a CDP hearing, those requests cannot be used as a basis for a DETL. A timely post-levy request for a CDP hearing made in response to a post-levy CDP notice may also constitute a prior CDP hearing request for the purposes of determining the availability of a DETL.

If appropriate, a DETL may be served during a CDP hearing or judicial review of such hearing to collect employment tax liabilities subject to the hearing. In other words, after the IRS serves the first levy for a DETL period and the taxpayer requests a CDP hearing, the IRS may serve subsequent levies on different levy sources for the same period while the CDP case is pending before Appeals or on the Tax Court.

4. Validity of the Notice Given.

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. In *Buffano v. Commissioner*, T.C. Memo. 2007-32, the Tax Court held that a CDP Notice was not sent to the taxpayer's last known address when the CDP Notice was sent to the address listed on the taxpayer's last filed return. The taxpayer had updated his address with the United States Postal Service and the Service had access to the Postal Service's records.

See also the discussion below regarding official regularity.

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.

5. Procedures for Requesting a CDP or Equivalent Hearing.

A taxpayer is entitled to one CDP hearing with respect to the tax and tax period covered by the post-lien filing CDP Notice or the pre-levy or post-levy CDP Notice provided the taxpayer. The taxpayer must request such a hearing in writing within the periods discussed above. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C3, 301.6330-1(c)(2) Q&A C3. A premature CDP hearing request (e.g., made before issuance of the CDP notice) is not an effective request. *Andre v. Commissioner*, 127 T.C. No. 4 (2006). *Johnson v. Commissioner*, 2000-2 USTC ¶ 50,591 (D. Or.), held that the requirement that a request for a CDP hearing be in writing is consistent with section 6330 and legislative intent.

A Form 12153, Request for a Collection Due Process Hearing, is included with the CDP Notice sent to the taxpayer. The Form 12153 requests the following information:

- The taxpayer's name, address, daytime telephone number, and taxpayer identification number (SSN, EIN, or ITIN).
- The type of tax involved.
- The tax period at issue.
- A statement that the taxpayer requests a hearing with Appeals concerning the proposed collection activity.
- The reason or reasons why the taxpayer disagrees with the proposed collection action.

If the taxpayer is not within the required time frame to make a CDP hearing request, the taxpayer must be notified of the right to request an equivalent hearing. This request must also be in writing and must contain all of the same information described above. Treas. Reg. §§ 301.6320-1(i)(2) Q&A I1; 301.6330-1(i)(2) Q&A I1. A request for an equivalent hearing must be filed within the 1-year period commencing after the date of the CDP levy notice or, with respect to CDP lien cases, within the 1-year period commencing the day after the end of the 5-business-day period following the filing of the NFTL. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C& and (i)(2) Q&A I7; 301.6330-1(c)(2) Q&A C7 and (i)(2) Q&A I7.

Although taxpayers are encouraged to use a Form 12153 in requesting a CDP hearing, the regulations do not require the use of Form 12153. However, the CDP or equivalent

hearing request must include the information requested above. The regulations require that any request for a hearing be in writing, 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; and 6320 reg. Any written request for a CDP hearing made after November 16, 2006 also must include a statement of the reasons for disagreement with the notice of federal tax lien or proposed levy. Treas. Reg. §§ 301.6320-1(c)(2) Q&A C1; 301.6330-1(c)(2) Q&A C1. If a timely written request for a CDP hearing or equivalent hearing is submitted that does not contain all of the required information, the IRS will make a reasonable attempt to contact the taxpayer and give the taxpayer a reasonable time to provide the missing information. *Id.*; Treas. Reg. §§ 301.6320-1(i)(2) Q&A I1; 301.6330-1(i)(2) Q&A I1.

On December 6, 2006, Congress passed the Tax Relief and Health Care Act of 2006 (TRHCA) Pub. L. 109-432, 120 Stat. 2922 (2006), which, among other changes, amended sections 6320 and 6330 to require taxpayers to include in their CDP hearing requests the written grounds for requesting the hearing. Sections 6320 and 6330 are also amended to provide that the IRS may disregard any portion of a hearing request that is based on a position identified as frivolous by the IRS in a published list or reflects a desire to delay or impede tax administration. See Notice 2004-8 (to be published early 2008). If the entire hearing request meets one or both of these criteria, then the hearing request will be denied. These amendments are effective for CDP hearing requests made after the date on which the IRS first prescribes the required list of frivolous provisions, which will be done by a Notice.

The regulations further provide that the written request for a CDP hearing must be sent or hand delivered, to the IRS office that issued the CDP Notice at the address indicated on the CDP Notice. If the address of that office does not appear on the CDP notice, taxpayers may obtain the address of the appropriate person to which the written request should be sent or hand delivered by calling, toll-free, 1-800-829-1040 and providing their taxpayer identification number (SSN, EIN or TIN). Treas. Reg. § 301.6330-1(c)(2) Q&A-C6. If the written request is postmarked within the applicable 30-day response period, 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. Section 7503 also applies, i.e., if the last day for a request falls on a Saturday, Sunday, or legal holiday, a request made on the next day which is not a Saturday, Sunday, or legal holiday is timely.

6. Effect of Bankruptcy on CDP Proceedings.

The automatic stay in bankruptcy, 11 U.S.C. § 362, may affect the Service's ability to issue a notice for a CDP hearing, the Appeal Office's ability to conduct a CDP hearing, and the court's ability to review a CDP determination. When a taxpayer files a bankruptcy petition, the automatic stay halts a range of collection activities, including proceedings to recover a prepetition claim against the debtor; acts to recover a prepetition

claim against the debtor's property; acts to create, perfect or enforce a lien against property of the debtor or the estate; and the commencement or continuation of a proceeding in the Tax Court. *See* 11 U.S.C. § 362(a).

A. **Issuance of a CDP Notice.** No NFTL should be filed and no levies proposed if the automatic stay is in effect. If a NFTL is filed after the commencement of the stay, it should be withdrawn; if a levy is proposed after the commencement of the stay, it should be abandoned. Any CDP notices issued in connection with such activity should be rescinded.

B. **Holding a CDP Hearing.** If a taxpayer requests a CDP hearing and then files a bankruptcy petition, the impact of the automatic stay is less clear.

(1) **CDP levy hearing.** Because the Service may not levy without providing a taxpayer an opportunity for a CDP hearing, the hearing itself is part of the collection process. As such, it is likely to be considered an "act to collect" stayed by the filing of a bankruptcy petition.

(2) **CDP lien hearing.** A NFTL is effective when filed. Since the CDP hearing concerning the NFTL occurs after the collection action has occurred, conducting the CDP hearing is less likely to be regarded as a violation of the stay.

In either case, proceeding with the CDP hearing is inconsistent with the purpose of filing for bankruptcy which is to provide a collective forum for dealing with the claims of all the debtor's creditors, including tax claims. Moreover, whether or not the CDP hearing itself is stayed, any further unilateral collection activity by the Service is barred until the automatic stay expires. At that time, the taxpayer's financial condition may have changed. For example, assets that the Service sought to levy may have been distributed in the bankruptcy case, the Service's claims may be provided for in a reorganization or repayment plan, and the tax liabilities sought to be collected may have been discharged. Therefore, it makes little sense to conduct a CDP hearing until the automatic stay expires and such issues have been resolved. Our general instruction to appeals officers is to suspend CDP hearings when they learn that a bankruptcy has been filed.

The Tax Court has held that the issuance of a notice of determination is the continuation of an administrative collection action against the petitioner and, thus, a violation of the automatic stay that renders the notice void. *Smith v. Commissioner*, 124 T.C. 36 (2005). Therefore, when the taxpayer files for bankruptcy prior to issuance of the notice of determination, and then files a Tax Court petition, the Tax Court will dismiss the case for lack of jurisdiction on the ground that the notice of determination is void. In our view, the Tax Court erred in holding that the issuance of a notice of determination is a violation of the

automatic stay under 11 U.S.C. § 362(a)(1) against the "continuation of a proceeding against the debtor." According to the court, a proceeding was instituted by the Service when it issued a CDP levy notice. In our view, that notice does not commence an administrative proceeding; rather, the administrative proceeding is commenced by the taxpayer when the taxpayer requests a CDP hearing. Nevertheless, the Service generally will not challenge the *Smith* holding in the Tax Court, especially if the notice was issued before confirmation of a plan. The Service's general practice is to rescind notices of determination issued during bankruptcy and suspend CDP proceedings. For further discussion of these issues please see the CDP handbook.

C. **Review of a CDP Determination**. If a taxpayer files for bankruptcy after appealing a CDP determination to the Tax Court, the Tax Court's review of the CDP determination is stayed under 11 U.S.C. § 362(a)(8). 11 U.S.C. § 362(a)(8) prohibits the commencement or continuation of a Tax Court proceeding while the stay is in effect (for individual debtors, the prohibition only extends to pre-bankruptcy petition taxes for bankruptcy cases filed on or after October 17, 2005 and subject to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). See *Prevo v. Commissioner*, 123 T.C. 326 (2004) (automatic stay bars petition for review of section 6320 determination).

7. 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, or 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) 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. This provision means that 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.** A timely CDP levy 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). Levy

action listed in section 6330(f), however, is not suspended. 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.

The Tax Court has found "good cause" and granted section 6330(e)(2) motions in cases where the taxpayers are making solely frivolous arguments. *See Burke v. Commissioner*, 124 T.C. 189 (2005); *Howard v. Commissioner*, T.C. Memo. 2005-100; *Cf. Polmar Int'l, Inc. v. United States*, 2002-2 USTC ¶ 50,636 (W.D. Wash.) (court found "good cause" where taxpayer corporation repeatedly failed to pay employment taxes on time). Counsel attorneys should generally file section 6330(e)(2) motions as a matter of course in all CDP cases involving taxpayers making solely frivolous arguments. A sample motion is found in the CDP handbook.

C. **Anti-Injunction Act.** The Anti-injunction Act, found at section 7421, generally prohibits suits to restrain the assessment and collection of any tax. The beginning of a levy or a 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.

(1) **Permitted Collection Actions**. Section 6330(e)(1) only prohibits levy if a proposed levy is the basis of the CDP hearing. Therefore, the Service may levy for taxes covered by a CDP *lien* notice if the section 6330 notice requirement for those taxes and periods has been satisfied. Treas. Reg. §§ 301.6320-1(g) (2) Q&A-G3, 301.6330-1(g)(2)Q&A-G3. However, 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. *See* IRM 5.1.9.3.5(5).

In addition, neither section 6320 nor section 6330 prohibits the filing of a notice of federal tax lien. Therefore, if a taxpayer requests a CDP hearing under section 6330, the Service may file an NFTL for the same tax and periods although the Service must also must provide notice and the right to a hearing under section 6320. If a taxpayer requests a CDP hearing under section 6320, the Service may file an NFTL for the same tax and periods in another recording office although the Service still must provide notice under section 6320. The taxpayer, however, is precluded from getting another CDP hearing. See I.R.C. § 6320(b)(2); Treas. Reg. § 301.6320-1(b)(1). If a taxpayer requests a CDP hearing under either

section 6320 or 6330, the Service may file an NFTL for tax periods or taxes not covered by the CDP Notice, but it must provide notice and the right to a hearing under section 6320.

Other non-levy collection actions are also permitted, including initiating judicial proceedings, offsetting overpayments from other periods, and accepting voluntary payments for the tax. *See* Boyd v. Commissioner, 451 F.3d 8 (1st Cir. 2006), *aff'g* 124 T.C. 296 (2005) (no CDP rights for offsets); *Bullock v. Commissioner*, T.C. Memo. 2003-5; *Karara v. United States*, 2002-2 USTC & 50,667 (M.D. Fla.).

CDP PROCEDURES

1. Conduct of CDP Hearing.

A. **In General.** 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). Where the taxpayer does not respond to the appeals officer, the appeals officer should rely on what is available in the administrative record to make a determination. *Bean v. Commissioner*, T.C. Memo. 2006-88.

B. **Location**. A taxpayer who presents in the CDP hearing request relevant, non-frivolous reasons for disagreement with the NFTL or proposed levy will ordinarily be offered a face-to-face conference 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)Q&A-D7, 301.6330-1(d)Q&A-D7. *See also Katz v. Commissioner*, 115 T.C. 329 (2000); *Parker v. Commissioner*, T.C. Memo. 2004-226 (court remanded for new CDP hearing where original meeting was scheduled at an Appeals office 180 miles from taxpayer's residence, and there was a closer Appeals office). 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 hearing either in person or by telephone), overruled on other grounds, *Lunsford v. Commissioner*, 117 T.C. 159 (2001).

The CDP handbook and the amended Treasury Regulations set forth the circumstances under which the Appeals Office will hold face-to-face conferences. Specifically, in cases where the CDP hearing request raises only frivolous and groundless arguments, Appeals will contact the taxpayer to ask the taxpayer to state what relevant issues the taxpayer would like to address at the hearing. If the taxpayer fails to respond or responds with only additional frivolous and groundless arguments, Appeals will not offer the taxpayer a face-to-face conference. Instead, the taxpayer will be provided a CDP hearing through telephone conferences, written correspondence or a combination thereof. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8; 301.6330-1(d)(2) Q&A D8.

A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or an offer to compromise liability, will not be granted unless other taxpayers would be eligible for the alternative in similar circumstances. *Id*. A face-to-face conference need also not be granted if the taxpayer does not provide the required information in the CDP hearing request. *Id*. However, a taxpayer will be given the opportunity to do what is necessary to become eligible for a face-to-face conference (e.g., present relevant non-frivolous arguments). *Id*.

Additionally, the Tax Court, in cases decided prior to the new regulation amendments, has upheld Appeals' denial of a face-to-face conference in cases involving taxpayers raising frivolous arguments. *Mitchell v. Commissioner*, T.C. Memo. 2006-238 (no abuse of discretion to deny face-to-face conference and uphold levy where taxpayer caused delay and refused to identify issues to be raised); *Summers v. Commissioner*, T.C. Memo. 2006-219 (no abuse of discretion to deny face-to-face conference where taxpayer raised only frivolous arguments); *Ho v. Commissioner*, T.C. Memo. 2006-41; *Thomas v. Commissioner*, T.C. Memo. 2003-231; *Moore v. Commissioner*, T.C. Memo. 2003-1; *see also Day v. Commissioner*, T.C. Memo. 2004-30.

See also the prior discussion on the TRHCA, regarding the authority of the IRS to disregard any portion of a CDP hearing request based on a position identified by the IRS in a published list as frivolous or reflecting a desire to delay or impede tax administration.

(1) **Recording**. 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 and 301.6330-1(d)(2)Q&A-D6; *see also Davis v. Commissioner*, 115 T.C. 35 (2000). To the extent *Mesa Oil, Inc. v. United States*, 2001-1 USTC & 50,130 (D. Colo. 2000) held that CDP hearings must be recorded verbatim, the Office of Chief Counsel disagrees. See 2001 AOD LEXIS 5. In *Keene v.*

Commissioner, 121 T.C. 8 (2003), the Tax Court held that, under section 7521, a taxpayer must be permitted to make an audio recording of a section 6330 hearing. Since the *Keene* case, Appeals has allowed taxpayers to record their in-person CDP conference if they provide the required advance notice under section 7521. However, the Tax Court has also held that, if the Service refused to allow a taxpayer to record the hearing and the taxpayer raised only frivolous arguments at his hearing and in his petition, it was not necessary to remand the case for a new hearing to be recorded nor was it a reason to reject the CDP determination. *Kemper v. Commissioner*, T.C. Memo. 2003-195; *Brashear v. Commissioner*, T.C. Memo. 2003-196; *Horton v. Commissioner*, T.C. Memo. 2003-197. The Tax Court has also held that section 7521 does not apply to telephone CDP conferences. *Calafati v. Commissioner*, 127 T.C. No. 16 (2006). Videotaping of an Appeals hearing has never been allowed.

(2) **Witnesses**. Taxpayers do not have the right to subpoena and examine witnesses. Treas. Reg. §§ 6320-1(d)(2)Q&A-D6 and 6330-1(d)(2)Q&A-D6; *Davis v. Commissioner*, 115 T.C. 35 (2000). 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 that 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); *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*, 89 AFTR2d ¶ 2517 (E.D. Cal. 2002). In the *Nestor* case, the Tax Court discussed but ultimately did not decide whether section 6203 requires an appeals officer to give a taxpayer a copy of his or her transcript of account upon the taxpayer's request. However, since the *Nestor* case, Appeals has provided a MFTRA-X (literal) transcript to each taxpayer who requests one.

(3) **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 involvement with respect to the unpaid tax prior to the first hearing under either section 6320 or 6330. *See Harrell v. Commissioner*, T.C. Memo. 2003-271; *Perez v. Commissioner*, T.C. Memo. 2002-274; *Casey v. Commissioner*, T.C. Memo. 2004-228. It is our position that the impartiality requirement under sections 6320(b)(3) and 6330(b)(3) is

limited to the express statutory language and that there is no general impartiality requirement in section 6320 or section 6330. Therefore, the Office of Chief Counsel does not agree with the district court's holding in *Mesa Oil, Inc. v. United States*, 2001-1 USTC ¶ 50,130 (D. Colo. 2000), that the appeals officer's prejudgment violated section 6330(b)(3)'s requirement of a "neutral officer." Nevertheless, prejudgment of the case by the appeals officer might bear on whether there has been an abuse of discretion.

Prior involvement includes participation or involvement in a matter (other than a prior CDP hearing) that the taxpayer may have with respect to the tax and tax period shown on the CDP notice. Prior involvement exists only when the taxpayer, the tax and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP matter, and the Appeals officer or employee actually participated in the prior matter. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D4; 301.6330-1(d)(2) Q&A-D4.

Therefore, based on the position that the section 6672 penalty and employment taxes are separate and distinct liabilities, the Office of Chief Counsel does not agree with the district court's holding in *MRCA Information Services, Inc. v. Commissioner*, 145 F. Supp. 2d 194 (D. Conn. 2000), 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. *See also Harrell v. Commissioner*, T.C. Memo. 2003-271 (appeals officer is not rendered impartial for purposes of section 6330(b)(3) just because another employee in the same appeals office was involved with the same taxpayer, type of tax, and tax years at issue in CDP).

C. **Verification Requirements.** Section 6330(c)(1) requires the appeals officer, at the hearing, to obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. It is our position that the appeals officer must verify that any actions required by the Code, regulations, and the Internal Revenue Manual prior to collection have occurred. No court has expressly ruled on this point. Section 6330(c)(1) does not require the appeals officer to rely on any particular document for verification. *Roberts v. Commissioner*, 118 T.C. 365, 371 n. 10 (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).

D. **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 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. *Blair v. Commissioner*, T.C. Memo. 2002-189. An appeals officer may rely on a Form 4340 to verify the validity of an assessment. *Nestor v. Commissioner*, 118 T.C. 162 (2002); *see also, Clough v. Commissioner*, T.C. Memo. 2007-106. 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. *Blair v. Commissioner*, T.C. Memo. 2002-189.

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 to verify certain requirements, if the transcript relied upon contains the information required in Treas. Reg. § 301.6203-1. *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. *Schroeder v. Commissioner*, T.C. Memo. 2002-190 (TXMOD-A); *Stanifird v. Wilcox*, 2001-2 USTC & 50,492 (D. Ariz.); *Hoffman v. United States*, 209 F. Supp. 2d 1089 (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. *Schaper v. Commissioner*, T.C. Memo. 2002-203.

E. **Other Methods.** 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.

2. Relevant Issues.

A. **Spousal Defenses**. A taxpayer may raise any appropriate spousal defense at a CDP hearing. Section 6330(c)(2)(a)(i). A taxpayer is precluded from requesting relief under section 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 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).

B. **Appropriateness of the Collection Action.** A taxpayer may also challenge whether the collection action is appropriate, including the following:

(1) **Bankruptcy discharge.**

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

(2) **Currently not collectible.**

The taxpayer may seek to have his or her liabilities administratively classified as currently not collectible.

C. **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

In addition, Treas. Reg. § 301.6320-1(e)(3) Q&A-E6 provides that specific collection alternatives in lien cases include a proposal to withdraw the NFTL in circumstances that will facilitate the collection of the tax liability, subordination of the NFTL, and discharge of specific property from the NFTL. A collection alternative is not available unless the alternative would be available to other taxpayers in similar circumstances.

D. **Liability.** Section 6330(c)(2)(B) provides 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 total amount of tax (including interest and penalties) assessed for a particular tax period, including tax assessed under the deficiency procedures, tax reported on a tax return, or a combination of both. *Montgomery v. Commissioner*, 122 T.C. 1, 7-8 (2004); *Callahan v. Commissioner*, 130 T.C. No. 3 (2008). In *Montgomery v. Commissioner*, 122 T.C. 1, 7-8 (2004), the Tax Court held that section 6330(c)(2)(B) permits a taxpayer to challenge the existence or amount of the tax liability reported on his or her original tax return when the taxpayer did not receive a notice of deficiency and did not otherwise have an opportunity to dispute the tax liability. The term "underlying tax liability also includes penalties and interest. *See Downing v. Commissioner*, 118 T.C. 22 (2002).

The Tax Court has also characterized this term, without analysis, to include the expiration of statutes of limitations and the application of payments and credits. *See Hoffman v. Commissioner*, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); *Pomerantz v. Commissioner*, T.C. Memo. 2005-295 (same); *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); *Williams v. Commissioner*, T.C. Memo 2007-162 (same); *Blocker v. Commissioner*, T.C. Memo. 2005-279 (challenge to validity of notice of deficiency is a challenge to underlying liability). See also *C&W Mechanical Contractors, Inc. v. United States*, 2007 U.S. Dist. LEXIS 23059 (U.S.D.C. N.D. Ga.) (dispute as to IRS application of credits is a liability challenge subject to de novo review).

Note: In *Kindred v. Commissioner*, 454 F.3d 688 (7th Cir. 2006), the Seventh Circuit states that it is "well settled law" that a challenge to the statute of limitations for making an assessment under section 6501 constitutes a challenge to the underlying liability, citing numerous Tax Court decisions including *Pomerantz* and *Hoffman*.

It is the position of Chief Counsel that "underlying tax liability" refers to the tax imposed by the Internal Revenue Code. Issues involving the expiration of statutes of limitations, application of payments and credits, and bankruptcy discharge are properly categorized as issues relating to the unpaid tax in section 6330(c)(2)(A), and should be reviewed for an abuse of discretion. *See, e.g., Eby v. Internal Revenue Service*, 2006 U.S. Dist. LEXIS 14590 (S.D. Ohio 2006) (determination regarding expiration of collection statute of limitations is subject to abuse of discretion review); *Comfort Plus Health Care, Inc. v. Internal*

Revenue Service, 2005-2 USTC ¶ 50,494 (D. Minn.) (determination with respect to application of credits reviewed for an abuse of discretion).

3. Precluded Issues.

A. Liability Challenges Barred by Section 6330(c)(2)(B).

Under section 6330(c)(2)(B), a taxpayer is not permitted to challenge his or her liability in a CDP hearing if he or she received a notice of deficiency or otherwise did not have an opportunity to dispute the liability. If a taxpayer is precluded 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.

(1) 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, the Service has the burden of proving by a preponderance of the evidence that the receipt requirement of section 6330 has been satisfied. *Sego v. Commissioner*, 114 T.C. 604 (2000). However, the Service need not prove actual receipt of the notice of deficiency in some circumstances in order to meet the receipt requirement of section 6330(c)(2)(B). *Id*.; *Carey v. Commissioner*, T.C. Memo. 2002-209; *Baxter v. Commissioner*, T.C. Memo. 2001-300.

a. Presumptions of official regularity and delivery.

For the presumptions of official regularity and delivery to arise in the CDP context, it must be shown that the statutory notice of deficiency was sent by certified mail to the taxpayer's last known address. *Sego v. Commissioner*, 114 T.C. 604 (2000); see also *Buffano v. Commissioner*, T.C. Memo 2007-32. Such proof is established by presenting a copy of the statutory notice and a certified copy of USPS Form 3877, certified mail list. *Id*.; *see also United States v. Zolla*, 724 F.2d 808 (9th Cir. 1984). 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 the taxpayer. *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. *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 a taxpayer is only making frivolous arguments regarding his tax 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.

d. Waiver of receipt of notice of deficiency.

If a taxpayer signs a form (*e.g.*, Form 4549), consenting to the immediate assessment and collection of the underlying tax liability, the taxpayer makes 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) 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. The Office of

Chief Counsel interprets the opportunity to dispute a tax liability as the opportunity to challenge the liability 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.

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 receive a statutory notice of deficiency before being barred from disputing the liability in a CDP hearing.

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). The following are examples 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)). *Mason v. Commissioner*, 123 T.C. No. 14 (2009); *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).

Frivolous Return Penalty Notice - A letter giving the taxpayer a chance to submit a correct return to avoid the frivolous income tax penalty under section 6702 does not constitute an opportunity to dispute the penalty. *Callahan v. Commissioner*, 130 T.C. 44 (2008). *But see Kintzler v. United States*, 2001-2 USTC ¶ 50,696 (D. Nev.). 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.

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.

Interest abatement - if the taxpayer has been issued a preliminary determination letter which gives him or her the right to go to Appeals on the same interest abatement claim asserted in the CDP hearing, then the taxpayer has had a prior opportunity to dispute the interest.

Prior CDP notice - if the taxpayer received a prior CDP notice under section 6320 or 6330 for the same tax and period, the taxpayer 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.

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 alluded to only in one of the enclosures sent with the notice.

b. Judicial proceedings.

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

Disallowance of refund claim - the receipt of a letter disallowing a claim for a tax refund that gives a taxpayer the opportunity to file

suit in district court or the Court of Federal Claims is not an opportunity to dispute the liability under section 6330(c)(2)(B). Because the taxpayer has not paid the tax liability in full, the district court and Court of Federal Claims would lack jurisdiction over the refund suit. *See Flora v. United States*, 362 U.S. 145 (1960).

Bankruptcy proceedings - the taxpayer may be precluded from contesting the tax 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.

District court cases - a tax lien foreclosure suit and/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. Memo. 2000-320; *see also, Summers v. Commissioner*, T.C. Memo. 2006-219.

Interest abatement - because a final determination letter denying an interest abatement request gives the taxpayer the right to appeal the denial to the Tax Court, the receipt of this letter is a prior opportunity to challenge the interest that is the subject of the abatement request.

B. **Issues Barred By Section 6330(c)(4).** Section 6330(c)(4) provides that an issue may not be raised at a CDP hearing if: (1) the issue was raised and considered at a previous hearing under section 6320 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. Section 6330(c)(4), as amended by the TRHCA, as previously discussed, also provides that a taxpayer is precluded from raising issues identified as frivolous in a list published by the IRS or reflecting a desire to delay or impede tax administration. This amendment becomes effective upon publication of the list of frivolous positions. *See also* Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1). Section 6330(c)(4) also applies to CDP judicial review proceedings, *Magana v. Commissioner*, 118 T.C. 488 (2002), and precludes a taxpayer from relitigating a statute of limitations defense that was previously raised and adjudicated in a district court proceeding. *Id*. Similarly, if a bankruptcy court has determined that the taxpayer did not receive a discharge of the taxes to be collected, section 6330(c)(4) would preclude the taxpayer from raising the discharge issue in the CDP proceeding.

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).

C. **Cons*Id*eration 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). Any determination, however, made by the appeals officer with respect to such precluded issue shall not be treated as part of the Notice of Determination issued by Appeals and will not be subject to judicial review. Even if a decision concerning a precluded issue is referenced in a Notice of Determination, it is not reviewable by the Tax Court. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E11, 301.6330-1(e)(3)Q&A-E11; *Behling v. Commissioner*, 118 T.C. 572 (2002).

4. Notice of Determination.

Section 6330(c)(3) requires Appeals, in making its determination, to take into consideration the "Big Three" issues: (A) the verification that the requirements of any applicable law or administrative procedure have been met; (B) issues raised under section 6330(c)(2) (see also Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E1, 301.6330-1(e)(3)Q&A-E1); 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. 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, which informs the taxpayer of his or her right to judicial review by the Tax Court. Treas. Reg. §§ 301.6320-1(e)(3)Q&A-E8, 301.6330-1(e)(3)Q&A-E8. The notice of determination should be sent to the taxpayer's last known address, consistent with the requirements for sending notices of deficiency. *Weber v. Commissioner*, 122 T.C. 258 (2004). 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.

JUDICIAL REVIEW/JURISDICTION

1. Subject Matter Jurisdiction.

A taxpayer has 30 days from the date of the notice of determination in which to appeal the determination to the Tax Court. I.R.C. § 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). Courts also have jurisdiction to review a notice of determination issued pursuant to section 6330(f) after a jeopardy levy or levy on a state income tax refund. *See Dorn v. Commissioner*, 119 T.C. 356 (2002).

The Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, enacted on August 17, 2006, amended section 6330(d)(1) to provide the Tax Court with exclusive jurisdiction to review CDP determinations. This amendment applies to all CDP determinations issued on or after October 17, 2006, regardless of the type of underlying tax. Prior to amendment, section 6330(d)(1) provided for judicial review in district court in cases where "… the Tax Court does not have jurisdiction of the underlying tax liability… .", e.g. employment tax cases. Prior to amendment, section 6330(d)(1) further provided a 30-day period to refile an appeal filed in the incorrect court. This refiling provision was also eliminated by the amendment.

A. No overpayment jurisdiction.

The Court has jurisdiction to determine a taxpayer's liability in a CDP case. In determining the balance of a taxpayer's liability, the Court may determine whether credits and payments have been properly applied. See *Landry v. Commissioner*, 116 T.C. 60 (2001); *Kazunas v. Commissioner*, T.C. Memo. 2002-188.

The Tax Court only has jurisdiction over the unpaid tax liability the Service is trying to collect. The court has no jurisdiction in CDP to determine an overpayment for the tax year at issue or to order a refund of any amounts paid. *Greene-Thapedi v. Commissioner*, 126 T.C. No. 1 (2006). However, if the CDP case involves innocent spouse relief or interest abatement, and the notice of determination addresses and rejects innocent spouse relief or interest abatement, the Tax Court has overpayment jurisdiction with respect to such relief or abatement under sections 6015(g)(1) and 6404(h)(2)(B), subject to the rules provided by sections 6511 and 6512(b).

B. Jurisdiction over non-CDP years.

In some cases, the taxpayer may claim that the liability for a tax year not in suit is less than the amount paid, and that taxpayer is entitled to an overpayment that could be credited toward the liability at issue. The Tax Court has stated that it can consider such issues regarding nonsuit years insofar as the tax liability for the nonsuit years may affect the appropriateness of the collection action for the suit year. In exercising that jurisdiction, the court does not determine whether any collection with respect to the nonsuit year may proceed, but only whether collection may proceed for the suit year. *Freije v. Commissioner*, 125 T.C. 14, 27 (2005). The Office of Chief Counsel disagrees with *Freije* to the extent it may be read to support the position that a taxpayer may argue the entitlement to credits for non-CDP periods to decrease the amount of tax due for purposes of the CDP case. The Office of Chief Counsel also disagrees with *Freije* to the extent that it holds that the Tax Court has jurisdiction to determine the existence of and entitlement to an overpayment of a non-CDP year. The Office of Chief Counsel believes that the Tax Court has jurisdiction to determine the existence and amount of an adjustment from a non-CDP year that may be used to refute the taxable income for the period subject to the CDP hearing.

C. Bankruptcy Discharge.

In *Washington v. Commissioner*, 120 T.C. 114 (2003), the Tax Court determined that it has jurisdiction in a CDP case to decide whether tax liabilities subject to the CDP proceeding have been discharged in bankruptcy. *See also Swanson v.*

Commissioner, 121 T.C. 111 (2003).

2. Notice of Determination Required.

Jurisdiction under section 6320 or 6330 is contingent upon both a timely petition for review and the issuance of 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, the court does not have jurisdiction over the taxpayer. *See Holguin v. Commissioner*, T.C. Memo. 2003-125. If the notice of determination does not include a particular tax and period listed in the petition, the court does not have jurisdiction over said tax, unless the taxpayer timely requested a CDP hearing for that tax and period and it was listed on the CDP notice.

A court lacks jurisdiction to review a decision letter (which is issued following an equivalent hearing). *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 court lacks jurisdiction over a notice of determination that is invalid. An invalid determination is one that 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. §§ 6320-1(i)(1), 6330-1(i)(1). The mere fact that the taxpayer was issued a notice of determination, rather than a decision letter, cannot bestow jurisdiction on the Tax Court.

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 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 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).

3. 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. § 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); *see also, Eisler v. Commissioner*, T.C. Summ. Op. 2007-171.

A. **Tax Court.** If the Tax Court petition, as reflected by the postmark, is mailed within the 30 days, the Atimely 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.

(1) 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).

(2) 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).

4. Standard of Review.

Where the liability is not properly at issue, the appeals officer's determinations should be reviewed for an abuse of discretion. H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at p. 266 (1998); *see also Goza v. Commissioner,* 114 T.C. 176 (2000). If liability is properly at issue, and the taxpayer contests both liability and the appeals officer's other determinations, the court reviews the liability challenge de novo and the other determinations for an abuse of discretion. *Jones v. Commissioner*, 338 F.3d 463, 466 (5th Cir. 2003); *Lee v. Commissioner*, T.C. Memo. 2002-233.

A. <u>Abuse of Discretion</u>. In *Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-286 (1974), the Supreme Court defined the application of the 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. The Tax Court has described the abuse of discretion standard in CDP cases as "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." *Robinette v. Commissioner*, 123 T.C. 85, 93 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006). See also *Blondheim v. Commissioner*, T.C. Memo. 2006-216 (Tax Court, in consideration of Appeals' determination to reject an offer-in-compromise, does not substitute its judgment for that of Appeals, nor does it decide independently what would be an acceptable offer amount).

(1) <u>Administrative record</u>.

The Administrative Procedure Act (APA), specifically 5 U.S.C. § 706, requires a court to review the administrative record when applying the abuse of discretion standard. Our position is that the APA judicial review provisions apply to CDP cases. *See also Triad Microsystems v. United States*, 2003-1 USTC ¶ 50,106 (E.D. Va.), citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Hart v. United States*, 291 F. Supp. 2d 635 (N.D. Ohio 2003) and cases cited therein [when a court applies the abuse of discretion standard, its review is limited to the administrative record].

The Tax Court has held that it is not required to limit its abuse of

discretion review in CDP cases to the administrative record. *Robinette v. Commissioner*, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). The Tax Court in *Robinette* held that general administrative law principles and the APA do not apply to Tax Court proceedings, so the court is permitted to conduct a trial de novo in connection with its abuse of discretion review.

The Tax Court has been reversed on this position by two circuits, however. In *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006), the Eighth Circuit agreed with the Commissioner that general administrative law principles and the APA require abuse of discretion review in Tax Court CDP cases to be limited to the administrative record (the record rule). *See also Murphy v. Commissioner*, 469 F.3d 27 (1st Cir. 2006). The Tax Court has not yet indicated whether it will change its position in view of the reversals by the First and Eighth Circuits. *See Cox v. Commissioner*, 126 T.C. 237 (2006) (Tax Court held that comprehensive administrative record was adequate for proper judicial review, expressly declining to address or reconsider the issue of whether its review was limited to the administrative record).

Case law under the APA defines the administrative record as the information the agency reviewed in making its determination. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). The basis of review of a notice of determination is the evidence that was before the appeals officer.

The Treasury Regulations specifically provide that the administrative record for Tax Court review is the case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3). Treas. Reg. §§ 301.6320-1(f)(2) Q&A F4, 301.6330-1(f)(2) Q&A F4.

(2) <u>Determinations subject to abuse of discretion</u>.

a. <u>Determinations under section 6330(c)(3)</u>.

Verification by the appeals officer under section 6330(c)(1) is subject to an abuse of discretion review. *Nicklaus v. Commissioner*, 117 T.C. 117 (2001); *Pikover v. United States*,

2001-2 USTC & 50,702 (C.D. Cal.). Rejection by Appeals of collection alternatives, such as an installment agreement or offer in compromise, is subject to abuse of discretion review. *Blondheim v. Commissioner*, T.C. Memo. 2006-216; *Schulman v. Commissioner*, T.C. Memo. 2002-129; *Estate of Doster v. Commissioner*, T.C. Memo. 2002-2; *Berkey v. Dept. of Treasury*, 2001-2 USTC & 50,708 (E.D. Mich.); *Kitchen Cabinets, Inc. v. United States*, 2001-1 USTC ¶ 50, 287 (N.D. Tex.). The application of the balancing test is also subject to abuse of discretion review. *Richter v. United States*, 2002-2 USTC & 50,607 (C.D. Cal.)

b. Interest abatement.

The determination not to abate interest in a CDP proceeding is reviewed under the abuse of discretion standard. *Downing v. Commissioner*, 118 T.C. 22 (2002).

c. Section 6015(f).

The abuse of discretion standard is also the proper standard for reviewing the denial of equitable relief under section 6015(f) in a CDP case. *Pless v. Commissioner*, T.C. Memo. 2004-24.

B. De Novo. The legislative history of sections 6320 and 6330 states that a court reviews the underlying liability de novo. A taxpayer may submit new evidence to the court on liability issues even if that evidence was not submitted to Appeals, as long as the issue was properly raised during the CDP hearing. The reviewing court also makes a de novo determination with respect to the following:

- Whether section 6330(c)(2)(B) precludes a taxpayer from challenging his or her 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.).

- Whether hearing procedures are required by law. *See, e.g., Keene v. Commissioner*, 121 T.C. 8 (2003) (holding that section 7521(a)(1) authorizes taxpayers to audio record in-person CDP conferences); *Cox v. United States*, 345 F. Supp.2d 1218, 1220 n. 1 (W.D. Okla. 2004) (issues of sufficiency of CDP telephone conference and impartiality of appeals officer under section 6330(b)(3) are procedural issues reviewed de novo).

- What constitutes the content of the administrative record. *See*, e.g., *Mesa*

Oil, Inc. v. United States, 2001-1 USTC ¶ 50,130 (D. Colo. 2000).

- Legal questions relating to issues reviewed for an abuse-of-discretion.

5. Issues Not Raised with Appeals.

In seeking Tax Court review of the notice of determination, the taxpayer can only request that the court consider an issue, including a liability issue, which was raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence. Treas. Reg. §§ 301.6320-1(f)(2)Q&A-F3 and 301.6330-1(f)(2)Q&A-F3. The term "hearing" should be interpreted broadly. The taxpayer or his representative may raise issues not only in the written request for a CDP hearing or in the face-to-face hearing, but also in correspondence and telephone calls that are exchanged between Appeals and the taxpayer. *But see Mesa Oil, Inc. v. United States*, 2001-1 USTC ¶ 50,130 (D. Colo. 2000) (in court's view, letter from appeals officer to taxpayer stating appeals officer's views prior to face-to-face meeting were communications prior to the "hearing").

In *Sego v. Commissioner*, 114 T.C. 604 (2000), the Tax Court held that matters raised after a hearing do not reflect on whether the determination made by Appeals was an abuse of discretion. In *Magana v. Commissioner*, 118 T.C. 488 (2002), the Tax Court held that, in reviewing a CDP case for abuse of discretion, it will generally consider only arguments, issues, and other matters that were raised at the collection hearing or otherwise brought to the attention of the Appeals Office. *See also Abu Awad v. United States*, 2003-2 USTC ¶ 50, 716 (S.D. Tex.); *The Inner Office, Inc. v. United States*, 2001 U.S. Dist. LEXIS 20617 (N.D. Tex.). Moreover, a court will not consider a challenge to liability if it was not raised during the CDP hearing process. *Giamelli v. Commissioner*, 129 T.C. No. 14 (2007); *Miller v. Commissioner*, 115 T.C. 582, 589 n. 2 (2000); *Lee v. Internal Revenue Service*, 2002-1 USTC & 50,365 (M.D. Tenn.).

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.

Unlike statutes that govern other Article I courts, the CDP provisions in the Code do not grant remand power to the Tax Court. However, in *Lunsford v. Commissioner*, 117 T.C. 183 (2001), the Tax Court clearly indicated that it has the authority to remand a CDP case back to the Appeals office and, in fact, has used that authority to remand in at least two published cases. *See Keene v. Commissioner*, 121 T.C. 8 (2003); *Harrell v. Commissioner*, T.C. Memo. 2003-271.

On remand, the case should return to the same appeals officer who handled the case before remand. The National Office has taken a position that cases returned to appeals on remand are continuations of the same case and not new cases. Coordinate with Branches 3 & 4 (P&A).

9. No Jury Trial Available.

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).

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." *AJP Management, Inc. v. United States*, 2001-1 USTC & 50,184 (C.D. Cal. 2000); *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. Treas. Reg. §§ 301.6320-1(h)(2)Q&A-H2, 301.6330-1(h)(2)Q&A-H2.