Prior Opportunities to Dispute Liability in Collection Due Process: An Oversized Reaction to Insufficient Action.

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Soreé Finley, Charlotte Center for Legal Advocacy, Charlotte, North Carolina
Keith Fogg, Legal Services Center, Harvard Law School, Cambridge, Massachusetts
Carolyn Lee, Morgan Lewis, San Francisco, California
Lavar Taylor, The Law Offices of A. Lavar Taylor, Santa Ana, California
Larry Williams, Office of IRS Chief Counsel, Washington, DC

A CDP Summit initiative program.
IRC § 6330(c)(2)(B)

“The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.”
An issue may not be raised at the hearing if—

(A)(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding;

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A); or

(C) a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63.”
“Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. An opportunity for a conference with Appeals prior to the assessment of a tax subject to deficiency procedures is not a prior opportunity for this purpose.”

Treasury Regulation § 301.6330-1(e)(3), Q&A-E2
Select Internal Revenue Manual Sections

- Section 8.22.8. Liability Issues and Relief from Liability.
  - IRM 8.22.8.3, When a Liability is Raised.
    - Provides guidance to Appeals on what and what is not a prior opportunity under section 6330(c)(2)(B) that will prevent the taxpayer from having liability determined as part of the CDP hearing.
  - IRM 8.22.8.4, Issues Precluded from CDP Under IRC 6330(c)(4).
    - Provides guidance when a previous determination of the liability by Appeals or a court will prevent the taxpayer from having the liability determined as part of the CDP hearing.

- Section 5.20.8. Promoter/Preparer Investigations.
  - IRM 5.20.8.8, Appealing IRC 6700 and IRC 6701 Penalty Assessments.
    - Provides guidance regarding the limited instances when a taxpayer may challenge the existence or amount of an IRC 6700 or IRC 6701 penalty in CDP; i.e., “one if the taxpayer did not receive a ‘prior opportunity’ to contest the assessment. See section 6330(c)(2)(B).” “[R]eceipt of a notice and demand, providing specific procedures for requesting an abatement and obtaining judicial review under IRC 6703(c) is a ‘prior opportunity’ and would preclude the taxpayer raising an issued challenging liability in CDP.”
Confidence that the government is interested in collecting only the correct amount of tax is critical to voluntary participation in the tax system.

Campus examinations by a resource-starved IRS do not always result in assessments of the correct amount of tax owed.

Satisfying substantiation requirements can be a trap for the unwary, including the vast population of unsophisticated taxpayers.

CDP provides an assisted path to determining the correct liability, including judicial oversight.
What Qualifies as a Prior Opportunity?
Actual Receipt of a Notice of Deficiency

Also applicable to:


Conscious Decision
Not to Pick Up Mail

Onyango v. Commissioner,
Waiver of Issuance of Notice of Deficiency

• Taxpayer signed Form 4549 waiving the right to issuance of the notice of deficiency.

• Taxpayer signed Form 870 or 870-A waiving the right to issuance of the notice of deficiency.
  • Potts v. Commissioner, T.C. Memo. 2017-228 (Form 870-AD).
  • Lance v. Commissioner, T.C. Memo. 2009-129 (Form 870).
Prior Administrative Hearing
With the Appeals Office

Lewis v. Commissioner, 128 T.C. 48 (2007), disputing late filing and late payment penalties in CDP after Appeals denied a request for abatement.

“On the one hand, [section 6330(c)(2)(B)] can be read to mean an opportunity to challenge the underlying liability in a forum ultimately subject to judicial review. On the other hand, it can be read to include challenges subject to judicial review as well as challenges heard by respondent’s Appeals Office in circumstances where no subsequent prepayment judicial review of the determination is available.” Lewis, 128 T.C. at 55.
Assessable Penalties

Three Circuit Court Decisions (litigated by Lavar Taylor)

Keller Tank Svcs. v. Commissioner (10th Cir. 2017).
Our Country Home Ent. v. Commissioner (7th Cir. 2017).
James v. Commissioner (4th Cir. 2017).
Opportunity for a Hearing With Appeals Office

• Receipt of Letter 1153 is an opportunity to challenge Trust Fund Recovery Penalty. Smith v. Commissioner, T.C. Memo. 2015-60.

• Receipt of section 6330 notice is an opportunity to challenge liability in section 6320 hearing about same liability. Nichols v. Commissioner, T.C. Memo. 2007-5.

• Receipt of section 6320 notice is an opportunity to challenge liability in section 6330 hearing about same liability. Smith v. Commissioner, T.C. Memo. 2016-186.
Failure to Properly Raise Liability During CDP Hearing

• Taxpayer not entitled to liability determination if liability raised for first time in Tax Court proceeding.  Giamelli v. Commissioner, 129 T.C. 107, 113-114 (2007).

• Taxpayer not entitled to liability determination if failed to submit documentary evidence to Appeals after being given opportunity to do so.  Newstat v. Commissioner, T.C. Memo. 2005-262.
What Does Not Qualify as a Prior Opportunity?
Self-Assessment

Montgomery v. Commissioner,
IRM 8.22.8.7.

A taxpayer may dispute a math error liability in a CDP hearing.

A math error is a mistake on a tax return corrected by the IRS during processing. IRM 21.5.4.3, What Is a Math Error, lists when the Service may summarily assess a deficiency resulting from the mathematical or clerical error.
Certain Penalties

Callahan v. Commissioner,
130 T.C. 44 (2008).

Pomeranz v. United States,

Light v. United States,

IRC § 6702: Frivolous tax submissions
Simultaneous Appeals Hearing


“Should the earlier Appeals conference opportunity be treated as a prior opportunity where, as in this case, the requested conference opportunity is not resolved by Appeals until after the taxpayer has requested, but not received, a section 6330 hearing? We conclude not, because to construe the statute in this manner would consign to the Commissioner's discretion whether the underlying tax liability is subject to judicial review.”

Interest


IRC § 6621(c): Increase in underpayment rate for large corporate underpayments

Underpayment interest not subject to and considered in deficiency proceeding
Merits vs. Procedure

TEFRA

**McNeill v. Commissioner,**

**Davison v. Commissioner,**

See also IRC section 6330(c)(4)(C), precluding consideration of an issue established in a BBA proceeding.
Strategic Considerations

*Landers v. Commissioner*, proposed opinion (July 8, 2019).

The taxpayer who did not receive a statutory notice of deficiency in time to petition the Tax Court sought audit reconsideration, which was denied. The taxpayer appealed the denial, receiving partial relief. The proposed *Landers* opinion would hold that the Appeals review of the audit reconsideration denial was a “prior opportunity” to contest the merits of the case even though audit reconsideration does not provide a right to Tax Court review of the IRS’s determination.
Alternatives for Consideration of a Liability on the Merits Outside of a CDP Hearing

- IRM 8.22.8.5, At Issue, Precluded or Precluded but Considered Outside of CDP.
  - “If a taxpayer provides evidence of eligibility for reducing a liability and the liability is precluded, you may request ATM approval to consider the issue under Delegation Order 8-8 outside of the CDP hearing if it is prudent to do so.”
  - Audit reconsideration for Exam assessments. “Provide the taxpayer with Publication 3598, which explains the audit recon process and provides the campus addresses. Proceed with the hearing if a liability will remain for the CDP periods even if the taxpayer is successful in audit reconsideration. If the potential reduction will affect the collection alternatives the taxpayer qualifies for, you may suspend the CDP hearing until the reconsideration is complete.”

- IRM 8.22.8.6.2, Automated Substitute for Return (ASFR)/Substitute for Return (SFR).
  - “[G]ive the taxpayer 21 calendar days to file a return with you to replace the IRS-prepared return.”
  - Submit return to ASFR Recon Team at Brookhaven Campus. “If a liability remains after the taxpayer’s return is adjusted, address any other issues in the CDP hearing.”
Questions?
References

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