Should the Tax Court Allow Remands in Light of the Taxpayer First Act Innocent Spouse Provisions?

By Carlton Smith

The Taxpayer First Act amended section 6015 to add a new subsection (e)(7) that provides for a Tax Court de novo standard of review of a section 6015 determination of the IRS based on (1) “the administrative record established at the time of the determination” and (2) “any additional newly discovered or previously unavailable evidence”. Thus, the statute appears to contemplate that there be an administrative record in a section 6015 case and that the IRS had made a determination in such case before the Tax Court “review[s]” that determination. But, the administrative record in section 6015 cases is often incomplete or nonexistent (e.g., in cases where the IRS hadn’t yet ruled after a 6015 request or because 6015 was first raised in response to a notice of deficiency).

In the past, the Tax Court has never remanded in section 6015(e) stand-alone cases or in deficiency cases seeking innocent spouse relief, but then those cases were not to be tried primarily based on the administrative record. In Friday v. Commissioner, 124 T.C. 220 (2005), citing the de novo nature of its proceedings under section 6015, the Tax Court denied an IRS motion to remand a stand-alone section 6015(e) case to Cincinnati Centralized Innocent Spouse Office (CCISO). The IRS had argued that CCISO had previously erroneously failed to consider section 6015(f) equitable relief on the merits.

In light of the Taxpayer First Act amendment no longer making Tax Court innocent spouse proceedings fully de novo, the Tax Court should overrule Friday, and it should also allow remands in deficiency cases, though limited to the section 6015 issue. Any taxpayer currently facing a limit on getting additional pertinent evidence not in the administrative record before the Tax Court beyond what is indisputably newly discovered or previously unavailable evidence should move to remand his or her case to CCISO and ask the Tax Court to overrule Friday, so that the pertinent evidence can be proffered to the IRS in the remand and become part of the administrative record before the case is returned to the Tax Court (if it returns at all).

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Let me first say that I have read the legislative history of section 1203 of the Taxpayer First Act (the section that added subsection (e)(7)), and it provides no useful guidance or even hints about what Congress had in mind about remands. The Committee Report just parrots the new statute in explaining the workings of the new subsection. See H. Rep. 116-39, Part I, at 38-40.

So, let’s begin by looking at the reasons for the Tax Court’s ruling in Friday prohibiting a remand in a section 6015(e) stand-alone case that was not one of the rare ones commenced 6 months after the Form 8857 was filed but before an IRS determination had been issued. This was a case where the IRS did not consider relief under subsection (f) apparently because the IRS thought the request too late based upon the now-overruled regulation that provided that subsection (f) relief requests had to be made within 2 years of the commencement of “collection activity”. In McGee v. Commissioner, 123 T.C. 314 (2004), the Tax Court held that an IRS failure to include in a refund offset notice any mention of the offset’s consequences regarding section 6015 relief debarred the IRS from relying on the offset as “collection activity”. In Friday, the IRS told the court that the case was governed by McGee, presumably meaning CCISO had thought a refund offset taking place more than 2 years before the Form 8857 was filed constituted “collection activity”, but IRS attorneys in the Tax Court now realized the offset notice had not included the proper section 6015 language. Thus, CCISO had never considered subsection (f) relief on the merits, but should have under McGee.

Here’s what the Tax Court wrote in Friday:

In support of his request, respondent relies on Natl. Nutritional Foods Association v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975), Camp v. Pitts, 411 U.S. 138, 143 (1973), and Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). Those cases, however, are examples where courts, in reviewing administrative action, remedied for further factual determinations that were deemed necessary to complete an inadequate administrative record or to make an adequate one.

In certain specific cases where statutory provisions reserve jurisdiction to the Commissioner, a case can also be remanded to the Commissioner’s Appeals Office. Under sections 6320(c) and 6330(d)(1), this Court may consider certain collection actions taken or proposed by the Commissioner’s Appeals Office. Under paragraph (2) of section 6330(d), the Commissioner’s Appeals Office retains jurisdiction with respect to the determination made under section 6330. As part of the process, a case may be remanded to the Appeals Office for further consideration. See, e.g., Parker v. Commissioner, T.C. Memo. 2004-226.
The situation is different, however, in a section 6015 proceeding, which is sometimes referred to as a “stand alone” case. Although entitled “Petition for Review by Tax Court”, section 6015(e) gives jurisdiction to the Court “to determine the appropriate relief available to the individual under this section”. The right to petition is “In addition to any other remedy provided by law” and is conditioned upon meeting the time constraints prescribed in section 6015(e)(1)(A)(i) and (ii). Even if the Commissioner fails to do anything for 6 months following the filing of an election for relief (where there is nothing to “review”), the individual may bring an action in this Court. See sec. 6015(b), (e)(1)(A)(i)(II). A petition for a decision as to whether relief is appropriate under section 6015 is generally not a “review” of the Commissioner’s determination in a hearing but is instead an action begun in this Court. There is in section 6015 no analog to section 6330 granting the Court jurisdiction after a hearing at the Commissioner’s Appeals Office.

124 T.C. at 221-222 (footnotes omitted).

After the Taxpayer First Act, the statutory situation is clearly different from that on which the Tax Court relied in Friday. Section 6015(e)(7) now discusses a “review” by the Tax Court of a “determination made under this section” and specifically mentions an “administrative record” that is part of the basis for the judicial record. At least for section 6015 cases where there was a determination made and an administrative record created, the Tax Court proceeding is now much more like that of the Tax Court’s Collection Due Process (CDP) jurisdiction. Although section 6015 does not discuss who in the IRS is to make the determination that is reviewed (unlike section 6330, which makes clear that the IRS Appeals Office both makes the determination and has retained jurisdiction), the Tax Court can fill in that blank by remanding to the case back to the IRS function (either CCISO or the Appeals Office) that made the final determination.

Relying on what the Tax Court has done in CDP cases, the Tax Court should remand such 6015 cases for pretty much any good reason proposed by either party. See, e.g., Churchill v. Commissioner, T.C. Memo. 2011-182 at *12-*16 (discussing various previous reasons for remanding CDP cases to Appeals and adding a new one – where there were changed financial circumstances such that remand would be “helpful, necessary, or productive”) (Holmes, J.). And, as in CDP, the IRS should be asked to create a “determination” or “supplemental determination” letter, and the Tax Court should only review the latest IRS determination letter. Kelby v. Commissioner, 130 T.C. 79, 86 (2008) (“When a [CDP] case is remanded to Appeals and supplemental
determinations are issued, the position of the Commissioner that we review is the position taken in the last supplemental determination.”

In a previous post on the whistleblower award review case of Kasper v. Commissioner, 150 T.C. 8 (2018) (Holmes, J.), Les noted that the Tax Court held that there are numerous judge-created exceptions to the administrative record rule that the Tax Court will follow in whistleblower cases – making the Kasper opinion arguably very important for all Tax Court jurisdictions where the Tax Court review is based on the administrative record. Those record-review exceptions are also being followed in CDP cases appealable to those the Circuits holding that the Tax Court proceeding is limited to the administrative record. See, e.g., Robinette v. Commissioner, 439 F. 3d 455, 459-462 (8th Cir. 2006) (allowing Tax Court “testimony from the appeals officer that further elucidated his rationale” to supplement the administrative record). Les has more recently raised the question whether those judicial exceptions to the administrative record rule survive section 6015(e)(7), which, on its face, specifies only two items beyond the administrative record that are to be part of the Tax Court record on review – i.e., newly discovered or previously unavailable evidence. Arguably, expressio unius est exclusio alterius (the expression of one thing implies the exclusion of another thing). This is a serious question to which I have no answer, though I certainly hope that the judicial exceptions to the administrative record rule survived the statute’s enactment. As Les put it in an e-mail to me recently, “Is the concern that the statutory language (previously unavailable or newly discovered) preempts the exceptions Judge Holmes discussed in Kasper? Or is there a desire for systemic pressure on a better administrative process?”

But, this Kasper question of Les’ becomes moot if the Tax Court is willing to remand section 6015 cases to supplement the record not just to address concerns underlying the judicial exceptions to the administrative record rule, but also to add any other pertinent materials to the record that may aid the proper determination.

I would also note that earlier this year, the Tax Court held that it could remand a whistleblower award case to the IRS Whistleblower Office. Whistleblower 769-16W v. Commissioner, 152 T.C. No. 10 (April 11, 2019). That opinion compares and contrasts the Tax Court’s CDP and innocent spouse provisions (pre-Taxpayer First Act) and says the Tax Court does not consider it dispositive that section 7623(b)(4) contains no retained jurisdiction provision like section 6330(d)(2) for CDP. The court points out that section 7623(b)(4) says nothing either way about remands. The court held that remands were permitted because that is normal when review of agency action is on an abuse of discretion standard and under the administrative record rule. Those were the standard and scope of review adopted in Kasper. Section 6015 is somewhere between CDP and
section 7623(b)(4), with a de novo standard of review, but a limit mostly to reviewing the administrative record.

I would hope that the Tax Court would liberally remand section 6015 cases to the IRS for the IRS to consider any material not previously included in the administrative record that might significantly alter the outcome of the case. This would include both newly discovered or previously unavailable evidence, but not be limited to that. Let me give you an example of material falling outside section 6015(e)(7) of the type I am worried about: I have seen Tax Court cases that have been brought to me as a clinician after the taxpayer has filed a pro se Tax Court petition. Pro se petitioners often do a bad job in creating the administrative record. I have known cases where the taxpayer has been the subject of abuse and there are police records to prove it – in addition sometimes to orders of protection – yet the taxpayer never sent the police records or orders of protection to the CCISO examiner. Such items are not previously unavailable or newly discovered, but they would likely have strongly affected the IRS’ determination had it seen such documents before issuing the notice of determination denying relief. It is hard for me to imagine that Congress would have wanted this evidence of abuse to be excluded from the Tax Court record merely because the unrepresented taxpayer did not think to find and submit this evidence to the IRS earlier. If the Tax Court were to be presented with such documentation, I would think the best course would be to remand the case to the IRS. There is a good chance such evidence would moot the case, as the IRS would probably concede in most cases.

Next, the statute as written discusses Tax Court review of IRS determinations, but leaves unstated what the scope and standard of Tax Court review is to be where the IRS hasn’t made a determination under section 6015 yet. This can happen when a taxpayer files a Form 8857 and brings suit after 6 months in the absence of an IRS determination or when the taxpayer responds to a deficiency notice by, for the first time, raising an innocent spouse request in the Tax Court petition. Legislative history of section 6015(e)(7) does not address these “no determination” situations. But, for the reasons that Congress thought it would be better for the Tax Court to review IRS determinations (and using the administrative record), I would urge the court to remand all such cases to CCISO for an initial determination. That way, regardless of the procedure by which the case came to the Tax Court, the case would be decided on a similar standard of review and record of review to the cases Congress specifically addressed. Current Tax Court case law holds that section 6015 review is done on a de novo record and standard, regardless of the procedure by which the case came to the court. Porter v. Commissioner, 130 T.C. 115 (2008), and 132 T.C. 203 (2009). In Porter I, the Tax Court expressed concern that the IRS’ proposal to limit the review of section 6015(f)
determinations in cases under section 6015(e) to the administrative record would provide inconsistent procedures in similar cases, since review in deficiency cases or where a case was brought under section 6015(e) before the IRS ruled would be on a de novo record. 130 T.C. at 124-125. Frankly, if the Tax Court doesn’t allow remands in these “no determination” cases, it appears that the Tax Court is currently bound by its precedent to allow a de novo trial record.

My final observation is one I have been repeating since the adoption of the Taxpayer First Act: The best solution here is to amend section 6015(e)(7) to provide for a de novo record for Tax Court determinations under section 6015 – thus reestablishing Porter I as the controlling authority for all Tax Court section 6015 cases. Such an amendment would make the need for remands of such cases moot.