LR #4 COLLECTION DUE PROCESS (CDP): Amend Internal Revenue Code § 6330 to Provide That the Standard and Scope of Tax Court Review in CDP Cases Is *De Novo* Regardless of Whether the Underlying Liability Is at Issue

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

Two related concepts affect how courts evaluate the correctness of an IRS action or determination: scope of review and standard of review. "The *scope* of judicial review refers to the *evidence* the reviewing court will examine in reviewing an agency decision. The *standard* of judicial review refers to *how* the reviewing court will examine that evidence."[2]

When the *scope* of review is *de novo*, a court reviewing an IRS determination does not limit its consideration to evidence already contained in the IRS's administrative record, but engages in independent fact-finding and may receive into evidence testimony and exhibits that were not included in the administrative record.[3] The alternative arrangement, sometimes referred to as the "record" rule, requires the reviewing court to base its judgment only on evidence already contained in the IRS's administrative record. When the *standard* of review is *de novo*, the reviewing court considers the evidence before it anew, without deference to the IRS's determination.[4] When the standard of review is for abuse of discretion, the court overturns the IRS's determination only where it is shown to be arbitrary, capricious, or without sound basis in fact.[5]

Since 1924, when review of a taxpayer's pre-payment challenge to the validity of a proposed *assessment* first became available, the scope and standard of judicial review has been *de novo*.[6] Since 1998, when review of a taxpayer's pre-payment challenge to proposed *collection* of an assessed tax became available pursuant to the IRS Restructuring and Reform Act of 1998 (RRA 98), the nature of judicial review has depended on whether the underlying tax liability is at issue.[7] In collection due process (CDP) cases, if the underlying tax liability is at issue, the scope and standard of judicial review is *de novo*.[8] If the underlying

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1136 (10th Cir. 1991) (emphasis added).

3 *Robinette v. Comm'r*, 123 T.C. 85, 95 (2004), *rev'd* 439 F.3d 455 (8th Cir. 2006).

4 *Porter v. Comm'r*, 132 T.C. 203 (2009).

5 *Jonson v. Comm'r*, 118 T.C. 106, 125 (2002), *aff'd* 353 F.3d 1181 (10th Cir. 2003).

6 *See Appeal of Barry*, 1 B.T.A. 156 (1924); *Greenberg's Express, Inc. v. Comm'r*, 62 T.C. 324 (1974).

7 Pub. L. 105–206, § 3401, 112 Stat. 685, 746, enacting IRC §§ 6320 and 6330, discussed below.

8 H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998).

liability is not at issue, the *standard* of review is for abuse of discretion.[9] As discussed below, this standard of review places an unnecessary burden on taxpayers, for whom the event of *collecting* the tax is at least as important as the previous determination to *assess* additional tax.

The courts do not agree as to the appropriate *scope* of review in CDP cases when the underlying tax is not at issue. In *Robinette v. Commissioner*, the Tax Court held that where the underlying liability is not at issue the scope of its review is *de novo*.[10] Thus, the court considered evidence introduced at trial that was not part of the administrative record. The Court of Appeals for the Eighth Circuit reversed the Tax Court's decision, holding that the Tax Court's review in *Robinette* was limited to the administrative record.[11] The Courts of Appeal for the First and Ninth Circuits agree with the Eighth Circuit, as does the IRS Office of Chief Counsel.[12] The Tax Court continues to adhere to its position, however, except in cases appealable to the First, Eighth, and Ninth Circuit Courts of Appeal.[13]

Restricting judicial review to the administrative record in CDP cases harms taxpayers, especially those who cannot afford representation or assistance during administrative proceedings. The divergence in the courts with respect to the appropriate scope of review when the underlying tax is not at issue creates uncertainty for taxpayers and consumes administrative and judicial resources. Therefore, the National Taxpayer Advocate recommends that Congress amend Internal Revenue Code (IRC) § 6330 to provide that the scope and standard of review in CDP cases is *de novo* whether or not the underlying tax liability is at issue.

EXAMPLE 1

In response to a final notice of intent to levy, a taxpayer requests a CDP hearing. At the hearing, the taxpayer claims that because she suffers from a medical condition requiring medication, a levy would leave her unable to pay for the medication she needs and still meet basic living expenses. However, the taxpayer, who is unrepresented, does not provide evidence to substantiate her medical condition and the cost of treatment. The Appeals Officer sustains the proposed levy, and the taxpayer petitions the Tax Court for a review of the Appeals Officer's determination. At trial, the taxpayer retains a representative, who submits documentation that demonstrates the taxpayer suffers from a medical condition and substantiates the cost of treatment. Any appeal of the Tax Court's decision will be heard by the Court of Appeals for the Second Circuit. The Tax Court admits into evidence the additional information. If an appeal of the Tax Court's decision would be heard by the First, Eighth, or Ninth Circuits, the Tax Court would not have admitted the additional information into evidence and would be unable to consider it in reaching its decision in the case.

EXAMPLE 2

During a CDP hearing, a taxpayer, who is a construction worker with the equivalent of an eighth grade education and for whom English is a second language, submits a Form 433-A, *Collection Information Statement*, which lists his assets, liabilities, income, and expenses in support of his proposed offer in compromise (OIC). The Appeals Officer refuses to consider some of the documentation the taxpayer

9 H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998).

10 *Robinette v. Comm'r*, 123 T.C. 85 (2004), *rev'd* 439 F.3d 455 (8th Cir. 2006).

11 *Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006) *rev'g* 123 T.C. 85 (2004).

12 *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006) *aff'g* 125 T.C. 301 (2005); *Keller v. Comm'r*, 568 F.3d 710 (9th Cir. 2009) *aff'g in part* T.C. Memo. 2006-166; Chief Counsel Notice CC-2014-002 (May 5, 2014).

13 *See Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd* 445 F.2d 985 (10th Cir. 1971), discussed below.

submits in support of his claimed income and expenses because the documents are handwritten, torn, and ungrammatical. At the conclusion of a CDP hearing, the Appeals Officer sustains the rejection of a taxpayer's OIC. The Tax Court, applying an abuse of discretion standard, upholds the Appeals Officer's determination even though the judge reviewing the case would have evaluated the documentation differently, taking into account the taxpayer's occupation, level of education, and English language skills.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress amend IRC § 6330 to specify that the standard and scope of review in Tax Court determinations under IRC § 6330, including the verification required by IRC § 6330(c)(1), is *de novo* whether or not the underlying liability is at issue.

PRESENT LAW

Background

The enactment of IRC §§ 6320 and 6330 as part of RRA 98 represented a profound departure from then-current tax collection procedures.[14] The rules for reviewing a tax deficiency as well as the rules for reviewing IRS collection action provide context for those changes.

Standard and Scope of Review in Deficiency Proceedings

Prior to 1924, taxpayers had no independent forum in which to contest, on a prepayment basis, the IRS's determination of a deficiency in tax.[15] A taxpayer who disagreed with the IRS's determination could only pay the tax and then seek a refund in a federal district court or in the U.S. Court of Claims.[16] Congress remedied this situation in 1924 by creating the Board of Tax Appeals (BTA), the predecessor to the U.S. Tax Court, as an independent agency of the executive branch.[17] Taxpayers could request BTA review of the IRS's final deficiency determinations. Proceedings before the Board were conducted as follows:

> When a taxpayer brings his case before the Board he proceeds by trial *de novo*. The record of the case made in the Internal Revenue Bureau is not before the Board except in so far as it may be properly placed in evidence by the taxpayer or by the Commissioner. The Board must decide each case upon the record made *at the hearing before it*, and, in order that it may properly do so, the taxpayer must be permitted to fully present any questions relating to his tax liability which may be necessary to a correct determination of the deficiency. To say that the taxpayer who brings his case before the Board is limited to questions presented before the Commissioner, and that the Board in its determination of the case is restricted to a decision

14 Pub. L. No. 105-206, § 3401(a), (b), 112 Stat. 685 at 746, 747 (1998).

15 See Walter W. Hammond, *United States Board of Tax Appeals*, 11 Marquette Law Review 1 at 8 (1926), noting that "[b]efore the establishment of the United States Board of Tax Appeals, a taxpayer did not have an opportunity to have the amount of his federal income tax determined in court before paying it nor could he secure an impartial hearing before a tribunal which did not have the dual function of being both prosecutor and judge."

16 If a refund suit was brought, the court reviewed the case *de novo*. *Blair v. Curran*, 24 F.2d 390 (1st Cir. 1928).

17 Revenue Act of 1924, Pub. L. No. 68-176, § 900, 43 Stat. 253, 336. The Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 amended IRC § 7441 to change the classification of the Tax Court from an agency of the executive branch to a specialized legislative court under Article I of the U.S. Constitution. IRC § 7441 was further amended by the Protecting Americans from Tax Hikes (PATH) Act, Pub. L. 114-113, Division Q, Title IV, § 441, 129 Stat. 2242, 126 (2015) to clarify that "[t]he Tax Court is not an agency of, and shall be independent of, the executive branch of the Government."

> of issues raised in the Internal Revenue Bureau would be to deny the taxpayer a full and complete hearing and an open and neutral consideration of his case.[18]

However, the Board's determinations were not binding on the parties and the 1924 legislation did not provide for judicial review of the BTA's decisions. Thus, if the taxpayer prevailed before the BTA, the IRS could not assess the additional tax but could seek readjudication in federal court of whether a deficiency existed.[19] The review in federal court would be *de novo*, with the BTA's findings *prima facie* evidence of the stated facts.[20] If the IRS prevailed before the BTA, the IRS could immediately assess the additional tax and the taxpayer could obtain further review only by paying the additional tax and then seeking a refund in federal court, the same option available when the adverse determination was first rendered by the IRS.[21] Thus, if either the IRS or the taxpayer disputed the BTA's decision in court, the IRS's determination would be subject to *de novo* review more than once — first by the BTA and then by a federal court. In 1926, Congress amended the U.S. tax code to make decisions by the BTA binding on the parties and appealable to the federal court of appeals for the district in which the taxpayer was an inhabitant (or for the district in which the return was filed), or the Court of Appeals of the District of Columbia.[22]

The BTA is now the U.S. Tax Court, which under IRC § 6214 has jurisdiction to re-determine deficiencies.[23] As with proceedings before the BTA, "a trial before the Tax Court is a proceeding de novo; our determination as to a petitioner's tax liability must be based on the merits of the case and not any previous record developed at the administrative level."[24] Thus, as Congress intended, both the scope and standard of review of IRS deficiency determinations in a prepayment forum has always been *de novo*, sometimes (for the period 1924-1926) in more than one venue.[25]

Standard and Scope of Review of IRS Collection Action

As described above, taxpayers have long been able to obtain prepayment review of the IRS's determination to *assess* additional tax, and that review was *de novo*, but until 1998 they had no prepayment forum for contesting the IRS's decision to *collect* an assessed tax by lien or levy.[26] Noting that "taxes are the lifeblood

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18 *Appeal of Barry*, 1 B.T.A. 156 at 157 (1924) (emphasis added). *Barry* also held that the BTA had jurisdiction to determine an overpayment for a non-deficiency year and apply that overpayment to the liability for the year in which there was a deficiency, a holding reversed by section 274(g) of the Revenue Act of 1926.

19 Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, § 274(b), 43 Stat. 253, 297.

20 Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, § 900(g), 43 Stat. 253, 337.

21 Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, §§ 274(b), 1014, 43 Stat. 253, 297, 343. As one appellate court observed, "[t]he hearing before the Board was at that time little more than a preliminary skirmish, a run for luck. For either party, if dissatisfied with the decision, could bring a court action and try the matter de novo." *Blair v. Curran*, 24 F.2d 390 (1st Cir. 1928).

22 Revenue Act of 1926, Pub. L. No. 69-20, ch. 27, §§ 1001(a), 1002, 44 Stat. 9, 109, 110. Review at this point was not *de novo*; rather, the appellate court's review was limited to evaluating the lower court's decision for errors of law. Revenue Act of 1926, Pub. L. No. 69-20, ch. 27, § 1003(a), (b), 44 Stat. 9, 110; *Avery v. Comm'r*, 22 F.2d 6 (5th Cir. 1927).

23 The Revenue Act of 1942, Pub. L. No. 77-753, ch. 619, § 504(a), 56 Stat. 798, 957 (1942) changed the name of the BTA to the Tax Court of the United States. The Tax Reform Act of 1969, Pub. L. No. 91-172 § 951, 83 Stat. 487, 730 renamed the court the United States Tax Court.

24 *Greenberg's Express, Inc. v. Comm'r*, 62 T.C. 324, 328 (1974). In fact, IRS deficiency determinations are exempt from the Administrative Procedure Act's formal adjudication requirements because they are subject to a subsequent trial *de novo* in the Tax Court on issues of both law and fact. Staff of Senate Judiciary Committee, 79th Cong., Administrative Procedure Act 22 (Comm. Print 1945) (Explanations of the provisions of the Administrative Procedure Act).

25 As noted above, taxpayers who do not seek pre-payment review of deficiency determinations may pay the proposed deficiency and request a refund from the IRS. IRC § 6402. If the IRS refuses to refund the payment, the taxpayer may seek a refund in a district court or the U.S. Court of Federal Claims, where the claim will be evaluated *de novo*. IRC § 7422; *National Right to Work Legal Defense and Ed. Foundation, Inc. v. U. S.*, 487 F.Supp. 801 (E.D.N.C. 1979).

26 RRA 98, Pub. L. No. 105–206, § 3401, 112 Stat. 685, 746, discussed below.

of government, and their prompt and certain availability an imperious need," the Supreme Court, in the *Bull* case, described those antecedent procedures as follows:

> Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution.[27]

In 1998, Congress enacted IRC §§ 6320 and 6330 as part of RRA 98.[28] The statutes were intended to inject more procedural due process into IRS collection practices by providing for a CDP hearing at the administrative level and for Tax Court review of the IRS's determination that results from that hearing — both to take place *before* the IRS takes its first enforced collection action with respect to a particular tax liability.[29]

At the CDP hearing, an IRS Appeals Officer:

- Verifies that the requirements of any applicable law or administrative procedure have been met (*e.g.*, that the underlying tax liability was properly assessed);[30]
- Considers issues raised by the taxpayer, such as spousal defenses, alternatives to collection, and under circumstances discussed below, the underlying tax liability;[31] and
- Considers "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."[32]

The taxpayer, within 30 days of the Appeals Officer's determination, may petition the Tax Court for review of the determination.[33]

These procedures represent a fundamental departure from the state of affairs described in the *Bull* case. However, the availability of a judicial hearing prior to levy or lien enforcement did not mean *de novo* review would be available in those Tax Court proceedings as it is in Tax Court review of proposed deficiencies.

The Senate Committee on Finance's version of the new CDP legislation would have allowed a taxpayer to raise, at the hearing before the IRS, "any relevant issue," including "challenges to the underlying liability

27 *Bull v. U.S.*, 295 U.S. 247, 260 (1935).

28 Pub. L. No. 105–206, § 3401, 112 Stat. 685, 746.

29 IRC §§ 6320(b)(c), 6330(b)-(d), (e). As some scholars have noted, respect for individuals' due process rights may constitute a source of legitimacy of agency adjudications. *See* Paul Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 Wm. & Mary L. Rev. 301, 316-317 (1988). *See also* Richard J. Pierce, Jr., Administrative Law Treatise § 2.8, Fifth Edition.

30 IRC § 6330(c)(1),(c)(3)(A).

31 IRC § 6330(c)(2),(c)(3)(B).

32 IRC § 6330(c)(3)(C).

33 IRC §§ 6230(c), 6330(d).

as to existence or amount."[34] The Conference agreement, however, adopted a different approach: at the administrative hearing, "the validity of the tax liability can be challenged only if the taxpayer did not actually receive the statutory notice of deficiency or has not otherwise had an opportunity to dispute the liability."[35] When a taxpayer challenged the underlying liability at the administrative hearing (not having actually received the statutory notice of deficiency or an opportunity to dispute the liability) then "[t]he amount of the tax liability will in such cases be reviewed by the appropriate court on a de novo basis." [36] Otherwise (where the underlying liability was not properly at issue) "the appeals officer's determination as to the appropriateness of collection activity will be reviewed using an abuse of discretion standard of review."[37] Whether the underlying liability was at issue is not always clear. For example, some Tax Court decisions have held that a taxpayer's claim that the collection statute expiration date (CSED) had passed is not a challenge to the underlying liability, while other decisions have held that CSED issues do relate to the underlying liability.[38]

The Conference report does not explain why the standard of review should differ depending on whether the underlying liability was at issue. The report also does not explain why an abuse of discretion standard of review, rather than the *de novo* standard that applies in deficiency cases, was thought suitable where the appropriateness of collection action, but not the underlying tax liability, was at issue.[39] Congress did not articulate how the abuse of discretion standard comports with general principles of administrative law, which have been described as follows:

> The purpose of calibrating the breadth-or scope-of judicial review over fact finding by administrative agencies is ultimately to allocate decision-making responsibility between the executive and judicial branches. Because Congress usually makes these decisions, all three branches have a stake in the process. In assigning oversight responsibilities, Congress makes

34 S. Rep. 105-174, 105th Cong. 2d Sess. at 68 (1998). The National Taxpayer Advocate would have followed a similar approach, allowing taxpayers to raise "issues relating to the existence or amount of any liability that is eligible for an audit reconsideration or a Doubt as to Liability Offer in Compromise." *See* National Taxpayer Advocate 2004 Annual Report to Congress 451, 452, Key Legislative Recommendation: *Collection Due Process Hearings*.

35 H.R. Conf. Rep. 105-599, 105th Cong. 2d Sess. Part 2, at 265 (1998). The provisions are now found in IRC §§ 6320(c), 6330(c)(2)(B); Treas. Reg. §§ 301.6320-1(e)(3), Q&A (E)(2), 301.6330-1(e)(3), Q&A (E)(2). The National Taxpayer has not supported this approach, wondering "[w]ho really cares if the taxpayer has had several opportunities to protest the liability and misses them — if the taxpayer is before us now, do we really want to collect a tax that is not, in fact, due?" *See* National Taxpayer Advocate 2004 Annual Report to Congress 451, 452, 459, Key Legislative Recommendation: *Collection Due Process Hearings*, recommending that Congress amend IRC § 6330(c)(2)(B) to provide that, "regardless of whether the taxpayer actually received a statutory notice of deficiency, had an opportunity to dispute such liability, or self-assessed the liability on a tax return, the taxpayer may raise issues relating to the existence or amount of any liability that is eligible for an audit reconsideration or a Doubt as to Liability Offer in Compromise." *See also* National Taxpayer Advocate 2005 Annual Report to Congress 447, 449, Key Legislative Recommendations, *Restructuring and Reform of Collection Due Process Provisions*, reiterating this recommendation.

36 H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998). While the National Taxpayer Advocate at one time suggested the abuse of discretion standard could be feasible, she has reconsidered that suggestion in the light of the IRS's continuing failure to reform its exam process, and the deterioration of IRS audit processes caused by not assigning a single employee to the vast majority of exams, making communication with taxpayers exceedingly difficult and increasing the likelihood of an incorrect result. *See* National Taxpayer Advocate 2004 Annual Report to Congress 451, 459, Key Legislative Recommendation: *Collection Due Process Hearings*; National Taxpayer Advocate 2005 Annual Report to Congress 447, 449, Key Legislative Recommendations, *Restructuring and Reform of Collection Due Process Provisions*, reiterating this recommendation.

37 H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998).

38 For a full discussion of this aspect of CDP hearings, see National Taxpayer Advocate 2014 Annual Report to Congress 380 (Legislative Recommendation: *Standard of Review: Amend IRC § 6330(d) to Provide for a De Novo Standard of Review of Whether the Collection Statute Expiration Date is Properly Calculated by the IRS*).

39 The Senate Committee on Finance, which also "expected" the Tax Court's review to be for abuse of discretion, did not explain why. S. Rep. 105-174, 105th Cong. 2d Sess. at 68 (1998).

> a choice: it weighs the desire for efficient and timely agency action against the need to ensure consistent and fair decision making. In balancing these considerations, Congress intends factual support for agency decisions to be subject to varying levels of scrutiny or, on occasion, to be free from scrutiny.[40]

Thus, general principles would suggest that the standard of review in CDP cases should balance the need for efficiency of IRS collection processes with fairness to taxpayers.

One scholar offered this explanation for why Congress chose the abuse of discretion standard:

> CDP, through its general scheme of abuse of discretion review of IRS decisions regarding collection determinations, expands rule of law principles to a previously unchecked area of agency action. The pre-CDP lack of review for collection determinations reflected practical concerns about the need to collect taxes without unwanted delay, and CDP reflects Congress's newfound willingness to sacrifice somewhat efficiency in collections to promote rule of law principles.
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> CDP thus represents Congress's commitment to expand, in a limited way, rule of law principles to IRS collection adjudications. The expansion is limited because judicial review of collection actions is on a highly deferential abuse of discretion basis and does not extend to consideration of collection alternatives or IRS collection actions outside of CDP.[41]

If, as the preceding passage suggests, the new CDP rules were forged with an eye to preventing delays in collection, imposing the abuse of discretion standard of review would not have been the most efficient way to accomplish that objective.[42] In fact, Congress amended IRC § 6330 in 2006 to allow the Appeals Officer to disregard requests for CDP hearings that are made to delay collection.[43] It was also not necessary to adopt the abuse of discretion standard to prevent frivolous CDP cases. Among the matters that cannot be raised at a CDP hearing are "specified frivolous submissions" as defined in IRC § 6702(b)(2)(A).[44]

Whatever the reason for adopting an abuse of discretion standard, at least one scholar views it as preventing CDP from "living up to its promise."[45] Recent experience supports that view. Appeals

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40 Paul Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm. & Mary L. Rev. 679, 681 (2002).

41 Leslie Book, *The Collection Due Process Rights: A Misstep or A Step in the Right Direction?*, 41 Hous. L. Rev. 1145, 1168-70 (2004) (fn. refs. omitted). *See also* Bryan T. Camp, *Tax Administration As Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 86 (2004), describing how, in Senate testimony that led up to RRA 98, "[w]itnesses testified that asserted abuses came about because the Service had unreviewed power to make tax determination and tax collection decisions."

42 Moreover, as discussed below, very few CDP hearings are requested compared to the number of CDP notices issued.

43 Tax Relief and Health Care Act of 2006 (TRHCA), Pub. L. No. 109-432, Division A, § 407, 120 Stat. 2960 added paragraph (g) to IRC § 6330, which provides: "Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review."

44 IRC § 6330 (c)(4)(B). TRHCA, Pub. L. No. 109-432, added section (c)(4)(B) to IRC § 6330 and expanded IRC § 6702 to allow for the imposition of a penalty of up to $5,000 where a request for a CDP hearing is "either based on a position the IRS has identified as frivolous or reflects a desire to delay or impede the administration of federal tax laws." IRC § 6702(b)(2)(A)(i) & (ii), (B)(i), (c). *See* S. Rep. 109–336, at 49–50 (2006).

45 Bryan T. Camp, *The Failure of CDP, Part 2: Why It Adds No Value*, 104 Tax Notes 1567, 1569 (2004), noting "CDP adds no value to the review of what information there is; court review is a mere snapshot review of what is an ongoing process and, further, courts review only for an abuse of discretion."

Officers, who must normally consider hazards of litigation in resolving their cases, now cite the abuse of discretion standard of review as a reason for not considering hazards of litigation in CDP cases.[46]

The Conference report is silent as to the appropriate scope of review in CDP cases. In *Robinette*, the Tax Court held its review of IRC § 6330 cases is not limited to the administrative record.[47] The appellate court reversed, noting:

> The Tax Court seemed to believe that because it traditionally has conducted *de novo* proceedings in deficiency proceedings, and because Congress did not change that practice when it passed the APA [the Administrative Procedure Act] in 1946, Congress should likewise be presumed to have intended *de novo* proceedings in the Tax Court in connection with the review of decisions by an appeals officer under § 6330. We do not think the proposed conclusion follows from the history. Collection due process hearings under § 6330 were newly-created administrative proceedings in 1998, and the statute provided for a corresponding new form of limited judicial review. The nature and purpose of these proceedings are different from deficiency determinations, and it is just as likely that Congress believed judicial review of decisions by appeals officers in this context should be conducted in accordance with traditional principles of administrative law. Indeed, that Congress provided for judicial review in either the Tax Court or a United States District Court, depending on the type of underlying tax liability involved, indicates that traditional principles of administrative law should apply. Every district court to consider an appeal under § 6330 has limited its review to the record created before the agency, see Olsen, 414 F.3d at 154 n. 9, and it would be anomalous to conclude that Congress intended in § 6330(d) to create disparate forms of judicial review depending on which court was reviewing the decision of an IRS appeals officer in a collection due process proceeding.[48]

Two other courts of appeal agree with the Eighth Circuit's decision in the *Robinette* case.[49] The Tax Court continues to reject the IRS's position that review under IRC § 6330 is limited to the administrative record, except in cases that would be appealable to the First, Eighth, or Ninth Circuit Courts of Appeal.[50] In any event, one source of potential divergence in opinion, identified above by the *Robinette* appellate

46 Treas. Reg. § 601.106(f)(2) provides that "Appeals will ordinarily give serious consideration to an offer to settle a tax controversy on a basis which fairly reflects the relative merits of the opposing views in light of the hazards which would exist if the case were litigated." *See* National Taxpayer Advocate 2013 Annual Report to Congress Most Serious Problem: *Collection Due Process Hearings: Current Procedures Allow Undue Deference to the Collection Function and Do Not Provide the Taxpayer a Fair and Impartial Hearing* 155, 162-63 (reporting that IRS Appeals, in its response to TAS's research request regarding the hazards of litigation, responded "Collection Due Process cases can be reviewed by the Tax Court, but only for an abuse of discretion, not on the actual case resolution.").

47 *Robinette v. Comm'r*, 123 T.C. 85, 95 (2004).

48 *Robinette v. Comm'r*, 439 F.3d 455, 461 (8th Cir. 2006) (fn. ref. omitted).

49 *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 301 (2005); *Keller v. Comm'r*, 568 F.3d 710 (9th Cir. 2009) *aff'g in part* T.C. Memo. 2006-166.

50 Pursuant to the rule in *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd* 445 F.2d 985 (10th Cir. 1971), the Tax Court will defer to a Court of Appeals decision which is squarely on point where appeal from the Tax Court decision lies to that Court of Appeals. Pursuant to IRC § 7482(b)(1)(G), for CDP petitions filed after Dec. 19, 2014, the venue will lie with the Court of Appeals where the petitioner's legal residence is found (if the petitioner is an individual), and where the principal place of business or principal office or agency is found (if the petitioner is an entity other than an individual). IRC § 7482(b)(1)(G) was added by the PATH Act, Pub.L. No. 114-113, Division Q, Title IV, § 423, 129 Stat. 2242, 3123 (2015).

court, has been eliminated: CDP cases are no longer appealable to district courts, but only to the Tax Court.[51]

REASONS FOR CHANGE

The Abuse of Discretion Does Not Allow Sufficient Judicial Scrutiny of IRS Collection Due Process (CDP) Determinations

Review of CDP determinations for an abuse of discretion, except where the underlying liability is at issue, results in minimal scrutiny of the very IRS determinations that have the greatest impact on taxpayers. The *de novo* standard of review applicable in deficiency proceedings, which prevents "deny[ing] the taxpayer a full and complete hearing and an open and neutral consideration of his case," should apply, perhaps with even greater force, to CDP proceedings.[52] There is no stated congressional objective being served by the current abuse of discretion standard.

Permitting *de novo* review, *i.e.*, affording no deference to Appeals' conclusions, supports *taxpayers' right to appeal an IRS decision in an independent forum*.[53] Particularly because IRS collection actions are where "theoretical" assessments have real and lasting impact, allowing the Tax Court to more completely consider facts and circumstances that might affect taxpayers' ability to pay enhances their *right to a fair and just tax system*.[54] *De novo* review would also better position the court to determine whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary, thus protecting *taxpayers' right to privacy*.[55] As discussed below, subjecting IRS collection determinations to more scrutiny than the abuse of discretion standard permits could actually improve the efficiency of IRS collection activities while better ensuring "consistent and fair decision making."[56] Thus, changing the standard of review would be consistent with fundamental concepts of administrative law.

The Abuse of Discretion Standard May Lead Appeals Officers to Not Settle Cases

As discussed below, most taxpayers who seek Tax Court review of the IRS's CDP determination are not represented. Thus, they are unlikely to be aware of or take into consideration the judicial standard of review in CDP cases. Appeals Officers, however, are certainly aware that the abuse of discretion standard applies and virtually guarantees the government will prevail in Tax Court, and in that event, the government can proceed with collection. Thus, Appeals Officers and IRS attorneys have less incentive to settle a CDP case without a trial. In contrast, in a deficiency case where the standard of review is *de novo* and prevailing in Tax Court does not trigger immediate collection activity, the IRS's incentive to settle is stronger.[57]

51 The Pension Protection Act of 2006, Pub. L. No. 109-280 § 855(a), 120 Stat. 780, 1019, enacted on Aug. 17, 2006, amended 6330(d)(1) to provide exclusive jurisdiction to the Tax Court in all CDP cases, regardless of which court had jurisdiction over the underlying liability.

52 *Appeal of Barry*, 1 B.T.A. 156 at 157 (1924) (emphasis added).

53 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

54 *Id*.

55 *Id*.

56 Paul Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm. & Mary L. Rev. 679, 681 (2002).

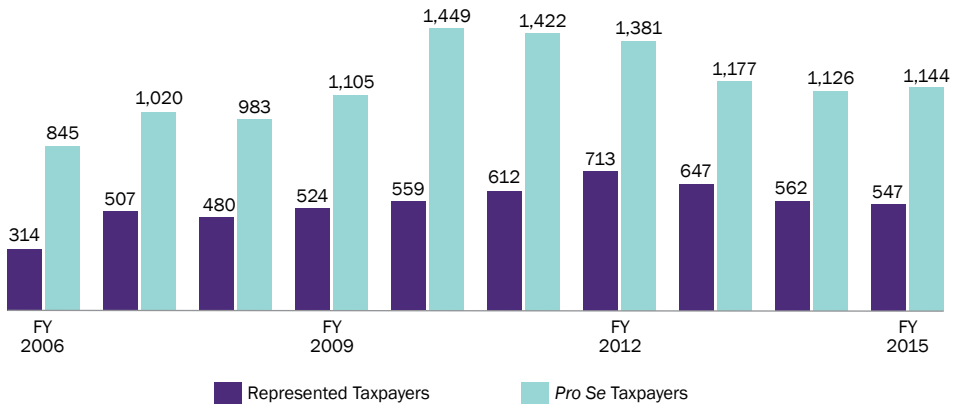
57 It is worth noting that the likelihood a taxpayer would even take the first step of requesting a CDP hearing is actually slim. For example, although the IRS sent more than 1.7 million CDP notices to individual taxpayers in fiscal year (FY) 2015, only about 56,000 CDP hearings were requested — a take-up rate of only 3.2 percent. FY 2015 notices issued from the Individual Master File on the IRS Compliance Data Warehouse.

Limiting the Scope of Review Is Burdensome for Taxpayers, Particularly for Unrepresented Taxpayers

Perhaps even more burdensome to taxpayers than the abuse of discretion standard of review is the position that Tax Court review in CDP cases is confined to the administrative record. Unrepresented taxpayers in particular are less likely to appreciate the importance of raising an issue and substantiating their position when they are dealing with an Appeals Officer. When they later try to introduce evidence in support of their claims, the record review rule would prevent them from doing so, thus undermining their *right to challenge the IRS's position and be heard*.[58] In fact, most taxpayers who petition the Tax Court for review in CDP cases proceed without representation (*i.e.*, they proceed "*pro se*"). Figure 2.4.1 shows the number of represented and *pro se* taxpayers filing CDP petitions from fiscal years (FYs) 2006-2015.[59]

FIGURE 2.4.1

Represented and *Pro Se* Taxpayers Filing CDP Petitions, FYs 2006-2015



Moreover, a significant portion of all cases the Tax Court tried and decided in recent years (*i.e.*, cases that were not settled or disposed of due to the taxpayer's default) were CDP cases. Figure 2.4.2 shows the portion of Tax Court cases that were tried and decided that were CDP cases.[60]

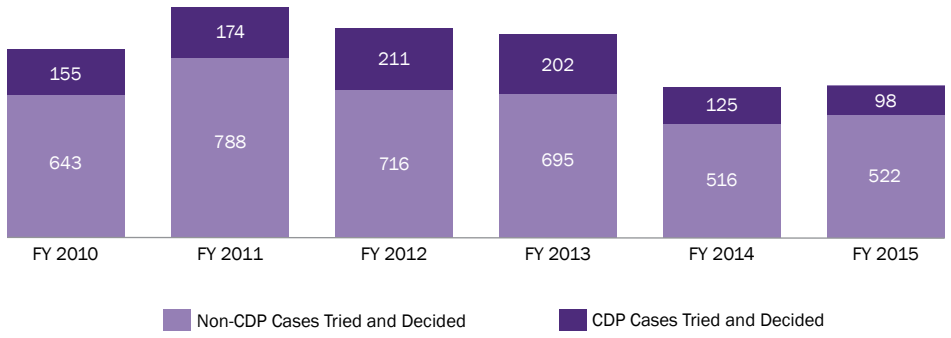
58 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

59 American Bar Association (ABA), Tax Section Court Procedure Committee, IRS Office of Chief Counsel, FY 2015, 23.

60 *Id*. at 16, 24.

FIGURE 2.4.2

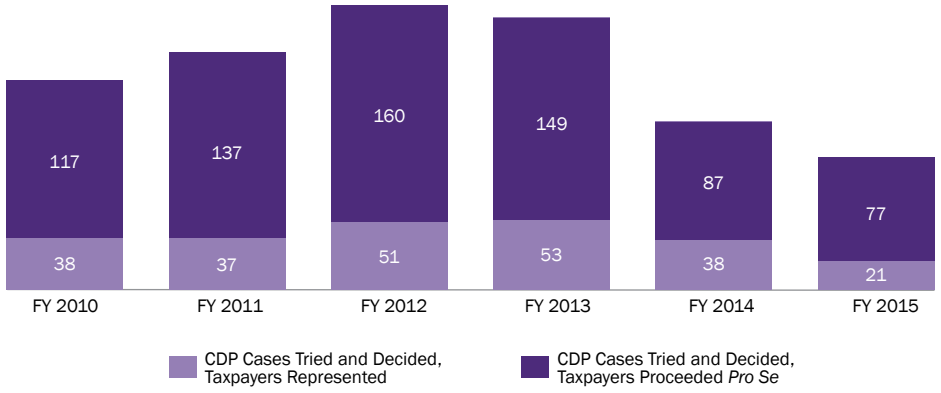
Tried and Decided Tax Court Cases, FYs 2010-2015



In the CDP cases the Tax Court tried and decided, the taxpayer usually proceeded *pro se*. Figure 2.4.3 shows the number of CDP cases the Tax Court tried and decided in the past five fiscal years, and the portion in which the taxpayer proceeded *pro se*.[61]

FIGURE 2.4.3

CDP Cases the Tax Court Tried and Decided by Represented and *Pro Se* Taxpayers, FYs 2010-2015



Thus, the Tax Court judges are on the front lines of tax administration and see the difficulties unrepresented taxpayers face as they attempt to navigate the system and produce documents. In view of the likelihood that taxpayers will proceed without representation, the Tax Court has designed its procedures to assist unrepresented taxpayers. For example, pursuant to agreements with some Low Income Taxpayer Clinics (LITCs) and other student tax clinics, the Tax Court sends taxpayers who do not already have representation in a docketed case a "stuffer" or notice that informs them LITC assistance may

61 ABA, Tax Section Court Procedure Committee, IRS Office of Chief Counsel, FY 2015, 25.

be available.[62] In addition, some participating clinics, some bar associations, integrated bars, and other professional organizations provide free assistance to unrepresented taxpayers by participating in calendar call programs.[63]

Moreover, consistent with its awareness of the realities of litigation before it, the Tax Court, in its considered opinion, continues to adhere to the *Robinette* rule where it can. Congress should defer to the Tax Court's wisdom and experience here, and adopt the *Robinette* rule. Clarifying that the scope of review is not limited to the administrative record would codify the Tax Court's interpretation of IRC § 6330 and resolve the divergence between the Tax Court and the Courts of Appeals. Thus, similarly situated taxpayers would be treated the same independently of which Court of Appeals would hear their case. Similarly, just as a *de novo* standard of review may encourage settlement of CDP cases, a *de novo* scope of review may encourage Appeals Officers to more diligently secure information to support their determinations. The abuse of discretion standard of review, together with the record rule in certain appellate jurisdictions, leave Appeals Officers with less incentive to build the strongest possible case.

EXPLANATION OF RECOMMENDATION

Amending IRC § 6330 to specify that the Tax Court standard and scope of review of CDP cases is *de novo* would clarify that the Tax Court is not required to defer to IRS determinations to proceed with enforced collection. Under this recommendation, an Appeals Officer's determination that the verification requirements of IRC § 6330(c)(1) were met, including ensuring that the CSED was properly calculated, would also be reviewed *de novo*. The Tax Court would decide *de novo* matters such as whether the taxpayer is entitled to an installment agreement, whether the taxpayer's OIC should be accepted, whether the taxpayer's account should be placed in currently not collectible status because levy would cause economic hardship, and whether the taxpayer has satisfied the requirements of IRC § 6323(j) for the withdrawal of a notice of federal tax lien. The recommendation would also clarify that the Tax Court's review is not limited to the administrative record. These changes would support taxpayers' rights by ensuring access to an independent judicial forum in which the outcome is not unduly influenced by the conclusions reached by the IRS or restricted to evidence introduced at the administrative level, and by removing impediments to judicial consideration of taxpayers' facts and circumstances.

62 In recognition of the need for low income taxpayers to have access to representation before the IRS and the courts, Congress in 1998 created Low Income Taxpayer Clinics (LITCs). IRC § 7526; RRA 98 § 3601(a). The clinics, which are independent from the IRS, represent low income taxpayers before the IRS and the Tax Court for free or no more than a nominal fee. IRC § 7526(b)(2). *See* Publication 4134, *Low Income Taxpayer Clinic List* (Aug. 2016) for a listing of LITCs. According to IRC § 7526(b)(1)(B), taxpayers whose income does not exceed 250 percent of the poverty level are low income taxpayers for purposes of qualifying for LITC assistance.

63 "Calendar call" refers to the procedure, once a case is scheduled for trial, of calling each scheduled case so that "counsel or the parties" can indicate to the court their estimate of how much time, if any, will be required for trial. See Rule 131(c), Tax Court Rules of Practice and Procedure.