

LR #5 **COLLECTION DUE PROCESS (CDP): Amend Internal Revenue Code § 6330 to Require Appeals Officers, in Considering Collection Alternatives, to Suspend Collection Due Process (CDP) Hearings Pending Resolution of Challenged Non-CDP Liabilities or Precluded CDP Liabilities**

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Quality Service*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

PROBLEM

Prior to 1998, taxpayers had no prepayment forum in which to contest the IRS's decision to collect an assessed tax by lien or levy. The collection due process (CDP) provisions of Internal Revenue Code (IRC) §§ 6320 and 6330, enacted as part of the IRS Restructuring and Reform Act of 1998 (RRA 98), were intended to “increase fairness to taxpayers” by requiring the IRS to “afford taxpayers adequate notice of collection activity and a meaningful hearing” before depriving them of their property.²

Of the 22,300 taxpayers whose CDP cases were closed in fiscal year (FY) 2016, 44 percent also had liabilities for non-CDP years.³ The National Taxpayer Advocate has recommended that IRS Appeals Officers be required to suspend a CDP hearing when a taxpayer raises a liability issue for a non-CDP year that would be included in collection alternatives covered by the CDP hearing, but the IRS has declined to adopt this recommendation.⁴ As a consequence, taxpayers may be required to choose between a collection alternative that does not properly reflect their final tax liability or no collection alternative at all. The same result may follow from an Appeals Officer's refusal to consider a taxpayer's challenge to the existence or amount of a liability for a CDP year, on the basis that such a challenge is a “precluded” issue.

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 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. 105-206, § 3401, 112 Stat. 685, 746; S. Rep. No. 105-174, at 67 (1998). See also J. Comm. on Tax'n, *General Explanation of Tax Legislation Enacted in 1998*, JCS-6-98, 81 (Nov. 24, 1998). As discussed below, the statutes provide for a hearing before the IRS (a CDP hearing), and for Tax Court review of the IRS's determination that results from that hearing, before the IRS takes enforced collection action. IRC §§ 6320(b), (c), 6330(b)-(d), (e).

3 TAS Research analysis of IRS Compliance Data Warehouse (CDW), Individual Master File (IMF), Transaction History Table and Status History Table, 2016 for Fiscal Year (FY) 2016. Of 22,252 taxpayers whose CDP cases were closed in FY 2016, 9,876 (44 percent) also had liabilities for non-CDP years.

4 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, 163. The IRS declined to adopt the recommendation, responding: “[s]uch a system would be impractical to implement as the underlying liability should be determined by Compliance not by Appeals and issues exists in attempting to keep an action suspended in Appeals for a potentially significant time.” National Taxpayer Advocate FY 2015 Objectives Report to Congress, vol. 2, 63.

EXAMPLE

Taxpayer X has an unpaid \$40,000 tax liability for 2014. When the IRS proposes to collect the liability by levying on X's assets, X requests a CDP hearing. At the hearing, X requests to enter into a streamlined installment agreement (IA), with payments to be made as direct debits from her bank account. X prefers a streamlined IA, which is generally available to taxpayers whose aggregate unpaid liability does not exceed \$50,000, because neither a formal application on Form 9465, *Installment Agreement Request*, nor a supporting Form 433-F, *Collection Information Statement*, is required.

The Appeals Officer has the authority to resolve X's case through an IA, but is required to include all open tax periods (not only those that are the subject of the CDP hearing) in the agreement. X has an outstanding liability for 2013 of \$25,000 that resulted from an audit of her return and the issuance of a notice of deficiency. X did not petition the Tax Court for review of the 2013 deficiency. Thus, her aggregate liability is \$65,000 and a streamlined IA is not available. However, as X explains to the Appeals Officer, she is seeking audit reconsideration of the 2013 liability and believes that after reconsideration, the 2013 liability will amount to only \$3,000. In that event, X's total outstanding liability will be \$43,000, and a streamlined IA would be available.

Alternatively, X would be willing to enter into an offer in compromise (OIC) based on doubt as to liability (with respect to the non-CDP year) or doubt as to collectability. X's reasonable collection potential is \$45,000 (*i.e.*, sufficient to pay the combined 2014 liability and the 2013 liability if it is ultimately established she owes less than \$5,000 for 2013, but insufficient to pay the combined amount of the 2014 and unadjusted 2013 liabilities).

X requests that the Appeals Officer suspend the CDP hearing pending the outcome of the audit reconsideration, or while X's OIC based on doubt as to liability for the non-CDP year is being evaluated. The Internal Revenue Manual (IRM) does not provide authority for the Appeals Officer to do so, and the Appeals Officer rejects the request. Thus, in order to resolve her liability through an IA, X would be required to enter into a regular (non-streamlined) agreement for \$65,000. If her 2013 tax liability, after audit reconsideration, is less than \$25,000, X may seek modification of the IA.

X could resolve her liability with an OIC based on doubt as to collectability, but only if she first withdraws her OIC based on doubt as to liability with respect to the non-CDP year. With an OIC based on doubt as to collectability, X would be required to resolve the liabilities for both tax years and to offer \$45,000, her reasonable collection potential. The OIC would not be subject to modification (and audit reconsideration would no longer be available). Thus, X would be required to assume the risk of entering into an OIC in an amount that, as audit reconsideration may have shown, exceeds her total tax liability for both 2013 and 2014.

X withdraws her offer to enter into an IA, and does not pursue an OIC. The Appeals Officer issues a notice of determination for tax year 2014 upholding the levy. If X petitions the Tax Court for review of the notice of determination, the court will not have jurisdiction to determine X's 2013 liability and may find that the Appeals Officer did not abuse her discretion by refusing to suspend the CDP hearing pending the outcome of the audit reconsideration, or evaluation of an OIC based on doubt as to liability for 2013.

Similar consequences would result if X, rather than challenging the amount of her liability for a non-CDP year, is precluded from challenging a liability for a CDP year. X could qualify for a streamlined IA if the IRS determined her precluded liability was lower.

RECOMMENDATION

To ensure that meaningful CDP hearings fairly and completely resolve taxpayers' liabilities early in the collection process, the National Taxpayer Advocate recommends that Congress amend IRC § 6330 to require Appeals Officers, in considering collection alternatives in CDP cases, to suspend the hearing while a taxpayer is challenging the existence or amount of a non-CDP liability, or a CDP liability that the Appeals Officer is precluded from considering. This could be accomplished by adding a new section 6330(c)(2)(C) providing:

For purposes of this section, when a tax and period not included in the notice specified in subsections (a)(1) and (a)(3)(A) or in section (f), or an underlying tax liability precluded from being raised in the hearing by section 6330(c)(2)(B) or (c)(4)(A), is required to be included in a collection alternative, and the person requesting the hearing disputes the existence or amount of such other tax and period, the hearing shall be suspended to give the person requesting the hearing whose dispute is not intended to delay a reasonable opportunity to obtain from the Service a decision regarding the existence or amount of such tax liability, including the Service's evaluation of an offer in compromise based on doubt as to liability.

PRESENT LAW

Statutory Framework

Congress enacted the CDP provisions of IRC §§ 6230 and 6330 after extensive Senate Finance Committee hearings in which witnesses described then-current IRS tax collection practices.⁵ Michael Saltzman, a tax attorney with over 33 years of experience and the author of a seminal treatise on tax practice and procedure, described the IRS's Service Center collection practices as follows:

In the usual case, the taxpayer attempts to correspond with the service center about a notice, but does not include full payment of the amount billed. The correspondence is not acted upon and the automated collection process continues. Accordingly, the service center computer generates another notice threatening collection action, and the taxpayer, now frustrated and fearful that the IRS will levy on a bank account or other property, writes another letter. Service center personnel either fail to act on this correspondence, or act on it by contacting the taxpayer, but they sometimes fail to see to it that a hold on collection is input. As a result, a levy is sent to the bank or even to an employer.⁶

Saltzman noted that collection procedures in IRS district offices were also inadequate to protect taxpayers' rights:

As your hearings have confirmed, revenue officers in IRS district Collection Divisions have enormous discretion in taking collection action against taxpayers, including the filing of notices of federal tax liens against their property, serving levies, and seizing and selling their property. Taxpayers are deprived of their property without due process because there is no statutory procedure for any independent review of the revenue officer's collection decision....

⁵ *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance*, 105th Cong. (1998) (the first set of Senate hearings were held on Jan. 28, 29; Feb. 5, 11, and 25, 1998); *IRS Oversight: Hearings Before the S. Comm. on Finance*, 105th Cong. (1998) (the second set of Senate hearings were held on April 28, 29, 30, and May 1, 1998).

⁶ *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance*, 105th Cong. 126, 375 (1998) (Michael Saltzman's Feb. 5, 1998 testimony and responses to questions from Senator Roth).

Furthermore, whether because of restrictions on their actions or possibly the incompleteness of their training, problem resolution officers often seem more intent on closing a case than in solving taxpayer problems.⁷

IRC §§ 6320 and 6330 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 enforced collection action.⁸ The hearing before an Appeals Officer is intended to interrupt the cycle of miscommunication between taxpayers and the IRS, fueled by the IRS's automated processes — described in the Senate testimony — and to ensure that IRS employees solve taxpayer problems rather than simply close cases.

The statutory framework contemplates complete resolution of the CDP case early in the collection process, by allowing taxpayers to raise “any relevant issue relating to the unpaid tax or the proposed levy.”⁹ IRC § 6330 provides a nonexclusive list of what these issues could be:

- Spousal defenses;
- Challenges to the appropriateness of collection actions; and
- Offers of collection alternatives.¹⁰

A taxpayer may challenge the existence or amount of the underlying liability “for any tax period”¹¹ if the taxpayer “did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute the tax liability.”¹² Otherwise, a challenge to the underlying liability is a “precluded issue” and may not be raised at the CDP hearing. The following additional precluded issues may not be raised at the CDP hearing:

- An issue that was raised and considered at a previous CDP hearing or in any other previous administrative or judicial proceeding in which the person seeking to raise the issue meaningfully participated;
- A “specified frivolous submission” as defined in IRC § 6702(b)(2)(A);¹³ and
- For returns filed for partnership tax years beginning after December 31, 2017, an issue with respect to which a final determination in a proceeding brought under subchapter C of chapter 63 (pertaining to the tax treatment of partnership items) has been made.¹⁴

According to applicable Treasury regulations, “in the Appeals officer’s sole discretion, however, the Appeals officer may consider the existence or amount of the underlying tax liability, or such other precluded issues,

7 *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance*, 105th Cong. 376, 377 (1998) (Michael Saltzman’s Feb. 5, 1998 testimony and responses to questions from Senator Roth).

8 IRC §§ 6320(b), (c), 6330(b)-(d), (e).

9 IRC § 6330(c)(2)(A).

10 *Id.*

11 Treas. Reg. § 301.6330-1(e)(1) rephrases this provision as “to any tax period specified on the CDP Notice” (emphasis added).

12 IRC § 6330(c)(2)(B). Treas. Reg. § 301.6330-1(e)(1) clarifies that “underlying liability” includes a liability reported on a self-filed return, and “for any tax period” means “any tax period specified on the CDP Notice.”

13 IRC § 6330 (c)(4)(B). Tax Relief and Health Care Act of 2006 (TRHCA), Pub. L. 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. Rept. 109-336, at 49-50 (2006).

14 IRC § 6330(c)(4)(A)-(C), as amended by Pub. L. 114-74, Title XI, § 1101(d), (g), 129 Stat. 637, 638 (Nov. 2, 2015).

at the same time as the CDP hearing.¹⁵ Nothing in the statute or regulations specifies the extent to which an Appeals Officer may, or is required to, take into consideration matters pertaining to non-CDP years. IRC § 6330 was amended in 2006 to allow the Appeals Officer to disregard requests for CDP hearings that are made to delay collection.¹⁶

At the CDP hearing, an IRS Appeals Officer:

- Verifies that the requirements of any applicable law or administrative procedure have been met;¹⁷
- Considers issues raised by the taxpayer, such as spousal defenses, alternatives to collection, and under circumstances discussed below, the underlying tax liability;¹⁸ 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.”¹⁹

At the conclusion of the CDP hearing, the Appeals Officer issues a notice of determination.²⁰ Neither Congress nor the IRS has ever imposed a timeframe within which the Appeals Officer must make a determination. On the contrary, to preserve the meaningfulness of CDP hearings, Congress cautioned that “a proposed collection action should not be approved solely because the IRS shows that it has followed appropriate procedures.”²¹

In 1999, the IRS and Treasury issued temporary regulations interpreting the new CDP provisions and received comments from the public.²² As the preamble to the final regulation notes:

One commentator requested that the final regulations establish formal procedures for the conduct of a CDP hearing as well as procedures for the admission and preservation of evidence to be considered by Appeals. Treasury and the IRS have declined to adopt this comment. Section 6320 and section 6330 are intended to give all taxpayers a right to an impartial Appeals review of the filing of a NFTL [notice of federal tax lien] or of an intended levy action, with an additional right of judicial review of the Appeals determination. Section 6330(c) (applicable to both sections) and the proposed regulations under section 6320 and section 6330 (as modified by final regulations) already set out the specific requirements, including the issues to be considered, for a CDP hearing and require that Appeals issue a written determination (Notice of Determination) setting forth Appeals’ findings and decisions. *Due to the varied circumstances of taxpayers and the varied situations in which the filing of a NFTL or an intended levy action may arise, the final regulations provide flexibility regarding the manner in which a CDP hearing may be conducted.*²³

15 Treas. Reg. § 301.6330-1(e)(3), Q&A- E11.

16 TRHCA § 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.”

17 IRC § 6330(c)(1), (c)(3)(A).

18 IRC § 6330(c)(2), (c)(3)(B).

19 IRC § 6330(c)(3)(C).

20 Treas. Reg. § 301.6330-1(e)(3), Q&A- E8.

21 S. REP. No. 105-174, at 68 (1998).

22 T.D. 8809, 1999-7 I.R.B. 27, *Notice and Opportunity for Hearing Before Levy*, 64 FR 3405-01.

23 T.D. 8980, 2002-6 I.R.B. 477, *Notice and Opportunity for Hearing Before Levy*, 67 FR. 2549-01 (emphasis added).

The only reference in the regulations to timeframes for making CDP determinations makes clear that there is no specified timeframe:

Q–E9. Is there a period of time within which Appeals must conduct a CDP hearing or issue a Notice of Determination?

A–E9. No. Appeals will, however, attempt to conduct a CDP hearing and issue a Notice of Determination as expeditiously as possible under the circumstances.²⁴

The regulation does not define what is meant by “expeditious,” but a standard dictionary definition is “acting or done in a quick *and efficient* way.”²⁵ A notice of determination that fails to completely and fairly resolve a CDP case creates *inefficiency* by generating downstream work. More importantly, if the taxpayer is not able to resolve with the IRS the amount of his or her liabilities, and include the correct amount of those liabilities in a collection alternative, the IRS may collect tax improperly.

The taxpayer, within 30 days of the Appeals Officer’s determination, may petition the Tax Court for review of the determination.²⁶ The Tax Court has jurisdiction to review the Appeals Officer’s determination with respect to taxable periods included in the notice of determination.²⁷

Internal Revenue Manual (IRM) Provisions

Recognizing that a taxpayer’s liability may not have been conclusively determined at the time of the CDP hearing, the IRM identifies several situations in which the Appeals employee must suspend the hearing pending the outcome of other proceedings that involve a CDP year. For example, if a taxpayer who has requested a CDP hearing seeks innocent spouse relief or files a bankruptcy petition, the CDP hearing will be suspended.²⁸ The National Taxpayer Advocate recommended that Appeals Officers be required to suspend CDP hearings when taxpayers seek audit reconsideration of a CDP year.²⁹ The IRS has partially implemented this recommendation by requiring suspension of a CDP hearing in two situations:

- When a taxpayer’s amended return results in audit reconsideration of a CDP year;³⁰ or
- When an original return for a CDP year filed with Appeals is referred for processing to the Automated Substitute for Return Program because the assessed liability was based on a substitute for return.³¹

24 Treas. Reg. § 301.6330-1(e)(3), Q&A- E9.

25 MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/expeditious> (emphasis added) (last visited Dec. 19, 2016).

26 IRC §§ 6230(c), 6330(d).

27 Any determination an Appeals Officer makes with respect to a precluded issue is not part of the notice of determination and is not subject to judicial review. Treas. Reg. § 301.6330-1(e)(3), Q&A- E11. Moreover, the taxpayer can ask the court to consider only an issue that was raised in the taxpayer’s IRC § 6330 hearing. Treas. Reg. § 301.6330-1(f), Q&A- E3. The Tax Court has jurisdiction to review an Appeals Officer’s determination, under IRC § 6330(g), to disregard all or part of a hearing request because it was based on a frivolous position or reflects a desire to delay or impede the administration of federal tax laws. *Thornberry v. Comm’r*, 136 T.C. 356 (2011).

28 See IRM 8.22.5.8 (4), *Substantive Contact Letters (SCL)* (Nov. 8, 2013) (containing a table showing common reasons why a CDP case would be suspended).

29 National Taxpayer Advocate 2004 Annual Report to Congress 451, 452, Key Legislative Recommendation: *Collection Due Process Hearings*.

30 See IRM 8.22.8.7.1.1(1), *Audit of the Taxpayer’s Self-filed Return* (Nov. 8, 2013).

31 See IRM 8.22.8.7.2, *ASFR/SFR (Automated Substitute for Return/Substitute for Return)* (Sept. 23, 2014).

Appeals Officers appear to have discretion to suspend CDP hearings in other situations in which audit reconsideration is being sought for a CDP year.³²

However, the IRM does not provide for suspending the CDP hearing when the tax year for which the taxpayer seeks reconsideration is a non-CDP year. This seems anomalous, considering that:

- IRC § 6330 permits a taxpayer to raise “any relevant issue relating to the unpaid tax or the proposed levy;”³³ and
- Applicable regulations give Appeals Officers discretion to consider precluded issues, including the existence or amount of the underlying tax liability for a CDP year, which is arguably more far-reaching authority than the authority to suspend the hearing.³⁴

Moreover, in considering collection alternatives, Appeals Officers are required to include all open tax periods in the resolution, even years that are not part of the CDP hearing.³⁵ The IRM identifies only two situations in which Appeals Officers may consider non-CDP years, both relating to collecting the tax:

- Where an overpayment from a non-CDP period may be available to pay the unpaid tax for the CDP period as long as it does not involve a liability determination of the non-CDP period;³⁶ and
- Where a carryover adjustment from a non-CDP period has already been made and may affect the tax due for the CDP year.³⁷

Case Law

In *Jones v. Commissioner*, a taxpayer requested a CDP hearing and on the same day requested audit reconsideration for the same years as the CDP years.³⁸ He requested that the Appeals Officer await the outcome of the audit reconsideration so that he could better evaluate his collection alternatives. The court, noting that Treasury regulations provide that an Appeals Officer will “attempt to conduct a * * * [section 6330 hearing] and issue a Notice of Determination as expeditiously as possible under the circumstances,” found that the Appeals Officer did not abuse his discretion “by declining to delay his determinations to await the uncertain outcome of petitioner’s eleventh-hour request for audit

32 IRM 8.22.8.5 (5) *At Issue, Precluded or Precluded but Considered Outside of CDP* (Nov. 8, 2013) provides: [i]f the precluded liability is an audit assessment, it is generally quicker for the taxpayer to request an audit reconsideration from one of the designated Campus locations. 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.

33 IRC § 6330(c)(2)(A). Not only does the IRM not contemplate suspension of the hearing, but IRM 8.22.5.5.4, *The Merits of a Non-CDP Tax Liability* (Sept. 30, 2014) provides “[t]axpayers may not raise a non-CDP tax period liability by characterizing it as a ‘relevant issue’ under IRC 6330(c)(2)(A).”

34 Treas. Reg. § 301.6330-1(e)(3), Q&A- E11.

35 IRM 8.22.7.1(2) *Overview* (Nov. 5, 2013), provides that “[a]ll open tax periods must be included when resolving a case through: Installment Agreement (IA)[,] Offer in Compromise (OIC)[, and] Currently not Collectible (CNC).”

36 See IRM 8.22.8.23.1, *Overpayment of a Non-CDP Tax Liability* (Sept. 23, 2014), providing, in part, “[a] non-CDP tax period may be considered if it does not involve an evaluation of the merits of the liability. The availability of an overpayment from a non-CDP period as a source of payment of the unpaid tax for the CDP period may be raised as a relevant issue under IRC 6330(c)(2)(A).” See also IRS Chief Counsel Notice CC-2011-021 (Sept. 19, 2011), noting IRS Chief Counsel’s position that “[t]he availability of an overpayment from a non-CDP period as a source of payment of the unpaid tax for the CDP period, however, may be raised as a relevant issue under section 6330(c)(2)(A) when the Service has already agreed that the taxpayer is entitled to the overpayment.”

37 See IRM 8.22.8.23.2, *Net Operating Loss and Carryover Adjustments* (Sept. 23, 2014).

38 T.C. Memo. 2007-142.

reconsideration and the uncertain outcome of any audit reconsideration that might be granted.”³⁹ The court granted the government’s motion for summary judgment. The opinion notes that according to the taxpayer, audit reconsideration was actually ongoing while the case was docketed in the Tax Court.⁴⁰ Thus, it is possible that the audit reconsideration resulted in an adjustment to the taxpayer’s liability and that the IRS collected more than the taxpayer’s adjusted liability – an unfair and inefficient outcome.

In *Baltic v. Commissioner*, at the conclusion of a CDP hearing, the Appeals employee determined to postpone collection by levy pending the outcome of the taxpayers’ requested audit reconsideration of the CDP year, and pending the IRS’s evaluation of the taxpayers’ OIC based on doubt as to liability for non-CDP years.⁴¹ However, the Appeals employee sustained the lien filing. The taxpayers argued that the Appeals employee’s refusal to consider the OIC herself, or at least to wait before issuing the notice of determination until the audit reconsideration and OIC had been evaluated, was an abuse of discretion. Relying on the *Jones* case, and noting “[t]he settlement officer here was just heeding the exhortation of the applicable regulation to issue a notice of determination as expeditiously as possible,” the court granted the government’s motion for summary judgment.⁴² As in the *Jones* case, this outcome may have been more rapid than awaiting consideration of proposed collection alternatives, but it was not necessarily efficient. Thus, it is unclear whether the notice of determination was actually issued “expeditiously.”

In *Lister v. Commissioner*, the Appeals Officer issued a notice of determination for tax years (TYs) 1993 and 1994 and the taxpayer sought Tax Court review of TYs “1993 through present.”⁴³ The Tax Court held it had jurisdiction to review the notice of determination with respect to TYs 1993 and 1994, but “[i]f the Appeals Office did not make a determination with respect to a particular taxable period under section 6330, the absence of a determination is grounds for dismissal of a petition regarding such period.”⁴⁴

However, in *Freije v. Commissioner*, the Tax Court held it would consider facts and issues arising in non-CDP years where relevant to a claim that the tax in a CDP year had already been paid.⁴⁵ In *Perkins v. Commissioner*, the Tax Court, relying on *Freije*, held that the court has jurisdiction to review a determination by Appeals about the availability of an overpayment credit shown on the account of a non-CDP year as a source of payment of the unpaid tax subject to the CDP hearing.⁴⁶ The Appeals Officer’s determination about whether the period of limitations on refunds should have been suspended in a non-CDP year under IRC § 6511(h), which would have allowed an overpayment arising in the non-CDP year to be applied to satisfy the CDP liability, was an abuse of discretion.⁴⁷

39 *Jones v. Comm’r*, T.C. Memo. 2007-142, slip op. at 2, quoting from Treas. Reg. § 301.6330-1(e)(3), Q&A- E9.

40 *Id.* at n. 3.

41 129 T.C. 178 (2007).

42 *Baltic v. Comm’r*, 129 T.C. 178, 183 (2007).

43 T.C. Memo. 2003-17, slip op. at 3.

44 *Id.* slip op. at 4.

45 125 T.C. 14, 24 (2005).

46 T.C. Memo. 2008-103.

47 *Id.* In *Weber v. Comm’r*, 138 T.C. 348, 368-69 (2012), the Tax Court clarified it only has jurisdiction to consider an overpayment credit that is already “available” because it has already been determined by the IRS or a court but not jurisdiction to make “available” a credit by determining the liability for a non-CDP period.

REASONS FOR CHANGE

The purpose of enacting the CDP provisions was to provide a mechanism for considering all collection alternatives and resolving covered liabilities early in the collection process. Practice has shown that many CDP cases involve taxpayers with liabilities for non-CDP years. Of the 22,252 taxpayers whose CDP cases were closed in FY 2016, 9,876 (44 percent) also had liabilities for non-CDP years.⁴⁸

Experience shows that resolution of the tax liability of non-CDP years can impact the collection alternatives available for the CDP year. In considering collection alternatives during a CDP hearing, Appeals Officers must include all open years in the resolution, including non-CDP years. Non-CDP years may be eligible for audit reconsideration or capable of resolution through an OIC based on doubt as to liability. Unless a taxpayer claims a net operating loss or credit carryover from a non-CDP year to a CDP year, an Appeals Officer is not required to consider or suspend the hearing to permit the taxpayer to attempt to resolve with the IRS the amount of tax liability for a non-CDP year. It does not appear the Tax Court would have jurisdiction to review an Appeals Officer's decision not to suspend the CDP hearing in this situation. Taxpayers may also seek to challenge the underlying liability for a CDP year, but if such a challenge is a precluded issue, the Appeals Officer is not required to consider it or to suspend the CDP hearing to allow the taxpayer to seek resolution through audit reconsideration, or through an OIC based on doubt as to liability.

If Appeals Officers are not required to suspend the CDP hearing in these situations while appropriate collection alternatives can be identified, the IRS may be improperly collecting tax, and the CDP hearing will not be an expeditious resolution of the case because there will be costly rework downstream. Moreover, taxpayers may be required to choose between seeking adjustment or compromise of their liability on one hand, and obtaining appropriate resolution of their tax liabilities with IRS Appeals on the other hand. Placing taxpayers in this situation undermines their *right to quality service, right to challenge the IRS's position and be heard, right to finality*, and *right to a fair and just tax system*.⁴⁹ Suspending CDP hearings will not inappropriately delay collection. Appeals Officers are free to ignore a CDP hearing request or issues raised in a CDP hearing when it concludes either is designed to delay collection.

EXPLANATION OF RECOMMENDATION

IRC § 6330(c)(2)(A)(iii) requires the Appeals Officer conducting a CDP hearing to consider offers of collection alternatives. A new provision, IRC § 6330(c)(2)(C), could provide:

For purposes of this section, when a tax and period not included in the notice specified in subsections (a)(1) and (a)(3)(A) or in section (f), or an underlying tax liability precluded from being raised in the hearing by section 6330(c)(2)(B) or (c)(4)(A), is required to be included in a collection alternative, and the person requesting the hearing disputes the existence or amount of such other tax and period, the hearing shall be suspended to give the person requesting the hearing whose dispute is not intended to delay a reasonable opportunity to obtain from the Service a decision regarding the existence or amount of such tax liability, including the Service's evaluation of an offer in compromise based on doubt as to liability.

48 TAS Research analysis of IRS CDW, IMF, Transaction History Table and Status History Table, for FY 2016. TAS provided the IRS with the syntax used to retrieve this data, but the IRS could neither verify nor disprove the results. IRS Appeals response to TAS fact check (Dec. 19, 2016); Small Business/Self-Employed division response to TAS fact check (Dec. 20, 2016).

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

The recommendation would clarify that Appeals Officers are expected to consider existing procedures for resolving outstanding liabilities in non-CDP years, dissolving the current artificial distinction between CDP years and non-CDP years for purposes of evaluating collection alternatives. The recommendation would also require Appeals Officers to suspend a CDP hearing where the taxpayer's challenge of the amount or existence of a liability for a CDP year is a precluded issue. Thus, taxpayers could work with other IRS functions to ensure that the existence and amount of all liabilities required to be included in a collection alternative are correct. Because IRC § 6330(c)(3)(B) cross references IRC § 6330(c)(2), the new provision would require the Appeals Officer, in making a determination, to take into consideration any challenges to underlying tax liabilities that require suspending the CDP hearing. Under IRC § 6330(d)(1), the Tax Court would have jurisdiction to review the IRS's actions in fashioning collection alternatives. The recommendation would not require Appeals Officers to consider non-CDP liabilities or precluded issues, but only to suspend the CDP hearing to permit the taxpayer to seek resolution of those liabilities. The recommendation would not confer jurisdiction on the Tax Court to re-determine a taxpayer's liability for non-CDP years, or to re-determine a liability for a CDP year where such liability is a precluded issue, but only to review the Appeals Officer's decision to not suspend a CDP hearing pending resolution of the taxpayer's liability for non-CDP years or a CDP year in which the liability is a precluded issue.