Department of the Treasury **Internal Revenue Service** **Office of Chief Counsel**

Notice

CC-2006-019

August 18, 2006

Subject: Collection Due Process Cases **Cancel Date**: Upon incorporation into CCDM

Purpose:

This Notice updates and replaces CC-2003-016, known as the Collection Due Process (CDP) Handbook, which provided guidance on the handling of CDP cases arising under I.R.C. §§ 6320 (liens) and 6330 (levies). These sections are a codification of section 3401, the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 685 (1998). The CDP provisions became effective January 19, 1999. Final regulations became effective January 18, 2002, and apply to all liens and levies on or after January 19, 1999. Proposed regulations updating the final regulations were published on September 16, 2005. The text that follows will appear as an item on the Procedure and Administration Website. Significant new cases will be digested on the Procedure and Administration Website.

This Notice also incorporates and supersedes:

- CC-2006-008, Collection Due Process Administrative Record;
- CC-2006-005, Change in Litigating Position Regarding Challenges to Self-Reported Liability in Collection Due Process Cases;
- CC-2005-008, Updated Sample Stipulated Decision Documents and Changes in Pre-Review of Briefs and Decision Documents in CDP Cases;
- CC-2005-007, Motions to Permit Levy Under I.R.C. § 6330(e)(2);
- CC-2004-031, Litigating Cases Brought Under I.R.C. §§ 6320(c) and 6330(d); and
- CC-2003-031, Face-to-Face Conferences with Appeals in Collection Due Process Cases.

/s/
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I. Background Material

The Treasury Regulations implementing sections 6320 and 6330 are at Treas. Reg. § 301.6320-1 and Treas. Reg. § 301.6330-1. The Congressional report explaining the final version of sections 6320 and 6330 is Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998). The Internal Revenue Manual (IRM) provisions addressing sections 6320 and 6330 are at IRM sections 5.1.9 (Collection Appeal Rights) and 8.7.2 (Special Collection Appeals Programs).

Treasury Regulation sections 301.6320-1 and 301.6330-1 have been updated by proposed regulations, published at 70 F.R. 54681 (Sept. 16, 2005) and 70 F.R. 54687 (Sept. 16, 2005). Note that these are only proposed regulations at this time. Some of the revisions include:

- The written request for a CDP hearing must include a statement of the reasons for disagreement with the notice of federal tax lien or proposed levy.

- A taxpayer (or authorized representative) who fails to sign a CDP hearing request filed on his behalf must provide written affirmation of his intent to request a hearing within a reasonable time after the IRS's request for affirmation, or a CDP hearing will be denied with respect to the nonsigning taxpayer.

- The proposed regulations clarify when an Appeals employee is considered to have "prior involvement" with a taxpayer for purposes of the impartiality requirement.

- The proposed regulations clarify that a face-to-face conference will not be granted to a taxpayer who raises solely frivolous arguments or who proposes only collection alternatives for which such taxpayer is ineligible.

- For a taxpayer to obtain judicial review of an issue, that issue must be raised during the CDP hearing and the taxpayer must submit evidence with respect to that issue after being given a reasonable opportunity to do so.

- The proposed regulations clarify what constitutes the administrative record for purposes of judicial review of a CDP determination.

- A taxpayer must be notified of the right to have an equivalent hearing in all cases when a tardy CDP hearing request is received. The request for an equivalent hearing must be in writing and made within one year commencing the day after the date of the CDP notice.

II. Coordination of CDP Cases with the National Office

Pre-review is required for only those briefs, motions, other Tax Court documents (including motions for summary judgment) and defense letters raising novel or significant issues. *See* CCDM Exhibit 35.11.1-1(18). Issues that may be considered novel or significant include (but are not limited to):

- administrative record rule (*i.e.*, the rule that court review for abuse of discretion is limited to the administrative record);

- underlying tax liability involves a TEFRA partnership;

- abatement of interest under section 6404(h);

• nonroutine bankruptcy issues;

• nonroutine issues involving the standards for acceptance, rejection, and termination of offers in compromise and installment agreements; and

• nonroutine issues involving the conduct of the administrative hearing.

Pre-review is also required for documents requesting sanctions against opposing counsel under section 6673(a)(2) and for responses to requests for sanctions against Chief Counsel attorneys. Stipulated decision documents require review only where there is a significant departure from the sample decision documents shown in section VI.I, *infra*.

Field attorneys seeking legal advice regarding CDP may contact Branch 1 of the Collection, Bankruptcy & Summonses Division, Office of the Associate Chief Counsel (Procedure & Administration) (CC:PA:CBS:BR1), at 202-622-3610.

III. Assisting Appeals in Reducing CDP Inventory

Chief Counsel Notice N(30)000-337a, dated May 24, 2000, announced a Chief Counsel program to assist the Office of Appeals in its efforts to reduce its significant CDP inventories. The program entails providing a dedicated Counsel resource to Appeals offices to resolve legal questions arising in CDP hearings. Each SB/SE Associate Area Counsel designates experienced attorneys to be available to provide prompt oral or written legal advice in resolving CDP issues. SB/SE Division Counsel, in turn, coordinates complicated or novel issues with National Office CDP experts. In order to ensure the uniformity of advice being given, SB/SE Division Counsel and Appeals should identify recurring legal issues, and SB/SE Division Counsel should forward copies of any advice given on such issues to CC:PA:CBS:BR1.

IV. Sections 6320 and 6330

A. CDP Notice Requirements

1. Notice of federal tax lien - section 6320

Prior to January 19, 1999, there was no requirement in the Code that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) was filed against that taxpayer's property. RRA section 3401 added section 6320 to the Code, which requires the Service to provide written notification (CDP notice) to the taxpayer of the first filing of a NFTL for a specific tax period and of that taxpayer's right to a CDP hearing not more than five business days after the filing of the NFTL. In practice, this notification is given by Letter 3172 - Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320.

2. Prior to levy - section 6330

Prior to January 19, 1999, taxpayers had no statutory hearing rights in connection with the section 6331(d) requirement that the Service provide the taxpayer with a notice of intent to levy 30 days before levy. RRA section 3401 added section 6330 to the Code, which requires the Service (except in the case of jeopardy levies or levies on State income tax refunds) to provide written notification (CDP notice) of its intent to levy on any property or right to property of any taxpayer at least 30 days

prior to the levy and inform the taxpayer of the right to a CDP hearing. In practice, this notification is given by either Letter 1058 - Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing, or LT 11 - Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing. The Letter 1058 is issued by field collection, in cases assigned to a Revenue Officer. The LT-11 is the culminating notice in a series of collection notices issued from a Service Center by the Automated Collection System (ACS). Most delinquent tax accounts are handled by ACS. Cases meeting certain priority criteria, *e.g.*, certain dollar amounts, are handled by field collection.

In practice, a taxpayer is usually given a non-CDP notice of intent to levy under section 6331(d) prior to being given a CDP notice of intent to levy and right to a hearing under section 6330. The taxpayer can only request a CDP hearing from the section 6330 CDP notice.

3. Jeopardy levies and state income tax refunds

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

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

4. Notice issuance

A CDP notice must be given in person, left at the taxpayer's dwelling or usual place of business, or delivered to the taxpayer's last known address by certified or registered mail. The CDP levy notice must also be sent return receipt requested. If the CDP notice is not properly sent, the 30-day period for requesting a hearing is not started, and the taxpayer is entitled to a substitute notice. Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A12, 301.6330-1(a)(3) Q&A-A10. A CDP lien notice (Letter 3172) is valid even if given before the NFTL is actually filed. Muldavin v. Commissioner, T.C.

Memo. 2002-182. Failure to provide an explanation of the appeals and collection process with the CDP notice is not harmful or prejudicial if the taxpayer knows of and pursues the taxpayer's right to administrative and judicial review. Klawonn v. Commissioner, T.C. Memo. 2002-27. A taxpayer's agreement with the appeals officer to address a non-CDP tax year in his CDP proceeding is not a substitute for the express CDP notice requirements prior to levy for the non-CDP period. Karara v. Commissioner, T.C. Memo. 2004-133.

5. Nominees and other third parties

A CDP lien notice will only be given to the person described in section 6321 who is named on the NFTL. Treas. Reg. § 301.6320-1(a)(2) Q&A-A1. A CDP levy notice will only be given to the person described in section 6331(a). Treas. Reg. § 301.6330-1(a)(3) Q&A-A1. In other words, CDP rights are only available to the delinquent taxpayer—the person liable to pay the tax due after notice and demand who refuses or neglects to pay. The IRS will not give an opportunity for a CDP hearing to a known nominee of, or person holding property of, the taxpayer. Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A7, 301.6330-1(a)(3) Q&A-A2; Forman v. United States Dept. of Treasury, 2005-1 USTC ¶ 50,418 (N.D. Ill.).

B. Collection Due Process Hearing

1. One hearing opportunity per tax and period

Sections 6320(b)(2) and 6330(b)(2) each provide that a taxpayer is entitled to only one CDP hearing with respect to the tax and tax period(s) covered by the CDP notice. This means that a taxpayer may have an opportunity for one CDP lien hearing, *see* Investment Research Associates, Inc. v. Commissioner, 126 T.C. No. 7 (2006) (upholds regulations only allowing hearing from filing of first NFTL), and one CDP levy hearing for each tax and tax period. Section 6320(b)(4) provides that, to the extent practicable, CDP hearings with respect to liens shall be held in conjunction with CDP hearings with respect to levies under section 6330. A taxpayer may receive more than one CDP hearing with respect to the same tax and period when there has been an additional assessment of tax (not including interest or penalty accruals) for that period or an additional accuracy-related or filing-delinquency penalty has been assessed. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D1, 301.6330-1(d)(2) Q&A-D1. In CDP cases when the Tax Court has imposed a penalty under section 6673(a)(1), for proceedings instituted primarily for delay, etc., such penalty is collected in the same manner as a tax. I.R.C. § 6673(b)(2). Thus, sections 6330(a)(1) and (3) require a new CDP notice be given to a taxpayer when the Service intends to levy to collect the amount of the section 6673(a)(1) penalty.

2. Procedures for requesting a CDP hearing

A Form 12153, Request for a Collection Due Process Hearing, is included with the CDP notice sent to the taxpayer. Use of a Form 12153 to request a CDP hearing is not required, but the request must be in writing and include the taxpayer's name, address, and daytime telephone number, and be dated and signed by either the taxpayer or the taxpayer's authorized representative. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C1, 301.6330-1(c)(2) Q&A-C1. The section 6320 hearing request must be submitted no later than 30 days after the expiration of five business days after the

date the NFTL is filed. The starting date is the actual filing date of the NFTL, not the date the NFTL was sent to the recording office for filing. Treas. Reg. § 301.6320-1(b)(1). The section 6330 hearing request must be submitted no later than 30 days from the date of the CDP notice (provided the notice was mailed on or before that date). Treas. Reg. § 301.6330-1(b)(1). A taxpayer whose timely unsigned hearing request was signed by an unauthorized representative, including a spouse, may ratify such request. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C1(iv), 301.6330-1(c)(2) Q&A-C1(iv).

Any written request for a CDP hearing should be filed with the Service's office that issued the CDP notice at the address indicated on the notice. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C6, 301.6330-1(c)(2) Q&A-C6. If this address (or other address authorized in the regulations) is used and the written request is postmarked within the applicable 30-day response period, then in accordance with section 7502, the request will be considered timely even if it is not received by the Service's office that issued the CDP notice until after the 30-day period. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C4, 301.6330-1(c)(2) Q&A-C4. Section 7503 applies if the last day of the 30-day response period falls on a weekend or legal holiday. *Id.* If the request is not sent to the address on the notice (*e.g.*, if it is sent to Appeals instead), it must be received by the office issuing the notice within the 30-day period in order to be timely. I.R.C. § 7502(a)(2). The 30-day period is not extended for taxpayers residing outside the United States. Treas. Reg. §§ 301.6320-1(c)(2) Q&A-C5, 301.6330-1(c)(2) Q&A-C5; Sarrell v. Commissioner, 117 T.C. 122 (2001).

A taxpayer whose hearing request is untimely is not entitled to a CDP hearing, but may receive an "equivalent hearing." Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1). A taxpayer may not appeal to a court any decision (issued in the form of a decision letter) made by an appeals or settlement officer ("appeals officer") as a result of an equivalent hearing. Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I5, 301.6330-1(i)(2) Q&A-I5; Orum v. Commissioner, 123 T.C. 1 (2004); Moorhous v. Commissioner, 116 T.C. 263 (2001); Johnson v. Commissioner, 2000-2 USTC ¶ 50,591 (D. Ore. 2000). *Cf.* Craig v. Commissioner, 119 T.C. 252 (2002) (decision letter issued following taxpayer's timely CDP hearing request was appealable "determination" for purposes of section 6330(d)(1)). The Tax Court has accepted the use of USPS Form 3877, certified mailing list, as direct evidence of both the fact and date of mailing in cases when the issue of timeliness is raised in litigation. Magazine v. Commissioner, 89 T.C. 321, 327 n.8 (1987), *nonacq. at* 1988-2 C.B. 1 (non-acquiescence on separate issue); Figler v. Commissioner, T.C. Memo. 2005-230.

3. Effect of requesting a CDP hearing

a. Statute of limitations

The limitation periods under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), and section 6532 (relating to other suits) with respect to the taxes and periods listed on the CDP notice are suspended beginning on the date the Service receives a timely hearing request. I.R.C. § 6330(e)(1); Treas. Reg. §§ 301.6320-1(g)(2) Q&A-G1, 301.6330-1(g)(2) Q&A-G1; Boyd v. Commissioner, 117 T.C. 127 (2001); Golden v. Commissioner, T.C. Memo. 2005-170. The suspension period ends either on the date the Service receives a written withdrawal of the hearing request, when

the determination resulting from the CDP hearing becomes final by expiration of the time for seeking review, or upon the exhaustion of any right of appeal. Boyd v. Commissioner*, supra.*

Section 6330(e)(1) further provides that, in no event shall any of the limitation periods expire before the 90th day after the day on which there is a final determination with respect to such hearing. If there are fewer than 90 days left in any limitations period after the suspension ends, the remaining limitations period will be 90 days. Treas. Reg. §§ 301.6320-1(g)(3), 301.6330-1(g)(3). This means that if less than 90 days remain on the limitations period after the suspension ends, the difference between the number of remaining days and 90 days will be added to the limitations period. There is no automatic 90-day addition to the period.

b. Levy action and injunctive relief

A timely CDP hearing request generally suspends any levy action to collect liabilities listed on the CDP notice for the period during which the hearing and appeals therein are pending. I.R.C. § 6330(e)(1). A levy will not be suspended while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Service has shown good cause not to suspend the levy. I.R.C. § 6330(e)(2). *See* section V.I.7, *infra*. The Service must file a motion with the court requesting a good cause determination before proceeding with the levy. A motion to permit levy should be considered in any CDP case involving a taxpayer who raises solely frivolous arguments. These cases represent an abuse of the CDP process and the suspension of the Service's levy authority in these cases serves no legitimate purpose. *See* Burke v. United States, 121 T.C. 189 (2005); Howard v. United States, T.C. Memo. 2005-100. *See also* Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash.) (court found "good cause" when taxpayer corporation repeatedly failed to pay employment taxes on time).

The Anti-injunction Act, section 7421, generally prohibits suits to restrain the assessment and collection of any tax. The beginning of a levy or proceeding, however, may be enjoined by the proper court, including the Tax Court, during the time the suspension under section 6330(e)(1) is in force. The Tax Court cannot enjoin any action or proceeding unless a timely appeal of a notice of determination has been filed with the Tax Court and then only with respect to the unpaid tax subject to proposed levy. I.R.C. § 6330(e)(1).

c. Permitted collection actions

Section 6330(e)(1) only prohibits levy if a proposed levy is the basis of the CDP hearing. Therefore, the Service may levy for taxes covered by a CDP lien notice if the section 6330 notice requirement for those taxes and periods has been satisfied. Treas. Reg. §§ 301.6320-1(g)(2) Q&A-G3, 301.6330-1(g)(2) Q&A-G3. In addition, nothing in section 6320 or 6330 prohibits the filing of a NFTL. *See* Beery v. Commissioner, 122 T.C. 184 (2004). If a taxpayer requests a CDP hearing under section 6320 or 6330, the Service may file a NFTL for the same tax and periods at another recording office or a NFTL for tax periods or taxes not covered by the CDP notice. Other permitted nonlevy collection actions include

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

4. Hearing requirements

a. CDP hearings are informal

A CDP hearing is informal and the formal hearing requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., do not apply. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6. *See also* Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006); Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621 (6th Cir. 2005); Cox v. Commissioner, 126 T.C. No. 13 (2006); Davis v. Commissioner, 115 T.C. 35 (2000). Accordingly, recordings of telephone or face-to-face conferences are not required. Living Care Alternatives, 411 F.3d at 625; Rennie v. Internal Revenue Service, 216 F. Supp. 2d 1078, 1079 n. 1 (E.D. Cal. 2002). *See also* Jewett v. United States, 292 F. Supp. 2d 962 (N.D. Ohio 2003) (CDP hearing is informal and tape recording of all CDP hearings is not required); Kitchen Cabinets, Inc. v. United States, 2001-1 USTC ¶ 50,287 (N.D. Tex. 2001). *Contra* Mesa Oil, Inc. v. United States, 2001-1 USTC ¶ 50,130 (D. Colo. 2000) (suggests that CDP hearings must be recorded verbatim), *nonacq. at* AOD-2001-5, 2001-34 I.R.B. 174 (non-acquiescence on this point). While recording of all CDP conferences is not required, the taxpayer does have the right to record a face-to-face CDP conference in accordance with section 7521(a)(1). Keene v. Commissioner, 121 T.C. 8 (2003).

Taxpayers do not have the right to subpoena and examine witnesses at the hearing. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6; Robinette v. Commissioner, 123 T.C. 85, 98 (2004), *rev'd on other grounds*, 439 F.3d 455 (8th Cir. 2006). The appeals officer is not required to give the taxpayer a set of procedures governing the hearing. Lindsay v. Commissioner, T.C. Memo. 2001-285. Taxpayers do not have the right to subpoena documents, Barnhill v. Commissioner, T.C. Memo. 2002-116; Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000), or examine them, Watson v. Commissioner, T.C. Memo. 2001-213. Section 6330(c)(1) does not require the appeals officer to provide the taxpayer with copies of the documents the appeals officer obtains to verify that the requirements of any applicable law or administrative procedure were met. Robinette v. Commissioner, *supra*; Nestor v. Commissioner, 118 T.C. 162 (2002); Brandenburg v. Commissioner, T.C. Memo. 2005-249; Gillett v. United States, 233 F. Supp. 2d 874, 883-884 (W.D. Mich. 2002); Danner v. United States, 208 F. Supp. 2d 1166 (E.D. Wash. 2002) (applying APA section 555(c) and section 6330); Reinhart v. Internal Revenue Service, 89 AFTR 2d 2517 (E.D. Cal. 2002). The court in Nestor wrestled with, but did not decide, whether an appeals officer is required by section 6203 to give a taxpayer a copy of his or her transcript of account if the taxpayer requests one. Since the Nestor opinion was issued, Appeals has decided to give a MFTRA-X (literal) transcript to each taxpayer who requests one.

Despite the informality of the hearing and the lack of a transcript and formal record, there must be a sufficient record, stating the appeals officer's findings and rationale, to permit review for abuse of discretion. The notice of determination must discuss all issues raised and should state why arguments and collection alternatives raised by the taxpayer were rejected. *See* Robinette v. Commissioner, 439 F.3d 455, 461-62 (8th Cir. 2006); Living Care Alternatives, 411 F.3d 621, 629 (6th Cir. 2005); Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004); Cox v. Commissioner, 126 T.C. No. 13 (2006). There must be sufficient documentation in the record to show what happened at the administrative hearing. Cox, *supra* (administrative file "… provides a singularly clear portrayal of administrative developments as they occurred.") If the record is insufficient to permit abuse of discretion review, the case may need to be remanded to Appeals. *See* section V.I.4.a., *infra*.

The appeals officer has discretion regarding when to conclude a CDP hearing. In Murphy v. Commissioner, 125 T.C. 301 (2005), the Tax Court held that the appeals officer did not prematurely conclude the CDP hearing when the determination was made 8 months after the hearing commenced.

b. Face-to-face conference not required

The regulations provide that a CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications, or some combination thereof. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D6, 301.6330-1(d)(2) Q&A-D6. *See* Olsen v. United States, 414 F.3d 144 (1st Cir. 2005); *see also* Katz v. Commissioner, 115 T.C. 329 (2000) (combination of telephone calls and written letters); Stephens v. Commissioner, T.C. Memo. 2005-183; Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000) (solely written correspondence if the taxpayer consents). Therefore, all communications between the taxpayer and the appeals officer between the time of the request for the hearing and the issuance of the notice of determination are part of the CDP hearing. *See* TTK Management v. United States, 2001-1 USTC ¶ 50,185 (C.D. Cal. 2000).

If a taxpayer requests a face-to-face meeting, the regulations provide that the taxpayer should be offered one at the Appeals office closest to the taxpayer's residence or, if the taxpayer is a corporation, at the Appeals office closest to its principal place of business. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D7, 301.6330-1(d)(2) Q&A-D7. *See also* Parker v. Commissioner, T.C. Memo. 2004-226 (court remanded for new appeals hearing when CDP hearing was scheduled at appeals office 180 miles from taxpayer's residence, and there was a closer appeals office); Katz v. Commissioner, 115 T.C. 329 (2000).

The regulations do not require Appeals to offer the taxpayer a face-to-face or telephone conference in the absence of a request. Loofbourrow v. Commissioner, 208 F. Supp. 2d 698, 707 (S.D. Tex. 2002). *But see* Meyer v. Commissioner, 115 T.C. 417 (2000) (appeals officer erred in failing to offer a conference either in person or by telephone). Nevertheless, Appeals offers taxpayers a face-to-face or telephone conference in each nonfrivolous CDP hearing. Taxpayers who fail to avail themselves of an offered face-to-face or telephone conference cannot complain that they were denied the opportunity for

such conference. Leineweber v. Commissioner, T.C. Memo. 2004-17; Moore v. Commissioner, T.C. Memo. 2003-1. *But cf.* Cox v. United States, 345 F. Supp. 2d 1218 (W.D. Okla. 2004) (hearing inadequate when taxpayer was not provided with notice that the telephone conference with Appeals constituted the CDP conference); Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004) (court remanded to Appeals for new face-to-face CDP conference when taxpayer had requested a face-to-face conference and it was unclear whether taxpayer was advised that the telephone conference received instead constituted the CDP conference).

c. No face-to-face conference for taxpayers raising solely frivolous arguments

The face-to-face conference contemplated by the regulations is a conference for the purpose of addressing issues relevant to the taxpayer's CDP case—*e.g.*, the issues listed in section 6330(c)(2). A face-to-face conference serves no useful purpose if the taxpayer has no intention of discussing relevant issues, or if the taxpayer wishes to use the conference as a forum to espouse only frivolous and groundless arguments.

Accordingly, in CDP cases when the taxpayer raises only frivolous and groundless arguments, Appeals will not offer a face-to-face conference. Instead, the taxpayer will receive a hearing by telephone, correspondence, or some combination thereof. This procedure is incorporated into the proposed CDP Treasury Regulations. *See* Section I, *supra*. The Tax Court has held in cases when a taxpayer raising only frivolous issues contests being denied a face-to-face conference that it would not be necessary or productive to remand the case to an appeals office for a new face-to-face hearing, citing Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). *See* Ho v. Commissioner, T.C. Memo. 2006-41 (there is no requirement to offer a face-to-face conference to a taxpayer who raises only frivolous arguments); Wright v. Commissioner, T.C. Memo. 2005-291; Brandenburg v. Commissioner, T.C. Memo. 2005-249; Kozack v. Commissioner, T.C. Memo. 2005-246. *See also* Frese v. United States, 2006 USTC ¶ 50,169 (D.N.J.) (failure to provide face-to-face conference for the purpose of considering an offer-in-compromise not an abuse of discretion because taxpayer was making frivolous arguments and was not filing required returns and providing necessary financial information); Hinman v. Grzesiowski, 96 AFTR 2d 6788 (N.D. Ind. 2005) (mandamus relief improper to compel a face-to-face CDP hearing, when taxpayer did not appeal the Appeals determination).

d. Recording of CDP hearings under section 7521(a)(1)

The Tax Court has held that if a taxpayer is offered a face-to-face conference and requests to record the face-to-face CDP conference, in accordance with section 7521(a)(1), such recording must be allowed. Keene v. Commissioner, 121 T.C. 8 (2003). However, when a taxpayer is improperly denied the right to record, the court will not remand to Appeals for a new recorded hearing when such a remand would be unnecessary or unproductive. Lunsford v. Commissioner, 117 T.C. 183, 189 (2001). *See*, *e.g.*, Carrillo v. Commissioner, T.C. Memo. 2005-290; Yazzie v. Commissioner, T.C. Memo. 2004-233; Kemper v. Commissioner, T.C. Memo. 2003-195; Pomeranz v. United States Department of Treasury, 2004-2 USTC ¶ 50,353 (S.D. Fla.).

e. Impartial appeals officer

Sections 6320(b)(3) and 6330(b)(3) require that the hearing be conducted by an officer or employee who has had no prior involvement with respect to the same unpaid tax. An appeals officer or employee will be considered to have had prior involvement with respect to the same tax if the taxpayer, the type of tax, and the tax period involved in the prior non-CDP hearing are identical to the taxpayer, the type of tax, and the tax period involved in the CDP hearing. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D4; 301.6330-1(d)(2) Q&A-D4.

Prior involvement includes participation in examination and collection activities (other than CDP appeals hearings) with respect to the same taxpayer, type of tax, and tax period. For example, an appeals officer has prior involvement under sections 6320(b)(3) and 6330(b)(3) if he served as a mediator during the examination of the same tax liability or was the revenue officer assigned to collect the same tax liability subject to the CDP hearing.

On the other hand, prior involvement does not generally include participation in prior CDP appeals hearings involving the taxpayer. For example, reviewing a taxpayer's 2001 and 2002 income tax liabilities as part of a CDP proceeding involving that taxpayer's 1999 and 2000 years does not constitute prior involvement for purposes of a subsequent CDP proceeding involving the 2001 and 2002 tax years. Cox v. Commissioner, 126 T.C. No. 13 (2006) ("… both the statutory and the regulatory language suggest a relatively permissive standard under which participation in earlier collection proceedings would not constitute disqualifying prior involvement …").

In MRCA Information Services, Inc. v. United States, 145 F. Supp. 2d 194 (D. Conn. 2000), the court held that an appeals officer who was assigned to hear a CDP case involving a corporation's employment tax liability was not impartial because he had presided at a hearing involving the section 6672 penalty assessed against the sole shareholder of that corporation for the same tax periods. We do not agree with the holding in MRCA. A section 6672 penalty and employment taxes are separate and distinct liabilities. *See also* Harrell v. Commissioner, T.C. Memo. 2003-271 (appeals officer is not rendered impartial for purposes of section 6330(b)(3) just because another employee in the same appeals office was involved with the same taxpayer, type of tax, and tax years at issue in CDP).

f. Prohibition of ex parte communications

RRA section 1001(a) directed the Service to develop a plan to prohibit ex parte communications between appeals officers and other employees of the Service. To ensure an independent Appeals function, ex parte communications between appeals officers and other IRS employees are prohibited to the extent that such communications appear to compromise the independence of the appeals officers. Rev. Proc. 2000-43, 2000-2 C.B. 404. The following examples are not considered prohibited ex parte communications:

- Communications between appeals officers and other appeals employees. Rev.

Proc. 2000-43, sec. 3, Q&A-3. Intra-Appeals communications during the deliberation process do not compromise or appear to compromise the independent Appeals function. *Id*.

• The transfer of the administrative file to Appeals by the office that made the determination that is subject to the appeals process. Rev. Proc. 2000-43, Q&A-4.

• Communications between Appeals and the originating function (such as Collection in a CDP case) that are limited to ministerial, procedural, or administrative matters. Appeals and the originating function cannot discuss the relative strengths and weaknesses of a case. Rev. Proc. 2000-43, Q&A-5 and 6.

In Drake v. Commissioner, 125 T.C. 201 (2005), the Tax Court ordered a remand to Appeals for a new CDP hearing when an ex parte communication occurred between an Appeals employee and an IRS bankruptcy advisor that was not shared with the taxpayer, in violation of Rev. Proc. 2000-43. The subject communication was a memorandum from the bankruptcy advisor that questioned the credibility and motives of the taxpayer's counsel in a prior bankruptcy proceeding.

• *See also* Rev. Proc. 2000-43, Q&A-11, with respect to communications between Appeals and Counsel attorneys in nondocketed cases. Generally, Appeals may contact a Counsel attorney (other than a Counsel attorney who provided guidance on the same issue to the originating function) for advice on a legal issue during the course of the CDP hearing. Since Appeals is responsible for independently evaluating the strengths and weaknesses of the case, however, it would be inappropriate to discuss those aspects with Counsel—*e.g.*, for Counsel to propose a settlement range. *See* Rev. Proc. 87-24, 1987-1 C.B. 720, for guidelines in docketed Tax Court cases.

5. Matters considered at hearing

   a. Section 6330(c)(1) verification

   Sections 6320(c) and 6330(c)(1) require the appeals officer to obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. Verification can be obtained at any time prior to the issuance of the determination by Appeals. Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1). The requirements the appeals officer are verifying are those things that the Code, Treasury Regulations, and the IRM require the Service to do before collection can take place.

   Section 6330(c)(1) does not require the appeals officer to rely on any particular document for verification. Craig v. Commissioner, 119 T.C. 252, 261-262 (2002). Verification is obtained by the appeals officer from the Service through its computer records and paper administrative files. The ACS or Field Compliance is responsible for providing Appeals with all the information necessary to conduct the verification required by section 6330(c)(1).

i. Computer transcripts

Most (but not necessarily all) of the legal and administrative procedural requirements can be verified by reviewing computer transcripts. The Form 4340 and TXMOD-A transcripts currently provide verification of assessment of the liability and the sending of collection notices. The current version of the MFTRA-X (literal) transcript provides verification of the assessment but not the sending of collection notices.

Generally, it is not an abuse of discretion for an appeals officer to rely on a Form 4340 to verify that legal and administrative requirements have been satisfied. Craig v. Commissioner, 119 T.C. 252, 261-263 (2002); Roberts v. Commissioner, 118 T.C. 365 (2002). An appeals officer may rely on a Form 4340 to verify the validity of an assessment, unless the taxpayer can identify an irregularity in the assessment procedure or other procedures. Nestor v. Commissioner, 118 T.C. 162 (2002); Meyer v. Commissioner, T.C. Memo. 2005-81. An appeals officer may rely on a Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig, 119 T.C. at 262-263.

Similarly, courts have found that it is not an abuse of discretion for an appeals officer to rely on computer transcripts other than the Form 4340 for verification, unless the taxpayer can identify an irregularity in the assessment procedure or other procedures. *See, e.g.,* Cipolla v. Commissioner, T.C. Memo. 2004-6 (citing Standifird v. Commissioner, T.C. Memo. 2002-245, and other cases). The appeals officer may rely on computer transcripts to verify the validity of an assessment, as long as the transcript relied upon contains the information required in Treas. Reg. § 301.6203-1. *See, e.g.,* Williams v. Commissioner, T.C. Memo. 2005-94 (citing Schroeder v. Commissioner, T.C. Memo. 2002-190); Hoffman v. United States, 209 F. Supp. 2d 1089, 1094 (W.D. Wash. 2002). An appeals officer may rely on a computer transcript to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. *See, e.g.,* Kun v. Commissioner, T.C. Memo. 2004-209 (citing Schaper v. Commissioner, T.C. Memo. 2002-203, among other cases).

ii. Invalid assessments

Sections 6320(c) and 6330(c)(1) require that the appeals officer determine whether the assessment was properly made. If the tax liability was incorrectly assessed under the math error procedures, the resulting tax assessment is invalid and must be abated. *See* I.R.C. § 6213(b)(1). Similarly, if the statutory notice of deficiency was not sent to the taxpayer's last known address, the resulting assessment is invalid. *Cf*. Blocker v. Commissioner, T.C. Memo. 2005-279 (assessment following return of undelivered notice of deficiency valid because sent to last known address). Such issues will often require the appeals officer to examine underlying documents in addition to the tax transcripts, such as the taxpayer's return, a copy of the notice of deficiency, and the certified mailing list for the notice of deficiency.

b. Relevant issues under section 6330(c)(2)(A)

Sections 6320(c) and 6330(c)(2)(A) provide that the taxpayer may raise during the hearing any relevant issue relating to the unpaid tax including the following:

i. Appropriate spousal defenses

A taxpayer may raise any appropriate spousal defense during a CDP hearing. I.R.C. § 6330(c)(2)(A)(i). A taxpayer is precluded from requesting relief under sections 66 and 6015 if the Commissioner has already made a final determination as to spousal defenses in a statutory notice of deficiency or final determination letter. Treas. Reg. §§ 301.6320-1(e)(2), 301.6330-1(e)(2); Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E4, 301.6330-1(e)(3) Q&A-E4. If the taxpayer had raised a spousal defense under section 66 or 6015 and meaningfully participated in a prior administrative or judicial proceeding that has become final, section 6330(c)(4) prevents the taxpayer from raising the defense in a subsequent CDP hearing or judicial review proceeding. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E5, 301.6330-1(e)(3) Q&A-E5. Further, section 6015(g)(2) bars a taxpayer who meaningfully participated in a judicial proceeding from raising relief under section 6015 for any tax year for which the court has rendered a final decision on the taxpayer's tax liability if section 6015 relief was available at the time of the decision. The taxpayer also may not raise any factual issues decided by the court that are relevant to relief under section 6015. Treas. Reg. § 1.6015-1(e).

ii. Challenges to appropriateness of collection action

Pursuant to section 6330(c)(2)(A)(ii), a taxpayer may also challenge whether the collection action is appropriate. For example, taxes not discharged in bankruptcy may be collected from the taxpayer personally and from that taxpayer's property. If a taxpayer has received a bankruptcy discharge and that taxpayer's tax liabilities are dischargeable, the taxpayer is no longer personally liable for the taxes and the Service is enjoined from collecting the liability from the taxpayer personally. *See* 11 U.S.C. § 524(a); *see also* In re Rivera Torres, 309 B.R. 643, 647 (1st Cir. B.A.P. 2004). If, however, the Service filed a NFTL before the bankruptcy petition date, then after the bankruptcy the lien continues to attach to prepetition property of the taxpayer that was exempt or abandoned from the estate. 11 U.S.C. § 522(c)(2)(B). *See* Isom v. United States, 901 F.2d 744 (9th Cir. 1990); *see also* Johnson v. Home State Bank, 501 U.S. 78 (1991). A lien remains attached to property excluded from the estate, such as an ERISA-qualified pension plan, even if a NFTL was not filed before the petition date.

iii. Offers of collection alternatives

Section 6330(c)(2)(A)(iii) and Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E6 and 301.6330-1(e)(3) Q&A-E6 list the following as examples of collection alternatives:

- posting of a bond;
- substitution of other assets;
- an installment agreement;

- an offer-in-compromise; and
- withholding collection action to facilitate future payment.

(A) Consideration of collection alternatives

In rejecting a proposed collection alternative, Appeals must consider all relevant evidence provided by the taxpayer, give the taxpayer reasonable time to submit requested documentation, follow statutory and regulatory requirements, and explain in detail in the notice of determination why collection alternatives offered by the taxpayer were rejected. *See generally* Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005). Acceptance of collection alternatives is generally within the discretion of the IRS and Appeals acts within its discretion when it follows guidelines in the IRM in evaluating the collection alternative. For example, the IRM provides that an offer-in-compromise is not processable if all tax returns for which the taxpayer has a filing requirement are not filed. IRM 5.8.3.4.1. It is accordingly not an abuse of discretion for Appeals to return an offer-in-compromise if the taxpayer has not filed all required tax returns.

Six appellate cases have affirmed Appeals' return or rejection of proposed collection alternatives during the CDP hearing. In Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621 (6th Cir. 2005), the court held that it was not an abuse of discretion to return an offer-in-compromise when the taxpayer had not filed an actual offer, was not in compliance with employment tax deposits at the time of the hearing, and had defaulted on a previous installment agreement. In Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005), the court held that it was not an abuse of discretion to reject an offer-in-compromise when the taxpayer failed to provide necessary financial information during the CDP hearing. In Orum v. Commissioner, 412 F.3d 819, 820 (7th Cir. 2005), the court held that it was not an abuse of discretion to reject an installment agreement when the taxpayer had failed to make required monthly payments on a previous installment agreement and because the taxpayer failed to provide additional financial information requested by the appeals officer. In Fargo v. Commissioner, 447 F.3d 706 (9th Cir. 2006), the court held that it was not an abuse of discretion to reject an offer based on "effective tax administration" grounds when large amounts of interest accrued on a liability arising out of a tax shelter. *See also* Kindred v. Commissioner, 2006 U.S. App. LEXIS 18220 (7th Cir. 2007); Speltz v. Commissioner, 2006 U.S. App. LEXIS 17690 (8th Cir. 2006).

For examples of favorable Tax Court decisions regarding rejection of offers-in-compromise, *see, e.g.*, Murphy v. Commissioner, 125 T.C. 301 (2005) (appeals officer did not abuse her discretion by rejecting offer-in-compromise as her computations as to collection potential were reasonable based upon income and expense information provided by taxpayer); Johnson v. Commissioner, T.C. Memo. 2004-73 (taxpayer failed to submit an actual offer and financial documentation); Willis v. Commissioner, T.C. Memo. 2003-302 (taxpayer failed to provide sufficient documentation); Moorhous v. Commissioner, T.C. Memo. 2003-183

(current financial information was not provided during the CDP hearing); Rodriguez v. Commissioner, T.C. Memo. 2003-153 (required returns had not been filed).

For examples of favorable Tax Court decisions regarding rejection of proposed installment agreements, *see, e.g.*, Castillo v. Commissioner, T.C. Memo. 2004-238 (no abuse of discretion for IRS to require that taxpayers with sufficient assets pay their tax liabilities more rapidly than would be accomplished by proposed installment agreement); McCorkle v. Commissioner, T.C. Memo. 2003-34 (taxpayer not in compliance with filing and payment obligations); Willis, *supra*.

For adverse Tax Court decisions when the court found an abuse of discretion, *see, e.g.*, Lites v. Commissioner, T.C. Memo. 2005-206 (abuse of discretion when appeals officer in rejecting installment agreement found without explanation taxpayers' disposable income to be higher than the financial information submitted by the taxpayers); Skrizowski v. Commissioner, T.C. Memo. 2004-229 (abuse of discretion in rejecting offer-in-compromise without full investigation of taxpayer's ability to pay); Fowler v. Commissioner, T.C. Memo. 2004-163 (abuse of discretion to reject offer-in-compromise when appeals officer didn't sufficiently consider the taxpayer's expenses).

In Murphy v. Commissioner, 125 T.C. 301 (2005), the Tax Court rejected the taxpayer's argument that an absence of administrative review and administrative appeal rights of the rejection of an offer-in-compromise demonstrated a bias in the section 6330 hearing procedures. The court noted that there was administrative review as part of the CDP process. In addition, while the taxpayer did not receive an administrative appeal in addition to the CDP appeal, the taxpayer had the right to appeal the CDP determination by seeking judicial review. In other words, the administrative review and appeal rights of the rejection of the offer-in-compromise were sufficient for purposes of both CDP and section 7122.

(B) Doubt as to liability offer-in-compromise

When a taxpayer files an offer-in-compromise based on doubt as to liability, this is a challenge to the existence or amount of the liability because the taxpayer is raising a genuine dispute as to the liability. Therefore, under section 6330(c)(2)(B), the taxpayer does not have the legal right to consideration of a doubt as to liability offer submitted as part of the CDP proceeding if the taxpayer previously received a notice of deficiency or otherwise had an opportunity to dispute the liability. Hajiyani v. Commissioner, T.C. Memo. 2005-198 n. 3. *Contra* Siquieros v. United States, 2005-1 USTC ¶ 50,244 (W.D.Tex. 2004) (finding that the taxpayer's offer based on doubt as to liability was not synonymous with a challenge to the underlying liability).

(C) Reconsideration of a previously rejected offer-in-compromise during the CDP hearing

If a taxpayer previously requested an offer-in-compromise that was rejected by Appeals prior to the taxpayer's request for a CDP hearing, the taxpayer must submit a new offer-in-compromise as a collection alternative during the CDP hearing. Appeals may review the prior rejection for procedural compliance, but the prior offer may not be considered as a collection alternative during the CDP hearing. If the taxpayer resubmits a collection alternative, the taxpayer must demonstrate that there are changed circumstances and must submit updated financial information before Appeals can consider the resubmitted offer. *See generally* Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004).

(D) Review of a terminated offer-in-compromise during the CDP hearing

In Robinette v. Commissioner, 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006), the Service terminated an offer-in-compromise for failure to file a timely income tax return. The Tax Court found the taxpayer's failure to file a timely income tax return was not a material breach of the offer agreement and because the agreement was not in default under contract law, the appeals officer abused his discretion by determining to proceed with collection.

Robinette was reversed by the Eighth Circuit on appeal. The Eighth Circuit held that the Tax Court erred in even reaching the question of "materiality" of breach, as the taxpayer's failure to file a timely income tax return was a breach of an express condition of the offer. The Eighth Circuit held that the failure to file one return (including a refund return) during the 5-year compliance period after an offer-in-compromise is accepted provides a legal basis for terminating the offer. Pursuant to the Eighth Circuit's decision, the taxpayer must strictly comply with the terms and conditions of the offer-in-compromise. Please contact Branch 2, CBS, if any issues arise in a CDP case regarding whether an offer was properly defaulted under Robinette.

iv. Consideration of non-CDP Years during CDP hearing

The Tax Court has held that it has jurisdiction under section 6330(d)(1)(A) to consider facts and issues in non-CDP years when the facts and issues are relevant in evaluating a claim that all or part of the tax for a CDP year has been paid. *See* Freije v. Commissioner, 125 T.C. 14, 27 (2005). Taxpayers may attempt to raise issues involving non-CDP years at the administrative hearing in reliance on Freije. Our position is that the taxpayer is not entitled in a CDP case to argue entitlement to credits from non-CDP tax periods to reduce the tax due for purposes of the CDP case. Please contact Branch 1, CBS for advice if a taxpayer relies on Freije to raise issues involving non-CDP years.

v. Conscience-based objections to use of TIN raised during the CDP hearing

In a CDP hearing, if the taxpayer raises any conscience-based objections to the use of a dependent's taxpayer identification number (TIN) to claim an exemption under section 151, coordinate with Branch 1, APJP. Objections on religious or constitutional grounds, which may include references to the TIN as the "mark of the beast," are not necessarily frivolous. *See* CCDM Exhibit 35.11.1-1.

c. Section 6330(c)(2)(B) liability challenges

Under section 6330(c)(2)(B), a taxpayer may challenge the existence or amount of the underlying tax liability in a CDP hearing under sections 6320 and 6330 if the taxpayer did not receive a statutory notice of deficiency for the tax liability or did not otherwise have an opportunity to dispute the tax liability. The term "underlying tax liability" means the total amount of tax (including interest and penalties) assessed for a particular tax period, including tax assessed under the deficiency procedures, tax reported on a tax return, or a combination of both. Montgomery v. Commissioner, 122 T.C. 1, 7-8 (2004).

If a taxpayer is barred from challenging the existence or amount of the underlying tax liability in a CDP hearing, the taxpayer is also precluded from raising the validity of the liability as an issue in a judicial review proceeding under section 6330(d). Goza v. Commissioner, 114 T.C. 176 (2000).

i. Self-reported taxes

In Montgomery v. Commissioner, 122 T.C. 1 (2004), the Tax Court construed the term "underlying tax liability" under section 6330(c)(2)(B) to encompass tax liability reported due on a tax return and held that the taxpayers, who had not received a notice of deficiency or any other opportunity to dispute their underlying tax liability for the taxable year 2000, could challenge the amount of the tax reported on their 2000 return in the CDP proceeding.

Even under Montgomery, a taxpayer may not challenge the existence or amount of self-reported tax liability for a taxable year if the taxpayer received a notice of deficiency with respect to that year or had some other prior opportunity to dispute the tax liability. The fact that the taxpayer disputes items on the return that were not adjusted by the Service in the notice of deficiency is immaterial. Of course, if the Tax Court entered a decision involving the same tax liability in a deficiency proceeding, the doctrine of res judicata would preclude the taxpayer from disputing that liability in the CDP proceeding. Golden v. Commissioner, T.C. Memo. 2005-170; Newstat v. Commissioner, T.C. Memo. 2004-208 (citing Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948)); Oyer v. Commissioner, T.C. Memo. 2003-178 (2003).

The Tax Court held in Greene-Thapedi v. Commissioner, 126 T.C. No. 1 (2006), that section 6330 does not give the court jurisdiction to determine an overpayment or order a refund or credit of taxes paid. Therefore, the court cannot order a credit or refund if the court determines an amount of underlying tax liability for a taxable year that is less than the taxpayer's

withholding, estimated tax, and other tax payments paid or credited for that year. A judicial determination of the amount of the underlying tax liability in a CDP case may, however, estop both parties from contesting the amount of that same liability in a subsequent refund action (subject to section 6511 limitations on filing refund claims).

ii. Taxpayer must raise issues at administrative hearing

A taxpayer is precluded from disputing the underlying tax liability in a CDP judicial review proceeding if the taxpayer failed to properly raise the merits of the underlying tax liability as an issue during the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F5, 301.6330-1(f)(2) Q&A-F5. A taxpayer would be precluded from challenging a self-reported tax liability when, prior to issuing the notice of determination, the appeals officer gave the taxpayer a reasonable opportunity to file an amended return and/or provide requested information substantiating his liability challenge but the taxpayer failed to do so. *See* Montgomery v. Commissioner, 122 T.C. at 19-20 (2004) (Marvel, J. and Goeke, J., concurring); Newstat v. Commissioner, T.C. Memo. 2005-262; Abu-Awad v. United States, 294 F. Supp. 2d 879, 889 (S.D. Tex. 2003). *Cf.* Sherer v. Commissioner, T.C. Memo. 2006-29 (failure to file tax return does not preclude raising liability when taxpayer provided evidence substantiating deductions).

iii. Receipt of a statutory notice of deficiency

Receipt of a statutory notice of deficiency under section 6320(c) or 6330(c)(2)(B) means receipt in time to petition the Tax Court for a redetermination of the deficiency. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E2, 301.6330-1(e)(3) Q&A-E2. Respondent has the burden of proving by a preponderance of the evidence that the receipt requirement has been satisfied. Sego v. Commissioner, 114 T.C. 604 (2000). Such proof may be obtained by asking the taxpayer about receipt through the discovery and admissions process.

(A) Presumptions of official regularity and delivery

Absent direct evidence that the taxpayer actually received the notice of deficiency or refused its delivery (s*ee, e.g.*, Thompson v. Commissioner, T.C. Memo. 2004-73; Baxter v. Commissioner, T.C. Memo. 2001-300), respondent must rely on the presumptions of official regularity and delivery to meet his burden of proof. *See* Sego v. Commissioner, 114 T.C. 604, 610 (2000) (holding that "presumptions of official regularity and of delivery justify the conclusion that the statutory notice was sent and that attempts to deliver were made in the manner contended by respondent") (citations omitted); Bailey v. Commissioner, T.C. Memo. 2005-241 (noting that there is "a strong presumption in the law that a properly addressed letter will be delivered, or offered for delivery, to the addressee") (citations omitted); *see also* Figler v. Commissioner, T.C. Memo. 2005-230; Carey v. Commissioner, T.C. Memo. 2002-209.

The presumptions of regularity and delivery arise if the record reflects that the notice of deficiency was properly mailed to the taxpayer. *See*, *e.g.*,

Sego v. Commissioner, 114 T.C. 604 (2000); Bailey v. Commissioner, T.C. Memo. 2005-241; Figler v. Commissioner, T.C. Memo. 2005-230. *See also, generally*, United States v. Ahrens, 530 F.2d 781, 785 (8th Cir. 1976) (presumption of regularity supports official acts of public officials and, in absence of contrary evidence, courts presume they have properly discharged duties).

"Proper mailing" of the notice of deficiency under sections 6320(c) and 6330(c) means mailing by certified mail to the taxpayer's last known address. Sego v. Commissioner, 114 T.C. 604 (2000). In determining whether a deficiency notice has been properly mailed, the Tax Court has looked to the cases under section 6212(a) for guidance. *See the discussions in* Sego v. Commissioner, *id.*, Bailey v. Commissioner, T.C. Memo. 2005-241 and Figler v. Commissioner, T.C. Memo. 2005-230.

The act of mailing is established by evidence of compliance with the Service's IRM mailing procedures, corroborated by direct testimony or documentary evidence of mailing. *See* Coleman v. Commissioner, 94 T.C. 82, 91 (1990); Pietanza v. Commissioner, 92 T.C. 729, 746 (1989) (Ruwe, J. dissent), *aff'd*, 935 F.2d 1282 (3rd Cir. 1991) (table); Spivey v. Commissioner, T.C. Memo. 2001-29.

A properly prepared USPS Form 3877 or IRS certified mail list bearing a USPS date stamp or the initials of a postal employee is proof of compliance with the Service's established procedures for mailing deficiency notices and constitutes direct documentary evidence of the date and fact of mailing. If the existence of the deficiency notice itself is not disputed, and absent evidence to the contrary, the Form 3877 or certified mail list by itself is sufficient to establish that the deficiency notice was properly mailed to the taxpayer. *See* Coleman v. Commissioner, 94 T.C. 82, 90-91 (1990); Figler v. Commissioner, T.C. Memo. 2005-230; Virgin v. Commissioner, T.C. Memo. 1991-63 (certified mail list performs same function as USPS Form 3877). *Cf*. Pietanza v. Commissioner, 92 T.C. 729, 738-39 (1989), *aff'd*, 935 F.2d 1282 (3rd Cir. 1991) (table) (respondent produced a properly completed USPS Form 3877 but failed to produce or corroborate the existence of the notice of deficiency; court concluded respondent failed to prove the mailing of the deficiency notice and dismissed the deficiency case for lack of jurisdiction.)

In Magazine v. Commissioner, 89 T.C. 321, 324-26 (1987), *non-acq*. *at* 1988-1 C.B. 1, the Tax Court held that respondent could not prove mailing a notice of deficiency based solely on evidence of respondent's mailing customs and practices. The court concluded that while "habit evidence" was admissible, respondent also had to present direct testimony or documentary evidence of mailing to show that the notice was in fact mailed. *Id*. at 326. It further noted that Form 3877 is often the only direct evidence of the mailing of a notice of deficiency. *Id.* at 327, n. 8.

The Service's failure to strictly comply with its mailing procedures is not fatal if the record contains evidence otherwise sufficient to prove proper mailing of the deficiency notice. *See, e.g.,* Massie v. Commissioner, T.C.

Memo. 1995-173 (postal clerk did not initial certified mail list but respondent submitted credible evidence in the form of a manager's testimony regarding respondent's mailing procedures); Bobbs v. Commissioner, T.C. Memo. 2005-272 (USPS clerk did not initial certified mail list but address reflected on the list was taxpayer's undisputed last known address and taxpayer did not argue respondent failed to follow his established mailing procedures).

(B) Rebuttal of presumptions

If the presumptions of official regularity and delivery arise, then the burden shifts to the taxpayer to rebut the presumptions. The presumptions of official regularity and delivery may be rebutted if the notice of deficiency is returned to the Service marked "undeliverable." *Cf.* Lehmann v. Commissioner, T.C. Memo. 2005-90 (liability challenge precluded where taxpayer deliberately provided bad address to prevent delivery of IRS correspondence). If the notice is returned unclaimed, the presumptions may be rebutted by credible testimony denying receipt. *See*, *e.g.*, Tatum v. Commissioner, T.C. Memo. 2003-115. In Tatum, a denial of receipt of USPS Form 3849 (Notice of Attempted Delivery), combined with evidence that the Postal Service returned the notice of deficiency after only one attempt at delivery, was sufficient to rebut the presumptions.

If the notice of deficiency is returned to the Service unclaimed, the presumptions are not rebutted by testimony denying receipt if sufficient contrary evidence exists that the taxpayer refused to accept delivery or took deliberate steps to thwart delivery of the deficiency notice. *See* Sego v. Commissioner, 114 T.C. 604 (2000); Lehmann v. Commissioner, T.C. Memo. 2005-90; Carey v. Commissioner, T.C. Memo. 2002-209. The presumptions are also not rebutted when the taxpayer admits to receiving the USPS Form 3849 but fails to pick up the certified mail. *See* Baxter v. Commissioner, T.C. Memo. 2001-300.

If the notice of deficiency is not returned to the Service, the presumptions generally are not rebutted if the taxpayer fails to deny receipt of the deficiency notice and there is no other evidence indicating nonreceipt. *See* Bailey v. Commissioner, T.C. Memo. 2005-241 (finding presumption of delivery not rebutted when only evidence to rebut presumption was taxpayer's testimony that he did not recall receiving notice of deficiency but taxpayer admitted he received other mail at address on the notice). *See also* Gilligan v. Commissioner, T.C. Memo. 2004-194; Jensen v. Commissioner, T.C. Memo. 2004-120; Robertson v. Commissioner, T.C. Memo. 2004-72. Even when the taxpayer denies receipt of the notice of deficiency, the denial alone may not be sufficient to rebut the presumptions if the record contains evidence impairing the taxpayer's credibility. *See*, *e.g.*, Figler v. Commissioner, T.C. Memo. 2005-230 (respondent produced evidence that the taxpayer had refused delivery of other IRS documents and lied at his prior divorce proceeding).

In Calderone v. Commissioner, T.C. Memo. 2004-240, the Tax Court

permitted the taxpayer to challenge his underlying tax liability where respondent was unable to prove proper mailing and the taxpayer denied receipt. Although it was undisputed that the taxpayer's tax representative received a copy of the notice of deficiency in time to file a timely petition challenging the notice, the court found the representative had failed to properly represent the taxpayer and refused to impute the tax representative's receipt to the taxpayer.

(C) Frivolous challenges to liability

If the taxpayer is making only frivolous challenges to liability and it is questionable whether respondent can prove actual or constructive receipt of the deficiency notice, Counsel should consider not raising section 6330(c)(2)(B) because defeating the frivolous challenge on the merits may be easier than proving receipt.

In Hathaway v. Commissioner, T.C. Memo. 2004-15, the taxpayer made frivolous arguments regarding his self-reported liability. Declining to consider the underlying liability challenge, the Tax Court reasoned that section 6330(c)(2) provides that a taxpayer may raise any "relevant" issue in a CDP hearing, not "any" issue. That analysis also pertains to frivolous arguments regarding a liability assessed from a deficiency.

iv. Other opportunity to dispute liability

Other than receipt of a notice of deficiency, the Code does not define what constitutes an "opportunity to dispute" the underlying tax liability. We generally interpret this to mean an opportunity to challenge the merits of the liability in an administrative hearing before Appeals or in a judicial proceeding.

(A) Appeals hearing

An opportunity to dispute a liability includes a prior opportunity for a conference with Appeals offered either before or after assessment of the liability. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E2, 301.6330-1(e)(3) Q&A-E2. *See also, e.g.,* Bailey v. Commissioner, T.C. Memo. 2005-241; Pelliccio v. United States, 253 F. Supp. 2d 258, 261-62 (D. Conn. 2003). The taxpayer (or the taxpayer's representative) must have received a letter offering a hearing with Appeals or must have actually participated in such a hearing to bar the taxpayer from challenging the underlying tax liability in the subsequent CDP hearing.

(1) 30-day letter in deficiency case

Receipt of a 30-day letter preceding a notice of deficiency is not an opportunity to dispute underlying tax liability under section 6330(c)(2)(B). If it were, the rule that a taxpayer who received a notice of deficiency is barred from challenging the underlying tax liability in a CDP hearing would be rendered meaningless.

(2) Other pre-assessment letters

An opportunity to dispute a tax liability under section 6330(c)(2)(B) includes an opportunity to dispute in Appeals taxes to which deficiency procedures do not apply, *e.g.*, employment tax, excise tax (except those in Chapters 41-44), and the trust fund recovery penalty. Each of the following is an example of an opportunity to dispute the liability because the notice received by the taxpayer informs the taxpayer of the right to go to Appeals.

- notice of a proposed excise tax assessment (Letter 955). Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.)

- notice of a proposed trust fund recovery penalty assessment (Letter 1153(DO)). Jackling v. IRS, 352 F. Supp. 2d 129, 132 (D.N.H. 2004); Pelliccio v. United States, 253 F. Supp. 2d 258, 261-62 (D. Conn. 2003); Dami v. IRS, 2002-1 USTC ¶ 50,433 (W.D. Pa.); Konkel v. Commissioner, 2001-2 USTC ¶ 50,520 (M.D. Fla. 2000)

- notice that a section 6682 penalty will be assessed. Adams v. United States, 2002-1 USTC ¶ 50,295 (D. Nev.)

- notice of proposed employment tax assessment (Letter 950)

- notice of proposed return preparer penalty assessment (Letter 1125(DO))

(3) Letter disallowing refund claim

A letter (*e.g.*, Letter 105C) notifying a taxpayer that the taxpayer's refund claim is disallowed would be a prior opportunity to dispute the tax if the letter gives the taxpayer an opportunity to dispute the disallowance in Appeals.

(4) Prior CDP notice

If the taxpayer received a prior CDP notice under section 6320 or 6330 for the same tax and taxable period, whether or not the taxpayer requested a CDP hearing, the taxpayer has had an opportunity to dispute the existence and amount of that liability and may not challenge it in a subsequent CDP hearing. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E7, 301.6330-1(e)(3) Q&A-E7; Bell v. Commissioner, 126 T.C. No. 18 (2006) (prior CDP hearing provided prior opportunity to dispute liability, even where the appeals officer in the prior CDP hearing erroneously determined that taxpayer was precluded from disputing liability).

(5) Audit reconsideration

An audit reconsideration conducted prior to the CDP hearing will preclude a challenge to the underlying tax liability under section 6330(c)(2)(B) only if the taxpayer was offered the opportunity for a conference with Appeals to dispute the results of the reconsideration.

Cf. Bailey v. Commissioner, T.C. Memo. 2005-241 (audit reconsideration with appeal rights one of several factors indicating taxpayer had a prior opportunity to challenge liability).

(6) Not opportunities to dispute liability

a. Receipt of a math or clerical error notice under section 6213(b)(1)

If upon receipt of the notice, the taxpayer timely challenges an assessment resulting from a math or clerical error on the taxpayer's return, the Service is required to immediately abate the assessment and any reassessment of the tax is subject to the deficiency procedures. The Service does not offer the taxpayer an opportunity for an Appeals hearing prior to issuance of the notice of deficiency under these circumstances.

b. Penalties and interest

Issues involving accrued interest and penalties that were not at issue in the notice of deficiency or prior proceedings are not generally barred by section 6330(c)(2)(B). *See*, *e.g*., Pomeranz v. United States, 96 AFTR 2d 6767 (S.D. Fla. 2005); Light v. United States, 2002-2 USTC ¶ 50,483 (D. Nev.) (challenge to frivolous return penalties); Francis P. Harvey & Sons, Inc. v. IRS, 2005-1 USTC ¶ 50,154 (D. Mass. 2004) (challenge to late payment penalties). However, an opportunity for a prior penalty Appeals hearing after denial of a penalty abatement request is a prior opportunity under section 6330(c)(2)(B).

We do not agree with, and will not follow, the decision in Kintzler v. United States, 2001-2 USTC ¶ 50,696 (D. Nev.), which held that a letter giving the taxpayer a chance to submit a correct return to avoid the section 6702 penalty constituted a prior opportunity under section 6330(c)(2)(B).

(B) Judicial proceedings

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

(1) Waiver of receipt of notice of deficiency

If a taxpayer signed a form (*e.g.*, Form 4549) consenting to the immediate assessment and collection of a tax liability, the taxpayer made a choice not to receive a notice of deficiency and, therefore, is precluded from contesting the underlying tax liability. Aguirre v. Commissioner, 117 T.C. 324 (2001) (Form 4545); Deutsch v. Commissioner, T.C. Memo. 2006-27 (Form 4549); Pomerantz v. Commissioner, T.C. Memo. 2005-295 (Form 4549); Perez v. Commissioner, T.C. Memo. 2002-274 (Form CP-2000); *see also* Sillavan v. United States, 2002-1 USTC ¶ 50,236 (N.D. Ala.).

(2) Bankruptcy proceedings

If the Service filed a proof of claim regarding an unpaid tax liability in a bankruptcy proceeding, the debtor could have filed an objection to the proof of claim. 11 U.S.C. § 502. If the bankruptcy court had jurisdiction to determine the liability, the taxpayer is precluded from challenging the underlying tax liability in a subsequent CDP hearing (without regard to whether the debtor or Trustee actually failed to file an objection to the proof of claim). *See* Kendricks v. Commissioner, 124 T.C. 69, 77 (2005); PCT Servs. v. United States Dep't of Treasury IRS, 2003-2 USTC ¶ 50,536 (N.D. Ga. 2003); Triad Microsystems, Inc. v. United States, 2003-1 USTC ¶ 50,106 (E.D. Va. 2002). The facts of a particular case should be examined to determine if the bankruptcy court had jurisdiction—*e.g.*, it would not have jurisdiction if the case was dismissed.

The section 6330(c)(2)(B) bar should not be asserted when the taxpayer is disputing a tax liability for which the Service did not file a proof of claim in a no-asset Chapter 7 case. That argument would be inconsistent with our position that a bankruptcy court should abstain from determining a tax liability if there is no need to determine the tax for purposes of administering the bankruptcy estate. *See*, *e.g.*, In re Stevens, 210 B.R. 200 (Bankr. M.D. Fla. 1997); In re Williams, 190 B.R. 225 (Bankr. W.D. Pa. 1995); In re Diez, 45 B.R. 137 (Bankr. S.D. Fla. 1984).

(3) District court cases

A tax lien foreclosure suit or a suit to reduce assessments to judgment involving the tax liability included on a CDP notice would be a prior opportunity under section 6330(c)(2)(B), because the taxpayer would be entitled to challenge the liability in the suit. *See* MacElvain v. Commissioner, T.C. Memo. 2000-320.

(C) TEFRA proceedings

Under the Code's TEFRA provisions (sections 6221 to 6234), adjustments to partnership items are determined in administrative and judicial proceedings conducted at the partnership level and the adjustments flow through to the tax returns of the individual partners. If a dispute over partnership items reported on a partnership return cannot be resolved administratively, the Service issues a final partnership administrative adjustment (FPAA), which is the functional equivalent of a notice of deficiency insofar as both permit access to the Tax Court to challenge the determination by the Service. Although only the tax matters partner and other notice partners (who may be fewer than all the partners, depending on the size of the partnership) receive the FPAA (section 6223) and have the opportunity to file a petition seeking a readjustment of partnership items with the appropriate court (section 6226), the final decision of the court is binding on all partners (section 6226(c)). Under section 6226(c), every partner is deemed to be a party to the

readjustment action and is allowed to participate in the litigation. *See* Kaplan v. United States, 133 F.3d 469, 473 (7th Cir. 1998); Chef's Choice Produce, Ltd. v. Commissioner, 95 T.C. 388 (1990). The tax matters partner is obligated to keep each partner informed of all administrative and judicial proceedings (section 6223(g)), but section 6230(f) expressly provides that if the tax matters partner fails to provide actual notice of a judicial proceeding to any partner, the proceeding is nevertheless applicable to that partner.

In cases when no valid readjustment petition was filed in response to an FPAA, the partners entitled to notice under section 6223 would have had an opportunity to dispute the liability if they actually received a copy of the FPAA in time to file a timely petition. *See*, *generally*, Hudspath v. Commissioner, T.C. Memo. 2005-83 (holding that section 6330(c)(2)(B) precluded a notice taxpayer from challenging in his CDP case those partnership items covered in the FPAA issued to him previously). The evidentiary rules regarding proof of receipt of a notice of deficiency discussed above should also apply to proof of receipt of an FPAA.

By virtue of sections 6226(c) and 6230(f), every partner has or is deemed to have an opportunity to challenge the partnership items in the partnership judicial proceeding, and therefore is precluded from challenging the partnership item adjustments in a subsequent CDP hearing involving the partner's individual income tax liability. If the partner has not received a notice of deficiency or had any other prior opportunity to challenge his underlying tax liability, however, that partner would not be barred from contesting partnership affected items or the partner's nonpartnership related liability.

Questions regarding the interplay between sections 6221 through 6234 and sections 6320 and 6330 should be referred to Branch 1, CBS.

v. Challenges to the unpaid tax outside the scope of sections 6320(c) and 6330(c)(2)(B)

A taxpayer's underlying tax liability should be distinguished from assessed tax and from unpaid tax. The term "underlying liability" refers to the validity of the tax and not to a request that payment be excused. Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 627 (6th Cir. 2005). "Underlying tax liability" has been interpreted by the Tax Court to include "the tax on which the Commissioner based his assessment." Robinette v. Commissioner, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). The Tax Court has also characterized this term, without analysis, to include the expiration of statutes of limitations and the application of payments and credits. *See* Hoffman v. Commissioner, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); Pomerantz v. Commissioner, T.C. Memo. 2005-295 (same); Boyd v. Commissioner, 117 T.C. 127 (2001) (claim that collection statute of limitations has expired is a liability challenge subject to de novo review, as is the claim that the taxpayer had already paid the liabilities at issue); Landry v. Commissioner, 116 T.C. 60 (2001) (dispute as to IRS application of credits is

a liability challenge subject to de novo review); Blocker v. Commissioner, T.C. Memo. 2005-279 (challenge to validity of notice of deficiency is a challenge to underlying liability).

Note: In Kindred v. Commissioner, 2006 U.S. App. LEXIS 18220 (7th Cir. July 20, 2006), the Seventh Circuit states that it is "well settled law" that a challenge to the statute of limitations for making an assessment under section 6501 constitutes a challenge to the underlying liability, citing numerous Tax Court decisions including Pomerantz and Hoffman. Counsel attorneys should contact Branch 1, CBS if this issue arises in one of their cases.

It is the position of Chief Counsel that "underlying tax liability" refers to the tax imposed by the Internal Revenue Code. Montgomery v. Commissioner, 122 T.C. 1, 7-8 (2004). Issues involving the expiration of statutes of limitations, application of payments and credits, and bankruptcy discharge are properly categorized as issues relating to the unpaid tax in section 6330(c)(2)(A), and should be reviewed for an abuse of discretion. *See*, *e.g.*, Eby v. Internal Revenue Service, 2006 U.S. Dist. LEXIS 14590 (S.D. Ohio 2006) (determination regarding expiration of collection statute of limitations is subject to abuse of discretion review); Comfort Plus Health Care, Inc. v. Internal Revenue Service, 2005-2 USTC ¶ 50,494 (D. Minn.) (determination with respect to application of credits reviewed for an abuse of discretion).

Section 6330(c)(2)(B) does not preclude claims for spousal relief under sections 66 or 6015 because these claims do not dispute the existence of the liability but rather seek relief from the liability. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E3, 301.6330-1(e)(3) Q&A-E3. Claims for interest abatement under section 6404 are also not disputes about the existence of liability, because they seek relief from liability for interest.

d. The balancing analysis of section 6330(c)(3)(C)

Appeals must decide whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. I.R.C. § 6330(c)(3)(C). Reviewing courts generally show deference to Appeals' conclusion regarding the balancing analysis. Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 627 (6th Cir. 2005). Additionally, the IRS is not required to consider in its balancing analysis whether there is sufficient equity in property to levy, whether it will receive any revenue from levy and sale, or whether the taxpayer's business will have to close down due to the levy and sale. *Id*. at 628-29. *See also* Jackling v. IRS, 352 F. Supp. 2d 129 (D.N.H. 2004); Elkins v. United States, 2004 WL 3187094 (M.D.Ga. 2004). In Johnson Home Care Services, Inc. v. United States, 96 AFTR 2d 6085 (E.D.N.Y. 2005), the court found no abuse of discretion in conducting the balancing analysis because the appeals officer expressly considered the taxpayer's financial situation and tax history, and gave reasoned explanations for the rejection of various payment options proposed by the taxpayer in lieu of the levy.

e. Section 6330(c)(4)

Sections 6320(c) and 6330(c)(4) provide that an issue may not be raised during a CDP hearing if: (1) the issue was raised and considered at a previous CDP hearing or in any other previous administrative or judicial proceeding; and (2) the person seeking to raise the issue participated meaningfully in such hearing or proceeding. *See also* Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1); McIntosh v. Commissioner, T.C. Memo. 2003-279. If an issue is precluded under section 6330(c)(4), it may not be raised in judicial review proceedings. Magana v. Commissioner, 118 T.C. 488 (2002).

f. Consideration of precluded issues by Appeals

An appeals officer may, in that appeals officer's sole discretion, consider issues precluded under sections 6015(g)(2), 6330(c)(2)(B), or 6330(c)(4). Consideration of any precluded issue does not allow a reviewing court to consider the matter in the CDP case. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E11, 301.6330-1(e)(3) Q&A-E11; Behling v. Commissioner, 118 T.C. 572 (2002); Swanson v. Commissioner, 121 T.C. 111, 118 (2003); Francis P. Harvey & Sons, Inc. v. IRS, 2005-1 USTC ¶ 50,154 (D. Mass. 2004); Casey v. Commissioner, T.C. Memo. 2004-35.

6. Department of Justice jurisdiction

Once a case is referred to the Department of Justice for defense or prosecution, only the Department of Justice has the authority to compromise the case, including the collection of the underlying liabilities. I.R.C. § 7122(a). This includes CDP cases that are referred to the Department of Justice. If a CDP hearing is held while a suit involving the same liabilities is pending, Appeals cannot consider any issue (such as the existence of the tax liability) that is part of the suit. Appeals may proceed with those issues that are not part of the suit, or choose to suspend the CDP hearing until the suit is concluded. Once a CDP case is referred to the Department of Justice, only the Department has the authority to settle the underlying liabilities of the taxpayer. A taxpayer who makes settlement overtures to the IRS regarding an underlying liability should be immediately referred to the Department of Justice.

If a liability has been reduced to judgment by the Department of Justice, Appeals must get the Department of Justice's approval of any offer-in-compromise submitted to resolve collection of the liability. No Department of Justice approval is required for Appeals to enter into an installment agreement under section 6159 providing for full payment of the liability.

C. Determination by Appeals

Delegation Order No. App 8-a authorizes appeals officers to make determinations under sections 6320 and 6330, and appeals team managers to approve these determinations. In making a CDP determination under section 6320(c) or 6330(c)(3), an appeals officer is required to take into consideration: (A) verification that the requirements of any applicable law or administrative procedure have been met; (B) issues raised at the hearing under section 6330(c)(2); and (C) whether the proposed collection action balances the need for efficient collection of taxes with the taxpayer's

legitimate concern that the collection action be no more intrusive than necessary. S*ee also* Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E1, 301.6330-1(e)(3) Q&A-E1.

The determination, sent by certified or registered mail and entitled "Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330," is issued as a dated letter, either as Letter 3193 or 3194, which informs the taxpayer of the right to judicial review by the Tax Court or district court, respectively. Treas. Reg. §§ 301.6320-1(e)(3) Q&A-E8, 301.6330-1(e)(3) Q&A-E8. The notice of determination should be sent to the taxpayer's last known address, consistent with the requirements for sending notices of deficiency. Weber v. Commissioner, 122 T.C. 258 (2004). The letter provides a summary of the determination and includes an enclosure containing a complete description by the appeals officer of the basis of his or her determination.

If the case is remanded to Appeals by the Tax Court, the Tax Court retains jurisdiction over the case and Appeals, after holding a supplemental hearing, will issue a supplemental notice of determination (Letter 3978). The supplemental notice of determination does not inform the taxpayer of his right to judicial review because the case is already docketed with the Tax Court. Counsel should submit the supplemental notice to the court with a status report.

D. Judicial Review

1. Subject matter jurisdiction

A taxpayer has 30 days from the date of the notice of determination in which to appeal the determination to the Tax Court or, if the Tax Court does not have jurisdiction over the underlying tax liability, to a district court of the United States. Sections 6320(c), 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2) Q&A-F3. It is possible that a CDP hearing will be subject to bifurcated judicial review with respect to the same tax period. For example, a CDP case involving income tax and the frivolous return penalty for the same tax year must be appealed to Tax Court to challenge the determination with respect to the income tax liability, and to the district court to challenge the determination with respect to the frivolous return penalty.

a. Tax Court

i. Income, estate, gift and certain excise taxes

In general, outside CDP, innocent spouse, interest abatement, and declaratory judgments, the Tax Court's jurisdiction is limited to redeterminations of income, estate, gift, and certain excise taxes (Subtitle D, Chaps. 41-44). *See* Sections 6211, 6213(a). The Tax Court does not have plenary jurisdiction over appeals of CDP determinations. It only has jurisdiction when it would have had jurisdiction to consider the underlying tax liability. Gorospe v. Commissioner, 2006 U.S. App. LEXIS 10956 (9th Cir.). Therefore, the Tax Court has jurisdiction over petitions to review CDP notices of determination involving the collection of income, estate, gift, or certain excise tax liabilities. Moore v. Commissioner, 114 T.C. 171, 175 (2000); Voelker v. Nolen, 365 F.3d 580 (7th Cir. 2004); Springer v. United States, 96 AFTR 2d 6846 (W.D. Okla. 2005). The Tax Court has jurisdiction whether or

not the assessed taxes were subject to deficiency procedures. Downing v. Commissioner, 118 T.C. 22 (2002). In light of Downing, we do not follow the opinions in Stephen C. Loadholt Trust v. Commissioner, T.C. Memo. 2000-349 (court lacks jurisdiction because the tax liabilities at issue, erroneous income tax refunds summarily assessed under section 6201(a)(3), are not subject to deficiency procedures), and Samuel and Bernice Boone Trust v. Commissioner, T.C. Memo. 2000-350 (same).

ii. Additions to tax and interest

The Tax Court also has jurisdiction in CDP over additions to tax, such as the failure to file and failure to pay additions to tax imposed under section 6651, that are computed based on the amount of income tax due. Downing, *supra*.

The Tax Court also has jurisdiction in CDP over unpaid statutory interest when the interest has accrued on a type of tax that the court normally has jurisdiction over. Urbano v. Commissioner, 122 T.C. 384, 390 (2004). In such a case, the court may redetermine the correct amount of interest due. Greene-Thapedi v. Commissioner, 126 T.C. No. 1 (2006). The Tax Court also has jurisdiction in CDP over interest abatement issues arising under section 6404(e). *Id.*; Katz v. Commissioner, 115 T.C. 329, 340-41 (2000). When an interest abatement issue is raised and decided at a CDP hearing and the taxpayer subsequently files a petition with the Tax Court, the case must be considered as both a CDP action and an interest abatement action under section 6404(h).

The Tax Court has jurisdiction to review a notice of determination where only additions to tax or interest are unpaid so long as the additions or interest relate to taxes over which the Tax Court typically has jurisdiction. *See* Lykes v. Commissioner, T.C. Memo. 2004-159.

iii. Employment taxes

Congress did not intend to expand the Tax Court's jurisdiction over types of taxes that it normally does not have jurisdiction over outside of CDP. The Tax Court does not generally have jurisdiction over employment taxes and so does not have jurisdiction over CDP cases involving employment taxes, including trust fund recovery penalty cases. Moore v. Commissioner, 114 T.C. 171 (2000).

However, section 7436 permits the Tax Court to determine the proper amount of employment taxes in connection with its review under section 7436 of the classification of workers as employees. The Tax Court has not ruled on whether it has jurisdiction to review employment taxes in a CDP case, when the assessments resulted from the reclassification of independent contractors as employees. Counsel's position is that the Tax Court has no jurisdiction over collection of employment taxes in CDP, even in cases presenting reclassification issues, because the court has no general jurisdiction over employment taxes. *Cf.* Salazar v. Commissioner, T.C. Memo. 2006-7 (no jurisdiction over employment tax liability when Service has not made a determination concerning employment status).

iv. Overpayment jurisdiction

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

v. Jurisdiction over non-CDP years

In some cases, the taxpayer may claim that the liability for a tax year not in suit is less than the amount paid, and that taxpayer is entitled to an overpayment that could be credited toward the liability at issue. The Tax Court has stated that it can consider such issues regarding nonsuit years insofar as the tax liability for the nonsuit years may affect the appropriateness of the collection action for the suit year. In exercising that jurisdiction, the court does not determine whether any collection with respect to the nonsuit year may proceed, but only whether collection may proceed for the suit year. Freije v. Commissioner, 125 T.C. 14, 27 (2005). *See* section IV.B.5.b.iv, *supra*. We disagree with Freije to the extent it may be read to support the position that a taxpayer may argue the entitlement to credits for non-CDP periods to decrease the amount of tax due for purposes of the CDP case. Please contact Branch 1, CBS for advice if a taxpayer relies on Freije to raise issues involving non-CDP years.

vi. Equitable jurisdiction

The Tax Court has exercised equitable authority to order the Service to return property to the taxpayer that was improperly levied upon, and to credit the taxpayer with the value of property that was seized but not sold as required by section 6335(f). *See* Chocallo v. Commissioner, T.C. Memo. 2004-152; Zaparra v. Commissioner, 124 T.C. 223 (2005), *reconsideration denied*, 126 T.C. No. 11 (2006); Greene-Thapedi v. Commissioner, 126 T.C. No. 1, n. 13 (2006). Our position is that the court's authority under section 6330 is to determine whether the Secretary's collection determination is an abuse of discretion, and that it does not have general equitable authority other than when its authority to enjoin levies or proceedings is invoked under section 6330(e)(1). *See generally* Boyd v. Commissioner, 451 F.3d 8 (1st Cir. 2006). Please coordinate any cases in which issues arise involving the court's general equitable authority with Branch 1, CBS.

vii. Jurisdiction over section 6015(f) issues

The Ninth Circuit in Commissioner v. Ewing, 439 F.3d 1009 (9th Cir. 2006), *rev'g* Ewing v. Commissioner, 118 T.C. 494 (2002), held that in a "stand-alone" section 6015(f) case the Tax Court lacks jurisdiction to review a section 6015(f) determination when no deficiency has been asserted. After it was

overruled by the Ninth Circuit, the Tax Court reversed its position on this issue. Billings v. Commissioner, 127 T.C. No. 2 (July 25, 2006). Although we agree with Ewing that the Tax Court lacks jurisdiction in a stand-alone section 6015(f) case, it is our position that the Tax Court does have independent jurisdiction under section 6330(d) to review appeals' findings regarding section 6015(f) relief, when such issue was raised by the taxpayer at the CDP hearing and was addressed by the appeals officer in the notice of determination.

b. District Court

i. Jurisdiction in general

District court subject matter jurisdiction to hear CDP cases is derived from section 6330(d)(1) and 28 U.S.C. § 1340. District court CDP jurisdiction is defined by reference to Tax Court jurisdiction; if the Tax Court does not have jurisdiction over the underlying liability, then the district court has jurisdiction over the CDP case.

ii. Employment and certain excise taxes

The district courts have jurisdiction to review CDP notices of determination involving the collection of employment taxes, FICA taxes, and unemployment taxes (Form 940). Olsen v. United States, 414 F.3d 144, 150 n. 4 (1st Cir. 2005); Dogwood Forest Rest Home, Inc. v. United States, 181 F. Supp. 2d 554, 558 n. 3 (M.D.N.C. 2001); Moore v. Commissioner, 114 T.C. 171 (2000). District court jurisdiction also includes review of determinations involving excise taxes other than ones found in Subtitle D, Chaps. 41-44. *See, e.g.,* Lee v. Internal Revenue Service, 2002-1 USTC ¶ 50,365 (M.D. Tenn.).

iii. Assessable penalties

All appeals of notices of determination involving assessable penalties (*i.e.*, those not subject to deficiency procedures and not defined as additions to tax, I.R.C. §§ 6671-6725) must be filed in district court. This jurisdiction includes notices involving the assessment of: (a) trust fund recovery penalty under section 6672 (Gorospe v. Commissioner, 2006 U.S. App. LEXIS 10956 (9th Cir.); Jackling v. IRS, 352 F. Supp.2d 129, 132 (D.N.H. 2004); Sillavan v. United States, 2002-1 USTC ¶ 50,236 (N.D. Ala.); Moore v. Commissioner, 114 T.C. 171 (2000)); (b) false withholding information penalty under section 6682 (Quigley v. United States, 358 F. Supp.2d 427 (E.D.Pa. 2004), Boyd v. United States, 322 F. Supp.2d 1229, 1231 (D.N.M. 2004), Weber v. Commissioner, 122 T.C. 258, 264 (2004)); and (c) frivolous return penalty under section 6702 (Myrick v. United States, 217 F. Supp. 2d 979 (D. Ariz. 2002); Hoffman v. United States, 209 F. Supp. 2d 1089, 1093 (W.D. Wash. 2002); Johnson v. Commissioner, 117 T.C. 204 (2001)).

iv. Additions to tax and interest

District courts have jurisdiction over CDP cases involving additions to tax and interest that relate to the type of tax over which the Tax Court does not have jurisdiction, *e.g.*, employment taxes.

Note: Our position is that the Tax Court has exclusive jurisdiction under section 6404(h) to review the Secretary's failure to abate interest. *See*, *e.g.*, Ballhaus v. IRS, 341 F. Supp. 2d 1145, 1147-49 (D. Nev. 2004); Dogwood Forest Rest Home, Inc. v. United States, 181 F. Supp. 2d 554, 558 (M.D.N.C. 2001). *Contra*, Beall v. United States, 336 F.3d 419, 423-24 (5th Cir. 2003) (holding that district courts have jurisdiction to abate interest). This issue should only be raised in a district court CDP case when the taxpayer has raised a separate claim for abatement of interest over which the Tax Court would have independent jurisdiction under section 6404(h). Such cases should be rare since the most common ground for abatement, abatement due to unreasonable errors and delays under section 6404(e), is not available for employment taxes, miscellaneous excise taxes, etc. *See* Woodral v. Commissioner, 112 T.C. 19 (1999); Scanlon White, Inc. v. Commissioner, T.C. Memo. 2005-282. In the typical CDP case involving unpaid employment taxes and interest and penalty accruals, the district court has jurisdiction over all issues involving the employment tax liabilities and accruals.

v. Refund jurisdiction

Section 6330(d)(1) does not confer jurisdiction on district courts to hear a refund claim unless there is an independent basis for a refund suit, *e.g.*, the tax is full-paid and administrative remedies have been exhausted. Francis P. Harvey & Sons, Inc. v. IRS, 2005-1 USTC ¶ 50,154 (D. Mass. 2004).

c. Improper court

If a petition to the Tax Court or a complaint filed in district court involves a tax over which the court does not have jurisdiction, a motion to dismiss for lack of jurisdiction should be filed. *See* sample at section VI.C.1, *infra*. A motion to dismiss should be filed even if the notice of determination directed the taxpayer to the wrong court (although the mistake should be noted in the motion to dismiss), since a notice of determination that is incorrect in this regard cannot confer jurisdiction on the court. The taxpayer has 30 days from the court's dismissal to file in the correct court. Sections 6320(c), 6330(d)(1); *see also* Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F4, 301.6330-1(f)(2) Q&A-F4. The 30-day period begins on the day after the later of the district court's dismissal for lack of jurisdiction or the court's denial of a timely-filed Fed. R. Civ. P. 59(e) motion for reconsideration. Hickey v. Commissioner, T.C. Memo. 2003-76. The Office of Chief Counsel's position is that the 30-day period may not be extended by an appeal from the court's dismissal.

2. Notice of determination required

Jurisdiction under section 6320 or 6330 is contingent upon both the issuance a "valid notice of determination" and the filing of a timely petition. Boyd v. Commissioner, 451 F.3d 8, 11 (1st Cir. 2006); Offiler v. Commissioner, 114 T.C. 492, 498 (2000). A notice of determination includes a written notice that embodies a determination to uphold the proposed levy or sustain the NFTL filing. Salazar v. Commissioner, T.C. Memo. 2006-7 (rejection of an offer-in-compromise not a notice of determination). In

determining the validity of the notice of determination for jurisdictional purposes, the court does not look behind the notice to see whether taxpayers were afforded a proper hearing. If the notice of determination is valid on its face, the court has jurisdiction. Lunsford v. Commissioner, 117 T.C. 59 (2001).

a. No notice of determination

If a notice of determination has not been issued to the taxpayer, a motion to dismiss for lack of jurisdiction should be filed. Kennedy v. Commissioner, 116 T.C. 255 (2001). Similarly, if a particular tax and period listed in the petition is not included in the notice of determination, a motion to dismiss for lack of jurisdiction should be filed as to that tax and period, unless the taxpayer properly requested a CDP hearing for that tax and period and it was merely inadvertently not listed in the determination. *See* Lister v. Commissioner, T.C. Memo. 2003-17.

A motion to dismiss should be filed if the taxpayer appeals a decision letter (which is issued following an equivalent hearing), because courts lack jurisdiction to review a decision letter. Orum v. Commissioner, 123 T.C. 1 (2004); Moorhous v. Commissioner, 116 T.C. 263 (2001); Johnson v. Commissioner, 2000-2 USTC ¶ 50,592 (D. Ore.). If a taxpayer shows that he was entitled to a CDP hearing because the taxpayer's hearing request was timely, the decision letter will be treated as a notice of determination for the purpose of granting jurisdiction. Craig v. Commissioner, 119 T.C. 252 (2002).

b. Invalid notice of determination

A motion to dismiss for lack of jurisdiction should also be filed if a notice of determination is invalid or void. For example, the Tax Court has held that a notice of determination issued during the automatic stay in bankruptcy is void and the court does not have jurisdiction to review such determination. Smith v. Commissioner, 124 T.C. 36 (2005); *but see* Beverly v. Commissioner, T.C. Memo. 2005-41 (holding that the court has jurisdiction to review a notice of determination even though the CDP levy notice was void because it was issued during the automatic stay in bankruptcy). *See* section IV.E, *infra*. Additionally, a notice of determination mistakenly issued to a taxpayer who filed a late request for a CDP hearing is invalid. The taxpayer is not legally entitled to a CDP hearing if the request for a hearing is late. Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1); Sarrell v. Commissioner, 117 T.C. 122, 125 (2001); Offiler v. Commissioner, 114 T.C. 492 (2000); Holguin v. Commissioner, T.C. Memo. 2003-125. *Contra,* Soo Kim v. Commissioner, T.C. Memo. 2005-96 (court will not look behind facially valid notice of determination).

The portion of a notice of determination with respect to taxes and periods for which no CDP notice was ever issued would not be valid. If a taxpayer includes in the request for hearing taxes and periods that are not listed on the CDP notice, only the portion of the notice of determination making a determination under section 6320 or 6330 with respect to collection of the liabilities listed on the CDP notice is valid. Any determination with respect to the liabilities not listed on the CDP notice is not subject to judicial review. Finally, a notice of determination that is undated or sent to the wrong address may not be valid. *Cf.* King v.

Commissioner, 857 F.2d 676 (9th Cir. 1988) (notice of deficiency invalid if it was sent to the incorrect address and not actually received by the taxpayer).

c. Post-levy review

Courts have jurisdiction to review a notice of determination issued after a levy pursuant to section 6320(c) or 6330(f) when collection of tax is in jeopardy or the levy is on a state income tax refund. Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). Section 6330(f), stating "this section shall not apply," means that the section 6330(a) prelevy notice is not required, not that the court is divested of jurisdiction. *See* Clark v. Commissioner, 125 T.C. 108 (2005) (levy on state income tax refund) and Dorn v. Commissioner, 119 T.C. 356 (2002) (levy where collection of tax is in jeopardy).

3. Timely petition/complaint

A petition or complaint for review of a notice of determination must be filed within 30 days from the notice date. Sections 6320(c), 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(1), 301.6330-1(f)(1). Stein v. Commissioner, T.C. Memo. 2004-124, n. 7. The 30 days are 30 calendar days, not 30 business days, and an appeal filed beyond the 30-calendar-day period will be dismissed for lack of jurisdiction. Guerrier v. Commissioner, T.C. Memo. 2002-3; Guy v. United States, 2002-2 USTC ¶ 50,633 (E.D.N.Y.). The statutory period cannot be extended by the filing of a request for reconsideration with Appeals or the taxpayer's failure to pick up the taxpayer's mail. McCune v. Commissioner, 115 T.C. 114 (2000). An untimely filing cannot be excused because the taxpayer is pro se. McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.). An untimely filing in an incorrect court does not extend the time to file in the correct court. McCune v. Commissioner, 115 T.C. 114 (2000) (because the complaint was untimely and improper in the district court, the petition is untimely in the Tax Court).

a. Tax Court

If the Tax Court petition, as reflected by the postmark, is mailed within 30 days from the notice date, the "timely mailing/timely filing" rule set forth in section 7502(a) applies, and the petition is timely even if filed after the 30-day period. *See, e.g.*, Montgomery v. Commissioner, 122 T.C. 1, 4 n.2 (2004); *but see* Sarrell v. Commissioner, 117 T.C. 122 (2001) (barring application of "timely mailing/timely filing" rule in the case of foreign postmarks).

i. Section 6015(e) exception

If a taxpayer seeks review of a notice of determination that includes a denial of relief under section 6015, the taxpayer must file an appeal within 30 days if the taxpayer also seeks review of other issues raised in the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F2, 301.6330-1(f)(2) Q&A-F2. If, however, a taxpayer seeks review of the denial of relief that is reviewable by the Tax Court under section 6015(e), the taxpayer must file an appeal with the Tax Court within 90 days of the notice of determination. *Id.*; Section 6015(e)(1)(A).

ii. Section 6404(h) exception

Similarly, if a taxpayer seeks review of a notice of determination which includes a determination not to abate interest under section 6404(e), the taxpayer must file an appeal within 30 days if the taxpayer also seeks review of other issues raised in the CDP hearing. If, however, a taxpayer seeks review only of the denial of the request for abatement of interest, the taxpayer must file an appeal with the Tax Court within 180 days after the notice of determination is mailed. *See* Section 6404(h)(1).

b. District court

Section 7502 does not apply to complaints in district court. Section 7502(d)(1); Austin v. Commissioner, 2005 WL 1324711 (E.D. Cal.), n. 2; Medical Psychiatric Association v. IRS, 2003-2 USTC ¶ 50,544 (N.D. Tex.); McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.). The date the complaint is filed with the district court controls, not the date it was mailed. Akram Al-Wardi v. Comand Airways/American Eagle, 1994 U.S. App. LEXIS 29944 (1st Cir. 1994). *Cf.* Reynolds v. Hunt Oil Company, 643 F.2d 1042, 1043 (5th Cir. 1981) (notice of appeal). The 30-day limit cannot be extended by Fed. R. Civ. P. 6(e). McNeil v. United States, 2002-1 USTC ¶ 50,415 (W.D. Mich.); Perry v. IRS, 2004-2 USTC ¶ 50,385 (E.D.N.C. 2004).

4. Standard and scope of review

The standard of review applicable to an agency's decision determines how closely a reviewing court will scrutinize the decision for correctness. The standard applied depends upon the function the court is performing. If the underlying liability is properly at issue, the court reviews the liability de novo and the other administrative determinations for an abuse of discretion. Jones v. Commissioner, 338 F.3d 463, 466 (5th Cir. 2003). If liability is not at issue, the court reviews the determination for an abuse of discretion. Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005).

The scope of review defines what a court is permitted to examine when applying a particular standard of review. The scope of review for the de novo standard of review in CDP cases is also de novo; the court may hold a trial and take evidence. The district courts and the Tax Court have applied different scopes of review for abuse of discretion review. District courts limit their review to the administrative record. The Tax Court has held that its review, as a general rule, is not limited to the administrative record, although as discussed *infra*, this position has been called into question and Counsel should continue to advocate limiting review to the administrative record.

a. Abuse of discretion standard of review

Two aspects of the CDP hearing process are reviewed for an abuse of discretion: (1) the appeals officer's determination with respect to the collection action, and determinations subsidiary to it; and (2) the procedures employed by the appeals officer in conducting the CDP hearing.

i. Determination with respect to the collection action

The court reviews the appeals officer's determination regarding the collection action for abuse of discretion. Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998).

In reaching the ultimate determination to sustain the proposed levy or NFTL filing, the appeals officer will make a number of subsidiary determinations, some legal, some factual and some judgmental. Each of these determinations subsidiary to the determination sustaining the collection action is also reviewed under an abuse of discretion standard. For example, the appeals officer will make the factual determination that the requirements of applicable law and administrative procedure have been met. *See, e.g.,* Nestor v. Commissioner, 118 T.C. 162, 166 (2002) (not an abuse of discretion to rely on Form 4340 for purposes of verifying validity of assessment). The appeals officer may have to decide whether the tax debt has been discharged by a bankruptcy court order, which may involve factual and legal determinations. *See, e.g.,* Swanson v. Commissioner, 121 T.C. 111, 119 (2003) (appeals officer's conclusion that the taxpayer had not received a bankruptcy discharge of the unpaid tax was subject to abuse of discretion review). The appeals officer may have to determine if the taxpayer qualifies for a collection alternative, such as an offer-in-compromise, which may involve factual and judgmental decisions. *See, e.g.,* Olsen v. United States, 414 F.3d 144, 153 (1st Cir. 2005) (denial of offer-in-compromise subject to abuse of discretion review). The appeals officer will have to make the judgment whether the collection action balances the need for efficiency with the taxpayer's legitimate concerns with intrusion. *See, e.g.,* Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 627-628 (6th Cir. 2005) (balancing analysis subject to abuse of discretion review).

Although the Secretary has discretion as to whether to accept or reject an offer-in-compromise, the Secretary's discretion is not unfettered because the IRS must follow statutory and regulatory criteria in exercising its discretion. The Eighth Circuit has, accordingly, rejected the argument that the Secretary's discretion is unreviewable, and we concur with the Eighth's Circuit's opinion. Speltz v. Commissioner, 2006 U.S. App. LEXIS 17690 (8th Cir. July 14, 2006).

ii. Conduct of CDP hearing

Decisions made by the appeals officer relating to the conduct of the CDP hearing (*i.e.*, procedural decisions) are subject to abuse of discretion review. Cavanaugh v. United States, 93 A.F.T.R.2d 1522 (D.N.J. 2004) (appeals officer's refusal to grant taxpayer's request for face-to-face CDP conference was abuse of discretion); *See also* Reid & Reid, Inc. v. United States, 366 F. Supp.2d 284, 289 (D. Md. 2005); Lindsay v. Commissioner, T.C. Memo. 2001-285. Questions about whether certain procedures are legally required are legal issues determined de novo by the reviewing court. *See, e.g.*, Keene v. Commissioner, 121 T.C. 8 (2003) (holding that section 7521(a)(1) authorizes taxpayers to audio record in-person CDP conferences); Cox v.

United States, 345 F. Supp.2d 1218, 1220 n. 1 (W.D. Okla. 2004) (issues of sufficiency of CDP telephone conference and impartiality of appeals officer under section 6330(b)(3) are procedural issues reviewed de novo).

iii. Abuse of discretion defined

Review by a court of a CDP determination under the abuse of discretion standard is deferential. Kindred v. Commissioner, 2006 U.S. App. LEXIS 18220 at n.16 (7th Cir. July 20, 2006); Robinette v. Commissioner, 439 F.3d 455, 459 (8th Cir. 2006); Olsen v. United States, 414 F.3d 144, 150 (1st Cir. 2005); Orum v. Commissioner, 412 F.3d 819, 821 (7th Cir. 2005) ("[T]he Judicial Branch does not instruct the Executive Branch how to make executive decisions."); Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 631 (6th Cir. 2005) (standard is "clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS, as contemplated by Congress…"). This deferential review has been widely applied by district courts. *See, e.g.,* Eby v. Internal Revenue Service, 2006 U.S. Dist. LEXIS 14590 (minor mistakes by the appeals officer are not sufficient to justify a remand absent a clear abuse of discretion); Alliance Services, Inc. v. United States, 363 F. Supp.2d 1367, 1371 (N.D. Ga. 2005) (court may not reverse just because it would have held differently if the choice had been its to make); Dudley's Commercial and Industrial Coating, Inc. v. United States, 292 F. Supp.2d 976 (M.D. Tenn. 2003) (not justifiable in light of facts and circumstances or made without rational explanation or inexplicably departed from established policies); MRCA Information Services v. United States, 145 F. Supp.2d 194, 199 (D. Conn. 2000) (court must determine if there is an adequate basis for determination). In defining abuse of discretion review, a number of district courts have relied on general administrative law principles or case law interpreting the APA. *See, e.g.,* Quigley v. United States, 358 F. Supp.2d 427, 431 (E.D. Pa. 2004); Talen v. United States, 355 F. Supp.2d 22, 29 (D.D.C. 2004); Living Care Alternatives of Utica, Inc. v. United States, 312 F. Supp.2d 929, 934-935 (S.D. Ohio 2004), *aff'd,* 411 F.3d 621, 631 (6th Cir. 2005); Christian v. Commissioner, 2003-2 USTC ¶ 50, 562 (E.D. Pa.) The application of these principles or the APA requires the agency determination to be based on a consideration of relevant facts and not be a clear error of judgment, and does not permit a reviewing court to substitute its judgment for that of the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Moreover, the agency must articulate a "rational connection between the facts found and the choices made." Bowman Transp., Inc. v. Arkansas-Best-Freight Sys., Inc., 419 U.S. 281, 285 (1974).

The Tax Court has described the abuse of discretion standard in CDP cases as "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." Robinette v. Commissioner, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006).

The Tax Court in Robinette showed little deference to the appeals officer's determination. The Eighth Circuit, however, in reversing Robinette, cited with favor the recent opinions of Olson v. United States, 414 F.3d 144, 150 (1st Cir. 2005) and Living Care Alternatives of Utica, Inc. v. United States, 411

F.3d 621, 625 (6th Cir. 2005), for the proposition that CDP hearings should be accorded more deferential review than more formal agency decisions, and such review should be for "… a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS … ." Robinette v. Commissioner, 439 F.3d 455, 459 (8th Cir. 2006) (quoting Olson, 414 F.3d at 150 (quoting Living Care Alternatives, 411 F.3d at 631)).

iv. Questions of law

A reviewing court owes no deference to an appeals officer's legal conclusions made in connection with determinations reviewed for an abuse of discretion. Kendricks v. Commissioner, 124 T.C. 69, 75 (2005). If a determination is based on an erroneous legal conclusion (and the error is not harmless), then it must be rejected as an abuse of discretion. Swanson v. Commissioner, 121 T.C. 111, 119 (2003).

v. Harmless error

The harmless error rule applies to abuse of discretion review of CDP determinations. *See, e.g.,* Borchardt v. United States, 338 F. Supp.2d 1040, 1045 (D. Minn. 2004); Boyd v. United States, 322 F. Supp.2d 1229, 1232-1233 (D.N.M. 2004), *aff'd,* 121 Fed. Appx. 348 (10th Cir. 2005); Nestor v. Commissioner, 118 T.C. 162 (2002) (Halpern, J., concurring) (observing that the majority applied the harmless error rule in making its decision). The harmless error rule provides that a reviewing court should not find an abuse of discretion if the agency mistake causes no prejudice or does not affect the ultimate determination. The harmless error rule has been applied often when Appeals would not permit the taxpayer to record a face-to-face CDP conference. Although the Tax Court has held that section 7521(a)(1) gives taxpayers the right to record a face-to-face CDP conference, the court has frequently decided a remand to allow recording is unnecessary if the taxpayer only makes frivolous arguments because it would not change the CDP determination under review. *See, e.g.,* Brandenburg v. Commissioner, T.C. Memo. 2005-249; Meyer v. Commissioner, T.C. Memo. 2005-81. The application of the harmless error rule is required by section 706(2) of the APA, which we believe is applicable to the judicial review of CDP determinations, as described below.

vi. Taxpayer precluded from raising issues not raised during CDP hearing

The taxpayer may only contest issues that were raised in the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F5, 301.6330-1(f)(2) Q&A-F5. The court will not consider issues not raised during the CDP hearing process, because the court cannot find an abuse of discretion where there is no evidence that the appeals officer exercised any discretion at all. Magana v. Commissioner, 118 T.C. 488 (2002); The Inner Office, Inc. v. United States, 2001 U.S. Dist. LEXIS 20617 (N.D. Tex.).

b. Abuse of discretion scope of review

i. District court

District court review of CDP determinations for an abuse of discretion is limited to the administrative record. Olsen v. United States, 414 F.3d 144, 155-156 (1st Cir. 2005). In reaching this result, the First Circuit Court of Appeals and district courts in other circuits have relied on general administrative law principles and the APA. *See, e.g.,* Alliance Services, Inc. v. United States, 363 F. Supp.2d 1367, 1371 (N.D. Ga. 2005); Carroll v. United States, 217 F. Supp.2d 852, 857-858 (W.D. Tenn. 2002).

Informal adjudications, such as CDP determinations, are reviewed under APA section 706(2)(A), which permits a reviewing court to set aside an agency's actions, findings and conclusions if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-415 (1971).

Except in unusual circumstances, the court is not permitted to hear testimony or receive evidence outside the record. Camp v. Pitts, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). The administrative record may be supplemented, (1) if there is a "strong showing of bad faith or improper behavior" by agency decision makers (Overton Park, 401 U.S. at 420), (2) to include an additional explanation or clarification of the reasons for the agency decision, if it merely explains the existing record and does not add any new rationalizations (Camp v. Pitts, *supra*; Envir. Defense Fund v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981)), or (3) to include documents adverse to the agency's position that were excluded from the record submitted by the agency (Kent County v. E.P.A., 963 F.2d 391, 395-396 (D.C. Cir. 1992)).

ii. Tax Court

Unlike district courts, the Tax Court has held that it is not required to limit its abuse of discretion review in CDP cases to the administrative record. Robinette v. Commissioner, 123 T.C. 85, 93 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006). *See also* Murphy v. Commissioner, 125 T.C. No. 15, at n.6 (2005) (Tax Court notes that it is not bound by Olsen v. United States, 414 F.3d 144 (1st Cir. 2005), although an appeal would lie in the same circuit, because Olsen only addresses district court cases). The Tax Court in Robinette held that general administrative law principles and the APA do not apply to Tax Court proceedings, so the court is permitted to conduct a trial de novo in connection with its abuse of discretion review.

The Tax Court's decision in Robinette was reversed by the Eighth Circuit. Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006). The Eighth Circuit agreed with the Commissioner that general administrative law principles and the APA require abuse of discretion review in Tax Court CDP cases to be limited to the administrative record (the record rule). The Tax Court has not yet indicated whether it will change its position in view of the Eighth Circuit's

reversal of Robinette. *See* Cox v. Commissioner, 126 T.C. No. 13 (2006) (Tax Court held that comprehensive administrative record was adequate for proper judicial review, expressly declining to address or reconsider the issue of whether its review was limited to the administrative record). Counsel should advocate adoption of the record rule as enunciated by the Eighth Circuit in Tax Court cases arising in other circuits. Coordinate with Branch 1, CBS, when issues involving the record rule arise in Tax Court litigation.

In a more recent opinion, Murphy v. Commissioner, 125 T.C. 301 (2005), the Tax Court held that it would not admit testimony with respect to facts that were not presented to the appeals officer, since such testimony would not be relevant to the issue of whether the appeals officer abused her discretion. The taxpayer in Murphy had the opportunity to present the appeals officer with such information but failed to do so. *See also* Speltz v. Commissioner, 124 T.C. 165, 176-177 (2005); Barnes v. Commissioner, T.C. Memo. 2006-150; Molino v. Commissioner, T.C. Memo. 2005-203.

iii. CDP administrative record

Case law under the APA defines the administrative record as the information the agency reviewed in making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The basis of review of a notice of determination is the evidence that was before the appeals officer, as well as the reasons given by Appeals for its determination. *See* Alliance Services, Inc. v. United States, 363 F. Supp.2d 1367, 1371 (N.D. Ga. 2005).

iv. Exceptions to record rule

Generally, review of the procedural aspects of a CDP hearing is limited to the administrative record. However, if the record does not adequately describe the hearing process or there is a dispute over what happened during the process, the reviewing court is permitted to supplement the administrative record with testimony or other evidence outside the record. Robinette v. Commissioner, 439 F.3d 455, 461 (8th Cir. 2006) ("Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings.") (citations omitted); Murphy v. Commissioner, 125 T.C. 301 (2005) (new evidence regarding an irregularity in the conduct of the hearing or some defect in the record may be presented at trial, even if the record rule is applied). *See also* James Madison Ltd. By Hecht v. Ludwig, 82 F.2d 1085,1096 (D.C. Cir. 1996) (courts may "need to resolve factual issues regarding the process the agency used in reaching its decision. … Although these facts are usually established by the administrative record or are otherwise undisputed, parties may occasionally raise an issue requiring district courts to engage in independent fact-finding.") Examples of factual disputes about the hearing process include a claim by a taxpayer that he requested a collection alternative despite the appeals officer's contrary finding in the notice of determination, and the taxpayer's claim that the appeals officer failed to inform him that the CDP hearing would be concluded if he failed to submit additional information by a certain date.

c. De novo standard and scope of review

When review is not precluded under section 6330(c)(2)(B), the court will determine the underlying tax liability de novo. Jones v. Commissioner, 338 F.3d 463, 466 (5th Cir. 2003); H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998). *See* section IV.B.5.c.v, *infra*, for a discussion of what constitutes "underlying tax liability." When the underlying liability is properly at issue, the court is not bound by the administrative record, but may conduct a trial. Although the parties may introduce evidence that was not submitted to the appeals officer, a court should not consider a challenge to liability if it was not raised during the CDP hearing. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F5, 301.6330-1(f)(2) Q&A-F5; Abu-Awad v. United States, 294 F. Supp.2d 879, 889 (S.D. Tex. 2003); Cavanaugh v. United States, 93 A.F.T.R.2d 1522 (D. N.J. 2004). The Tax Court has not yet ruled on whether a taxpayer must raise a de novo liability issue at the CDP hearing to obtain judicial review of the issue. *But see* Montgomery v. Commissioner, 122 T.C. 1, 19-20 (2004) (Goeke, J., concurring) (in dicta, Judge Goeke stated that liability is not properly raised if taxpayer fails to challenge liability in CDP hearing).

Similar to liability determinations, a reviewing court also applies a de novo standard of review to Appeals' determination that a taxpayer is precluded under section 6320(c) or 6330(c)(2)(B) from challenging the underlying liability. Sego v. Commissioner, 114 T.C. 604 (2000); Render v. Internal Revenue Service, 389 F. Supp.2d 808 (E.D. Mich. 2005); Jackling v. Internal Revenue Service, 352 F. Supp.2d 129, 132-133 (D.N.H. 2004); Pelliccio v. United States, 253 F. Supp.2d 258, 261-262 (D. Conn. 2003). The court is not limited to the administrative record when deciding whether the taxpayer is precluded from challenging liability under section 6330(c)(2)(B). *See* Sego v. Commissioner, *supra*.

d. Determinations under section 6015

Section 6330(c)(2)(A)(i) specifically permits the taxpayer to raise "appropriate spousal defenses" at the CDP hearing. *See* section IV.B.5.b.i, *supra*. The appeals officer's determination concerning innocent spouse relief is reviewed in the same manner as an innocent spouse determination by the Service outside the CDP context. Denial of relief under section 6015(b) or (c) is reviewed de novo and the court is not bound by the administrative record. I.R.C. § 6015(e)(1)(A). The Service's denial of "equitable relief" under section 6015(f) is reviewed for abuse of discretion, and review is accordingly limited to the administrative record. In Ewing v. Commissioner, 122 T.C. 32 (2004), *vacated*, Commissioner v. Ewing, 439 F.3d 1009 (9th Cir. 2006), the Tax Court held that it could look outside the administrative record when reviewing section 6015(f) determinations, but the Ninth Circuit found that the Tax Court lacked jurisdiction to hear the case, and vacated the Tax Court's decision concerning the administrative record issue. Thus, the Tax Court will have to reconsider the administrative record issue in the context of section 6015(f) determinations.

E. Effect of Bankruptcy Filings on CDP

1. Notice of Intent to Levy and Notice of Federal Tax Lien Filing

When a taxpayer files for bankruptcy, the automatic stay prohibits many types of collection of pre-bankruptcy petition tax debts and with respect to the taxpayer's property. *See* 11 U.S.C. § 362(a). While the automatic stay is in effect, a NFTL for prepetition taxes should not be filed. Likewise, no levies should be proposed or made. *See* Beverly v. Commissioner, T.C. Memo. 2005-41 (issuance of CDP levy notice violated the automatic stay); In re Parker, 279 B.R. 596, 602-603 (Bankr. S.D. Ala. 2002) (same); In re Covington, 256 B.R. 463, 465-466 (Bankr. D.S.C. 2000) (issuance of final notice of intent to levy violated automatic stay). If a NFTL is filed in violation of the automatic stay, it should be withdrawn and the CDP lien notice rescinded. If a CDP levy notice is sent in while the automatic stay is in effect, it should be rescinded and any levies made in violation of the stay should be released.

After the termination of the automatic stay, the Service may file NFTLs and issue CDP notices for taxes excepted from discharge under 11 U.S.C. § 523. Even if the taxes are discharged, the IRS may collect from pre-bankruptcy petition property to which the tax lien still attaches after discharge. *See* Isom v. United States, 901 F.2d 744 (9th Cir. 1990). A lien does not continue to attach to exempt property unless a NFTL was filed before the bankruptcy petition. A lien remains attached to property excluded from the estate, such as an ERISA-qualified pension plan, even if a NFTL was not filed before the petition date.

2. CDP Hearing and Notice of Determination

a. General rule

The Tax Court has held that the issuance of a notice of determination is the continuation of an administrative collection action against the petitioner and, thus, a violation of the automatic stay that renders the notice void. Smith v. Commissioner, 124 T.C. 36 (2005). Therefore, when the taxpayer files for bankruptcy prior to issuance of the notice of determination, and then files a Tax Court petition, the Tax Court will dismiss the case for lack of jurisdiction on the ground that the notice of determination is void rather than because the Tax Court petition was filed in violation of 11 U.S.C. § 362(a)(8). In our view, the Tax Court erred in holding that the issuance of a notice of determination is a violation of the automatic stay under 11 U.S.C. § 362(a)(1) against the "continuation of a proceeding against the debtor." According to the court, a proceeding was instituted by the Service when it issued a CDP levy notice. In our view, that notice does not commence an administrative proceeding; rather, the administrative proceeding is commenced by the taxpayer when the taxpayer requests a CDP hearing. Nevertheless, the Service generally will not challenge the Smith holding in the Tax Court, especially if the notice was issued before confirmation of a plan. The Service's general practice is to rescind notices of determination issued during bankruptcy and suspend CDP proceedings. As discussed below, different considerations may apply, however, if a notice of determination is issued after confirmation of a Chapter 11 or 13 plan. For example, if a bankruptcy plan resolves all the issues that were raised in the CDP proceeding, it

may be appropriate to issue a notice of determination rather than wait until the plan is completed.

The Tax Court has not yet decided whether issuance of a notice of determination in a CDP lien case violates the stay. However, it is the policy of the Service to suspend CDP proceedings, which include issuance of notices of determination, during bankruptcy, assuming that the taxpayer's purpose in filing the bankruptcy petition is legitimate. This policy should preclude these issues from arising very often.

The IRS policy is based on the following considerations. Continuing CDP proceedings when a taxpayer is in bankruptcy is inconsistent with the underlying goal of the Bankruptcy Code to deal with all pre-bankruptcy claims against a debtor, including tax claims. The circumstances upon which a CDP notice of determination would be based may change as a result of the bankruptcy case. The taxpayer's bankruptcy case may resolve his liabilities and the amount of taxes that is collectible against his property. After a bankruptcy plan is confirmed or the automatic stay is lifted in a Chapter 7 case, Appeals, in consultation with the local Insolvency unit, should determine what taxes are nondischargeable and remain unpaid, what property remains subject to the federal tax lien, and what collection alternatives remain available.

If Appeals becomes aware that the automatic stay was in effect when a notice of determination was issued to the taxpayer, Appeals generally will rescind the notice, even if the thirty-day appeal period in section 6330(d)(1) has expired, to ensure that the taxpayer is not precluded from exercising his appeal rights under CDP if the Service contemplates further collection action. Although rescission is not expressly authorized by the Internal Revenue Code, it is permissible. A government agency generally has authority to reconsider its own decisions, *see*, *e.g.*, Macktal v. Chao, 286 F.3d 822, 825-826 (5th Cir. 2002) (Department of Labor Administrative Review Board has authority to reverse earlier decision awarding former employee fees and costs); Anderson v. Bowen, 881 F.2d 1, 10 (2d Cir. 1989) (Health Care Financing Administration agency empowered to issue binding instructions also has derivative power to rescind such instructions), and the broad powers given to the Secretary of the Treasury under section 7801(a) to administer and enforce the Internal Revenue laws provide authority to rescind notices of determination. As discussed below, however, if confirmation of a plan resolves all the issues in the CDP hearing, it may be appropriate in some cases to issue a notice of determination rather than delaying the issuance until the plan is completed and the stay is terminated.

Rescinding the notice of determination will have the effect of returning the CDP case to Appeals for continuation of the CDP hearing. Appeals will generally postpone the continuation of the CDP proceedings until at least the date a discharge has been granted or denied or the bankruptcy case has been dismissed. These events represent significant milestones in a bankruptcy case and may resolve many, if not all, of the collection and liability issues in the CDP proceeding, thus allowing Appeals to decide whether the CDP case should proceed. Even if all the issues are resolved in the bankruptcy case, Appeals

will need to issue a notice of determination unless the taxpayer withdraws the request for a CDP hearing. Contact Branch 2, CBS, if you have any questions on these issues.

b. Exception when a notice of determination may be issued during bankruptcy

There is an exception that allows Appeals to issue a notice of determination during the pendency of a bankruptcy proceeding (or not rescind a notice of determination). When a debtor has resolved all issues set forth in his request for CDP hearing through his confirmed Chapter 11 or 13 plan and has not withdrawn his request for CDP hearing, then Appeals may issue a notice of determination before completion of the plan stating that all issues have been resolved through the bankruptcy plan. In order for all issues to be resolved, all the tax liabilities are either to be paid through the plan or will be discharged upon completion of the plan. If liabilities remain unpaid and are discharged, issues may still remain unresolved if a federal tax lien continues to attach to exempt, abandoned, or excluded property after the discharge. In addition, any "gap interest" in a Chapter 11 case may render a case unresolved unless it has been provided for outside the plan. *See* Bruning v. United States, 376 U.S. 358 (1964). In other words, the issues are fully resolved on confirmation of a Chapter 11 or 13 plan, where the IRS will be fully satisfied at the completion of the plan and is not entitled to take any further collection action for the liabilities at issue in the CDP proceeding.

These facts present a significantly different factual situation than the Smith case. In Smith, the notice of determination affirmed the proposed collection action of the IRS, the IRS was free to levy, and the debtor had lost her right of judicial review of the determination. Unlike in Smith, the issuance of a notice of determination stating all the issues have been resolved in bankruptcy is not a continuation of an action against the debtor. It is the opposite. The notice of determination is a statement that issues presented in the CDP proceeding were resolved by confirmation of a plan in bankruptcy court. Also, unlike in Smith, when the debtor's CDP issues are fully resolved through bankruptcy the debtor does not lose the right of judicial review as there is no issue remaining that would require review. Lastly, when there is a confirmed bankruptcy plan the IRS is not free to continue its levy actions as it was in Smith, but rather the IRS is bound by the bankruptcy plan and may not take other collection action. Thus, Smith can be distinguished and a notice of determination issued under these circumstances will be defended as its issuance is not an act against the debtor. Call Branch 2, CBS, if you have any questions on these issues.

3. Tax Court practice

a. Bankruptcy filed before notice of determination

(i) Levy cases

If the notice of determination in a CDP levy case is issued during the pendency of the automatic stay, and it does not satisfy the exception which allows such filing, and the taxpayer subsequently files a Tax Court petition, Counsel should ensure

that the notice of determination is rescinded and the CDP hearing is continued pursuant to Appeals' procedures. Counsel should file a motion to dismiss for lack of jurisdiction on the grounds that the rescission of the notice of determination renders the taxpayer's petition premature and the notice of determination is void pursuant to the authority of Smith v. Commissioner, 124 T.C. 36 (2005). If the exception previously discussed applies, however, counsel should seek dismissal under 11 U.S.C. § 362(a)(8) and argue that Smith is distinguishable.

(ii) Lien cases

The Tax Court did not address *lien* cases in Smith. Therefore, in lien cases counsel should argue that a notice of determination sustaining the filing of a NFTL is not by itself a collection action that violates the automatic stay nor is it a continuation of an administrative proceeding against the debtor in violation of 11 U.S.C. § 362(a)(1). If a notice of determination in a CDP lien case is issued during the pendency of the automatic stay, the notice is not void. If the taxpayer subsequently files a Tax Court petition also during the pendency of the automatic stay, counsel should file a motion to dismiss for lack of jurisdiction pursuant to 11 U.S.C. § 362(a)(8). In the motion, counsel should also inform the court that the notice of determination has been or will be rescinded (unless the exception applies) and the CDP hearing continued so that the taxpayer will have a future opportunity for judicial review. If a notice of determination in a lien case has not been rescinded before the taxpayer files a petition with the Tax Court, it should not be rescinded until after the Tax Court grants the Service's motion to dismiss.

Note: While we have decided to follow Smith in the Tax Court in most cases, our legal position is that issuance of a notice of determination in both lien and levy cases does not violate the automatic stay. If this issue arises in a case subject to district court jurisdiction then, after obtaining the Department of Justice's concurrence, the notice of determination should be rescinded and the United States should seek dismissal on the ground that the suit is premature because the CDP hearing has not concluded.

b. Bankruptcy filed after notice of determination

11 U.S.C. § 362(a)(8) prohibits the commencement or continuation of a Tax Court proceeding while the stay is in effect (for individual debtors, the prohibition only extends to pre-bankruptcy petition taxes for bankruptcy cases filed on or after October 17, 2005 and subject to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). *See* Prevo v. Commissioner, 123 T.C. 326 (2004) (automatic stay bars petition for review of section 6320 determination). Note that where the taxpayer files bankruptcy after issuance of a notice of determination but before filing a Tax Court petition, the taxpayer has fallen into a trap for the unwary: filing a Tax Court petition is barred but there is no tolling provision that would allow a filing after the automatic stay is lifted. Thus, the period for filing a Tax Court petition may run while the automatic stay is in effect. *Id.*, 123 T.C. at 331. *See* CCDM for procedures for filing motions to dismiss under 11 U.S.C. § 362(a)(8).

Note: Remember that for individual taxpayers filing a bankruptcy case on

or after October 17, 2005, the automatic stay of 11 U.S.C. § 362(a)(8) does not extend to post-bankruptcy-petition taxes.

c. Bankruptcy filed after Tax Court petition

If the bankruptcy petition is filed after the Tax Court petition is filed, then continuation of the Tax Court proceeding is prohibited by 11 U.S.C. § 362(a)(8). Counsel should prepare a Notice of Proceeding in Bankruptcy as detailed in CCDM 35.3.9.2.2, so the Tax Court will stay the proceeding. After the bankruptcy proceedings are concluded, further collection may be unnecessary or inappropriate. If the taxes have been paid, or if they have been discharged and there is no prebankruptcy property encumbered by the tax lien, counsel should move to dismiss on the ground of mootness. Even if the case is not moot, conditions may have changed so that settlement is appropriate. If the case cannot be settled, counsel should generally argue that the notice of determination be sustained based on the status of the case at the time of the CDP hearing; since the bankruptcy occurred after the CDP hearing, the Tax Court should not address any issues arising from the bankruptcy.

4. Jurisdiction over bankruptcy discharge issues

a. Tax Court jurisdiction

If a discharge has been entered in the bankruptcy case, the Tax Court has held it has jurisdiction to determine whether the tax liability at issue in the CDP hearing is excepted from discharge. Washington v. Commissioner, 120 T.C. 114 (2003); Woods v. Commissioner, T.C. Memo. 2006-38. *But see* Meadows v. Commissioner, 405 F.3d 949 (11th Cir. 2005) (holding that the Tax Court did not abuse its discretion in declining to exercise its jurisdiction over a complex bankruptcy issue involving whether tax payments violated automatic stay and the appropriate remedies for the violation thereof).

Note: The court reviews a CDP determination concerning collection issues, including dischargeability, for abuse of discretion. Swanson v. Commissioner, 121 T.C. 111, 119 (2003) (appeals officer's conclusion that the taxpayer had not received a bankruptcy discharge of the unpaid tax was subject to abuse of discretion review). The question for the court, then, is not whether the debtor's tax was discharged, but whether the appeals officer abused her discretion in determining the tax was discharged. The distinction may be of limited consequence, since if the appeals officer applied an erroneous interpretation of the law, the court will find that she abused her discretion. *Id*.

b. Bankruptcy Court jurisdiction

In In re Otto, 311 B.R. 43 (Bankr. E.D. Pa. 2004), the court held it would not exercise its discretion to reopen a no-asset chapter 7 bankruptcy case to determine dischargeability of tax debts because the taxpayer had an alternative

CDP forum to address those issues. We do not agree with Otto. Chief Counsel's position is that reopening a bankruptcy case to determine dischargeability should not generally be opposed by the Government just because the taxpayer can raise the discharge issue in CDP administrative and judicial proceedings (although there may be other grounds to oppose reopening). Judicial review of the CDP administrative determination is for abuse of discretion based on the administrative record and so is not the equivalent of the de novo consideration of the issue in bankruptcy court.

V. CDP Litigation Practice in Tax Court

A. Tax Court Rules

Title XXXII of the Tax Court Rules of Practice and Procedure, which encompasses T.C. Rules 330 through 334, applies to petitions brought under sections 6320 and 6330.

B. Applicability of Small Case Procedures

Section 7463(f)(2) permits small case ("S") designation in CDP cases "in which the unpaid tax does not exceed $50,000." "Unpaid tax" includes unpaid additions to tax, penalties and interest. Our position is that "unpaid tax" includes interest and penalty accruals as of the date of the filing of the petition. Accruals after the date of the filing of the Tax Court petition should not be considered.

C. Motion to Change Caption

If a petition seeking review of a notice of determination is not marked with either an "L" or an "S," and the notice of determination was not attached to the petition, the notice of determination should be attached to the answer. If the filing of the answer does not cause the court to add the letter "L" to the case docket number, a joint motion to change the caption should be filed. *See* sample at Section VI.A.

D. Answers

T.C. Rule 333(a) provides that the Commissioner will file an answer or move with respect to the petition within the periods specified in T.C. Rule 36. If petitioner was previously involved in a judicial proceeding involving the same tax liabilities and years that are listed in the taxpayer's petition, the answer should raise the defense of res judicata or collateral estoppel, as appropriate, pursuant to T.C. Rule 39. Since the Commissioner generally has the burden to prove that liability is (or other issues are) precluded under sections 6330(c)(2)(B) or 6330(c)(4), issue preclusion under these provisions should also be affirmatively pleaded. Any other avoidance or affirmative defense should also be pled in the answer, in accordance with T.C. Rule 39.

The provisions of sections 6330(c)(2)(B) and 6330(c)(4) are similar to the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion), respectively. These doctrines are independent of the statutory provisions and should be affirmatively pleaded, if appropriate (in addition to the statutory provisions), when answering an appeal of a notice of determination. Section 6330(c)(2)(B) does not displace the doctrine of res judicata as to liability determinations. *See* Sparks v. United States, 2000-1 USTC ¶ 50,338 (Bankr. N.D. Ok.).

If the tax liability is properly at issue and respondent has the burden of proof under T.C. Rule 36(b), the answer should include affirmative allegations as to every ground on which respondent relies.

If the CDP case has an "S" designation, then pursuant to T.C. Rule 175(b) there is no need to answer the petition unless respondent has the burden of proof under T.C. Rules 36(b) and 39 and must make affirmative allegations.

E. Replies

T.C. Rule 333(b) refers to T.C. Rule 37 for provisions relating to the filing of a reply and is applicable only if respondent makes an affirmative allegation under T.C. Rule 36(b). T.C. Rule 37(c) provides that where a reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the reply, shall be deemed to be admitted.

F. Additional Pleading in Cases Involving Section 6015

In any Tax Court proceeding, including a CDP case, in which petitioner seeks review of respondent's determination under section 6015, respondent, on or before 60 days from the date of the service of the petition, must serve notice of the filing of the petition on any nonparty spouse who filed the joint return for the years at issue and shall simultaneously file with the court a copy of the notice with an attached certificate of service. T.C. Rule 325. *See* CCDM 35.2.2.12.2 for further guidance.

G. T.C. Rule 331(b)(4) - Issues Not Raised

The Tax Court will address only those issues raised in the petition to the court and in the trial memorandum, and issues not raised will be deemed conceded. T.C. Rule 331(b)(4); Lunsford v. Commissioner, 117 T.C. 183 (2001). General allegations are not sufficient to raise an issue under T.C. Rule 331(b)(4). *See* Poindexter v. Commissioner, 122 T.C. 280 (2004) (taxpayer disagrees with income tax liability but fails to specify the basis of the disagreement); Davis v. Commissioner, T.C. Memo. 2001-87 (taxpayer claims only that she was denied due process); Lindsay v. Commissioner, T.C. Memo. 2001-285 (petition states only that the determination was not complete and was erroneous). T.C. Rule 331(b)(4) has been most strictly applied in cases involving frivolous arguments. *See*, *e.g.*, Stephens v. Commissioner, T.C. Memo. 2005-183.

H. Issues Not Raised in the CDP Hearing

In addition, when reviewing for abuse of discretion, the Tax Court generally considers only issues that were raised at the administrative hearing. Robinette v. Commissioner, 123 T.C. 85 (2004), *rev'd on other grounds,* 439 F.3d 455 (8th Cir. 2006); Magana v. Commissioner, 118 T.C. 488, 493 (2002).

I. Pretrial Motions

Many CDP cases should be resolved by pretrial motion without trial, unless the taxpayer is properly contesting the underlying tax liability. It is therefore critical that Counsel attorneys file appropriate motions sufficiently in advance of the trial date.

1. Motion to dismiss on the ground of mootness

If subsequent to the Appeals hearing the tax, including all interest and penalty accruals, is fully paid and the assessment abated, generally the case should be dismissed as moot. There is no tax liability to collect, the NFTL will be or has been released, the proposed levy will be abandoned, and there is therefore no case or controversy for the Tax Court to adjudicate. The Tax Court's jurisdiction under section 6330(d) is generally limited to reviewing whether the NFTL should remain filed or the proposed levy should proceed, and the court will dismiss as moot cases in which there is no unpaid tax liability upon which the lien or the proposed levy could be based. Greene-Thapedi v. Commissioner, 126 T.C. No. 1 (2006); Gerakios v. Commissioner, T.C. Memo. 2004-203; Chocallo v. Commissioner, T.C. Memo. 2004-152. *See* sample motion at section VI.B.

If the taxpayer is raising liability and requesting a refund in such a situation, the CDP case is not the appropriate forum to resolve such issues because the Tax Court does not have refund jurisdiction in the CDP case and can only address the legality or appropriateness of the NFTL or proposed levy. Greene-Thapedi v. Commissioner, 126 T.C. No. 1 (2006).

When the tax has been fully paid, a motion to dismiss for mootness is inappropriate if the notice of determination rejected interest abatement or spousal relief and the taxpayer would be entitled to a refund if interest abatement or spousal relief is granted, since the Tax Court has independent overpayment jurisdiction under sections 6404(h) and 6015(e). The case should proceed with only the interest abatement or spousal relief issues addressed.

A motion to dismiss for mootness is also appropriate if subsequent to the Appeals hearing the assessment has been abated because it is invalid (*e.g.*, invalid notice of deficiency) or the IRS has decided to forgo collection after a bankruptcy discharge. If the assessment has not actually been abated yet, a stipulated decision would be appropriate in these situations. *See* sample Stipulated Decision at section VI.I.1.a.

Note: Not all bankruptcy discharge situations justify a motion to dismiss for mootness or a stipulated decision. If a taxpayer has received a bankruptcy discharge and the taxpayer's tax liabilities are dischargeable, the taxpayer is no longer personally liable for the taxes and the Service is enjoined from collecting the liability from the taxpayer personally. However, the Service may collect a discharged liability from prebankruptcy assets if a NFTL was filed before the taxpayer's bankruptcy. Iannone v. Commissioner, 122 T.C. 287 (2004). The Service may also collect a discharged liability from pension assets excluded from the bankruptcy estate, even if a NFTL is not on file prepetition. *See* section IV.E, *supra*.

2. Motion to dismiss for lack of jurisdiction

a. Improper court

See discussion at IV.D.1, *supra*. A sample motion is attached at section VI.C.1.

b. No notice of determination for all or some taxes at issue.

See discussion at IV.D.2, *supra*. Two sample motions are attached at section VI.C.2 and 3.

c. Invalid notice of determination

See discussion at IV.D.2.b, *supra*. Two sample motions are attached at section VI.C.4 and 5.

d. Late-filed petition

See discussion at IV.D.3, *supra*. A sample motion is attached at section VI.C.6.

e. Taxpayer-initiated motions to dismiss

Relying on Lunsford v. Commissioner, 117 T.C. 159 (2001), the Tax Court will deny taxpayers' motions to dismiss for lack of jurisdiction when the basis for the motion is that the taxpayers were not provided with a procedurally-valid CDP hearing. *See, e.g.,* Stoewer v. Commissioner, T.C. Memo. 2002-167.

In Wagner v. Commissioner, 118 T.C. 330 (2002), the Tax Court held that a CDP case may be dismissed without prejudice upon motion by the taxpayer, distinguishing CDP cases from cases holding that taxpayers may not withdraw a petition under section 6213 to redetermine a deficiency. *See* Estate of Ming v. Commissioner, 62 T.C. 519 (1974); I.R.C. § 7459(d). Accordingly, if a taxpayer wishes to withdraw her CDP petition and have the case dismissed without prejudice, counsel attorneys should file a Notice of No Objection indicating that if the case is dismissed, the Service will take any appropriate collection action as provided by law. Upon dismissal of the case, counsel attorneys should make sure the case is immediately closed and returned to Collection to proceed with collection.

3. Motion to dismiss for failure to state a claim upon which relief can be granted

T.C. Rule 40 provides for the filing of a motion to dismiss for failure to state a claim upon which relief can be granted. Such motion must be filed within 45 days after the date of service of the petition. If such a motion is not filed within this 45-day period, then the attorney should consider a motion for judgment on the pleadings. The Tax Court's review of these motions is limited to the pleadings and any documents attached thereto. T.C. Rule 333(a) and T.C. Rule 36(a). Examples of when a motion to dismiss for failure to state a claim should be filed include: (1) taxpayer makes only frivolous arguments, and (2) taxpayer challenges only the existence or amount of the underlying liability, and admits in the petition that he received the statutory notice of deficiency for the liability. When the taxpayer states a nonfrivolous claim that can be properly raised in the CDP case (such as he was denied the right to a face-to-face conference, or the hearing was not otherwise conducted properly), generally a motion for summary judgment should be filed instead of a motion to dismiss for failure to state a claim, even if frivolous arguments are also made. Responses to frivolous arguments can be found on the P&A web page through the Developing Issues link under the heading "The Truth about Frivolous Tax Arguments."

4. Motion to remand

a. Grounds for remand

When Appeals has abused its discretion, the Tax Court will remand the case to the Office of Appeals to hold a new hearing if a new hearing is necessary or will be productive. Lunsford v. Commissioner, 117 T.C. 183, 189 (2001); Lites v. Commissioner, T.C. Memo. 2005-206; Day v. Commissioner, T.C. Memo. 2004-30. If counsel determines that the appeals officer's exercise of discretion in conducting the hearing or making a determination on a nonliability issue can not be defended, and reconsideration of the case by Appeals is required because the error is not harmless, counsel may file a Motion for Remand to require Appeals to hold a supplemental hearing (if necessary) and issue a Supplemental Notice of Determination (Letter 3978).

Review for abuse of discretion requires an adequate administrative record including clear findings by the appeals officer on relevant issues so the court can determine whether the record supports the appeals officer's findings. The court should not be making findings but instead should be reviewing the appeals officer's findings for abuse of discretion and should give deference to those findings. *See* Olsen v. United States, 414 F.3d 144, 156 (1st Cir. 2005) ("In the event the administrative record is found inadequate for judicial review, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'") (citing Florida Power & Light Co. v. Lorian, 470 U.S. 729, 744 (1985); Robinette v. Commissioner, 439 F.3d 455, 459 (8th Cir. 2006) (" … in providing for CDP hearings on what is ordinarily a scant record, Congress … must have been contemplating a more deferential review of these tax appeals than of more formal agency decisions. …") (citing Olsen, *Id*.); *see also* Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 626 (6th Cir. 2005) ("Congress must have been contemplating a more deferential review of these tax appeals than of more formal agency decisions.").

Accordingly, instead of trying to defend an erroneous or insufficient notice of determination at trial, Counsel attorneys should consider asking the court to remand the case to Appeals for a supplemental determination if (1) the appeals officer failed to address a relevant issue; (2) the appeals officer failed to make necessary findings of fact; (3) the appeals officer failed to perform an analysis that is necessary in making the determination; (4) the administrative record contains no indication of the documents or evidence the appeals officer considered in making the determination or the reasons for the determination; (5) the appeals officer's conduct of the hearing deprived the taxpayer of a procedural right granted by statute or regulation, such as the right to an impartial appeals officer under section 6320(b)(3) or 6330(b)(3); or (6) the appeals officer did not give the petitioner an adequate opportunity to present evidence or arguments in support of relevant issues raised during the CDP hearing process.

Specific examples of cases when remand would be appropriate are: (1) taxpayer requested abatement of interest but the appeals officer failed to address this issue; (2) although taxpayer has a colorable argument for abatement of interest based on evidence that could show unreasonable delays by the IRS, the appeals officer summarily rejected abatement without any explanation; (3) the appeals

officer rejected the taxpayer's offer-in-compromise without consideration of relevant financial information that was provided by the taxpayer; (4) the appeals officer's findings are confusing or contradictory (*e.g.*, a low installment agreement amount is rejected as not adequate, while a higher amount is rejected because the taxpayer cannot afford it); and (5) the appeals officer closed the hearing and issued the notice of determination prior to the expiration of the agreed upon deadline for the taxpayer to submit financial documentation.

Note: Inadequate findings or discussion in the notice of determination do not always require remand. There might be sufficient explanation in the appeals officer's case activity notes or letters to the taxpayer, or the appeals officer may be able to clarify his findings in a Declaration or through testimony.

Note: Remand may also be appropriate for cases filed in district court. *See*, *e.g.*, Cavanaugh v. United States, 93 AFTR 2d 1522 (D.N.J. 2004); MRCA Information Services, Inc. v. Commissioner, 145 F. Supp. 2d 194 (D. Conn. 2000).

b. Remand not appropriate

The court should uphold a determination where the appeals officer erred if the error does not affect the outcome of the case. As a consequence, any error should be evaluated to determine whether it is harmless. The harmless error rule is often applied where the taxpayer is only making frivolous arguments. For example, if the taxpayer was denied the right to record his conference but relies on frivolous or groundless arguments, the Tax Court will not remand the case. Fray v. Commissioner, T.C. Memo. 2004-87; Kemper v. Commissioner, T.C. Memo. 2003-195.

Some errors by Appeals on nonliability issues may not require reconsideration even if the error was not harmless, because the issue involves the application of law to uncontested facts. These issues may include whether the unpaid tax was discharged in bankruptcy, whether the statute of limitations has expired, or whether a notice of deficiency was properly issued. If an issue that was wrongly decided by Appeals does not require further fact-finding or a determination by Appeals, in appropriate cases the notice of determination can be conceded in a stipulated decision. *See* section VI.I.1.a.

If Appeals erroneously failed to consider an underlying liability issue, remand is optional. Because the issue will be reviewed de novo by the court, a remand is not necessary to develop an administrative record. On the other hand, if the taxpayer is raising nonfrivolous issues the case may be able to be resolved on remand without the necessity for trial.

c. Remand procedure

A Motion for Remand should be filed as early as possible in the proceeding after the petition is answered. If the case is calendared, the Motion for Remand should be filed with a separate motion for continuance. If the case is not calendared, only a Motion for Remand should be filed. The Motion for Remand should explain the error in the determination or hearing that is to be remedied on remand. A sample motion is attached at section VI.D.

Prior to filing a Motion for Remand, attorneys should advise the appeals officer of the reasons for remand. After the case is remanded, the appeals officer should not issue a standard notice of determination using Letter 3193. Instead, a Letter 3978, Supplemental Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, should be issued to the taxpayer. This supplemental notice should not have the standard language concerning the right to file a petition with the court to appeal the determination, as the case is already docketed with the court. Following the issuance of the supplemental notice, a status report should be filed with the court attaching the supplemental determination.

5. Motion for summary judgment

a. General matters

T.C. Rule 121(b) permits the court to grant summary judgment if the "pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with affidavits, if any, show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." Even if a summary judgment motion will not dispose of all of the issues, a motion for partial summary judgment may help narrow the issues for trial.

A summary judgment motion may be submitted at any time beginning 30 days after the pleadings have closed, but not within such time so as to delay trial. T.C. Rule 121(a). A summary judgment motion should not be submitted later than 30 days before trial. It is recommended that the motion be filed no later than 75 days prior to the call of the calendar.

When appropriate, counsel should consider filing a motion to permit levy under section 6330(e)(2) in connection with a motion for summary judgment. *See* section V.I.7, *infra*. A summary judgment motion and section 6330(e)(2) motion must be filed as separate motions and not joined together. T.C. Rule 54.

Also when appropriate, counsel should consider requesting the court to impose a section 6673(a)(1) penalty in connection with a motion for summary judgment. The penalty can be requested as part of the summary judgment motion.

b. Grounds for summary judgment

If the taxpayer is only raising frivolous or groundless arguments, and there is no need to go beyond the pleadings, a motion to dismiss for failure to state a claim upon which relief can be granted should be filed within 45 days after service of the petition or a motion for judgment on the pleadings should be filed beyond that time. In such cases, if the respondent needs to go outside the pleadings, a motion for summary judgment should generally be filed. A summary judgment motion should also be filed where the only issues raised by the taxpayer are precluded by section 6330(c)(2)(B) (preclusion of liability) or (c)(4) (preclusion due to prior proceedings) and there is no dispute as to material fact with respect to the facts supporting the preclusion. A sample summary judgment motion where section 6330(c)(2)(B) preclusion is at issue is attached at section VI.E.2.

A full or partial summary judgment motion should also be considered if the petitioner raises an issue not raised in the administrative hearing. *See* Magana v. Commissioner, 118 T.C. 488, 493 (2002).

Additionally, many cases involving nonliability issues can be decided through summary judgment. The Tax Court should resolve the case based on the administrative record, and should be reviewing the appeals officer's findings for abuse of discretion rather than finding its own facts, *see* IV.D.4, *supra*, so no trial should be necessary. Even if the petitioner plans to introduce evidence at trial that was not presented to the appeals officer, a summary judgment motion is generally appropriate because the court must confine its review to the administrative record. Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006). *See also* Murphy v. Commissioner, 125 T.C. 301 (2005) (new evidence inadmissible because not relevant). A sample motion for summary judgment, where only claims subject to abuse of discretion review are at issue, is attached at section VI.E.1.

A motion for summary judgment is not appropriate if there is a dispute of material fact concerning an issue for which the court must engage in fact-finding based on new evidence at trial. The court may hear evidence if the existence or amount of the underlying liability is properly at issue or the taxpayer raises a claim for relief under section 6015(b) or (c). Although the Commissioner takes the position that de novo review is not permitted for section 6015(f) determinations, the Tax Court has taken a different view in Ewing v. Commissioner, 122 T.C. 32, 38-39 (2004), *vacated*, 439 F.3d 1009 (9th Cir. 2006). The Ninth Circuit reversed the Tax Court in Commissioner v. Ewing, 439 F.3d 1009 (9th Cir. 2006), on the grounds that the Tax Court lacks jurisdiction to review denial of section 6015(f) relief when jurisdiction is predicated on section 6015(e) and no deficiency has been asserted (thus, not addressing the scope of review issue). *See* discussion at Section IV.D.4.d, *infra*. *See also* Chief Counsel Notice 2004-26, which discusses litigation of cases in which section 6015(f) is implicated.

In some cases, the court may also hear evidence where the taxpayer raises an issue as to how the administrative hearing was conducted. For example, the Tax Court may resolve issues of material fact with respect to whether the appeals officer was impartial, refused to accept the submission of evidence, failed to consider issues raised by the taxpayer, or properly communicated to the taxpayer deadlines for the submission of evidence. Such issues are generally treated as involving exceptions to the record rule. *See generally* Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006); Murphy v. Commissioner, 125 T.C. 301 (2005). *See also* section IV.D.4.b.iv. As a result, a summary judgment motion will probably not be successful if the taxpayer disputes facts concerning the conduct of the CDP hearing, unless the taxpayer offers no support for the alleged factual dispute or respondent can demonstrate that the taxpayer's allegations are irrelevant.

c. Declaration

A declaration from the appeals officer making the determination should be filed with the summary judgment motion. The declaration should authenticate and attach the documents that support the motion for summary judgment, *i.e.*, all

documents which establish that no material facts are in dispute and the Commissioner is entitled to judgment as a matter of law. The entire administrative record does not need to be submitted to the court with a summary judgment motion and declaration. *See* sample at section VI.E.3.

The documents that support a motion for summary judgment in a CDP case will vary depending upon the facts and issues in each case. Section 6330(c)(3) requires that the notice of determination address the verification requirement, all issues raised by the taxpayer, and whether the collection action balances the need for efficient collection with the taxpayer's concern that the collection action be no more intrusive than necessary. Examples of documents relevant to these issues that should generally be attached to the declaration of the appeals officer in support of a motion for summary judgment are:

- The CDP lien or levy notice. Copies of levy notices sent by the ACS are not retained by the IRS and so they will generally not be in the administrative record unless the appeals officer can obtain a copy from the taxpayer. If Appeals cannot obtain a copy of the notice, the transcript relied upon to confirm the issuance of the notice should be attached.

- The CDP hearing request.

- The transcript of the taxpayer's account that was reviewed by the appeals officer (*e.g.*, TXMOD-A, Form 4340). Transcripts prepared after the issuance of the notice of determination, such as updated Forms 4340, are <u>not</u> part of the administrative record. This updated Form 4340 should not be submitted as part of the summary judgment motion unless the court specifically requests it. Obtain a certified copy of the Form 4340. Because it is self-authenticating, it is not necessary to attach a declaration.

Note: Some Tax Court judges have required respondent's counsel to bring Forms 4340 to hearings on summary judgment motions.

- The statutory notice of deficiency and any supporting documents the appeals officer relied upon to establish the notice of deficiency was sent to the taxpayer's last known address, and/or was received by the taxpayer, when these issues are raised by the taxpayer.

- Correspondence between the taxpayer and the appeals officer.

Note: This includes e-mail correspondence. Attorneys should secure copies of e-mail correspondence from Appeals if these are not already printed out and placed in the CDP file.

- Copies of the taxpayer's bankruptcy petition and schedules and order of discharge (when the impact of the bankruptcy on the tax due is raised as an issue).

- A Form 656, Offer-in-Compromise, submitted by the taxpayer along with the taxpayer's supporting financial documents.

- Form 1040, Individual Income Tax Return, for the tax years at issue (if the taxpayer disputes the liability).

- The history notes of the appeals officer included in the Appeals case activity record.

- The Appeals Transmittal and Case Memo, and the Notice of Determination with attachments.

Among the documents that the appeals officer may rely upon are the printouts from Integrated Collection System or ACS screens; documents pertaining to the evaluation of collection alternatives, such as financial statements; and documents that establish that an issue raised in the CDP proceeding was previously raised in an administrative or judicial proceeding in which the taxpayer participated meaningfully, for purposes of section 6330(c)(4).

Additionally, if any face-to-face or telephone conference between the appeals officer and the taxpayer was recorded, a copy of the tape or a transcript of the recording, made by accepted means by a licensed transcription agency (the latter is not required to be made) and authenticated by the appeals officer, should be submitted as part of the administrative record. If the taxpayer submits a transcript of the recorded conference, the appeals officer should authenticate the taxpayer's transcript only after comparing it to the tape recording made by the appeals officer.

The declaration should set forth the appeals officer's job position, that the appeals officer was assigned responsibility to handle the taxpayer's hearing request, and that, pursuant to this assignment, the appeals officer made the determination required under section 6330(c)(3). If any of the materials require interpretation (*e.g.*, transaction codes) or authentication, the declaration should include appropriate paragraphs.

Note: When the appeals officer failed to consider an issue raised or information submitted by taxpayer or when the facts or reasoning relied upon by the appeals officer do not fully support the determination, a declaration may not be the appropriate method of supplementing the administrative record. A motion to remand may be appropriate in such cases.

6. Section 6673(a)(1) penalties

Section 6673(a)(1) authorizes the Tax Court to impose a penalty, not in excess of $25,000, on a taxpayer if the Tax Court finds that the taxpayer has instituted or maintained a CDP proceeding primarily for delay, or that the taxpayer's position in the proceeding is frivolous or groundless. Burke v. Commissioner, 124 T.C. 189 (2005); Pierson v. Commissioner, 115 T.C. 576 (2000); Forbes v. Commissioner, T.C. Memo. 2006-10 ($20,000 penalty imposed). Ordinarily, the penalty is asserted against taxpayers who take frivolous positions, and should be requested by counsel where appropriate in motions or at trial.

If a Counsel attorney wishes to ask for a section 6673(a)(1) penalty against a taxpayer who instituted the proceeding primarily for delay but who is not making

frivolous arguments, the attorney should be prepared to put forth substantial evidence to support the penalty. The Chief Counsel Sanctions Officer must approve a motion or request for imposing a section 6673(a)(2)(A) penalty against an attorney or person admitted to practice before the Tax Court. Contact Branch 3, APJP, to obtain approval of the Sanctions Officer in such situations.

7. Section 6330(e)(2) motions

Counsel attorneys should file motions to permit levy pursuant to section 6330(e)(2), in appropriate cases. *See* sample at section VI.F. In general, a motion to permit levy should be considered in any CDP case involving a taxpayer who raises solely frivolous arguments. Suspension of the Service's levy authority in such cases serves no legitimate purpose.

Section 6330(e)(2) contains two criteria for obtaining relief from the suspension of levy. First, the underlying tax liability must not be at issue in the appeal. Second, there must be a showing of "good cause."

The underlying tax liability is not "at issue" merely because the taxpayer challenges it. Liability is not at issue, for example, if a taxpayer challenges underlying liability in the petition, but the court is precluded from considering that liability, pursuant to section 6330(c)(2)(B). Burke v. United States, 124 T.C. 189 (2005). Liability is also not at issue if the petition makes only frivolous arguments. Unless the challenge to liability is both allowed under section 6330(c)(2)(B) and bona fide, a motion to permit levy may be appropriate. Note that if the notice of determination contains multiple tax years and periods, but a taxpayer disputes only the tax liabilities (or interest or additions) for some of the periods, a section 6330(e)(2) motion may be brought with respect to the undisputed tax liabilities.

The primary focus of a section 6330(e)(2) motion should be the required showing of "good cause" not to suspend the levy during the pendency of the judicial review period. A showing of good cause may be made in any case in which a taxpayer is using the CDP provisions in a manner inconsistent with or inappropriate to their purpose. The purpose of the CDP statutes, sections 6320 and 6330, is to provide taxpayers with a forum to raise relevant issues with respect to a proposed levy or NFTL. I.R.C. § 6330(c)(2)(A); H.R. Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998). A section 6330(e)(2) motion should be considered in all CDP levy cases which are not brought for this purpose, but are used solely as a forum for frivolous arguments or otherwise to delay collection action.

While our position is that good cause to permit levy during appeal will exist primarily in cases when a taxpayer raises solely frivolous issues, there may also be good cause for relief in other types of cases in the Tax Court, district courts, or appellate courts. For example, a section 6330(e)(2) motion may be appropriate in some cases involving the pyramiding of tax liabilities. *See* Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash) (court found "good cause" where taxpayer corporation repeatedly failed to pay employment taxes on time).

Section 6330(e)(2) motions filed with the Tax Court should be captioned as "Respondent's Motion to Permit Levy." The opening paragraph should

state that respondent moves, pursuant to Tax Court Rule 50(a) and section 6330(e)(2), that the court remove the suspension of the levy under section 6330(e)(1) because the underlying liability is not at issue and respondent has shown good cause for the removal of the suspension of the levy. The body of the motion should set forth the background of the case and establish that the two criteria for relief from the stay have been met. The motion should conclude by requesting expedited handling by the court to minimize further unnecessary collection delays.

The section 6330(e)(2) motion may be filed at any point at which the court retains jurisdiction over the case. Of course, the motion should be filed as early in the case as possible to minimize delays in resuming collection. The motion can be filed with motions for summary judgment (two separate motions must be filed, in accordance with T.C. Rule 54) and for imposition of the penalty under section 6673(a)(1).

Note: Although a section 6330(e)(2) motion should be filed early in the case, such a motion may be made up to the time a final decision is entered. In the absence of an order permitting levy, a litigious taxpayer making frivolous arguments may delay collection for a significant period by appealing the tax court's decision to the court of appeals.

Finally, since the purpose of a section 6330(e)(2) motion is to permit immediate levy, alert the Service before filing the motion, and immediately after the motion is granted, so that it will be prepared to proceed promptly with a levy. For cases which originate from the field, contact the group manager of the Revenue Officer who referred the case to Appeals. For cases that originate from ACS, contact the CDP coordinator for the state of taxpayer's residence.

J. Trial Preparation

1. Discovery

Unless the taxpayer is raising only frivolous arguments, informal discovery should be conducted at a Branerton conference. The taxpayer should be provided with a copy of the complete administrative record. In addition, request for admissions and all formal discovery procedures are available in a CDP case. However, if the taxpayer is only disputing the determinations that are reviewed for abuse of discretion, the need for formal discovery (interrogatories or requests for admission) should generally be limited to cases when there is a factual dispute over the contents of the administrative record (*e.g.*, taxpayer asserts he submitted financial documentation that was not considered by Appeals) or the conduct of the administrative hearing (*e.g.*, taxpayer disputes statement in notice of determination that he did not request a face-to-face conference, or did not request collection alternatives) .

For determinations subject to trial de novo (*i.e.*, liability determination or section 6015(b) or (c) relief), the full range of formal discovery tools may be used.

Any requests by the taxpayers to depose appeals officers or their managers should be opposed. We take the position that the appeals officers and their managers are nonparty witnesses. Therefore, T.C. Rule 75(b) applies to their depositions. The rule states that depositions of nonparty witnesses are permitted only in extraordinary circumstances where the information sought is not available through other, less

extraordinary means. Additionally, anything the taxpayer wishes to know about the Appeals determinations can be found in the administrative record or obtained through interrogatories or requests for admission.

In the event the court permits a deposition, the scope of the testimony should be limited to circumstances where the court can review relevant evidence outside the administrative record. *See* section IV.D.4. In addition, inquiry into the mental processes of the agency decision maker is not permissible, except for the limited purpose of determining if the decision was a result of bad faith. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). The taxpayer, however, must make a "strong showing of bad faith or improper behavior" before any such inquiry will be permitted. *Id.*

2. Stipulation of facts

The stipulation should include facts and documents relevant to issues subject to trial de novo. The stipulation of facts should also attach the documents comprising the administrative record as discussed in section V.J.3, *supra*. If the taxpayer will not cooperate with the Counsel attorney on the stipulation of facts, the attorney should file, at least 45 days before trial, a motion under T.C. Rule 91(f) to compel stipulation.

If a stipulation of facts cannot be agreed to within sufficient time to file a motion to compel, Counsel should still prepare a stipulation of facts for submission to the Tax Court at the trial calendar call. Additionally, Counsel should prepare a declaration of the appeals officer who made the CDP determination to authenticate the administrative record. This is similar to the declaration that is prepared for a summary judgment motion. The Counsel attorney should send a copy of the declaration to the taxpayer, informing the taxpayer of respondent's plan to offer the documents into evidence. Under Fed. R. Evid. 902(11), the declaration permits the documents comprising the administrative record to be self-authenticating, provided written notice of respondent's intention to use the documents is given to the taxpayer and the records and declaration are made available for inspection sufficiently in advance to provide the taxpayer a fair opportunity to challenge them. By using this declaration, the appeals officer's live testimony is not necessary to authenticate the administrative record at trial. The hearsay exception for business records found in Fed. R. Evid. 803(6) also applies to permit admission of the declaration into evidence. In a non-CDP case, the Tax Court has approved the use of a declaration to admit a certified mail list into evidence, citing Fed. R.s Evid. 902(11) and 803(6). Clough v. Commissioner, 119 T.C. 183 (2002).

3. Submission of the administrative record at trial

Counsel should submit the administrative record to the Tax Court as part of the stipulation of facts, as outlined below. Submission of a standardized and comprehensive administrative record should decrease the need for testimony of the appeals officer in CDP cases and reduce the court's need to go beyond the administrative record. Although the Tax Court held in Robinette v. Commissioner, 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006), that it would consider evidence outside of the administrative record in CDP cases, the Tax Court was reversed by the Eighth Circuit. The Eighth Circuit held that the APA and general

principles of administrative law limit review under section 6330(d) to the administrative record. *Id.* at 459-60. The Tax Court has not yet indicated whether it will follow the Eighth Circuit's opinion in other circuits.

Under well-settled principles of administrative law, the administrative record consists of the information an agency reviews when making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). In CDP cases, the administrative record consists of all materials relied upon by an appeals officer in making a determination regarding the collection action. Materials not relied upon by the appeals officer in making the determination are not part of the administrative record for judicial review. If a case is remanded to the Appeals office, however, any additional materials that the appeals officer relies upon, including any recordings or a supplemental notice of determination, become part of the administrative record.

The administrative record attached to the stipulation of facts should generally include the items described above that should be attached to a declaration filed with a motion for summary judgment. See section V.I.5.c, *supra*, which lists the minimum items which should comprise every administrative record.

When preparing the stipulation of facts, the Counsel attorney should place the items comprising the administrative record in the categories and order described in section V.I.5.c. If there is more than one document within a category, the items should be listed in chronological order (*e.g.*, the taxpayer's bankruptcy petition, the taxpayer's bankruptcy schedules, the bankruptcy court's order of discharge).

The stipulation should contain a paragraph stating that the specifically enumerated exhibits constitute the entire administrative record. Each item, labeled with a separate exhibit number, should be attached to the stipulation. If the item contains more than one page and is not otherwise numbered, the item should be paginated sequentially. A sample stipulation of facts attaching the administrative record is at section VI.G.

K. Trial

1. Objections to evidence not in the administrative record

As more fully discussed in section IV.D.4.b.ii, the Eighth Circuit held in Robinette v. Commissioner, that when reviewing issues in a CDP case for an abuse of discretion, the Tax Court must limit its review to the administrative record. The Tax Court's holding to the contrary was reversed by the Eighth Circuit. The Tax Court has not yet indicated whether it will follow Robinette outside of the Eighth Circuit.

In those cases in which a trial of nonliability issues cannot be avoided by a motion for summary judgment, counsel should argue that the court should not consider either an issue or evidence that was not presented to Appeals during the administrative hearing. In the alternative, counsel should argue that evidence not in the administrative record is not relevant to the issue of whether Appeals abused its discretion because such evidence could not have had any bearing on Appeals' determination. *See* Murphy v. Commissioner, 125 T.C. 301 (2005); Barnes v.

Commissioner, T.C. Memo. 2006-150. *See also* Fed. R. Evid. 401, 402; Morlino v. Commissioner, T.C. Memo. 2005-203.

Note: Presentation of evidence as to what happened during the CDP hearing may be permissible as an exception to the record rule. *See* section IV.D.4.b.iv.

In order to preserve the Robinette issue for possible appeal in cases outside of the Eighth Circuit, counsel should make an evidentiary objection if the taxpayer attempts to testify as to matters not in the administrative record or otherwise offers evidence that was not made available to Appeals.

Attorneys should also consider filing a motion in limine objecting to the admission of the testimony or evidence. If the taxpayer will not stipulate to the administrative record, the motion in limine can be accompanied by a declaration of the appeals officer so as to place the administrative record before the court without calling the appeals officer to testify. The motion can seek to both affirmatively place the administrative record before the court and to prohibit admission of any evidence not presented to the appeals officer. A sample motion in limine is attached at section VI.H.

If the court denies the evidentiary objection or motion, or if the court reserves ruling on the objection or motion until after the trial, only then would it be appropriate to present any additional evidence not reviewed by the appeals officer that strengthens the respondent's case. With this evidence an alternative argument on brief can be made that the appeals officer's determination is not an abuse of discretion, even if the court allows evidence not available to Appeals during the administrative proceeding.

2. Appeals testimony

Appeals testimony should be kept at a minimum. On issues subject to abuse of discretion review, the general rule is that an appeals officer's live testimony is unnecessary because the court's review is limited to the administrative record. If the taxpayer will not stipulate to the administrative record, the record can be authenticated and admitted by declaration as described *supra*. In Murphy v. Commissioner, 125 T.C. 301 (2005), the Tax Court excluded appeals officer testimony that was not relevant to the appeals officer's determination. The Tax Court also excluded testimony with respect to the appeals officer's rejection of the taxpayer's offer-in-compromise, when such testimony was unnecessary as the record evidence provided adequate basis for the rejection.

In some cases an issue may arise involving the accuracy of the administrative record or whether the appeals officer conducted the hearing correctly. When these types of issues are present, the administrative record may be detailed enough so that Appeals testimony is unnecessary. For example, the notice of determination and supporting Case Activity Records may contain detailed summaries of the appeals officer's attempts to schedule a face-to-face conference. However, if the record is inaccurate, unclear or incomplete, counsel may determine that appeals officer testimony is necessary. *See* Murphy v. Commissioner, 125 T.C. 301 (2005) (appeals officer testimony is necessary and admissible to explain notations and abbreviations in case activity report). As discussed at section IV.D.4.b.iv, *supra*, the record rule does not generally apply to issues involving the accuracy of the

administrative record or the conduct of the hearing. Appeals testimony may also occasionally be necessary to rebut the taxpayer's evidence where the court permits the taxpayer to introduce evidence outside the administrative record over respondent's objection.

Appeals has agreed to permit Appeals employee testimony in these limited situations, but not on a routine basis. A joint memorandum from the Director, Technical Services and the Division Counsel SBSE dated March 23, 2005, details the circumstances under which Appeals employees will testify. All decisions to allow an Appeals employee to testify are made by the Appeals Area Director. Counsel should make requests for Appeals personnel to testify well in advance of the trial date, *i.e.*, soon after the first calendar call status report meeting or as soon as the taxpayer raises an issue necessitating the testimony. Pursuant to the March 23, 2005, memorandum, Appeals will pay for its personnel to testify at trial in those few cases where the testimony is necessary.

L. Stipulated Decision Documents

Based on common situations presented in CDP cases, sections VI.I.1 through 3 are sample stipulated decision documents. Individual cases will vary, of course, and the sample stipulated decision documents may need to be adapted to fit the particular facts of each case.

Issues in CDP cases can be grouped under two headings: nonliability issues, which are reviewed by the courts for abuse of discretion, and liability issues, which are reviewed de novo. "Liability" refers to the proper amount of tax imposed by the Internal Revenue Code. Nonliability issues include those involving the Service's compliance with applicable law and administrative procedures, the conduct of the administrative hearing, collection alternatives, and the appeals officer's determination to proceed with collection. Additionally, all issues relating to the "unpaid tax" (*e.g.*, application of payments, discharge in bankruptcy, timeliness of assessment and whether procedural requirements for assessment were met) are nonliability issues.

Note: Where decision documents contain language indicating that the taxpayer waives restrictions in section 6330(e) prohibiting collection until the decision of the Tax Court becomes final, the suspension of the collection statute of limitations in section 6330(e) is also no longer in effect as of the date the decision is entered.

1. Nonliability issues

When, with respect to a nonliability issue, the appeals officer abused his discretion in conducting the hearing or in making the determination, and reconsideration of the case by Appeals is required because the error is not harmless, the attorney should generally file a Motion for Remand to Appeals to allow the appeals officer to correct the error and issue a supplement to the notice of determination. However, if the error was harmless, the notice of determination should be defended.

On the other hand, some nonliability issues may not require reconsideration by Appeals even if the error was not harmless, because the issue involves the application of law to uncontested facts. These issues may include whether the unpaid tax was discharged in bankruptcy, whether the statute of limitations has

expired, or whether a notice of deficiency was properly issued. If an issue does not require further fact finding or a determination by Appeals, and the case is to be conceded and the tax abated, the decision document should state that the notice of determination is not sustained as in the sample decision at section VI.I.1.a. When the assessment is conceded as invalid but the assessment period is still open, the sample paragraph stating that respondent's right to reassess the tax liability is preserved should be included.

A motion to dismiss on ground of mootness, rather than a stipulated decision document, should be filed if the tax liability has been paid in full and no issues have been raised that would invoke the Tax Court's overpayment jurisdiction under sections 6404(h) or 6015(e). Similarly, a motion to dismiss on the ground of mootness should be filed if the assessment has been abated. *See* section V.H.1, *supra*. If the Service has agreed to abate the assessment but the abatement has not been completed, a motion to dismiss on ground of mootness should not be filed. Instead, a stipulated decision document setting forth the basis for the abatement should be filed. (Sample decision in section VI.I.1.a.)

If the taxpayer is conceding the case in full and the underlying tax liability is not at issue, then a stipulated decision document stating that the determinations are sustained in full should be filed. (Sample decision in section VI.I.1.b). If the taxpayer is conceding the case in full but a collection alternative has been agreed to outside CDP, then the collection alternative should be referenced below the judge's signature as in Sample decision in section VI.I.1.c. An example would be when Appeals properly declined to consider an offer-in-compromise because the taxpayer did not submit requested financial documentation at the administrative hearing. While the appeal to Tax Court is pending, the taxpayer submits the financial documentation and this is forwarded with taxpayer's offer-in-compromise to the Collection function, which accepts the offer. The acceptance of the offer should not be referenced above the line because the offer was accepted outside of the CDP hearing and the court has no jurisdiction in connection with the offer. Note that if Appeals had erred in concluding that the financial documentation was not submitted, a motion for remand should generally be filed rather than a document not sustaining the determination.

2. Liability issues

When the taxpayer challenges the underlying tax liability (*i.e.*, the proper amount of tax imposed by the Internal Revenue Code), the attorney must first determine whether the challenge is precluded under section 6330(c)(2)(B). If the challenge to the underlying tax liability is not precluded, then the stipulated decision document must set forth the amount of the underlying tax liability, which is referred to in the decision document as the amount of tax imposed by the Internal Revenue Code. *See* sample at section VI.I.1.d. The amounts of the liability and additions to tax should be calculated as of the date the decision is entered. Stipulations as to interest should generally be below the line and state that interest accrues in accordance with law. If the amount of interest that accrued on the tax liability was specifically at issue, the amount of interest agreed to can be put above the line. Any stipulation as to overpayments should be placed below the line, because the Tax Court does not have jurisdiction under the CDP provisions to determine an

overpayment or order its refund (unless the overpayment arises under section 6404(h) or 6015(e)). If the underlying tax liability is not properly at issue but adjustments are agreed to, the amount of the underlying tax liability should be set forth below the Judge's signature. *See* sample at section VI.I.1.e.

3. Sections 6404 and 6015 issues

   CDP cases may involve claims for interest abatement under section 6404 or innocent spouse relief under section 6015. For sample decisions for cases in which the notice of determination addresses both CDP issues and interest abatement, see section VI.I.2 a and b. For sample decisions in which the notice of determination addresses both CDP issues and innocent spouse relief, see section VI.I.3.a through d.

M. Appeal of Tax Court CDP Decision

Section 7482(b)(1) provides that a Tax Court decision is appealable to the Court of Appeals for the District of Columbia Circuit unless the decision is listed in one of the categories specified in section 7482(b)(1)(A)-(F). Although none of subparagraphs (A)-(F) expressly mentions a decision in a CDP case, we should not object to venue when a taxpayer appeals a CDP decision to the circuit court of appeals of the taxpayer's residence or principal place of business, which is the rule for deficiency cases. It is reasonable to believe that Congress intended the rules of section 7482(b)(1)(A)-(F) to apply to the appeal of CDP decisions, because section 6330(d)(1)(A) contemplates that the Tax Court should exercise jurisdiction over taxes being collected in the same manner as it exercises jurisdiction over deficiency cases.

Section 7485(a), requiring a taxpayer to post an appeal bond in order to stay collection, does not apply to CDP cases. By its terms, section 7485 applies only to the collection (and assessment) of deficiencies, not assessed liabilities that are the subject of a CDP case. In a CDP levy case, levy is suspended during the pendency of appeals, unless the IRS obtains a lifting of the suspension pursuant to section 6330(e)(2).

VI. Exhibits

A. Joint Motion to Change Caption

JOINT MOTION TO CHANGE CAPTION

RESPONDENT MOVES that the Court enter an order correcting the caption in the above-entitled case by changing the docket number to read [*insert docket number*]"L" and designating this case as a Lien or Levy Action provided for in I.R.C. § 6320(c) or 6330(d) and T.C. Rules 330 through 334.

IN SUPPORT THEREOF, respondent respectfully states:

1. [*Describe something in the petition from which it appears that petitioner is challenging a Notice of Determination under Section 6320 and/or 6330, such as a reference to lien or levy or collection or section 6320 or 6330.*]

2. The petition appears to be an appeal of a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued by respondent on ____, 200_, a copy of which is attached as Exhibit A.

3. The copy of the petition served on respondent does not include an "L" in the docket number.

4. Petitioner informed respondent that he/she intended to seek review of the Notice of Determination as a levy [lien] action brought under section 6330(d) [6320(c) and 6330(d)].

WHEREFORE, it is prayed that this motion be granted.

B. Motion to Dismiss for Mootness.

MOTION TO DISMISS ON GROUND OF MOOTNESS

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed as moot given that, subsequent to the filing of the petition, the tax liability for taxable year(s) [*insert year(s)*] has been paid in full and the proposed levy is no longer necessary.

IN SUPPORT THEREOF, respondent respectfully states:

1. On ___, 200_, respondent issued a Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing ("CDP Notice") to petitioner with respect to his/her income tax liabilities, including penalties and interest, for taxable year(s) [*insert year(s)*].

2. In response to the Final Notice, petitioner requested a collection due process ("CDP") hearing with respondent's Office of Appeals pursuant to I.R.C. § 6330(b)(1).

3. On __, 200_, Appeals issued a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 approving the proposed levy to collect the liabilities arising with respect to taxable year(s) [*insert year(s)*].

4. On ___, 200_, petitioner filed a Petition for Lien or Levy Action under Code Section 6320(c) or 6330(d) in the present case.

5. Subsequently, petitioner [an offset pursuant to section 6402(a) of an overpayment from petitioner's taxable year(s) [*insert year(s)*] paid all outstanding income taxes, penalties, and interest with respect to taxable year(s) [*insert year(s)*].

6. As a result of the full payment of petitioner's liabilities subject to the Notice of Determination, respondent no longer needs nor intends to levy to collect petitioner's income tax liabilities for taxable year(s) [*insert year(s)*], which gave rise to the petition in the instant case. As there is no remaining case or controversy to sustain this Court's jurisdiction, this action is no longer justiciable. *See* Greene-Thapedi v. Commissioner, 126 T.C. No. 1 (2006), Accordingly, the Notice of Determination is moot, and the petition should be dismissed.

7. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

C. Motions to Dismiss for Lack of Jurisdiction

1. Action in incorrect court

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the ground that the United States Tax Court does not have jurisdiction of the underlying tax liability in this matter.

IN SUPPORT THEREOF, respondent respectfully states:

1. Petitioner herein seek review of the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 that respondent's Office of Appeals issued on ____, 200_. A copy of the Notice of Determination is attached as Exhibit A.

2. The Notice of Determination instructs petitioner to file a complaint in the appropriate federal district court if petitioner disputes the Notice of Determination.

3. The Notice of Determination identifies the tax type as [*insert type of tax liability, e.g., a Trust Fund Recovery Penalty*] and the attachment to the Notice shows that the type of tax for which the Notice of Determination was issued is [*insert type of tax liability*].

4. Moreover, the Final Notice-Notice of Intent to Levy and Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320], which led to the issuance of the Notice of Determination in this case, relates to collection of [*insert type of tax liability*]. A copy of the Final Notice-Notice of Intent to Levy and Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] is attached as Exhibit B.

5. I.R.C. § 6330(d)(1)(A) provides that the Tax Court shall have jurisdiction to hear an appeal of a determination made under section 6330 [section 6320] if it has jurisdiction of the underlying tax liability. If the Tax Court does not have jurisdiction of the underlying tax liability, a district court of the United States shall have jurisdiction to hear the matter. I.R.C. § 6330(d)(1)(B); see also Treas. Reg. § 301.6330-1(f)(2) Q&A-F3 [301.6320-1(f)(2) Q&A-F3].

6. The Tax Court has interpreted section 6330(d)(1) to provide for Tax Court jurisdiction except where the Court does not normally have jurisdiction over the underlying liability. Moore v. Commissioner, 114 T.C. 171 (2000).

7. The Tax Court does not have jurisdiction to determine liability for the [*insert type of tax liability*].

8. Because the Tax Court does not have jurisdiction over liability for the [*insert type of tax liability*], the Tax Court does not have jurisdiction over the petition seeking review of the Notice of Determination in this case.

9. Should the Court grant this motion, petitioner will have 30 days after this Court's determination to file an appeal with the correct court under I.R.C. § 6330(d)(1). 10. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted. No CDP notice of determination (and no notice of deficiency or other determination issued)

2. No CDP notice of determination (and no notice of deficiency or other determination issued)

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the grounds that no notice of determination under I.R.C. § 6320 or 6330 was sent to petitioner for taxable year(s) [*insert year(s)*], nor has respondent made any other determination with respect to taxable year(s) *[insert year(s)*] that would confer jurisdiction on this Court.

IN SUPPORT THEREOF, respondent respectfully states:

1. Petitioner attached to the petition a Notice of Levy [*or state the type of notice regarding filing of notice of federal tax lien, levies, or collection actions*]. Such document, attached hereto as Exhibit A, may indicate that petitioner is seeking to invoke the Court's jurisdiction under I.R.C. § 6330(d) [§§ 6320(c) and 6330(d)] in this case.

2. The Tax Court cannot acquire jurisdiction with respect to a proposed levy [the filing of a notice of federal tax lien] unless, and until, there is a determination by respondent's Office of Appeals and the taxpayer seeks review of that determination within 30 days thereof. Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

3. Respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 was sent to petitioner with respect to taxable year(s) [*insert year(s)*].

For decision letters attached to the petition, insert the following instead of the three paragraphs above.

1. Petitioner attached to the petition a Decision Letter Concerning Equivalent Hearing under Section 6320 and/or 6330 of the Internal Revenue Code. Such document, attached hereto as Exhibit A, may indicate that petitioner is seeking to invoke the Court's jurisdiction under section 6330(d) [sections 6320(c) and 6330(d). Petitioner was issued a Decision Letter, rather than a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, because he/she did not timely request a hearing under section 6330 [6320]. Treas. Reg. § 301.6330-1(i)(1). [Treas. Reg. § 301.6320-1(i)(1).]

2. A Final Notice-Notice of Intent to Levy and Notice of Your Right to Request a Hearing under I.R.C. § 6330 [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice") dated _____, 200_, was sent to petitioner by certified mail on _____, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877. Copies of the CDP Notice and Postal Service Form 3877, showing the date the CDP Notice was delivered to the Post Office to be sent by certified mail, are attached as Exhibits B and C, respectively.

3. Respondent received petitioner's Request for a Collection Due Process Hearing on Form 12153 on ____, 200_, as evidenced by respondent's date stamp thereon. A copy of petitioner's Request for Collection Due Process Hearing is attached as Exhibit D.

4. Pursuant to section 6330(a)(3)(B) and Treas. Reg. § 301.6330-1(b)(1) petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the date of the CDP notice. [Pursuant to section 6320(a)(3)(B) and Treas. Reg. § 301.6320-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6320 within the 30-day period commencing the day after the end of the five day business period within which

respondent is required to give notice of the lien filing.] Any written request for a CDP hearing should be filed with the IRS office that issued the CDP notice at the address indicated on the notice. Treas. Reg. § 301.6330-1(c)(2) Q&A-C6 [301.6320-1(c)(2) Q&A-C6]. If the address on the CDP Notice is used and the written request is postmarked within the applicable 30-day response period, then in accordance with section 7502, the request will be considered timely even if it is not received by the IRS office that issued the CDP Notice until after the 30-day response period. Treas. Reg. § 301.6330-1(c)(2) Q&A-C4 [301.6320-1(c)(2) Q&A-C4].

5. Petitioner's request for hearing was not received within the 30-day period, and was not timely mailed. [*Describe the reasons why the request for hearing should be considered late.*]

6. A taxpayer who makes an untimely request for a CDP hearing under either section 6320 or section 6330 is not entitled to a CDP hearing. Treas. Reg. § 301.6330-1(i)(1)[301.6320-1(i)(1)]; Kennedy v. Commissioner, 116 T.C. 255 (2001). Because petitioner did not make a timely written request for a hearing under section 6330 [section 6320], the Office of Appeals properly held an equivalent hearing and issued a Decision Letter. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330[6320] and T.C. Rule 330.

End decision letter insert.

4. Respondent has diligently searched his records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

5. Petitioner has not demonstrated that a Notice of Determination sufficient to confer jurisdiction on this Court with respect to tax year(s) [*insert year(s)*] was issued by Appeals as required by section 6320(c) and/or 6330(d)(1).

6. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6320 or 6330 and T.C. Rule 330(b).

7. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

3. Petition includes taxes and/or periods not included in CDP notice of determination (and not included on any notice of deficiency or any other determination)

MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO STRIKE AS TO TAXABLE YEAR 1997

RESPONDENT MOVES, pursuant to T.C. Rules 52 and 53, that petitioner's claim with respect to taxable year 1997 be dismissed upon the ground that no notice of determination under I.R.C. § 6320 or 6330 was sent to petitioner for taxable year 1997, nor has respondent made any other determination with respect to taxable year 1997 that would confer jurisdiction on this Court, and that all references to taxable year 1997 be stricken from the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, which hereinafter is referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable years 19XX through and including 1996 [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable years 19XX through and including 1996], and that petitioner could receive a collection due process hearing with Appeals. A copy of the CDP Notice is attached hereto as Exhibit A.

2. Respondent has diligently searched his records and has found no indication that any Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [any Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] was sent to petitioner with respect to taxable year 1997.

3. On ___, 200_, petitioner requested a collection due process hearing from respondent for taxable years 19XX through 1997. A copy of the Form 12153 Request for Collection Due Process Hearing is attached hereto as Exhibit B.

4. On ____, 200_, respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, informing petitioner that he/she was not entitled to the relief requested. On the first page of the Notice of Determination, under the headings "Tax Type/Form Number" and Tax Period(s) Ended, income tax for taxable year 1997 is not included. Moreover, income tax for taxable year 1997 is not included in the attachment to the Notice of Determination, which describes the determinations of respondent's Office of Appeals with respect to collection of petitioner's tax liabilities by proposed levy [filing of notice of federal tax lien]. A copy of the Notice of Determination is attached hereto as Exhibit C.

5. On ___, 200_, petitioner timely commenced the above-entitled case by filing a petition with the Court pursuant to section 6330(d) [sections 6320(c) and 6330(d)] and T.C. Rule 331(a). In the petition, petitioner requests relief with respect to taxable years 19XX through 1997.

6. Respondent has diligently searched respondent's records and has found no indication that any Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 was sent to petitioner with respect to taxable year 1997.

7. Respondent has diligently searched his records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

8. Petitioner has not demonstrated that a notice of determination sufficient to confer jurisdiction on this Court with respect to taxable year 1997 was issued by respondent's Office of Appeals as required by section 6330(d)(1) [sections 6320(c) and 6330(d)(1)].

9. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330 [6320] and T.C. Rule 330(b). See Freije v. Commissioner, 125 T.C. No. 3 (2005); Lister v. Commissioner, T.C. Memo. 2003-17.

10. Petitioner objects/does not object to the granting of this motion.
WHEREFORE, respondent requests that this motion be granted.

4. Invalid notice of determination (because of late-filed request for hearing)

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the grounds that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 sent to petitioner for taxable year(s) [*insert year(s)*] is invalid, and therefore cannot confer jurisdiction on this Court under section 6330(d) [sections 6320(c) and 6330(d)].

IN SUPPORT THEREOF, respondent respectfully states:

1. The Tax Court cannot acquire jurisdiction under section 6330(d) [sections 6320(c) and 6330(d)] with respect to a proposed levy [the filing of a notice of federal tax lien] unless and until, there is a valid notice of determination by respondent's Office of Appeals and a timely petition for review has been filed with the Court. Offiler v. Commissioner, 114 T.C. 492, 498 (2000).

2. Petitioner filed a timely petition for review under section 6330(d) [sections 6320(c) and 6330(d)] and attached to the petition a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, attached hereto as Exhibit A. Petitioner, however, should not have been issued a Notice of Determination, but instead should have been issued a Decision Letter Concerning Equivalent Hearing under Section 6320 and/or 6330 of the Internal Revenue Code, because he did not timely request a hearing under section 6330 [6320]. Treas. Reg. § 301.6330-1(i). [Treas. Reg. § 301.6320-1(i).]

3. A Final Notice-Notice of Intent to Levy and Notice of Your Right to Request a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice") dated _____, 200_, was sent to petitioner by certified mail on _____, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877. Copies of the CDP Notice and Postal Service Form 3877, showing the date the CDP Notice was delivered to the Post Office to be sent by certified mail, are attached as Exhibits B and C, respectively.

4. Respondent received petitioner's Request for a Collection Due Process Hearing on Form 12153 on ____, 200_, as evidenced by respondent's date stamp thereon. A copy of petitioner's Request for Collection Due Process Hearing is attached as Exhibit D.

5. Pursuant to section 6330(a)(3)(B) and Treas. Reg. § 301.6330-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the date of the CDP notice. [Pursuant to section 6320(a)(3)(B) and Treas. Reg. § 301.6320-1(b)(1), petitioner must submit a written request for a hearing with respect to a CDP notice issued under section 6330 within the 30-day period commencing the day after the end of the five day business period within which respondent is required to give notice of the lien filing.] Any written request for a CDP hearing should be filed with the IRS office that issued the CDP notice at the address indicated on the notice. Treas. Reg. § 301.6330-1(c)(2) Q&A-C6 [301.6320-1(c)(2) Q&A-C6]. If the address on the CDP Notice is used and the written request is postmarked within the applicable 30-day response period, then in accordance with section 7502, the request will be considered timely even if it is not received by the IRS office that issued the CDP Notice until after the 30-day response period. Treas. Reg. § 301.6330-1(c)(2) Q&A-C4 [301.6320-1(c)(2) Q&A-C4] .

6. Petitioner's request for hearing was not received within the 30-day period, and was not timely mailed. [*Describe the reasons why the request for hearing should be considered late.*]

7. A taxpayer who makes an untimely request for a CDP hearing under either section

6320 or section 6330 is not entitled to a CDP hearing. Treas. Reg. § 6330-1(i)(1) [6320-1(i)(1)]; Kennedy v. Commissioner, 116 T.C. 255 (2001). Even if Appeals erroneously issued a notice of determination to a taxpayer who filed his/her hearing request late, the mere fact the taxpayer was issued a notice of determination cannot confer jurisdiction on the Tax Court or district court any more than a decision letter issued to the taxpayer can deprive the court of jurisdiction under section 6330(d). See Craig v. Commissioner, 119 T.C. 252 (2002). Contra, Soo Kim v. Commissioner, T.C. Memo. 2005-96 (court will not look behind a facially valid notice of determination). Because petitioner did not make a timely written request for a hearing under section 6330 [section 6320], Appeals should not have issued a Notice of Determination. Under the circumstances described above, the Tax Court lacks jurisdiction of this matter under section 6330(d) [sections 6320(c) and 6330(d)] and T.C. Rule 330(b).

8. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, Respondent requests that this motion be granted.

5. Invalid notice of determination (because no CDP lien or levy notice was issued for certain taxes and periods listed in notice of determination, and no notice of deficiency or other determination has been issued for such taxes and periods)

MOTION TO DISMISS FOR LACK OF JURISDICTION AND TO STRIKE AS TO TAXABLE YEAR 1997

RESPONDENT MOVES, pursuant to T.C. Rules 52 and 53,on the grounds that the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 sent to petitioner for taxable year 1997 is invalid and cannot confer jurisdiction on this Court under I.R.C. § 6320(c) or 6330(d), nor has respondent made any other determination with respect to taxable year 1997 that would confer jurisdiction on this Court, and that all references to taxable year 1997 be stricken from the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent sent to petitioner a Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for 19XX through and including 1996, [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable years 19XX through and including 1996], and that petitioner could receive a hearing with respondent's Office of Appeals. A copy of the CDP Notice is attached hereto as Exhibit A.

2. Respondent has diligently searched his records and has found no indication that any Final Notice-Notice of Intent to levy and Notice of Your Right to a Hearing [any Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] was sent to petitioner with respect to taxable year 1997.

3. On _____, 200_, petitioner requested a collection due process hearing from respondent for taxable years 19XX through 1997. A copy of the Form 12153 Request for Collection Due Process Hearing is attached hereto as Exhibit B.

4. On ____, 200_, respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, informing petitioner that he/she was not entitled to the relief requested. A determination with respect to the collection of petitioner's liability for taxable year 1997 was erroneously included in the Notice of Determination. A copy of the Notice of Determination is attached hereto as Exhibit C.

5. On _____, 200_, petitioner timely commenced the above-entitled case by filing a petition with the Court pursuant to section 6330(d) [sections 6320(c) and 6330(d)] and T.C. Rule 331(a).

6. Section 6330(c)(2)(A) [sections 6320(c) and 6330(c)(2)(A)] provide(s) that during the collection due process hearing (the "CDP hearing") with Appeals, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy...."

7. Treas. Reg. § 301.6330-1(e)(1) [301.6320-1(e)(1)] provides that the taxpayer may raise any relevant issue relating to the unpaid tax during the CDP hearing process and the taxpayer also may raise "challenges to the existence or amount of the tax liability for <u>any tax period shown on the CDP Notice</u> if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute that tax liability." (Emphasis added.)

8. Similarly, the legislative history of section 6330 [6320] indicates that Congress intended courts only to review liabilities properly at issue in the CDP hearing. <u>See</u> H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess., at p. 266 (1998) (Courts are to review the amount of tax liability on a de novo basis "where the validity of the tax liability was properly at issue in the

[collection due process] hearing, and where the determination with regard to the tax liability is part of the [judicial] appeal....").

9. Thus, petitioner was not entitled to make any challenges with respect to taxable year 1997 on his/her Request for a Collection Due Process Hearing or as part of his/her CDP hearing, because that taxable year was not shown on the CDP Notice. The fact that the appeals officer erroneously included taxable year 1997 in the Notice of Determination, and made a determination with respect to this taxable year does not entitle petitioner to judicial review thereof. Cf. Treas. Reg. § 301.6330-1(e)(3) Q&A-E11 [301.6320-1(e)(3) Q&A-E11]; Behling v. Commissioner, 118 T.C. 572 (2002).

10. Where a levy has not been proposed nor a notice of federal tax lien filed for the collection of a particular tax liability, a notice of determination erroneously listing such tax liability cannot confer jurisdiction on a court, any more that a statutory notice of deficiency that erroneously lists a tax period for which a deficiency has not been proposed can confer jurisdiction. Cf. Saint Paul Bottling Co. v. Commissioner, 34 T.C. 1137 (1960); Commissioner v. Forest Glen Creamery Co., 98 F.2d 968 (7th Cir. 1938); Wilkens & Lange v. Commissioner, 9 B.T.A. 1127 (1928). Contra, Soo Kim v. Commissioner, T.C. Memo. 2005-96.

11. Because it was improper for petitioner to challenge in the CDP hearing the collection of his/her 1997 tax liabilities, this Court does not have jurisdiction over that taxable year in the judicial review of the Notice of Determination.

12. Respondent has diligently searched his records and has determined that no other determination has been made by respondent that would confer jurisdiction on this Court.

13. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, respondent requests that this motion be granted.

6. Late-filed petition

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES, pursuant to T.C. Rule 53, that this case be dismissed for lack of jurisdiction upon the ground that the petition was not filed within the time prescribed by I.R.C. § 6330(d) [I.R.C. §§ 6320(c) and 6330(d)] or § 7502.

IN SUPPORT THEREOF, respondent respectfully states:

1. The Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated ___, 200_, upon which the above-entitled case is based, was sent to petitioner at his/her last known address by certified mail on ___, 200_, as shown by the postmark date stamped on the certified mail list, United States Postal Service Form 3877, a copy of which is attached hereto as Exhibit A.

2. The 30-day period for timely filing a petition with this Court from the Notice of Determination expired on [*insert day of the week*], ___, 200_, which date was not a legal holiday in the District of Columbia.

3. The petition was filed with the Tax Court on ___, 200_, which date is [*insert number of days*] days after the mailing of the Notice of Determination.

4. The copy of the petition served upon respondent bears a notation that the petition was mailed to the Tax Court on ___, 200_, which date is [*insert number of days*] days after the mailing of the Notice of Determination.

5. The petition was not filed with the Court within the time prescribed by sections 6330(d) [6320(c) and 6330(d)] or 7502.

6. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

D. Motion to Remand

MOTION TO REMAND

RESPONDENT MOVES, that the Court remand this Collection Due Process case to the respondent's Office of Appeals for further consideration. IN SUPPORT THEREOF, respondent respectfully states:

Insert paragraph(s) below as appropriate.

1. During the Collection Due Process (CDP) hearing, the petitioner requested a face-to-face conference at the Office of Appeals closest to his residence. The appeals [settlement] officer assigned to conduct the hearing instead conducted a telephone conference on _____, 200_. On ____, 200_, Appeals issued to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 upholding the [notice of federal tax lien filing/proposed levy]. The petitioner was not advised that the telephone conference constituted his opportunity to be heard, nor was he advised that his request for a face-to-face conference had been denied. Accordingly, the petitioner is entitled to a new CDP hearing, to be held as a face-to-face conference at the [*insert location*] Office of Appeals.

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1. During the Collection Due Process (CDP) hearing, the petitioner submitted an offer-in-compromise. The appeals [settlement] officer assigned to conduct the hearing rejected the offer-in-compromise as she determined that the petitioner was not in compliance with filing of all required tax returns. The appeals [settlement] officer was incorrect, however, as petitioner was actually in full compliance with the filing requirements. Accordingly, this case should be remanded to the [*insert location*] Office of Appeals for a new CDP hearing during which petitioner's offer-in-compromise should be reconsidered.

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1. During the Collection Due Process (CDP) hearing, the petitioner asked that the CDP conference be postponed to allow for him to consult with counsel. The appeals [settlement] officer from respondent's Office of Appeals refused to postpone the conference in violation of I.R.C. § 7521(b)(2). Section 7521(b)(2) provides a taxpayer with the right to suspend an interview with an Internal Revenue Service officer or employee for the purpose of consulting with an attorney or other authorized representative. The hearing was thereafter terminated by the appeals officer without any relevant issues having been advanced by the petitioner. Respondent issued the Notice of Determination from which the petitioner appeals without considering arguments which petitioner may have made had he consulted with his attorney.

2. Where respondent has abused his discretion, this Court may remand the case to the Office of Appeals to hold a new hearing, where a new hearing is necessary and will be productive. Lunsford v. Commissioner, 117 T.C. 183, 189 (2001); Lites v. Commissioner, T.C. Memo. 2005-206.

3. This case should be remanded to the Office of Appeals in order that the hearing prescribed by section 6330 may be conducted with the petitioner and/or a duly authorized representative.

4. Petitioner objects/does not object to the granting of this motion.

5. WHEREFORE, respondent requests that this motion be granted.

E. Motions for Summary Judgment and Declaration

1. Motion for summary judgment (for issues subject to abuse of discretion review)

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
[AND TO IMPOSE A PENALTY UNDER I.R.C. § 6673]

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor upon all issues presented in this case.

[RESPONDENT FURTHER MOVES that the Court impose a penalty in an appropriate amount, pursuant to I.R.C. § 6673, as petitioner has instituted these proceedings primarily for the purpose of delay and petitioner's position in the present case is frivolous and groundless.]

IN SUPPORT THEREOF, respondent respectfully states:

1. The pleadings in this case were closed on ___, 200_. This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay the trial. T.C. Rule 121(a).

2. Attached to this motion is a declaration by _____, the appeals [settlement] officer in respondent's Office of Appeals who conducted petitioner's collection due process ("CDP") hearing, setting out the relevant documents contained in the administrative record from the CDP hearing.

Insert the appropriate paragraph 3.

3. Petitioner filed income tax return(s) for taxable year(s) [*insert year(s*], but failed to pay all of the liability (ies) reported on the return(s). Respondent assessed the tax shown on the returns. Declaration Exhibit **_**.

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3. Petitioner filed income tax return(s) for taxable year(s) [*insert year(s)*]. Respondent conducted an examination of the return(s) for taxable year(s) [*insert year(s)*]. On ___, __, respondent sent a statutory notice of deficiency to petitioner, proposing a tax liability(ies). Declaration Exhibit _. As petitioner did not petition the Tax Court with respect to the proposed assessment(s), on ___, __, respondent assessed the tax liability (ies), along with additions to tax and interest. Declaration Exhibit ___.

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3. Petitioner failed to file his/her income tax return(s) for [*list year(s) involved*]. On ___, __, respondent sent a statutory notice of deficiency to petitioner, proposing a tax liability (ies). Declaration Exhibit **_**. As petitioner did not petition the Tax Court with respect to the proposed assessment(s), on ___, __, respondent assessed the tax liability(ies), along with additions to tax and interest. Declaration Exhibit_.

Continue with following paragraphs.

4. Respondent sent to petitioner a Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable year(s) [*insert year(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable year(s) [*insert year(s)*]], and that petitioner could receive a hearing with respondent's Office of Appeals. Declaration Exhibit ___.

5. On ___, 200_, petitioner submitted a Form 12153, Request for a Collection Due Process Hearing. Declaration Exhibit __.

6. On __, 200_, a face to face [telephone] conference was held between Appeals Officer ___ and petitioner [petitioner's representative]. Declaration Exhibit __.

7. [Prior to/at/after] the conference, the appeals officer provided petitioner [petitioner's representative] with a copy of the [type of transcripts provided] for petitioner's tax liabilities for taxable year(s) [*insert year(s)*]. Declaration Exhibit __.

8. On ___, 200_, Appeals issued to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330. Declaration Exhibit _.

9. On ___, 200_, petitioner filed with this Court a Petition for Lien or Levy Action under Code Section 6230(c) or 6330(d).

10. When the underlying tax liability is properly at issue, the Court decides the issue of liability de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). The Court reviews the Office of Appeals' administrative determination regarding nonliability issues for an abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000).

Insert argument(s) below as appropriate where record rule is at issue.

11. In Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004), the Eighth Circuit held that judicial review of nonliability issues under section 6330(d) is limited to the administrative record. Respondent respectfully urges the Court to follow the Eighth Circuit's decision in Robinette in all cases arising under sections 6320 and 6330, including this case.

12. Respondent's position is that the Court is bound by both the general principles of administrative law as well as the judicial review provisions of the APA in reviewing a notice of determination. Respondent's position is that when reviewing for abuse of discretion, the court is limited to the administrative record. If the evidence in the record or the explanation in the determination is inadequate for the Court's review, if the appeals [settlement] officer has not considered all relevant factors, or if the administrative record does not support the determination, then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

13. Testimony [*evidence*] outside of the administrative record may be admissible if the administrative record does not completely disclose all of the factors considered by the agency or if there is a dispute over what happened during the hearing process. Murphy v. Commissioner, 125 T.C. 301 (2005) (new evidence regarding an irregularity in the conduct of a hearing or some defect in the record may be presented at trial, even if the record rule is applicable). See also Robinette v. Commissioner, 439 F.3d 455, 461 (8th Cir. 2006) ("Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings.") (citation omitted). The administrative record in this case, however, not only completely discloses all of the factors that the appeals officer [*settlement officer*] considered in making his/her determination but also confirms that he/she did not omit any relevant factor required to make such determination, and the petitioner has failed to allege material facts or otherwise make a prima facie showing that any exceptions to the record rule applies.

14. In the alternative, the evidence offered by petitioner should also be excluded

because it is not admissible under the Federal Rules of Evidence. In particular, the evidence is not relevant as required by Federal Rule of Evidence 401, as it does not have a tendency to make the existence of any fact that is of consequence in determining whether the appeals [settlement] officer abused his discretion more probable or less probable than it would be without the evidence. [Evidence that the petitioner had an opportunity to present but failed to produce at the CDP hearing is not relevant to the question of whether the appeals [settlement] officer abused her discretion.] *See* Murphy v. Commissioner, 125 T.C. 301 (2005).

Insert arguments below as appropriate.

15. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the validity of the notice of deficiency (Declaration Exhibit __) issued to him/her. Petitioner admits he/she received a notice of deficiency but contends that the notice was invalid because the Secretary did not sign the notice. This Court rejected this argument in Nestor v. Commissioner, 118 T.C. 162 (2002), and held that the Secretary's authority to issue notices of deficiency had been delegated to the District Director(s) as well as to the Service Center Director(s). In this case, the notice of deficiency was issued by the District Director [Director of the Service Center].

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16. In his/her petition, petitioner argues that the appeals officer erred in not providing him/her with documentation that established that the appeals officer verified that the requirements of any applicable law or administrative procedure were met. Section 6330(c)(1) [Sections 6320(c) and 6330(c)(1)] does not require the appeals officer to give petitioner a copy of the verification that the requirements of any applicable law or administrative procedure were met. Nestor v. Commissioner, 118 T.C. 162 (2002). Therefore, petitioner was not entitled to the production of the documents requested, including [*list documents requested*]. [Petitioner was provided with a MFTRA-X transcript of account [Form 4340].]

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17. In his/her petition, petitioner argues that the appeals officer did not produce documents which show a valid assessment was made. The appeals officer, however, provided petitioner with a copy of a MFTRA-X transcript of his/her account [Form 4340]. Declaration Exhibit _. This transcript identifies the taxpayer, the character of the liability assessed, the taxable period and the amount of the assessment. Absent a showing of irregularity, transcripts which show this type of information are sufficient to establish that a valid assessment was made. Standifird v. Commissioner, T.C. Memo. 2002-245 (MFTRA-X); Schroeder v. Commissioner, T.C. Memo. 2002-190 (TXMOD-A); Wagner v. Commissioner, T.C. Memo. 2002-180 (IMF MCC - Individual Master File-Martinsburg Computing Center - transcript). [Absent a showing of irregularity, a Form 4340 is sufficient to establish that a valid assessment was made. Nestor v. Commissioner, 118 T.C. 162 (2002).] As petitioner does not allege that there were any irregularities in the assessment procedure, petitioner's argument that there was no valid assessment has no merit.

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18. In his/her petition, petitioner claims he/she never received [was never sent] a notice and demand for payment, as required under section 6303. The TXMOD-A transcript of account, however, reviewed by the appeals officer showed that respondent sent to petitioner notice and demand for payment on ___. Declaration Exhibit _. [*Describe how "status 21" in the notice section of a TXMOD-A transcript shows that a notice and demand was sent to the taxpayer at his/her last known address.*] Declaration Exhibit _. An appeals officer may rely on a computer transcript to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Schaper v. Commissioner, T.C. Memo. 2002-203; Schroeder v.

Commissioner, T.C. Memo. 2002-190. [The Form 4340 provided to petitioner by the appeals officer shows that respondent issued to petitioner notice(s) of balance due on ____. This notice of balance due constitutes notice and demand for payment within the meaning of section 6303(a). Thompson v. Commissioner, T.C. Memo. 2004-204; Henderson v. Commissioner, T.C. Memo. 2004-157; Standifird v. Commissioner, T.C. Memo. 2002-245. An appeals officer may rely on a Form 4340 to verify that a notice and demand for payment has been sent to the taxpayer in accordance with section 6303. Craig v. Commissioner, 119 T.C. 252, 262-263 (2002).] Proof that notice and demand was issued is sufficient to satisfy the requirements of section 6303, and there is no requirement that respondent prove receipt of such notice. I.R.C. § 6303(a); Perez v. United States, 2002-1 USTC ¶ 50,259; United States v. Lisle, 92-1 USTC ¶ 50,286 (N.D. Cal.), citing Thomas v. United States, 755 F.2d 728 (9th Cir. 1985). As petitioner has failed to present any evidence that the notice and demand was not issued as reflected on the transcripts of account [Forms 4340], his/her argument has no merit.

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19. In his/her petition, petitioner claims that the appeals officer erred in not considering his/her offer of a collection alternative, i.e., his/her offer to pay the tax liability (ies) if the appeals officer showed him/her the law which requires payment of tax. Petitioner's attempt to label this conditional offer as a "collection alternative" has no merit as the offer is based on the assumption that the Internal Revenue Code does not require petitioner to pay taxes. This Court has found this argument to be frivolous. Holliday v. Commissioner, T.C. Memo. 2005-240; Tolotti v. Commissioner, T.C. Memo. 2002-86; Rowlee v. Commissioner, 80 T.C. 1111 (1983).

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20. Throughout the administrative and litigation process, the petitioner has advanced contentions and demands previously and consistently rejected by this and other courts. Carrillo v. Commissioner, T.C. Memo. 2005-290; Holliday v. Commissioner, T.C. Memo. 2005-240; Delgado v. Commissioner, T.C. Memo. 2005-186. Courts have acknowledged that there is no need to devote resources to refuting such arguments "… with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Id., citing Crain v. Commissioner, 737 F.2d 1417 (5th Cir. 1984).

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21. The appeals officer did not abuse his [her] discretion in rejecting the offer-in-compromise [installment agreement] offered by the taxpayer. Acceptance of a proposed collection alternative is within the discretion of the appeals officer. The appeals officer followed all guidelines in the IRM in evaluating the offer-in-compromise [installment agreement]. See, e.g., IRM 5.8.3.4.1 (offer-in-compromise is not processable if all tax returns for which a taxpayer has a filing requirement are not filed). [The appeals officer did not abuse her discretion in rejecting petitioner's offer-in-compromise, as petitioner failed to provide the necessary financial information during the CDP hearing. Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005).] [The appeals officer did not abuse her discretion in rejecting petitioner's installment agreement, as petitioner failed to provide the necessary financial information during the CDP hearing. Orum v. Commissioner, 412 F.3d 819, 820 (7th Cir. 2005).] [The appeals officer did not abuse her discretion in rejecting the proposed installment agreement [offer-in-compromise] as, during the CDP hearing, petitioner was not in compliance with the filing requirements for all required tax returns. Rodriguez v. Commissioner, T.C. Memo. 2003-153; McCorkle v. Commissioner, T.C. Memo. 2003-34.] [The appeals officer did not abuse her discretion in rejecting the proposed installment agreement [offer-in-compromise] as, during the CDP hearing, petitioner was not in compliance with the required employment tax deposits. Living Care Alternatives Inc. v. United States, 411 F.3d 621 (6th Cir. 2005).]

End insert

22. Pursuant to section 6330(c)(3), the determination of an appeals officer must take into consideration (A) the verification that the requirements of applicable law and administrative procedures have been met, (B) issues raised by the taxpayer, and (C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary. As stated in the attachment to the Notice of Determination, attached as Declaration Exhbit _, the appeals officer considered all three of these matters. The appeals officer fully responded to petitioner's challenge(s) to the proposed collection action at the collection due process hearing. Because the appeals officer fully complied with the requirements of section 6330(c)(3), particularly in responding to the issue(s) raised by petitioner, there was no abuse of discretion.

Insert the following if Motion includes Request for Section 6673 penalty.

23. Section 6673(a)(1) authorizes the Tax Court to impose a penalty, not in excess of $25,000, on a taxpayer, if it appears that the taxpayer has instituted or maintained a proceeding primarily for delay, or that the taxpayer's position in the proceeding is frivolous or groundless. I.R.C. § 6673(a). Section 6673(a)(1) applies to collection due process proceedings. Pierson v. Commissioner , 115 T.C. 576 (2000); Hoffman v. Commissioner, T.C. Memo. 2000-198. In collection due process proceedings, this Court has imposed the penalty when petitioner raises frivolous and groundless arguments with respect to the legality of the federal tax laws. Burke v. Commissioner, 124 T.C. 189 (2005); Forrest v. Commissioner, T.C. Memo. 2005-228; Yacksyzn v. Commissioner, T.C. Memo. 2002-99; Watson v. Commissioner, T.C. Memo. 2001-213; Davis v. Commissioner, T.C. Memo. 2001-87.

24. In his/her [request for a hearing/ petition/any other relevant pleadings], petitioner argues [*list arguments*]. These allegations establish that petitioner is using the collection due process proceedings as a vehicle to raise frivolous arguments against the federal income tax system.

Conclude motion with the following paragraphs.

25. Respondent respectfully states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

26. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

2. Motion for summary judgment (section 6330(c)(2)(B))

MOTION FOR SUMMARY JUDGMENT

RESPONDENT MOVES, pursuant to T.C. Rule 121, for summary adjudication in respondent's favor, because, pursuant to I.R.C. § 6330(c)(2)(B), petitioner's receipt of the statutory notice of deficiency precludes him/her from challenging the underlying tax liability for taxable year(s) [*insert year(s)*], the only error assigned in the petition.

IN SUPPORT THEREOF, respondent respectfully states:

1. The pleadings in this case were closed on ___, 200_. This motion is made at least 30 days after the date that the pleadings in this case were closed and within such time as not to delay the trial. T.C. Rule 121(a).

2. Respondent sent to petitioner a Final Notice - Notice of Intent to levy and Notice of Your Right to a Hearing [Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320] (the collection due process notice, hereinafter referred to as the "CDP Notice"), dated _____, 200_, advising petitioner that respondent intended to levy to collect unpaid liabilities for taxable year(s) [*insert year(s)*] [advising petitioner that a notice of federal tax lien has been filed with respect to his/her unpaid liabilities for taxable year(s) [*insert year(s)*]], and that petitioner could receive a hearing with respondent's Office of Appeals. Declaration Exhibit B.

3. Petitioner timely filed Form 12153, Request for Collection Due Process Hearing, on ___, 200_. Declaration Exhibit C.

4. Respondent sent to petitioner a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated ___, 200_, with respect to petitioner's income tax liability for tax year(s) [*insert year(s)*]. Declaration Exhibit D.

5. In his/her petition, petitioner argues that the appeals officer erred in not allowing him/her to challenge the existence of the underlying tax liability. Pursuant to section 6330(c)(2)(B), petitioner cannot raise during the CDP hearing the existence or amount of the underlying tax liability if petitioner received a statutory notice of deficiency for that tax liability.

6. Treas. Reg. § 301.6330-1(e)(3) Q&A-E2 [301.6320-1(e)(3) Q&A-E2] provides that receipt of a statutory notice of deficiency for purposes of section 6330(c)(2)(B) means receipt in time to petition the Tax Court for a redetermination of the deficiency asserted in the notice of deficiency.

Insert one of the following paragraphs as appropriate.

7. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert year(s)*]. A copy of the notice of deficiency for [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit _. Additionally, the examination file contains a letter from petitioner to Deborah Decker, Director of the Ogden Service Center, dated ___, __, acknowledging receipt of the notice of deficiency and raising frivolous objections. Declaration Exhibit _.

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7. Petitioner received a statutory notice of deficiency for taxable year(s) [*insert year(s)*]. A copy of the notice of deficiency for [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit _. Petitioner admitted to Appeals Officer ____, the person in respondent's Office of Appeals who conducted petitioner's CDP hearing, that petitioner received the notice of deficiency. Declaration, ¶ __.

Insert one of the following paragraphs as appropriate.

8. Because respondent mailed the statutory notice of deficiency on ___, __ and petitioner received it on ___, __, petitioner received it in sufficient time to petition the Tax Court. Thus, during the subsequent CDP hearing with Appeals, it was improper for petitioner to challenge the tax liability(ies) to which the statutory notice of deficiency related.

8. Respondent properly mailed the statutory notice of deficiency to the petitioner's last known address on ____,____. A copy of the notice of deficiency for taxable year(s) [*insert year(s)*] sent to petitioner is contained in respondent's examination file, and is attached hereto as Declaration Exhibit __. Also attached is United States Postal Service Form 3877 [IRS certified mail list bearing a USPS date stamp or the initials of a postal employee] dated ____,____. Declaration Exhibit __. Respondent is entitled to rely upon presumptions of official regularity and delivery where the record reflects proper mailing of the statutory notice of deficiency. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Bailey v. Commissioner, T.C. Memo. 2005-241. See also Figler v. Commissioner, T.C. Memo. 2005-230; Carey v. Commissioner, T.C. Memo. 2002-209. There is no evidence that the statutory notice of deficiency was returned to the Service, nor has petitioner ever denied its receipt. Thus, the presumptions of official regularity and delivery have not been rebutted. Bailey v. Commissioner, supra. Accordingly, the appeals officer properly determined that the petitioner was precluded from disputing the underlying tax liability under section 6330(c)(2)(B).

End insert.

9. Because it was improper for the taxpayer to challenge in the CDP hearing the existence or amount of petitioner's liability (ies) with respect to taxable year(s) [*insert year(s)*], the validity of petitioner's underlying tax liability is not properly at issue before this Court. Sego v. Commissioner, 114 T.C. 603 (2000).

10. The petition raises no issues other than challenges to petitioner's tax liability. Pursuant to T.C. Rule 331(b)(4), all other issues are deemed conceded. Lunsford v. Commissioner, 117 T.C. 183 (2001).

11. Respondent respectfully states that counsel of record has reviewed the administrative file, the pleadings, and all written proof submitted, and, on the basis of this review, concludes that there is no genuine issue of any material fact for trial.

12. Petitioner objects/does not object to the granting of this motion.

WHEREFORE, it is prayed that this motion be granted.

3. Declaration

DECLARATION OF [NAME OF APPEALS OFFICER]

I, [name of appeals officer], declare:

1. I am an appeals officer employed in the [name of specific Appeals office], Office of Appeals, Internal Revenue Service, Department of the Treasury, who was assigned to petitioner's appeal under I.R.C. § 6330 of the Service's proposed collection action with respect to petitioner's unpaid liabilities for taxable year(s) [*insert year(s)*].

2. Pursuant to this assignment, I made the determination under section 6330(c)(3) to permit the collection action to proceed. The reasons for, and the facts underlying, my determination are found in the Notice of Determination, dated _____, 200_, a true and correct copy of which is attached hereto as **Exhibit A**, and in the Appeals Transmittal Memorandum and Case Memo, a true and correct copy of which is attached hereto as **Exhibit B** [*attach only if applicable*].

3. My determination was made after a face-to-face conference [telephone conference] with petitioner on _____, 200_, and after reviewing the following documents, true and correct copies of which are marked as exhibits, and attached to this declaration:

Exhibit C: Letter 1058 [LT-11], Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing [Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320], dated ___, 200_, issued to petitioner for collection of his/her unpaid tax liabilities for taxable year(s) [*insert year(s)*].

Exhibit D: Form 12153, Request for a Collection Due Process Hearing, filed by petitioner and received by respondent on _____, 200_.

Exhibit E: Letter, dated _____, 200_, to petitioner scheduling a face-to-face [telephone] conference.

Exhibit F: TXMOD-A transcript, dated ____, 200_.

Exhibit G: [*continue attaching as exhibits all documents used by appeals officer in making his or her determination*].

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____

[Name of appeals officer]

F. Motion to Permit Levy

RESPONDENT'S MOTION TO PERMIT LEVY

THE RESPONDENT MOVES, pursuant to Tax Court Rule 50(a) and I.R.C. § 6330(e)(2), that the Court remove the suspension of the levy under I.R.C. § 6330(e)(1) as the underlying tax liability is not at issue and respondent has shown good cause for the removal of the suspension of the levy.

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent filed a Motion for Summary Judgment and to Impose a Penalty under I.R.C. Section 6673 on or about [*insert date*]. Petitioner was ordered to respond to the motion on or before [*insert date*]. On or about [*insert date*], petitioner filed a declaration with the Court. The motion for summary judgment was calendared for hearing at the [*insert City, State*] trial session of the Court commencing on [*insert date*]. A hearing was held before Judge [*insert name*] on [*insert date*], and the case was taken under advisement for opinion on the motion for summary judgment and damages.

2. Section 6330(e)(1) provides, in pertinent part, that, except as provided in paragraph (2), if a hearing is requested under section 6330(a)(3)(B), the levy actions which are the subject of the requested hearing "shall be suspended for the period during which such hearing, and appeals therein, are pending." Paragraph 2 of section 6330(e) provides that: "Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has good cause not to suspend the levy."

3. In the present case, the underlying tax liabilities for [*insert years*] are not at issue. Petitioner failed to file a valid tax return for [*insert years*] reporting his income. Petitioner received the Statutory Notice of Deficiency for [*insert years*] and petitioned the Tax Court. This case was dismissed for lack of prosecution in [*insert year*] in favor of respondent after petitioner raised frivolous arguments that labor/income is not taxable at [*insert case citation*].

4. In the present levy review (CDP or collection due process) case, petitioner has made only frivolous assertions challenging the validity of the assessments. The assessments with respect to the taxable years in this case were valid. Copies of the Forms 4340 were reviewed and provided to petitioner reflecting that assessments were properly made and notices and demands for payment were mailed to petitioner for each of the taxable years at issue.

5. Respondent submits that "good cause" clearly exists to remove the suspension upon levy in this case, in accordance with section 6330(e)(2). *See* Burke v. Commissioner, 124 T.C. 189 (2005); Howard v. Commissioner, T.C. Memo. 2005-100; *Cf.* Polmar Int'l, Inc. v. United States, 2002-2 USTC ¶ 50,636 (W.D. Wash.) (court found "good cause" where taxpayer corporation repeatedly failed to pay employment taxes on time). The purpose of the collection due process statutes, sections 6320 and 6330, is to provide taxpayers with a forum to raise relevant issues with respect to a proposed levy or notice of federal tax lien. I.R.C. § 6330(c)(2)(A); Internal Revenue Service Restructuring and Reform Act of 1998, H.R. Conf. Rep. No. 105-599, 105 Cong., 2d Sess., 263-267 (1998). Petitioner is not using the collection due process statutes for this purpose. Rather, petitioner is using the collection due process statutes solely as a mechanism to delay collection. As noted *supra*, petitioner has continued to waste judicial resources, after numerous warnings, by continuing to pursue frivolous arguments which have been rejected numerous times by this and other courts. Without relief from the stay upon collection in section 6330(e)(1), this subversion of the collection due process statutes will continue until all final judicial appeals have been exhausted.

6. In sum, all of the aforementioned facts establish good cause for the Court to issue an Order permitting levy under section 6330(e)(2). We respectfully request this motion be handled expeditiously, to minimize any further unnecessary delays in collection.

7. Respondent has been unable to contact petitioner regarding this motion.

G. Stipulation of Facts Attaching Administrative Record

STIPULATION OF FACTS

In accordance with Tax Court Rule 91(e), the parties agree to this Stipulation of Facts pursuant to the general terms of this preamble, unless specifically expressed otherwise. All stipulated facts shall be conclusive. All stipulated exhibits shall be considered authentic. All copies shall be considered electronic reproductions of the originals and shall be treated as if originals. Any relevance or materiality objection may be made with respect to all or any part of this stipulation at the time of submission, but all other evidentiary objections are waived unless specifically expressed within this stipulation.

1. At the time of the filing of the Tax Court petition, the petitioner was a resident of [*insert city and state*].

2. From [*insert date*] through [*insert date*], the petitioner resided at [*insert address*].

3. On [*insert date*], a Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320 [*Letter 1058 or LT 11*], was sent to the petitioner for his [*insert date and type of tax liability*]. Attached and marked as Exhibit 1-J is a true and correct copy of the Letter 3172 [*Letter 1058 or LT11*].

4. On [*insert date*], respondent received a Form 12153, Request for a Collection Due Process Hearing, filed by the petitioner. Attached and marked as Exhibit 2-J is a true and correct copy of the Form 12153.

5. Attached and marked as Exhibit 3-J is an IMFOLT transcript [*Form 4340, TXMOD-A, MFTRA*-X] for petitioner's income tax liability for tax year [*insert year*] dated [*insert date*].

6. On [*insert date*], Appeals Officer [*insert name*] mailed a letter to the petitioner scheduling a hearing for [*insert date*]. Attached and marked as Exhibit 4-J is a true and correct copy of the [*insert date*] letter.

7. Attached and marked as Exhibit 5-J is a true and correct copy of a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, signed by the petitioner and dated [*insert date*].

8. On [*insert date*], the petitioner filed a Form 1040 Individual Income Tax Return, for the taxable year [*insert year*]. Attached and marked as Exhibit 6-J is a true and correct copy of the petitioner's Form 1040 for the taxable year [*insert year*].

9. On [*insert date*], a statutory notice of deficiency was sent to the petitioner for his taxable year [*insert year*]. Attached and marked as Exhibit 7-J is a true and correct copy of the statutory notice of deficiency sent to the petitioner for his taxable year [*insert year*]. Attached and marked as Exhibit 8-J is a true and correct copy of the certified mail list for the [*insert date*] statutory notice of deficiency.

10. On [*insert date*], a conference was held between the petitioner and Appeals Officer [*insert name*].

11. Attached and marked as Exhibit 9-J is a true and correct copy of the Appeals Case Activity Record dated [*insert dates*].

12. Attached and marked as Exhibit 10-J is a true and correct copy of the Appeals Transmittal and Case Memo dated [*insert date*].

13. On [*insert date*], a Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 and Attachment 3193 was sent to the petitioner. Attached and marked as Exhibit 11-J is a true and correct copy of the Notice of Determination.

14. Exhibits 1-J through 11-J constitute the administrative record in the above captioned case.

15. Attached and marked as Exhibit 12-J is a true and correct copy of a letter dated [*insert date*], mailed to petitioner from his personal physician, [*insert name*], discussing petitioner's present medical condition.

_____ _____

Counsel for Petitioner Counsel for Respondent

H. Motion in Limine

RESPONDENT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE NOT CONTAINED IN THE ADMINISTRATIVE RECORD

PURSUANT TO Tax Court Rules 50(a) and 143(a), respondent hereby moves that the Court not permit the admission of petitioner's exhibits [*list exhibits*] **OR** the testimony of [*name of person*] on the grounds that said exhibits **OR** [*name of person*']s testimony constitute(s) evidence outside of the administrative record and are not relevant as to whether the appeals officer abused his/her discretion.

IN SUPPORT THEREOF, respondent respectfully states:

1. On [*insert date*], respondent issued petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (hereinafter, "Notice of Determination"), which sustained the filing of a Notice of Federal Tax Lien [proposed levy] for petitioner's income tax liabilities for the years [*insert years*]. Petitioner timely filed a petition with the Tax Court on [*insert date*], contesting the Notice of Determination.

2. In his petition, petitioner does not challenge the underlying tax liabilities. Therefore, the Court reviews the Notice of Determination for an abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000).

3. In Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004), the Eighth Circuit held that Tax Court review of nonliability issues arising under sections 6320 and 6330 is limited to the administrative record. Respondent respectfully urges the Court to follow the Eighth Circuit's decision in Robinette in all collection due process cases in this Court, including this case.

4. Respondent's position is that the Court is bound by both the general principles of administrative law as well as the judicial review provisions of the APA in reviewing a notice of determination. Respondent's position is that when reviewing for abuse of discretion, the court is limited to the administrative record. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); Olsen v. United States, 414 F.3d 144, 155-156 (1st Cir. 2005).

5. The administrative record consists of the information that the agency reviewed in making its determination. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996). In cases arising under section 6330 of the Internal Revenue Code, the administrative record consists of all of the information the appeals officer reviewed in making his/her determination. Attached as Exhibit __ to this motion is a declaration from the appeals officer attaching the complete administrative record in this case.

6. In this case, in petitioner's proposed Stipulation of Facts **OR** in the Stipulation of Facts, petitioner includes the following as exhibits:

[*list exhibits*]

None of these exhibits were presented to or considered by the appeals officer in this case.

OR

6. In this case, in his Trial Memorandum, petitioner lists [*name of person*] as a witness that petitioner expects to call at the trial in this case. Respondent anticipates that [*name of person*] will testify as to events and circumstances that occurred subsequent to the appeals officer's determination to proceed with collection in this case, or to facts and matters that were not considered by the appeals officer.

7. As petitioner's exhibits are not part of the administrative record, they should not be admitted. Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004).

OR

7. As the testimony petitioner seeks to introduce from [*name of person*] constitutes evidence outside of the administrative record, it should not be admitted. Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004).

8. Testimony [*evidence*] outside of the administrative record may be admissible if the administrative record does not completely disclose all of the factors considered by the agency or if there is a dispute over what happened during the hearing process. Murphy v. Commissioner, 125 T.C. 301 (2005) (new evidence regarding an irregularity in the conduct of a hearing or some defect in the record may be presented at trial, even if the record rule is applicable); Robinette v. Commissioner, 439 F.3d 455, 461 (8th Cir. 2006) ("Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings.") (citation omitted). The administrative record in this case, however, not only completely discloses all of the factors that the appeals officer [*settlement officer*] considered in making his/her determination but also confirms that he/she did not omit any relevant factor required to make such determination, and the petitioner has failed to allege material facts or otherwise make a prima facie showing that any exceptions to the record rule applies.

Insert where appropriate

9. The evidence offered by petitioner should also be excluded because it is not admissible under the Federal Rules of Evidence. In particular, the evidence is not relevant as required by Federal Rule of Evidence 401, as it does not have a tendency to make the existence of any fact that is of consequence in determining whether the appeals [settlement] officer abused his discretion more probable or less probable than it would be without the evidence. [Evidence that the petitioner had an opportunity to present but failed to produce at the CDP hearing is not relevant to the question of whether the appeals [settlement] officer abused her discretion.] *See* Murphy v. Commissioner, 125 T.C. 301 (2005).
WHEREFORE, respondent requests that this motion be granted.

I. Stipulated Decision Documents

1. Notice of determination addresses only tax liability or collection issues (CDP issues)

a. Notice of Determination not sustained
- underlying tax liability or unpaid tax to be abated

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are not sustained.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

Insert the following paragraphs as applicable:

It is further stipulated that respondent will abate the [*insert type of tax*] tax liability for taxable year [*insert year*] on the basis that [*e.g., the assessment was not made within the applicable statute of limitations; the statutory notice of deficiency was not sent to petitioner's last known address and petitioner did not receive it in time to file a Tax Court petition.*]

It is further stipulated that respondent will abate the balance of petitioner's outstanding [*insert type of tax*] tax liability for taxable year [*insert year*] on the basis that [*e.g., the statute of limitations for collection has expired; the tax liability was discharged in bankruptcy.*]

It is further stipulated that respondent will take no further collection action with respect to the [*insert type of tax*] tax liability for taxable year [*insert year*].

If the statute of limitations for assessment has not expired include the following paragraph:

It is further stipulated that the above-referenced tax liability will be abated without prejudice to respondent's right to reassess the tax liability for taxable year [*insert year*] pursuant to the deficiency procedures prescribed in the Internal Revenue Code, to the extent permitted by law.

b. Notice of Determination sustained in full
- underlying tax liability not at issue
- no abuse of discretion

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED: That the determinations set forth in the Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are sustained in full.

Judge.

Entered:

* *** *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the [*insert type of tax*] tax liability (plus statutory interest) until the decision of the Tax Court becomes final.

c. Notice of Determination sustained in full
- no abuse of discretion
- tax liability not at issue
- IRS agrees to collection alternative outside CDP (e.g., OIC, installment agreement)

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*)], and upon which this case is based, are sustained in full.

Judge.

Entered:

* ** * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that the collection of petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] shall be closed as currently uncollectible for reason of economic hardship as provided under the conditions specified on Form 53, Report of Currently Not Collectible Taxes.

OR

It is further stipulated that collection of petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] shall be made in accordance with the terms of the [*insert date of installment agreement*] Installment Agreement entered into between the parties pursuant to the provisions of I.R.C. § 6159.

OR

It is further stipulated that collection of petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] shall be made in accordance with the terms of the [*insert date of offer-in-compromise*] Offer in Compromise entered into between the parties pursuant to the provisions of I.R.C. § 7122.

d. Underlying tax liability properly at issue, no abuse of discretion

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are sustained [*insert "in full" if the underlying tax liability is not adjusted; insert "except as provided herein" if the underlying tax liability is adjusted*].

That the tax imposed on petitioner by the Internal Revenue Code for taxable year [*insert year*] is as follows :

Year	**[*Insert type* of tax] Tax**	**Addition to tax I.R.C. §**	**Addition to tax I.R.C. §**
-------	**$xxxx.xx**	**$xxxx.xx**	**$xxxx.xx**

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that interest is not included in the above-referenced tax liability, and that interest will be assessed as provided by law on the tax liability.

It is further stipulated that fees and collection costs related to the above referenced tax liability, and interest thereon, are not included in the tax liability and shall remain due and owing.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the tax liability (plus statutory interest) until the decision of the Tax Court becomes final.

Insert if applicable:

It is further stipulated that unassessed additions to tax under I.R.C. § [*insert applicable code section*] will be assessed as provided by law on the above-referenced tax liability.

Insert any of the following paragraphs as appropriate:

It is further stipulated that the above-referenced tax liability does not include a payment in the amount of [*insert amount*] that was made on [*insert date of payment*] and applied to petitioner's tax liability for taxable year [*insert year*].
It is further stipulated that the above-referenced tax liability does not include petitioner's withholding credits in the amount of [*insert amount*] for taxable year [*insert year*].

It is further stipulated that the above-referenced tax liability does not include an advance payment of estimated tax in the amount of [*insert amount*] made by petitioner on [*insert day of payment*] for taxable year [*insert year*].
It is further stipulated that petitioner is entitled to an overpayment credit in the amount of [*insert amount*] from his [*insert year*] tax year which will be applied to petitioner's tax liability for taxable year [*insert year*].
It is further stipulated that there are no overpayments due to petitioner for taxable year [*insert year*].

It is further stipulated that the amount of petitioner's unpaid [*insert type of tax*] tax liability for taxable year [*insert year*] is [*insert amount*].

e. Underlying tax liability not at issue but adjusted, no abuse of discretion

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*], for petitioner's [*insert type of tax*] tax liability for taxable year

[*insert year*], and upon which this case is based are sustained, except as provided herein.

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that the tax imposed on petitioner by the Internal Revenue Code for taxable year [*insert year*] is as follows:

Year	**[*Insert type* of tax] Tax**	**Addition to tax I.R.C. §**	**Addition to tax I.R.C. §**
-------	**$xxxx.xx**	**$xxxx.xx**	**$xxxx.xx**

It is further stipulated that interest is not included in the above-referenced tax liability, and that interest will be assessed as provided by law on the tax liability.

It is further stipulated that fees and collection costs related to the above referenced tax liability, and interest thereon, are not included in the tax liability and shall remain due and owing.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6330(e) prohibiting collection of the tax liability (plus statutory interest) until the decision of the Tax Court becomes final.

Insert if applicable:

It is further stipulated that unassessed additions to tax under I.R.C. § [*insert applicable code section*] will be assessed as provided by law on the above-referenced tax liability.

Insert any of the following paragraphs as appropriate:

It is further stipulated that the above-referenced tax liability does not include a payment in the amount of [*insert amount*] that was made on [*insert date of payment*] and applied to petitioner's tax liability for taxable year [*insert year*].

It is further stipulated that the above-referenced tax liability does not include petitioner's withholding credits in the amount of [*insert amount*] for taxable year [*insert year*].

It is further stipulated that the above-referenced tax liability does not include an advance payment of estimated tax in the amount of [*insert amount*] made by petitioner on [*insert day of payment*] for taxable year [*insert year*].

It is further stipulated that petitioner is entitled to an overpayment credit in the amount of [*insert amount*] from his [*insert year*] tax year which will be applied to petitioner's tax liability for taxable year [*insert year*].

It is further stipulated that there are no overpayments due to petitioner for taxable year [*insert year*].

It is further stipulated that the amount of petitioner's unpaid [*insert type of tax*] tax for taxable year [*insert year*] is [*insert amount*].

2. Notice of Determination addresses CDP issues and interest abatement

a. No abuse of discretion in denial of abatement of interest

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

[*Insert all appropriate paragraphs that are above the Court's signature in sample decisions I.1.a.-e. for the CDP issues*.]

That petitioner is not entitled to abatement of interest under I.R.C. ' 6404 with respect to taxable year [*insert year*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

b. Concession of abatement of interest

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of Notice of Determination*], for petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*], and upon which this case is based, are sustained except as provided herein.

[*Insert all appropriate paragraphs that are above the Court's signature in sample decisions I.1.a.-e. for the CDP issues*];

That interest assessed on petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] will be abated under I.R.C. § 6404 for the period beginning [*insert date*], and ending [*insert date*].

OR

That interest will not be assessed on petitioner's [*insert type of tax*] tax liability for taxable year [*insert year*] for the period beginning [*insert date*], and ending [*insert date*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

3. Notice of Determination addresses CDP issues and innocent spouse relief

a. Innocent spouse relief denied

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

[*Insert all appropriate paragraphs that are above the Court's signature in sample decisions I.1.a.-e. for the CDP issues.]*;

That petitioner is not entitled to relief under I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*] with respect to petitioner's joint and several income tax liability for taxable year [*insert year*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

b. Innocent spouse relief granted

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*] for petitioner's joint and several income tax liability for taxable year [*insert year*], and upon which this case is based, are not sustained;

That there is no income tax due from petitioner for taxable year [*insert year*], after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*];

That there are no additions to tax due from petitioner under the provisions of I.R.C. § [*insert applicable code section*] for taxable year [*insert year*] after application of I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*];

Insert as applicable:

That there is no overpayment in income tax due to petitioner for taxable year [*insert year*].

OR

That there is an overpayment in income tax for taxable year [*insert year*] in the amount of [*insert amount*], which was paid on [*insert date of payment*] and for which amount a claim for refund was filed on [*insert appropriate date*], which was within the period provided by I.R.C. ' 6511(b)(2).] [NOTE: If there is an overpayment, also add a stipulation providing the calculation of the overpayment as found on the Chief Counsel's intranet site at http://intranet/wi/isdecisionindex.asp under Relief Granted, Overpayment.]

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

It is further stipulated that respondent will take no further collection action with respect to the income tax liability that was assessed against petitioner on [*insert date of assessment*] for taxable year [*insert year*].

c. Partial innocent spouse relief granted

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*] for petitioner's joint and several income tax liability for taxable year [*insert year*], upon which this case is based are sustained, except as provided herein.

That the amount of petitioner's liability for income tax and additions to tax for taxable year [*insert year*] after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*] is as follows :

		Addition to Tax
Year	**Income Tax**	**I.R.C. § xxxx**

That there are no overpayments in income tax due to petitioner for taxable year [*insert year*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

[*Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.*]

d. Innocent spouse relief granted, in whole or in part, for some years, but denied for other years

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED:

That the determinations set forth in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 issued to petitioner on [*insert date of notice of determination*] for petitioner's joint and several income tax liability for taxable year [*insert year*], and upon which this case is based are sustained, except as provided herein.

If relief granted in whole for some years, insert the following:

That there is no income tax due from petitioner for taxable year [*insert year*], after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*];

That there are no additions to tax due from petitioner under the provisions of I.R.C. § [*insert applicable code section*] for taxable year [*insert year*], after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*];

Insert as applicable:

That there is no overpayment in income tax due to petitioner for taxable year [*insert year*].

OR

That there is an overpayment in income tax for taxable year [*insert year*] in the amount of [*insert amount*], which was paid on [*insert date of payment*] and for which amount a claim for refund was filed on [*insert appropriate date*], which was within the period provided by I.R.C. ' 6511(b)(2). [NOTE: If there is an overpayment, also add a stipulation providing the calculation of the overpayment as found on the Chief Counsel's Intranet Site at http://intranet/wi/isdecisionsindex.asp under Relief Granted, Overpayment.]

If relief granted in part for some years, insert the following:

That the amount of petitioner's liability for income tax and additions to tax for taxable year [*insert year*] after application of I.R.C. § 6015 [*insert applicable subsection (b), (c), or (f)*] is as follows:

		Addition to Tax
Year	**Income Tax**	**I.R.C. § xxxx**

That there are no overpayments in income tax due to petitioner for taxable year [*insert year*].

That petitioner is not entitled to relief under I.R.C. § 6015 [*insert applicable subsection (b), (c) or (f)*] with respect to petitioner's joint and several income tax liability for taxable year [*insert year*].

Judge.

Entered:

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision.

[Insert all appropriate paragraphs that are below the Court's signature in sample decisions I.1.a.-e. for the CDP issues.]