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Highlights

Proposed Changes to Tax Court Rules Regarding Administrative Record in Collection Due Process Cases

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EXECUTIVE SUMMARY

Section 6330 of the Internal Revenue Code requires the IRS to provide an opportunity for a hearing before making a levy on a taxpayer's property.[2] The hearing takes place before the IRS Office of Appeals. The hearing takes place informally and, while no formal record is made, the administrative record that is made is very important if the taxpayer seeks judicial review in the Tax Court. The taxpayer may appeal the determination to the Tax Court.

The Tax Court review of collection activity is for abuse of discretion, *i.e.*, whether the reviewing Appeals officer abused his or her discretion.[3] The court's review is limited to issues and grounds that were raised with the Appeals Office; hence the administrative record delimits the issues before the Tax Court.[4]

There is a conflict between the Tax Court and some other courts as to whether the taxpayer may provide evidence to the court if not previously made part of the administrative record. The Tax Court has held that its review is not limited to evidence included in the administrative record, that is, it may consider all relevant evidence at the trial, even if not previously made part of the administrative record.[5] However that holding was overruled by the Eighth Circuit Court of Appeals.[6] Two additional Courts of Appeals have reversed the Tax Court and held that review should be limited to the administrative record.[7] The Tax Court's position continues to be that review is not limited to the administrative record although, under the *Golsen* rule, the court will follow the law of the circuit court to which a case is appealable.[8]

Whether review is limited to the administrative record, or whether additional evidence may be offered and received, the administrative record is highly significant to the court's determination.

The Tax Court's Rules of Practice and Procedure ("Rules") have no explicit provisions regarding the administrative record in CDP cases. In contrast, Title XXI of the Tax Court's Rules, Rules 210 *et seq.*, contain extensive provisions with respect to the administrative record in the context of declaratory judgment actions relating to exempt organizations, retirement plans, and other areas.

This paper proposes that the Tax Court's Rules be amended as follows, with respect to CDP cases:

1. Within 75 days after service of the answer, or when a summary judgment motion is filed, if earlier, the IRS must serve on the taxpayer a complete copy of the administrative record, as defined.

2. At trial, or at the same time as the government files a summary judgment motion, the parties shall file with the court the entire administrative record (or so much thereof as the parties deem necessary for a complete disposition of the matter), with a complete index, as part of the stipulation of facts, stipulated as to its genuineness.

3. If the parties are unable to reach a stipulation, the Commissioner shall file the entire record with the court, with a complete index, with a certification as to its genuineness. This requirement applies at the time a summary judgment motion is filed or, if none is filed, at the trial.

I. BACKGROUND

A. Collection Process before and at the Collection Due Process Hearing

If a person liable to pay tax neglects or refuses to do so within ten days after notice and demand, the IRS can collect such tax by levy.[9] Before proceeding with the levy the IRS is required to give the taxpayer notice of intent to levy and notice of their right to a hearing before levy.[10] As a practical matter the IRS will send several notices to the taxpayer, the last one constituting the formal notice of intent to levy. There may be extensive communication, oral and in writing, up to the point of the notice of levy.

A taxpayer can request a Collection Due Process ("CDP") hearing before the Internal Revenue Service Office of Appeals in response to a notice of intent to levy.[11] If the taxpayer does so, collection is stayed while the hearing and appeals are pending.[12]

At the Appeals hearing a taxpayer may raise any relevant issue with regard to the Commissioner's collection activities, including spousal defenses, challenges to the appropriateness of the Commissioner's intended collection action, and alternative means of collection.[13] The taxpayer may be able to question the underlying tax liability but this paper does not deal with such cases because the standard of review and the procedures are different.

CDP hearings in the Appeals Office are informal. A face-to-face meeting is not necessarily required. The hearing may consist of a face-to-face meeting, one or more written or oral communications between the Appeals Officer and the taxpayer, or some combination of the two. A transcript or recording is not required. The taxpayer does not have the right to subpoena and examine witnesses.[14]

The Appeals officer must verify that the requirements of applicable law and administrative procedure have been met and whether any proposed collection action balances the need for the efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary.[15]

The Appeals Office will issue a formal notice of determination.

Obviously, the administrative record of the Appeals Office proceeding is critical if the taxpayer later seeks review of the determination in the Tax Court.

B. The CDP Case in the Tax Court

Once the Appeals Office issues a notice of determination, the taxpayer may appeal to the Tax Court by filing a petition within 30 days.[16]

In the ordinary CDP case seeking review of collection activity, the court reviews the determination of the Appeals Office for abuse of discretion.[17] An abuse of discretion occurs if the Appeals Office exercises its discretion "arbitrarily, capriciously, or without sound basis in fact or law."[18]

Issues reviewed for abuse of discretion include: challenges to the appropriateness of collection actions (*i.e.*, whether it is proper for the Commissioner to proceed with the collection action as determined in the notice of determination and whether the type and method of collection chosen by the Commissioner is appropriate), as well as proposals for collection alternatives (*e.g.*, installment agreements, offers in compromise, currently not collectible status).[19]

The Tax Court considers only arguments, issues and other matter that was raised at the CDP hearing or otherwise made known to the Appeals Office.[20] In *Magana v. Commissioner,*[21] the court refused to consider the taxpayer's long term physical illness as evidence of hardship because the taxpayer had not raised it before the Appeals office. The court said that evidence of recent, unusual illness or hardship, or other special circumstance, might justify an exception to the general rule. In *Giamelli v. Commissioner,*[22] the court moved closer to an absolute rule that the court's review was limited to issues that had been raised in the CDP hearing. However, Judge Wherry, in a concurring opinion, described two circumstances where the court might permit consideration of arguments, issues or matters not previously brought to the Appeals Officer's attention. The first was where there is dispute over the accuracy and completeness of the administrative record – the court may hold an evidentiary hearing to resolve that dispute. The second was where, because of the informality of CDP hearings, a diligent taxpayer may be unable to garner testimony and evidence in the hands of uncooperative third parties. The taxpayer may seek to provide such evidence at the Tax Court trial utilizing the court's subpoena power or the threat thereof.[23]

C. The Administrative Record Rule

There is an ongoing controversy concerning whether the Tax Court's review of a CDP appeal is limited to the administrative record, or whether evidence outside the administrative record may be offered and received. This paper does not take a position on that dispute, although some background on the controversy is helpful to an understanding of the role of the administrative record.

The IRS takes the position that Tax Court review must be limited to the administrative record. The Tax Court rejected this position and held that Tax Court review is not limited to evidence included in the administrative record, that is, it may consider all relevant evidence at the trial, even if not previously made part of the administrative record.[24] However, that holding was overruled by the Eighth Circuit Court of Appeals.[25] Two additional Courts of Appeals have also reversed the Tax Court's position and held that review should be limited to the administrative record.[26] Meanwhile, the Tax Court's position continues to be that review is not limited to the administrative record although, under the *Golsen* rule, the court will follow the law of the circuit court to which a case is appealable.[27] The Tax Court's position has not been adopted by any Court of Appeals and one must conclude that this issue is still in flux.

The Tax Court traditionally has employed *de novo* procedures where the court receives and considers all relevant evidence at the trial. The court does not see itself as a "reviewing court" under the Administrative Procedure Act, which simply reviews the record.[28] According to the court, "[t]he APA has never governed proceedings in the Court (or in the Board of Tax Appeals)."[29]

Tax practitioners also have seen the Appeals office as a place to offer information and evidence in an attempt to settle a case, but not necessarily requiring the formality, the

rigor, and the energy that might go into compiling evidence for a Tax Court trial. Hence the idea that all evidence must be offered at the CDP hearing or not at all is a real change, for the Tax Court as well as practitioners and taxpayers.[30]

In overruling the Tax Court, the Eighth Circuit held that Congress apparently intended that general administrative law principles should apply to Tax Court review of CDP appeals. Thus, review should be limited to the information and evidence available to the hearing officer, and no additional evidence should be received by the Tax Court.[31]

To this writer, there is a fundamental inconsistency between the informal nature of CDP proceedings, versus the relatively strict standard of review, especially when the administrative record rule applies.

D. Current Practice and Need for Change

There are procedures in place for compilation of the administrative record, for eventually providing a copy to the taxpayer, and for presenting it to the court. However, there are reasons to believe that these procedures are not consistently followed, and reasons to believe that they may not lead to satisfactory results even if followed totally.

The Internal Revenue Manual includes provision for the Appeals Office to compile a "Standardized Administrative Record" with contents prescribed in detail.[32]

In 2006, the Chief Counsel Office compiled recommended procedures in the updated "CDP Handbook".[33]

The CDP Handbook says that the taxpayer should be provided with a copy of the administrative record at the so-called "*Branerton* hearing."[34] Generally, the *Branerton* hearing will be held a month or two before the trial date. The recommendation herein is that a copy of the administrative record should be provided earlier, within 75 days after the answer is filed. There is anecdotal evidence that Counsel does not always comply with the Handbook by producing the administrative record at the *Branerton* conference, perhaps because a discrete administrative file has not been compiled at the time of the *Branerton* conference.

The CDP Handbook recommends, more or less consistently with the recommendations herein, that Counsel attempt to file the complete administrative record with the Court as part of the stipulation of facts and, if a stipulated submission is not feasible, then to submit it to the Court with a certification of accuracy from a responsible IRS official.[35]

Several comments from the court indicate that the process could work better.

A few years ago, Judge Vasquez made the following comment:

> In order to fulfill our section 6330 review function, as mandated by Congress after lengthy and careful deliberation, the Court needs more information than is provided by current section 6330 hearings. This statement is tempered by almost a decade of experience handling section 6330 cases where the IRS consistently has attempted to limit the evidence the Court can review. Frequently the Court is provided virtually no record at all or the scant documents accumulated by Appeals, making meaningful review impossible.[36]

In *Fairlamb v. Commissioner*,[37] the judge suggested that it would be helpful to have the entire administrative record before the court, as well as procedures for accomplishing that. The judge noted that evaluation of the parties' evidentiary claims was complicated by the fact that the government had not offered into evidence a certified copy of the entire administrative record. The judge further noted that, while the parties had stipulated numerous documents that might properly appear in an administrative record, they had not filed the entire record, stipulated as to its genuineness, and that it was apparent that the entire administrative record was not in evidence.

In *Mandody v. Commissioner*,[38] the court denied a government motion for summary judgment because there was a dispute as to what should be contained in the administrative record.

The IRS and the Treasury Department have acknowledged the disputes over the content of the administrative record, and recommend that the Tax Court develop rules governing preparation and submission of the administrative record.[39]

E. Analogy in the Tax Court Rules – Title XXI

As mentioned, the Tax Court's Rules of Practice and Procedure ("Rules") have no explicit provisions dealing with the administrative record in CDP cases.

In contrast, Title XXI of the Tax Court's Rules, Rules 210 *et seq*, contain extensive provisions with respect to the administrative record. These rules apply to declaratory judgment actions relating to classification of exempt organizations and private foundations, retirement plan qualifications, gift valuation, government obligations, and installment payments under section 6166.

Rule 210(b)(12) defines the administrative record as follows:

> *(12) "Administrative record"* includes, where applicable, the request for determination, all documents submitted to the Internal Revenue Service by the applicant in respect of the request

for determination, all protests and related papers submitted to the Internal Revenue Service, all written correspondence between the Internal Revenue Service and the applicant in respect of the request for determination of such protests, all pertinent returns filed with the Internal Revenue Service, and the notice of determination by the Commissioner.

The regulations dealing with CDP matters contain a better definition of "administrative record, for purposes of CDP cases in the Tax Court:

> Q-F4. What is the administrative record for purposes of Tax Court review?
>
> A-F4. The case file, including the taxpayer's request for hearing, any other written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing; notes made by any Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the record in the Tax Court review of the Notice of Determination issued by Appeals.[40]

The definition in the Regulations better reflects the informal nature of CDP proceedings by requiring that the administrative record include notes of oral communications with the taxpayer or the taxpayer's authorized representative. The definition in Rule 210(b)(12) does not explicitly or implicitly require the inclusion of notes of oral communications.

Rule 213 (a)(3) provides that the answer shall include a complete index to the administrative record. In CDP cases, a requirement that IRS prepare such an index at the time the answer is served would be overly burdensome to the IRS without creating a significant benefit to the taxpayer.

> Rule 217(b)(1) provides, in part:
>
> Within 30 days after service of the answer, the parties shall file with the Court the entire administrative record (or so much thereof as either party may deem necessary for a complete disposition of the action for declaratory judgment), stipulated as to its genuineness.

In the CDP context, there is no reason to file the administrative record with the Court until the trial or until a summary judgment is filed. However, this writer recommends that a copy of the administrative record be provided to the taxpayer within 75 days after the answer is filed. We trust that this timing is sufficient for the IRS to perform the necessary file transfer and administrative tasks, but also sufficient to provide the taxpayer with the materials and information necessary to prepare for the trial (or a summary judgment motion, if filed by the government).

Many CDP cases, perhaps as many as 8 out of 10, are disposed of on summary judgment.[41] The recommendations herein conclude that the taxpayer should be provided with a complete copy of the administrative record in order to respond to any summary judgment motion that is filed.

> Rule 217(b)(1) also provides:
>
> If, however, the parties are unable to file such a stipulated administrative record, then, not sooner than 30 days nor later then 45 days after service of the answer, the Commissioner shall file with the Court the entire administrative record, as defined in Rule 210(b)(12), appropriately certified as to its genuineness by the Commissioner or by an official authorized to act for the Commissioner in such situation.

We recommend that the Rules require that the parties file the administrative record with the court as part of the stipulation of facts, stipulated as to its genuineness. This requirement should apply to the complete administrative record, or to so much of the record as either party may deem necessary for a complete disposition of the action. This requirement should apply at the time a summary judgment motion is filed or, if none is filed, at the trial. If the parties are unable to file a stipulated administrative record, the Commissioner should be required to file the entire administrative record with the court with a certification as to its genuineness.

II. PROPOSAL

This paper proposes that the Tax Court's Rules be amended as follows, with respect to CDP cases involving the abuse of discretion standard:

A. Within 75 days after service of the answer, or when a summary judgment motion is filed, if earlier, the IRS shall

serve on the taxpayer a complete copy of the administrative record, with a complete index.

B. At trial, or at the same time as the government files a summary judgment motion, the parties shall file with the Court the entire administrative record (or so much thereof as the parties deem necessary for a complete disposition of the matter), with a complete index, as part of the stipulation of facts, stipulated as to its genuineness.

C. If the parties are unable to reach a stipulation, the Commissioner shall file the entire record with the Court, with a complete index, with a certification as to its genuineness. This requirement applies at the time a summary judgment motion is filed or, if none is filed, at the trial.

The proposed Rule changes can be bolstered by other changes in procedure and practice:

D. When IRS Counsel sends the administrative record to the taxpayer, the letter should describe the role and significance of the administrative record and seek the taxpayer's agreement that the record, as transmitted, is accurate and complete. If the taxpayer does not agree, the taxpayer should be asked to specify the areas of disagreement and to produce copies of any additional documents the taxpayer believes should be part of the administrative record.

E. The Court's standing pretrial order should include a statement that the parties are expected to include the administrative record in the stipulation of facts with a stipulation as to its completeness and accuracy, and that the parties should seek to eliminate or reduce disagreement by communicating and exchanging relevant documents.

III. CONCLUSION

The administrative record is critical to the Tax Court's review of an Appeals Office CDP proceeding. In some cases, review is limited to the administrative record. Even when additional evidence may be received, the administrative record is a critical starting point. In virtually all cases, the court's review is limited to issues and grounds that were raised with the Appeals Office; hence the administrative record sets the parameters of the issues before the Tax Court.

The proposed procedures would focus the parties' attention on the administrative record at an earlier point in the proceedings and, likely reduce disputes about the content of the administrative record, and the Tax Court's role in those disputes.

If the Tax Court adopts more formal procedures with respect to the administrative record, the Appeals Office and IRS Counsel will likely devote more attention to compilation of a complete and accurate administrative record.

If the taxpayer is provided with the administrative record earlier in the proceeding, along with information about the role of the administrative record as the proceeding unfolds, taxpayers will be better prepared and make better decisions, perhaps eliminating some trials, and better focusing the issues in other cases.

ENDNOTES

1 This proposal was principally prepared by Woodford G. Rowland, a member of the Tax Procedure & Litigation Committee of the State Bar of California's Taxation Section. He can be reached at the Law Offices of Rowland & Chambers, 1120 Nye Street, Suite 300, San Rafael, CA 94901. His phone number is (415) 459-3100 and email is WdyRowland@aol.com. The author wishes to thank the reviewers Lavar Taylor, of Santa Ana, California, and Mark Ericsson, of Walnut Creek, California, for their helpful comments. The comments contained in this paper are the individual views of the author(s) who prepared them, and do not represent the position of the State Bar of California or of the Los Angeles County Bar Association.

2 Section 6320 provides similar rules and procedures allowing a taxpayer to challenge the filing of a notice of federal tax lien. Unless indicated otherwise, all Section references are to the Internal Revenue Code of 1986, as amended, 26 U.S.C. §§ 1 *et seq.* ("I.R.C."), as in effect during the relevant periods, and references to "Treasury Regulations" are references to the Treasury Regulations promulgated under the Code.

3 *E.g., Sego v. Comm'r*, 114 T.C. 604 (2000).

4 *E.g., Murphy v. Comm'r*, 125 T.C. 201 (2005).

5 *Robinette v. Comm'r*, 123 T.C. 85 (2004), *overruled*, 439 F.2d 455 (8th Cir. 2006).

6 *Robinette v. Comm'r*, 439 F.2d 455 (8th Cir. 2006).

7 *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006), *aff'g* 125 T.C. 201 (2005); *Keller v. Comm'r*, 568 F.3d 710 (9th Cir. 2009).

8 *See Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971); *cert denied*, 404 U.S. 940, 30 L. Ed. 2d 254 (1971).

9 I.R.C. § 6331(a).

10 I.R.C. § 6330(a)(1). Under Section 6320, similar procedures are available to challenge a notice of federal tax lien.

11 I.R.C. § 6330(b)(1).

12 I.R.C. § 6330(e)(1).

13 I.R.C. § 6330(c)(2)(A).

14 Treas. Reg. § 301.6330-1(d)(2); *Davis v. Comm'r*, 115 T.C. 35

(2000); *Katz v. Comm'r*, 115 T.C. 329 (2000).

15 I.R.C. § 6330(c)(2)(A).

16 I.R.C. § 6330(d)(1).

17 *Sego v. Comm'r*, 114 T.C. 604 (2000); *Goza v. Comm'r*, 114 T.C. 176 (2000). If the validity of the underlying tax liability is at issue in a CDP case, the Court will review the matter *de novo, i.e.*, will consider all relevant evidence introduced at the trial. *Davis v. Comm'r*, 115 T.C. 35, 39 (2000).

18 *Woodral v. Comm'r*, 112 T.C. 19 (1999).

19 I.R.C. § 6330(c)(2)(A); *e.g.*, *Swanson v. Comm'r*, 121 T.C. 111 (2003).

20 *Magana v. Comm'r*, 118 T.C. 488 (2002). This is consistent with the Treasury Regulation addressing the scope of a CDP appeal (Treas. Reg. § 301.6320-1(f)(2)):

> Q-F3. What issue or issues may the taxpayer raise before the Tax Court if the taxpayer disagrees with the Notice of Determination?
>
> A-F3. In seeking Tax Court review of a Notice of Determination, the taxpayer can only ask the court to consider an issue, including a challenge to the underlying tax liability, that was properly raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence.

21 118 T.C. 488 (2002).

22 129 T.C. 107 (2007).

23 *Id.* at 117-18.

24 *Robinette v. Comm'r*, 123 T.C. 85 (2004), *overruled*, 439 F.2d 455 (8th Cir. 2006).

25 *Robinette v. Comm'r*, 439 F.2d 455 (8th Cir. 2006).

26 *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006), aff'g 125 T.C. 201 (2005); *Keller v. Comm'r*, 568 F.3d 710 (9th Cir. 2009).

27 *See Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971); *cert. denied*, 404 U.S. 940, 30 L.Ed.2d 254 (1971).

28 *See Robinette*, 123 T.C. at 95-97.

29 *Id.* at 96.

30 The instructions to IRS Form 12153, Request for a Collection Due Process or Equivalent Hearing, make a brief reference to possible court review of the Appeals Office determination. A statement could be added to the effect that the court will only review arguments and issues that were raised at the Appeals Office.

31 *Robinette*, 439 F. 3d at 455.

32 Internal Revenue Manual 8.22.2.2.19 – Standardized Administrative Record (Oct. 30, 2007).

33 Office of Chief Counsel Notice CC-2006-019 (Aug. 18, 2006).

34 CDP Handbook, V. J. 1., at 64; *see Branerton v. Comm'r*, 61 T.C. 691 (1974). Rule 70(a)(2) requires the parties to attempt to obtain information from each other through informal consultation and communication before resorting to formal discovery. Hence, IRS Counsel will generally invite the taxpayer or the taxpayer's representative to a *Branerton* conference before the trial, to pursue informal discovery and also to discuss and negotiate a stipulation of facts.

35 CDP Handbook., V. J. 2-3, at 65-66.

36 *Giamelli*, 129 T.C. at 128 (Vasquez, J. dissenting,).

37 T.C. Memo 2010-22.

38 T.C. Memo. 2005-142

39 T.D. 9291, 2006-46 I.R.B. 887.

40 Treas. Reg. § 301.6320-1(f)(2).

41 See *Giamelli*, 129 T.C. at 119 (Swift, J. dissenting).