

[CC-2004-031]

August 31, 2004

Subject: Litigating Cases Brought under
I.R.C. §§ 6320(c) and 6330(d)

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Purpose

This Notice provides guidance to Chief Counsel attorneys in litigating cases brought under I.R.C. §§ 6320(c) and 6330(d).

Background

The Tax Court recently issued an opinion in *Robinette v. Commissioner*, 123 T.C. No. 5 (July 20, 2004), involving a petition from a notice of determination issued pursuant to section 6330. In *Robinette*, the Tax Court concluded that, when reviewing issues in a Collection Due Process case for an abuse of discretion, it need not limit its review to the administrative record. Based on its practice in deficiency cases, the court held that it may consider evidence not presented to the appeals officer to decide if the CDP determination is an abuse of discretion. The Office of Chief Counsel disagrees with the court's conclusion and is considering whether to recommend appeal.

Motions for Remand to IRS Office of Appeals

Application of the abuse of discretion standard of review requires the court to determine if the appeals officer followed the proper procedures in conducting the CDP hearing, made the requisite factual findings, and considered all the factors necessary to make the determination. Review for abuse of discretion also requires an adequate administrative record. The failure of an appeals officer to follow proper procedures, make necessary findings, consider required factors, or provide an adequate administrative record may invite the court to engage in its own fact-finding and substitute its judgment for that of the appeals officer.

To minimize this possibility, Chief Counsel attorneys should ordinarily ask the court to remand the case to Appeals for a supplemental determination if (1) the appeals officer failed to make necessary findings of fact; (2) if the appeals officer failed to perform an analysis that is necessary in making the determination; (3) 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; (4) the appeals officer's

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conduct of the hearing deprived the petitioner of a procedural right granted by statute or regulation, such as the right to an impartial appeals officer under sections 6320(b)(3) and 6330(b)(3); or (5) 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. The court, however, should uphold a determination even where the appeals officer erred if the error does not affect the outcome. As a consequence, any error should be evaluated to determine whether it is harmless.

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 in detail the defect in the determination or hearing that is to be remedied on remand. The motion should also explain that an order of remand is necessary to perfect the administrative record and to give Appeals the opportunity to issue a supplemental notice of determination.

Prior to filing a motion for remand, attorneys should advise the appeals officer of the reasons for remand. After the hearing on remand is concluded, the appeals officer should not issue a standard notice of determination using Letter 3193, but rather a document titled "Supplemental Notice of Determination" should be issued to the petitioner. This supplemental notice should not have the standard language concerning the right to file a petition with the court to appeal the determination. Following the issuance of the supplemental notice, a status report should be filed with the court advising of the supplemental determination.

Motions for Summary Judgment

In general, a summary judgment motion continues to be the preferred method of disposing of a CDP case in the Tax Court in cases in which there is no dispute of material fact. Summary judgment motions should be filed as soon as possible after the end of the 30-day period that follows the close of the pleadings, and not later than 30 days before the trial date. See T.C. Rule 121(a). It is recommended that the motions be filed no later than 75 days prior to the call of the calendar.

A summary judgment motion should be filed in cases in which the petitioner (1) makes only frivolous arguments or (2) only challenges the merits of the underlying liability, when a liability challenge is precluded under section 6330(c)(2)(B). A full or partial summary judgment motion should be considered if the petitioner (1) raises an issue not raised in the CDP hearing or (2) relies on evidence not submitted to the appeals officer in the CDP hearing.

In *Robinette*, the Tax Court signaled its willingness to find facts in connection with its abuse of discretion review at least in those situations in which the taxpayer was not given an opportunity to present relevant evidence before Appeals. In general, under these circumstances, a summary judgment motion will not succeed and, accordingly, should not be filed. Rather, as discussed above, a motion for remand should be filed.

A motion for summary judgment is also not appropriate if there is a dispute of material fact concerning an issue subject to a de novo standard of review. In a CDP case, the

court may hear evidence if (1) the existence or amount of the underlying liability is properly at issue; (2) the petitioner raises properly a claim for relief under section 6015(b) or (c); or (3) the petitioner raises a relevant issue as to how the CDP hearing was conducted. Under administrative law, the reviewing court may determine de novo facts relating to whether the agency used the proper procedure to make its determination. In a CDP case, for example, the Tax Court may resolve issues of material fact with respect to whether the appeals officer was impartial under section 6320(b)(3) or 6330(b)(3) or refused to accept the submission of relevant evidence. As a result, a summary judgment motion will probably not be successful if the petitioner disputes the facts concerning the conduct of the CDP hearing, unless the petitioner offers no support for the alleged factual dispute or the respondent can demonstrate that the petitioner's allegations are completely implausible or irrelevant.

Trial of Nonliability Issues

In those cases in which a trial of nonliability issues cannot be avoided by a motion for summary judgment, attorneys should continue to argue that the court should not consider either an issue or evidence that was not presented to Appeals as part of the CDP process. This argument is based on the principle that there could be no abuse of discretion by the appeals officer if the petitioner did not present an issue or evidence during the CDP hearing process. In order to establish what issues or evidence the appeals officer reviewed in making the determination, attorneys should work with the petitioner to enter into a stipulation that would put the administrative record before the court. A CDP administrative record includes all information submitted by the taxpayer and other materials reviewed by Appeals, plus any notes or memoranda created by Appeals from the time of receipt of the CDP hearing request through the issuance of the notice of determination.

Preserving Argument Regarding Abuse of Discretion for Appeal

In order to preserve the *Robinette* issue for possible appeal, attorneys should make a continuing evidentiary objection, coupled with the statement that we are considering an appeal of *Robinette*, if the petitioner attempts to testify or otherwise offer evidence that was not made available to the appeals officer. Attorneys should also consider filing a motion in limine on the ground that information not raised during the administrative process is not relevant to whether the appeal officer's determination is an abuse of discretion. If the parties have not stipulated to the administrative record, filing a motion in limine with the administrative record as an exhibit to a declaration from the appeals officer is a means of placing the administrative record before the court without calling the appeals officer to testify. The motion should seek both to affirmatively place the administrative record before the court and to prohibit admission of any evidence not presented to the appeals officer.

If the court denies the evidentiary objection or motion, or if the court reserves ruling on the objection or motion until after the trial, then, and only then, would it be appropriate to present any additional evidence not reviewed by the appeals officer that strengthens the

