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The Tax Court Keeps Growing Its Collection Due Process Powers

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Over the 13 years that the Tax Court has been hearing appeals of IRS collection due process rulings, the court has steadily expanded both the scope and nature of the proceedings. In this report, Smith looks at where the Tax Court is today—including two recent opinions that expanded the court's jurisdiction—and recommends further expansion of its powers.

Introduction

Thirteen years ago, in the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98),[1] Congress created collection due process hearings in the IRS Appeals Office. Congress made determinations after those hearings appealable to either the Tax Court or district courts. Five years ago, Congress eliminated district court review and made the Tax Court the exclusive place to which a taxpayer could appeal an adverse Appeals CDP ruling.[2] Both the original portion of the CDP statute dealing with appeals to the courts and its later update were exceedingly terse, and little was added in legislative history by way of guidance to implement that language.

From those meager congressional instructions, over the last 13 years, in more than a thousand published opinions, the Tax Court has worked out a vision of the CDP appeal to the Tax Court, making that appeal a surprisingly robust review proceeding. Further, over that same time, the Tax Court has steadily grown both the scope and nature of its CDP-review powers—in one instance, coming into conflict with three circuit courts of appeals.

This report will summarize where the Tax Court CDP appeals proceeding stands today, particularly highlighting two court opinions issued this summer that arguably again expand the court's CDP review powers. In *Churchill v. Commissioner*,[3] the Tax Court held that it may remand a matter to Appeals because of changed circumstances, effectively retaining Tax Court supervision of what might otherwise be an arguably unreviewable supplemental Appeals proceeding. And in *Zapara v. Commissioner*,[4] the Ninth Circuit affirmed the Tax Court's 2005 and 2006 holdings that in the face of an abuse of discretion by IRS Appeals, the Tax Court may fashion an equitable remedy in its CDP appeals proceeding.

I am not opposed to those holdings. Indeed, not only do I support them, but I have further controversial suggestions for growing the Tax Court's CDP powers, although the court has not yet faced either scenario:

1. I believe the Tax Court has jurisdiction to review supplemental Appeals proceedings, notwithstanding a regulation that says it does not; and

2. I believe the logic of *Zapara* and code language dictates that when the Tax Court holds that the IRS has abused its discretion in rejecting a taxpayer's proposed offer in compromise, the Tax Court, as part of its CDP equitable remedy powers, should be able to order the IRS to enter into the OIC.

Statute and Legislative History

Under the CDP structure created by Congress, a taxpayer may request a CDP hearing at Appeals either after the IRS issues a notice of intention to levy (section 6330) or files its first notice of federal tax lien (NFTL) (section 6320). If a taxpayer is dissatisfied with the notice of determination issued by Appeals, the taxpayer may bring an appeal in court. RRA '98's statutory instructions to the courts for those types of appeals proceedings were minimal:

> The person may, within 30 days of a determination under this section, appeal such determination—(A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States. If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.[5]

Traditionally, the Tax Court did not have jurisdiction to review section 6672 responsible person payment penalties or section 6702 frivolous return penalties, and section 6330(d) was intended to continue that division of authority among courts in CDP review proceedings. Thus, the Tax Court held early on that it did not have jurisdiction to hear appeals from CDP notices of determination involving section 6672 penalties.[6]

The committee reports accompanying the new CDP provisions said little about the judicial review proceedings.[7] The conference committee report provided only a paragraph on judicial review, stating:

> The conferees expect the appeals officer will prepare a written determination addressing the issues presented by the taxpayer and considered at the hearing. The determination of the appeals officer may be appealed to the Tax Court, or, where appropriate, the Federal district court. Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is part of the appeal, no levy may take place during the pendency of the appeal. The amount of the tax liability will in such cases be reviewed by the appropriate court on a de novo basis. Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion. In such cases, the appeals officer's

> determination as to the appropriateness of collection activity will be reviewed using an abuse of discretion standard of review.[8]

In 2000 Congress made a small modification to the above statutory language, changing the words "jurisdiction to hear such matter" to "jurisdiction with respect to such matter."[9] The purpose of that change was apparently to broaden the wording to accommodate the simultaneous amendment of section 6330(e)(1) to authorize the Tax Court to enjoin IRS collection actions during a Tax Court CDP appeals proceeding.[10]

In 2006 Congress decided that it was more efficient and less confusing to taxpayers to have the Tax Court hear all CDP appeals, so it replaced section 6330(d)(1) with a provision reading, "The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)."[11] But the 2006 legislative history did not say anything more about the scope or nature of the Tax Court CDP proceeding.[12]

Standard of Review

In two of its earliest CDP opinions,[13] the Tax Court simply adopted the rules from the committee reports that the court's review of Appeals notices of determination would be on an abuse of discretion standard, except for disputes about the underlying liability under section 6330(c)(2)(B), which would be governed by *de novo* review.

Perhaps a more interesting issue on the standard of review is whether, when review is on abuse of discretion, the Tax Court may apply a harmless error analysis when Appeals personnel make errors in the reasons they articulate for upholding the collection action. The Tax Court has repeatedly affirmed notices of determination when Appeals officers have made errors that the court has treated as or called "harmless"—usually procedural missteps, such as belatedly furnishing proof of proper assessment.[14] While some amount of harmless error affirmance makes sense (particularly procedural error), it does not appear that the Tax Court always distinguishes between the kinds of errors that a reviewing court will ignore as harmless when reviewing another court and the errors in reasoning of an administrative agency that a reviewing court cannot affirm under a harmless error analysis.

It is standard in administrative law outside the tax world to cite the Supreme Court's 1947 opinion in *SEC v. Chenery Corp.*[15] for the proposition that:

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.[16]

This past January in *Mayo Foundation v. United States*,[17] the Supreme Court said, "We are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly

'recogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'"[18]

Therefore, now may be the time for the Tax Court to hold that the *Chenery* doctrine applies in its CDP appeals proceedings. Interestingly, before this year, the Tax Court never cited *Chenery* in a CDP opinion. But just this summer, in *Rosenbloom v. Commissioner*, Tax Court Judge Mark V. Holmes (who is well known for his interest in uniform application of administrative law principles to tax matters), wrote in a footnote:

> We also note that neither party raised the *Chenery* doctrine as an issue for us to consider. *Chenery*, in the CDP context, would say that we can't uphold the notice of determination on grounds other than those actually relied upon by the appeals officer in making her determination. But, we haven't yet addressed the applicability of *Chenery* in CDP cases, and we are not going to start in a case where neither party made the argument.[19]

In the case, Holmes found that the settlement officer had made a mistake about the existence of installment agreements in determining that the collection statute of limitations was still open, so he refused to affirm the notice of determination, making the *Chenery* issue unnecessary to decide, in any event. Frankly, when it comes up in a proper case, I don't see how the *Chenery* doctrine does not apply in a CDP appeals proceeding in the Tax Court.

Scope of Proceeding—Issues

The mainstay of the Tax Court's jurisdiction has always been its jurisdiction to redetermine deficiencies under section 6213(a). It was well established before 1998 that in redetermining a deficiency, either party could raise a new issue not raised before at the examination or Appeals level. For example, under section 6512(b)(3)(B), a taxpayer could, for the first time in the Tax Court, ask for a refund of any amount for which he could have filed a refund claim (but had not) on the date the notice of deficiency was issued. Similarly, under section 6214(a), the IRS could seek in its answer a higher deficiency, as long as it did so before a hearing. Or, the IRS could completely change its theory of why there was a deficiency, although in doing so, it might assume the burden of proof on that "new matter" under Tax Court Rule 142(a)(1).

In an Appeals CDP lien hearing under section 6320, the primary question is whether the NFTL should be removed. In an Appeals CDP hearing under section 6330, the primary question is whether levies should be permitted to commence. But under a section 6330(c)(2)(A) Appeals CDP hearing, Congress also allows taxpayers to raise other issues—that is, "any relevant issue relating to the unpaid tax or the proposed levy, including—(i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise." Under section 6330(c)(2)(B), a taxpayer in a CDP hearing may raise "challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."

In addition to those statutorily enumerated issues, the Tax Court has held that the direction in section 6330(c)(1) that "the appeals officer shall at the hearing obtain verification from the Secretary that the

requirements of any applicable law or administrative procedure have been met" gives a taxpayer the right to challenge whether all those procedural requirements have been met.[20] The court has also held that it can decide whether an originally self-reported liability was too high[21] and whether the IRS properly applied payments and credits.[22] About the only thing the Tax Court has firmly held to as a limit to its jurisdiction is that it has no jurisdiction to find there is an overpayment or to order a refund in a CDP appeals proceeding.[23]

While there is a broad range of issues that may be considered at an Appeals CDP hearing, the Tax Court has held that in the appeal of that hearing, a taxpayer, with one exception, is limited to raising issues previously raised during the Appeals CDP hearing. However, it took several Tax Court opinions to reach that conclusion.

In *Magana v. Commissioner*,[24] a 2002 CDP opinion, the taxpayer had raised several issues in the CDP Appeals hearing but wanted to raise in Tax Court the issues of hardship and illness, having deliberately decided not to do so before Appeals. The Tax Court rejected considering the new issues, stating, "Generally we consider only arguments, issues, and other matters that were raised at the collection hearing or otherwise brought to the attention of the Appeals Office."[25] The Tax Court went on to open the door to new issues in other cases, however, with the following caveat: "This case does not involve an allegation of recent, unusual illness or hardship, or other special circumstance, that might cause us to make an exception to the general rule set forth herein and to consider petitioner's new hardship argument."[26]

Five years later, in *Giamelli v. Commissioner*,[27] the Tax Court reconsidered and rejected that caveat *en banc*. In *Giamelli*, an individual had sought during a CDP hearing only to enter into an installment agreement to pay the amount of tax he reported on his return. After the IRS denied the proposed installment agreement, Giamelli petitioned the Tax Court, where he negotiated an installment agreement with IRS counsel. Before the decision could be entered, however, the taxpayer was killed in an automobile accident. His estate was substituted as a party in the Tax Court proceeding and sought to argue that he had overstated his tax liability by leaving out some unclaimed deductions. Granting summary judgment to the IRS, the Tax Court refused to consider the underlying tax liability issue for the first time. It slammed the door on the possible exception to the *Magana* rule, saying, "We hold today that we do not have authority to consider section 6330(c)(2) issues that were not raised before the Appeals Office."[28]

Taxpayers' representatives quickly assumed that *Giamelli* meant that the Tax Court would never consider a new issue in a CDP appeal proceeding. However, that assumption was short-lived. Note how in the above quote, the Tax Court carefully limited its holding to issues under paragraph (2) of section 6330(c). But there is another kind of issue: Under paragraph (1) of subsection (c), the IRS Appeals officer is directed to "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." Just one year after *Giamelli*, in *Hoyle v. Commissioner*, [29] the Tax Court held that whether proper procedures were followed—in that case, the issuance of a notice of deficiency—could be raised in the Tax Court even though the issue had not been raised before Appeals. The Tax Court distinguished *Giamelli* from *Hoyle*, saying:

> The cornerstone of our holding in *Giamelli* was that in reviewing an Appeals officer's determination under section 6330(d), we decline to

> consider issues that are not a part of that determination. Logically, it follows that we may review those issues that were considered or should, by reason of the statutory mandate, have been considered by the Appeals officer in arriving at the determination. Unlike section 6330(c)(2) issues, which will be a part of the determination we are reviewing only if the issues were raised by the taxpayer at the Appeals hearing, the section 6330(c)(1) verification is required to be a part of every determination.
>
> Accordingly we hold that this Court will review the Appeals officer's verification under section 6330(c)(1) without regard to whether the taxpayer raised it at the Appeals hearing.[30]

Scope of Proceeding -- Evidence

Under its deficiency jurisdiction, the Tax Court has long had a history of holding trials *de novo* in which both the taxpayer and the IRS had to newly introduce into the Tax Court record all evidence they wanted considered in the proceeding. And the Tax Court had almost no interest in hearing about what had been shown to the IRS during the administrative phase, pre-Tax Court.[31]

But a Tax Court CDP proceeding is not described as one for "redetermination of a deficiency," but as an "appeal." Does that mean that the court should only review the administrative record created at the CDP hearing—at least as to the issues for which it was required to make its decision on an abuse of discretion standard? That was the crux of the issue in *Robinette v. Commissioner*.[32] There, the taxpayer argued during the Appeals CDP hearing that he had filed a particular tax return on time and therefore had not defaulted on the terms of his OIC. But on appeal to the Tax Court, he wanted to introduce further testimony and documentary evidence on the filing issue. Could he?

In the 2004 *en banc* opinion, a majority of the Tax Court held that it could consider additional evidence not placed in the administrative record for those CDP issues that the Tax Court had to review under an abuse of discretion standard.[33] Thus, the court let the taxpayer introduce his additional evidence of filing, although that evidence did not ultimately persuade the court that the IRS had been wrong. In part, the Tax Court rested its holding that it could accept new evidence on the fact that Congress long knew that under the court's deficiency jurisdiction, the court sometimes determined deficiencies on an abuse of discretion standard through a trial *de novo* as to evidence.

The IRS appealed *Robinette* to the Eighth Circuit. I share the opinion (which won the Tannenwald Prize in 2007 for the best student paper in tax in the United States)[34] that under a plain reading of section 7482(b)(1), appeals from Tax Court CDP decisions—except when underlying tax is at issue—can go only to the D.C. Circuit. Thus, in my view, the Eighth Circuit was not the proper circuit of venue unless the parties wanted to stipulate to the wrong circuit under the permissive venue rule of section 7482(b)(2). In any event, the Eighth Circuit held that the Tax Court was wrong and that under both the Administrative Procedure Act and general principles of administrative law, the standard of review (abuse of discretion) implies the scope of the proceeding—that is, limiting Tax Court review essentially to the administrative record created at the CDP appeals proceeding.[35]

Two other circuits, the First[36] and the Ninth,[37] have agreed with the Eighth Circuit on that point. Neither the D.C. Circuit nor any other has faced the issue of whether the Tax Court may consider new evidence in its appeal proceeding beyond that included in the Appeals CDP administrative record. Without ever discussing the prize-winning article's argument,[38] however, the Tax Court has continued to apply the *Golsen* rule[39] and take the position that it is bound to review only the administrative record in cases appealable only to the First, Eighth, and Ninth circuits.[40] However, the IRS continues to disagree with the Tax Court over the trial *de novo* issue, and in each relevant case has requested that the Tax Court reconsider its position in *Robinette*.[41]

As noted above in the discussion of *Chenery* as applied to CDP, the Supreme Court's recent opinion in *Mayo* calls for a uniform approach to review of administrative action. It may be that the IRS should include the quote from *Mayo* as grounds for the Tax Court to reconsider its holding in *Robinette*. I actually think that as a matter of policy, there is only benefit to pro se or formerly pro se taxpayers in allowing additional evidence into the Tax Court on issues raised at Appeals. However, I think that the Tax Court should issue an opinion addressing whether *Mayo*, when combined with the opinions of all three circuits that have addressed the issue, changes its thinking.

Remands and Supplemental Proceedings

In *Keene v. Commissioner*,[42] a taxpayer had asked to audio record his CDP hearing at Appeals. The IRS refused to allow him to do so, so he left the hearing. When he later brought the issue before the Tax Court, the court, sitting *en banc*, held that a taxpayer has a right to record a CDP hearing at Appeals. As a remedy for the mistake, the IRS suggested that the matter be remanded to Appeals for a new CDP hearing that would be recorded. The Tax Court agreed to that remand.

Since *Keene*, the Tax Court has on many occasions in published opinions directed a remand for further proceedings—usually, but not always, when the IRS has committed a procedural error in conducting the hearing.

My research with Prof. T. Keith Fogg of the Villanova Tax Clinic into Tax Court CDP appeals indicates that there are a lot of Tax Court CDP dockets that produce remands without any published opinions. In a study of CDP cases filed in January and February 2008, we found that 13 of 154 dockets were eventually remanded (8 percent).[43] A high level of remands continues to this day: On June 17, 2011, the Tax Court began publishing previously unpublished orders that do not appear as published opinions. Between June 17 and November 4, the Tax Court issued more than 100 orders involving the question of remands in CDP appeals—ordering remands in most (often at the request of the IRS). That alone should give heart to many of those who merely read published opinions and conclude that CDP is a waste of time for tax-payers. Practitioners like me know it is not. Remands often achieve either the original goal or something more acceptable than what was determined in the original notice of determination.

The Tax Court has held that after a remand, its job is to review only the supplemental notice of determination generated after the remand, not any errors in the original notice.[44] The Tax Court also recently held that when it made no limiting instructions in its remand order, the Appeals hearing officer in a remand hearing is not limited to considering only evidence presented in the first hearing.[45]

The idea that the Tax Court could remand a proceeding to Appeals should be controversial. A remand means that after the remand, the IRS will issue a supplemental notice of determination, which can again be brought back by the taxpayer to the Tax Court for review because the Tax Court case is not closed but merely held in abeyance during the remand. The Tax Court cannot remand a proceeding under section 6213(a) when it is asked to redetermine a deficiency. And in *Friday v. Commissioner*,[46] it held that it cannot remand a section 6015(e) innocent spouse proceeding to the IRS. In *Friday*, the Tax Court explained the source of its jurisdiction to remand a CDP case to the IRS:

> In certain specific cases where statutory provisions reserve jurisdiction to the Commissioner, a case can also be remanded to the Commissioner's Appeals Office. Under section 6320(c) and 6330(d)(1), this Court may consider certain collection actions taken or proposed by the Commissioner's Appeals Office. Under paragraph 2 of section 6330(d), the Commissioner's Appeals Office retains jurisdiction with respect to the determination made under section 6330. As part of the process, a case may be remanded to the Appeals Office for further consideration.[47]

But did Congress really intend that the Tax Court have remand powers within its CDP appeals proceeding?

Section 6330(d)(2) was enacted as part of RRA '98 and states:

> The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—(A) collection actions taken or proposed with respect to such determination; and (B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

The conference committee report accompanying RRA '98 states under the heading "Judicial review" just after its discussion of the CDP court appeals proceedings:

> No further hearings are provided under this provision as a matter of right. It is the responsibility of the taxpayer to raise all relevant issues at the time of the pre-levy hearing. A taxpayer could apply for consideration of new information, make an offer-in-compromise, request an installment agreement, or raise other considerations at any time before, during, or after, the Notice of Intention to Levy hearing. However, after the 30 day period had expired, the IRS is not required to provide a hearing or delay any levy or sale of levied property. Nothing in this provision is intended to limit any remedy that is otherwise available under present law.[48]

The IRS has issued regulations stating that section 6330(d)(2) Appeals "retained jurisdiction" hearings neither toll the collection statute of limitations under section 6330(e) nor are reviewable by the Tax Court. Reg. section 301.6330-1(h) states:

> Q-H1. Are the periods of limitation suspended during the course of any subsequent Appeals consideration of the matters raised by a taxpayer when the taxpayer invokes the retained jurisdiction of Appeals under section 6330(d)(2)(A) or (B)?
>
> A-H1. No. Under section 6330(b)(2), a taxpayer is entitled to only one CDP hearing under section 6330 with respect to the tax and tax periods specified in the CDP Notice. Any subsequent consideration by Appeals pursuant to its retained jurisdiction is not a continuation of the original CDP hearing and does not suspend the periods of limitation.
>
> Q-H2. Is a decision of Appeals resulting from a retained jurisdiction hearing appealable to the Tax Court?
>
> A-H2. No. As discussed in A-H1, a taxpayer is entitled to only one CDP hearing under section 6330 with respect to the tax and tax period or periods specified in the CDP Notice. Only determinations resulting from CDP hearings are appealable to the Tax Court.

Do remands for supplemental determinations and retained jurisdiction hearings conflict? Remember that a remanded Appeals CDP hearing gives the Tax Court a chance to review the supplemental notice of determination, whereas, at least according to the IRS, an Appeals CDP retained jurisdiction hearing determination does not. Might the regulation saying that the Tax Court may not hear an appeal from a retained jurisdiction hearing be invalid? Perhaps the "one CDP hearing" portion of section 6330, when read in conjunction with section 6330(d)(2), means that Congress intended that all retained jurisdiction hearings are part of (that is, mere continuations of) that one CDP hearing, so that retained jurisdiction hearings are always subject to Tax Court review.

Frankly, as a policy matter, I think it would be best if retrained jurisdiction hearings were reviewable in the Tax Court the same way that remand hearings giving rise to supplemental notices of deficiency are. Someone should be policing the IRS in CDP. I think there is enough ambiguity in the statute for the Tax Court to take that expansive position. No one has yet argued to the Tax Court, though, that the regulation is invalid. The next time someone is unhappy with a retained jurisdiction hearing result, I suggest that they appeal to the Tax Court and argue about the regulation's validity.

I know that many of you may be thinking that at least since *Mayo, Chevron*[49] deference is owed to the regulation because it resolves an ambiguity. But the Supreme Court has held that "only Congress may determine a lower federal court's subject-matter jurisdiction."[50] The IRS should not be determining the Tax Court's jurisdiction by regulation.

In the recent case of *Churchill v. Commission*,[51] the Tax Court was faced with a tough situation: A married taxpayer had proposed an OIC to settle his tax debts, and his wife had threatened to leave him if he did not resolve his tax problems. The CDP hearing officer held that the wife's substantial income had to be considered along with the taxpayer's minimal income in connection with determining the taxpayer's reasonable collection potential (RCP). That made his RCP $ 100,000 higher, so the hearing officer

rejected his OIC. After the hearing, but before the notices of determination were issued, the taxpayer's wife divorced him and moved out. By the time the Tax Court case was submitted fully stipulated, it was clear that the ex-wife's income should no longer be considered in evaluating the OIC. Because California is a community property state, Judge Holmes held that the Appeals officer was initially right to include the taxpayer's wife's income in calculating RCP. But he went on:

> So what happens when a taxpayer has a change in circumstances after the CDP hearing, but before we decide his case?
>
> At one time, we thought we could consider new information where it became available after the CDP hearing—at least when it wasn't the taxpayer's fault that he didn't raise the issue before. See Magana. . . . A few years later, however, we firmly limited our review of section 6330(c)(2) issues to those presented in the CDP hearing. See Giamelli. . . . Accordingly, the Court cannot now update Churchill's snapshot and make our own determination. But can we remand?
>
> Absent limiting statutes, courts generally have "the inherent authority to issue such orders as they deem necessary and prudent to achieve the 'orderly and expeditious disposition of cases.'" In Friday. . . , we noted in dicta that we can remand to an agency if it retains jurisdiction over the underlying case, such as the Appeals Office does in a CDP determination. See sec. 6330(d); sec. 301.6330-1(h)(1), Proced. & Admin. Regs.
>
> We certainly can remand in CDP cases when an Appeals officer abused his discretion in some way. We also remand when, for example, the Appeals officer didn't develop the record enough for us to properly review it.
>
> One might consider remand to be, in both these situations, a response to an error we've found that we want the Appeals Office to fix. But we've also remanded where the law changed between the CDP hearing and the Tax Court trial if that may have affected a taxpayer's presentation of his case. We've even hinted that we might remand when the Appeals Office didn't abuse its discretion and the law didn't change—as long as the remand would be "helpful."
>
> In this case, we take the hint we've made and hold that remand is appropriate in cases where there has been a material change in a taxpayer's factual circumstances between the time of the hearing and the time a case lands on our trial calendar. As we held in *Giamelli*, it's not sensible for us to hold that the Appeals Office has abused its discretion in failing to consider information that it didn't have any way of knowing about. We said there that we didn't want to usurp the Appeals officer's role or frustrate the statutory administrative review process by litigating new issues without prior consideration by the Commissioner.

> Even more compelling is that the Supreme Court has held that when there is a question of "changed circumstances" raised on appeal, well-established principles of administrative law will generally require the issue be remanded back to the agency for its consideration.
>
> We therefore hold that we do have authority to remand a CDP case for consideration of changed circumstances when remand would be helpful, necessary, or productive. This standard is satisfied in this case. This means that the answer to the question with which we began—did the Commissioner abuse his discretion in declining Churchill's offer in compromise—is that we can't say yet.

I consider *Churchill* a significant expansion of the Tax Court's CDP appeals powers. One would have thought that changed circumstances were only to be considered in a retained jurisdiction hearing after the Tax Court case was over—a type of hearing that the IRS would say is not subject to further judicial review. But Judge Holmes's solution in *Churchill* instead causes a remand hearing that can come back to the Tax Court to be reviewed anew on the facts brought into the remand hearing and under the rationale of the supplemental notice of determination. Certainly, *Churchill* at least erodes the force of the IRS regulation limiting judicial review—although it does not hold the regulation invalid.

Churchill may also present a way around the *Giamelli* limitation. In *Churchill*, there was no new issue raised in the Tax Court—the issue in both the Appeals CDP hearing and in the Tax Court appeal had always been whether the taxpayer's OIC should be accepted. But once a remand is ordered at the court's discretion because of changed circumstances, unless the court orders otherwise, the taxpayer can probably raise new issues in the remand hearing, and the Tax Court will have to review them if the remand generates a supplemental notice of determination that comes back to the court. Thus, the Tax Court's suggestion in *Magana* that it might consider new issues in its CDP appeal as a result of changed circumstances may have been given partial new life if, as a result of changed circumstances, a Tax Court judge directs a remand.

Equitable Remedies

The other major development of the summer was the first confirmation by an appellate court that the Tax Court has equitable powers to fashion CDP remedies.

In *Zapara v. Commissioner*,[52] the IRS had seized some of the taxpayer's stock under a jeopardy levy. The taxpayer asked the Appeals officer to sell the stock during a CDP hearing, but the officer refused to do so absent receipt from the taxpayer of information about the stock's current fair market value. The taxpayer did not provide that information, and the stock declined in value. Under section 6335(f):

> the owner of any property seized by levy may request that the Secretary sell such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner

> within such period) that such compliance would not be in the best interests of the United States.

The Tax Court held that there is no requirement in section 6335(f) that a taxpayer making a sell request provide FMV information, and that the Appeals officer had abused his discretion by not selling the stock. The court then fashioned an equitable remedy, directing that the taxpayer's unpaid liabilities that were the subject of the CDP hearing be credited with an amount equal to the stock's FMV 60 days after the taxpayer made the request to sell.

Zapara produced two Tax Court opinions because the IRS was so upset about the remedy proposed. The IRS moved for reconsideration of the first opinion, arguing that the Tax Court had, in effect, usurped the powers of the district courts under section 7433 to provide a monetary remedy for unauthorized collection actions; the Tax Court has no power to hear section 7433 actions for damages. The court, however, disagreed that it had granted damages to the taxpayer, holding that it had inherent powers under section 6330(d)(1) to fashion equitable remedies in CDP appeals. The IRS appealed the Tax Court's decision to the Ninth Circuit, but that court agreed with the Tax Court. This CDP equitable remedy issue was a novel issue, and no other circuit court has faced it.

CDP dockets in which the Tax Court, in published opinions, finds the IRS to have abused its discretion in a material way are fairly uncommon. So it is not clear how often issues of the Tax Court's equitable remedy powers will come up. However, there is one issue that comes up periodically in my practice and those of other low-income taxpayer clinics: an Appeals officer who is refusing an OIC on grounds that appear wrong. That does not happen often, but when it does, I appeal to the Tax Court and I assume others do, too. I also assume that IRS attorneys resolve most of those cases by settlement or the cases are remanded and resolved in a supplemental CDP hearing. But that raises this question: If push comes to shove, and the IRS does not agree to an OIC that it should have under its own manual policies, what power does the Tax Court have? The Tax Court has often said that it is not in the business of determining a more appropriate OIC; it just decides whether the IRS has abused its discretion in rejecting the exact OIC submitted by the taxpayer.[53] Well enough. But what does the Tax Court do when it finds an abuse of discretion in rejecting an OIC?

In 2006 I was counsel in a case before Judge Harry A. Haines. In a telephone conference, the judge asked me why I would even bother contesting an OIC denial in Tax Court, as he thought he had no power to order the IRS to enter into an OIC, even if he found that the IRS had abused its discretion in rejecting it. All he thought he could do was order a remand. I respectfully disagreed. I noted that the Tax Court had never said that it had no power to order the IRS to enter into an OIC and that I could not imagine that Congress would have wanted a situation in which the Tax Court found that there was an abuse of discretion regarding an OIC that the court had no power to fix. That would be a right without a remedy. I pointed out that Congress had just amended section 7122 to add new subsection (f) providing that if the IRS did not reject an OIC in 24 months, then the IRS was deemed to have accepted the OIC. I could not imagine that the same Congress would agree that if the IRS had improperly rejected the same OIC within that 24-month period, the taxpayer would have no recourse.

There have been many hundreds of Tax Court published opinions over the last 13 years in which the court has considered whether the IRS should have entered into an OIC. In most of those opinions, the taxpayers either failed to actually submit an OIC or to submit relevant financial information. My students

and I have gone through all those OIC opinions. We found only 10 opinions in which the IRS was held to have significantly abused its discretion in rejecting an actually submitted OIC. In none of the cases did the Tax Court include in its opinion (or in the decision at the end of the case) an order that the IRS enter into the OIC, but the court also never said that it lacked that power.

In most of the cases, the Tax Court ordered a remand to reconsider the OIC.[54] One of those remand opinions deserves special note. In *Samuel v. Commissioner*,[55] the Tax Court found that the IRS Appeals officer had used an excessive amount of dissipated assets in doing a "reasonable collection potential" (RCP) calculation. The court took note of a manual provision stating that if the taxpayer had submitted too low an offer, the Appeals officer must contact the taxpayer by letter or telephone and advise him that he may amend the offer to what the IRS reviewer thought would be an acceptable amount. The court said the failure to notify the taxpayer of the acceptable OIC amount (as revised by the court) was an abuse of discretion. The court said, "We shall remand this case to Appeals for a 60-day period within which petitioner may, if he so chooses, revise the amount of his offer-in-compromise and suggest new terms of payment in accordance herewith." In my view, that remand allowing the taxpayer to make a new OIC "in accordance herewith" is a mild equitable remedy. It does not take a leap of faith that the Tax Court might order the IRS to accept the new OIC if it was made in the amount and terms "in accordance herewith." But I have no evidence that the court did so. I do know that the court kept the case open and on report for several years until, according to the stipulation below the final decision, the IRS and taxpayer entered into an OIC on January 21, 2009. But I have no proof that the OIC was done under the court's compulsory process.

Three other OIC abuse of discretion cases deserve special discussion because their conclusion is unclear.

In *Fowler v. Commissioner*,[56] the taxpayers proposed a $ 2,400 OIC to be paid in 24 monthly installments of $ 100 each. The Appeals officer rejected the OIC because he concluded that the taxpayers could not afford the monthly payments from current income and they refused to sell their car, whose value had determined the $ 2,400 RCP amount. In court, the IRS stipulated that $ 2,400 was the right amount to offer for an OIC. The Tax Court held that the IRS should have believed that the taxpayers could live more frugally than the collection financial standards expense allowances and could have come up with the proposed $ 100 monthly OIC payments out of current income. The court held that it was an abuse of discretion to reject the OIC. There were no further proceedings in the case, so I have no idea whether the IRS later entered into the OIC. Neither the opinion nor the decision contains a statement about whether the court could order the IRS to enter into the OIC.

In *Harris v. Commissioner*,[57] a couple in their seventies owed about $ 13,000 and submitted an OIC to pay $ 1,000. The IRS denied the offer and issued an NFTL filing. In the ensuing CDP hearing, the settlement officer did no independent review of the taxpayers' OIC or RCP or the financial information they submitted. The officer sustained the lien filing and the rejection of the OIC. The Tax Court held that the settlement officer abused his discretion by not independently considering the OIC and the financial information submitted by the taxpayers. The opinion then abruptly ends: "Decision will be entered for the petitioners." There were no further proceedings in the Tax Court, so, again, I have no idea whether the taxpayers got their OIC.

In *Dalton v. Commissioner*,[58] the taxpayers sought to compromise hundreds of thousands of dollars of trust fund penalties by submitting an OIC in the amount of $ 5,000, which they later suggested raising to

$10,000. But the Appeals officer rejected the OIC on the grounds that the taxpayers held a very valuable indirect interest in real property in Poland, Maine. The IRS moved for summary judgment, but the Tax Court held that the Appeals officer had not completed a proper analysis of ownership of the property under both state and federal law and remanded. In the supplemental notice of deficiency, the Appeals officer did a more thorough analysis and still held the taxpayers to have had an interest in the real property. Back in the Tax Court, the taxpayers moved for summary judgment, which the court granted, holding that the taxpayers did not have any interest in the real property. "We hold that respondent's determination to proceed with the levy was an abuse of discretion because respondent rejected petitioners' offer-in-compromise on the basis that it did not include a nominee interest in the Poland property," the court wrote.[59] As in the prior three cases, the court's order disposing of the case did not specifically discuss the OIC. So I don't know if an OIC resolved the case.

The above cases may or may not indicate the Tax Court's unwillingness to order the IRS to enter into an OIC. All I can say for sure is that the court has never discussed whether its equitable powers extend to ordering the IRS to enter into an OIC. But I think the court possesses those powers and should feel free to exercise them.

Conclusion

The Tax Court's CDP appeals proceedings have gradually expanded over the last 13 years. As an advocate for taxpayers, I hope that this expansion continues. A robust Tax Court review proceeding is necessary to effectuate what I believe was Congress's intent in setting up the CDP in the first place—preventing the IRS from overreaching in the collection process.

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1 P.L. 105-206, section 3401.
2 Pension Protection Act of 2006, P.L. 109-280, section 855(a).
3 T.C. Memo. 2011-182, *Doc 2011-16759*, *2011 TNT 148-7*.
4 2011 U.S. App. LEXIS 14656 (9th Cir. 2011), *Doc 2011-15592*, *2011 TNT 138-8*, *aff'g* 124 T.C. 223 (2005), *Doc 2005-10872*, *2005 TNT 95-12*, and 126 T.C. 215 (2006), *Doc 2006-7877*, *2006 TNT 80-7*.
5 Section 6330(d)(1), as added by RRA '98, section 3401.
6 *Moore v. Commissioner*, 114 T.C. 171 (2000), *Doc 2000-8458*, *2000 TNT 54-72*.
7 *See* S. Rep. 105-174 at 68-69.
8 H.R. Rep. (Conf.) 105-599 at 266.
9 P.L. 106-554, section 1(a)(7) (enacting into law section 313(b)(2)(A) of Subtitle B of Title III of H.R. 5662, the Community Renewal Tax Relief Act of 2000, as introduced on Dec. 14, 2000).
10 H.R. Rep. (Conf.) 106-1033 at 1024-1025.
11 Pension Protection Act of 2006, P.L. 109-280, section 855(a).
12 S. Rep. 109-174, at Title X, B., 1.
13 *Goza v. Commissioner*, 114 T.C. 176 (2000), *Doc 2000-8459*, *2000 TNT 54-70*; *Sego v. Commissioner*, 114 T.C. 604 (2000), *Doc 2000-18157*, *2000 TNT 128-46*.
14 *See, e.g., Nestor v. Commissioner*, 118 T.C. 162 (2002), *Doc 2002-4258*, *2002 TNT 34-14*.
15 332 U.S. 194 (1947).
16 *Id*. at 196.
17 131 S. Ct. 704 (2011), *Doc 2011-609*, *2011 TNT 8-10*.
18 *Id*. at 713 (citations omitted).
19 T.C. Memo. 2011-140, *Doc 2011-13562*, *2011 TNT 120-14*, at n.17.
20 *Hoyle v. Commissioner*, 131 T.C. 197 (2008), *Doc 2008-25463*, *2008 TNT 234-9*.
21 *Montgomery v. Commissioner*, 122 T.C. 1 (2004), *Doc 2004-1409*, *2004 TNT 15-9*.
22 *Freije v. Commissioner*, 125 T.C. 14 (2005), *Doc 2005-15064*, *2005 TNT 135-11*.
23 *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006), *Doc 2006-772*, *2006 TNT 9-14*.

[24] 118 T.C. 488 (2002), *Doc 2002-13178, 2002 TNT 106-11*.
[25] *Id*. at 493-494.
[26] *Id*.
[27] 129 T.C. 107 (2007), *Doc 2007-24182, 2007 TNT 211-7*.
[28] *Id*. at 115.
[29] 131 T.C. 197 (2008).
[30] *Id*. at 202-203.
[31] *Greenberg's Express Inc. v. Commissioner*, 62 T.C. 324 (1974):
> As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of respondent's motives or of the administrative policy or procedure involved in making his determinations. . . . The underlying rationale for the foregoing is the fact that a trial before the Tax Court is a proceeding de novo; our determination as to a petitioner's tax liability must be based on the merits of the case and not any previous record developed at the administrative level. (Citations omitted.)

[32] 123 T.C. 85 (2004), *Doc 2004-14878, 2004 TNT 140-17*.
[33] If the issue is one that the Tax Court would review on a *de novo* standard—*i.e.*, a challenge to the underlying liability—the court has held that it can conduct a trial *de novo* as to evidence, as well, relying on an exception in the Administrative Procedure Act to the record rule at 5 U.S.C. section 554(a)(1). *Jordan v. Commissioner*, 134 T.C. 1, 9 (2010), *Doc 2010-611, 2010 TNT 7-11*.
[34] *See* James Bamberg, "A Different Point of Venue: The Plainer Meaning of Section 7482(b)(1)," 61 *Tax Lawyer* 445 (Winter 2008) (the proper venue on appeal in many of these newer-jurisdiction cases is only the Court of Appeals for the D.C. Circuit). I don't just talk the talk on this view. In May, under threat of a DOJ motion to dismiss or transfer the appeal for improper venue, I appealed the Tax Court's CDP appeals decisions in *Tucker v. Commissioner*, 135 T.C. 114 (2010), *Doc 2010-16604, 2010 TNT 143-9*, and T.C. Memo. 2011-67, *Doc 2011-6030, 2011 TNT 56-10*, to the D.C. Circuit. The case there is pending, and the government never did move to dismiss or transfer the appeal to the Tenth Circuit, the circuit where Mr. Tucker lived when he filed his Tax Court petition. However, at the government's request, I later signed a permissive venue stipulation under section 7482(b)(2), to the D.C. Circuit.
[35] 439 F.3d 455, 460 (8th Cir. 2006):
> Nothing in the text or history of the Restructuring and Reform Act of 1998 clearly indicates an intent by Congress to permit trials *de novo* in the Tax Court when that court reviews decisions of IRS appeals officers under section 6330. If anything, the available evidence suggests the opposite. The agreed-upon standard of review itself implies that review is limited to the administrative record, for . . . it would be incongruous to hold that review is limited to determining whether an appeals officer "abused his discretion," but also to conclude that the appeals officer committed such an "abuse" by failing to weigh information that was never even presented to him. (Citation omitted.)

[36] *Murphy v. Commissioner*, 469 F. 3d 27, 31 (1st Cir. 2006), *Doc 2006-23555, 2006 TNT 224-11*.
[37] *Keller v. Commissioner*, 568 F. 3d 710, 718 (9th Cir. 2009), *Doc 2009-4282, 2009 TNT 37-17*.
[38] That lack of discussion is rather surprising, since two Tax Court judges were part of the Tannenwald Prize panel, so they must have read the argument and thought it at least potentially correct.
[39] 54 T.C. 742, 756-758 (1970), *aff'd on another issue*, 445 F.2d 985 (10th Cir. 1971).
[40] *See Rosenbloom*, T.C. Memo. 2011-140.
[41] *See* CC-2009-010, *Doc 2009-3733, 2009 TNT 32-6*, which, at 245, contains model language for asking the Tax Court to "reconsider its holding in *Robinette* and adopt the record rule as enunciated by the First and Eighth Circuits in all cases arising under sections 6320 and 6330, including this case."
[42] 121 T.C. 8 (2003), *Doc 2003-16246, 2003 TNT 131-10*.
[43] Carlton M. Smith and T. Keith Fogg, "Tax Court Collection Due Process Cases Take Too Long," *Tax Notes*, Jan. 24, 2011, p. 403, *Doc 2010-26807, 2011 TNT 16-20*.
[44] *Kelby v. Commissioner*, 130 T.C. 79 (2008), *Doc 2008-9447, 2008 TNT 83-13, aff'd on another issue*, 2011 U.S. App. LEXIS 15246 (9th Cir. 2011).
[45] *Hoyle v. Commissioner*, 136 T.C. No. 22 (2011), *Doc 2011-11121, 2011 TNT 100-13*.
[46] 124 T.C. 220 (2005), *Doc 2005-10423, 2005 TNT 92-13*.
[47] *Id*. at 221-222 (citation omitted).
[48] H.R. Rep. (Conf.) 105-599 at 266.
[49] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984):
> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.

Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. (Citations omitted.)

[50] *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (bankruptcy rules do not create or withdraw federal jurisdiction).

[51] T.C. Memo. 2011-182, *Doc 2011-16759, 2011 TNT 148-7*.

[52] 124 T.C. 223 (2005) and 126 T.C. 215 (2006), *aff'd*, 2011 U.S. App. LEXIS 14656 (9th Cir. 2011).

[53] *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006):

We do not conduct an independent review of what would be an acceptable offer in compromise. The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law. (Citation omitted.)

[54] *Fairlamb v. Commissioner*, T.C. Memo. 2010-22, *Doc 2010-2741*, *2010 TNT 24-9* (remand to have the IRS explain reasoning for superiors overruling settlement officer's recommendation to enter into an OIC based on settlement officer's apparently correct calculation of RCP); *Blair v. Commissioner*, T.C. Memo. 2009-232, *Doc 2009-22339*, *2009 TNT 194-14* (remand to confirm that settlement officer had apparently used incorrect number of months in calculating RCP); *Judge v. Commissioner*, T.C. Memo. 2009-135, *Doc 2009-13220*, *2009 TNT 110-10* (remand because settlement officer ignored financial information to calculate RCP and terminated hearing prematurely); *Oman v. Commissioner*, T.C. Memo. 2006-231, *Doc 2006-22116*, *2006 TNT 210-10* (remand to consider apparently conflicting manual instructions about what to do when past noncompliance appears egregious); *Sampson v. Commissioner*, T.C. Summ. Op. 2006-75, *Doc 2006-8889*, *2006 TNT 89-22* (remand to reconsider OIC because settlement officer used incorrect income in RCP). *See also Skirzowski v. Commissioner*, T.C. Memo. 2004-229, *Doc 2004-19813*, *2004 TNT 196-16* (court entered decision for the taxpayer after holding that the IRS was incorrect both in leaving on file some nominee liens and failing to complete a financial analysis of the taxpayer's OIC; after the opinion, it appears that the court, although not formally remanding the case, kept ordering reports until a final decision was entered in 2006).

[55] T.C. *Memo*. 2007-312, *Doc 2007-23095*, *2007 TNT 200-8*.

[56] T.C. Memo. 2004-163, *Doc 2004-14409*, *2004 TNT 135-21*.

[57] T.C. Memo. 2006-186, *Doc 2006-16519*, *2006 TNT 169-6*.

[58] T.C. Memo. 2008-165, *Doc 2008-14924*, *2008 TNT 131-14* (ordering remand), 135 T.C. 393 (2010), *Doc 2010-20844*, *2010 TNT 185-12* (granting taxpayer's motion for summary judgment), T.C. Memo. 2011-136, *Doc 2011-13466*, *2011 TNT 119-8* (granting attorney fees).

[59] 135 T.C. at 423.