Tax Court Jurisdiction is Not Automatic and Your Appeal Might Preclude It

By Marcus J. Brooks

Curriculum: Tax

Level: Intermediate

Designed For: Tax practitioners, CPAs in public practice

Objectives: Learn more about Tax Court jurisdiction, related court cases, judicial review and considerations for Appeals Office determinations

Key Topics: Notice of deficiency and potential for Tax Court review, collection due process hearings, deficiency cases vs. non-deficiency cases, appeals conferences and collection due process hearings

Prerequisites: None

Advanced Preparation: None

Take this CPE quiz online! Go to TSCPA's website at http://bit.ly/cpequiz

One of the many things separating the IRS from most potential creditors is that the IRS has the ability to assess taxes and collect taxes without having to sue the taxpayer, reduce the liability to an enforceable judgment and then proceed with collection activities. Subject to affirmative procedural options on behalf of the taxpayer, discussed further below, the IRS can make an assessment of taxes and simply begin collecting, including utilizing its substantial powers of lien and levy. In other words, if the taxpayer just sits there, the IRS can eventually show up and collect without ever having to file or set foot in front of a judge.

The opportunity for a taxpayer to seek pre-payment judicial review in front of the Tax Court covers most potential tax liabilities. Many taxpayers assume that the opportunity for Tax Court jurisdiction and the procedural protections that generally come with it (e.g., a post-petition appeals conference if the matter has not had consideration by appeals, attention from IRS counsel individually assigned to the case and finally a trial in front of a Tax Court judge) are axiomatic. There are, however, circumstances in which Tax Court review is not available and there are even some situations in which the taxpayer may cut off the opportunity for Tax Court review by seeking an appeals conference prior to a collection due process (CDP) hearing.

A recent case out of the Seventh Circuit, *Our Country Home Enterprises, Inc. v Comm'r*, 855 F.3d 773 (7th Cir. 2017), highlights these issues as it takes a methodical walk through what the court refers to as "the abstruse world of federal-tax procedure." The opinion starts with a big picture, macro take of tax procedure. It then winnows down to the question at issue in that case, namely whether a taxpayer was precluded from challenging liability for a penalty (§6707A failure to include reportable transaction information with return) in a CDP hearing, because the taxpayer previously challenged its liability in an appeals hearing that did not offer the potential for judicial review. The court answers the question in the affirmative, ostensibly leaving the taxpayer to walk the longer and more expensive road of paying the penalty and eventually filing a refund suit if the taxpayer chooses to challenge the IRS' position.

In so doing, the opinion outlines the difference between (i) taxes and related penalties that are subject to deficiency procedures and consequently an opportunity for Tax Court review prior to assessment and collection and (ii) taxes or penalties that are not subject to the deficiency procedures, i.e., "non-deficiency taxes," which do not provide the taxpayer with an opportunity for Tax Court review prior to assessment and collection. It also underscores some situations in which taxpayers might not want to request an appeal, as doing so may cut off an opportunity for Tax Court review.

Deficiency Procedures – i.e., Notice of Deficiency and Potential for Tax Court Review

The court observes that Congress enacted sections 6212 and 6213 to prohibit the IRS from assessing a deficiency in income, estate, gift and certain excise taxes until the IRS issues a notice of deficiency, giving the taxpayer access to Tax Court. A taxpayer then has 90 days (or 150 days if he/she lives outside the United States) to petition the Tax Court for review.

If the taxpayer does not timely file a petition in Tax Court after having received a notice of deficiency, the IRS can assess (or formally record) the deficiency under section 6203. The assessment "is given the force of a judgment," authorizing the IRS to collect the tax. *Bull v. United States*, 295 U.S. 247, 260, 55 S. Ct. 695, 79 L. Ed. 1421, 81 Ct. Cl. 974, 1935-1 C.B. 310 (1935); *Matter of Carlson*, 580 F.2d 1365, 1368 (10th Cir. 1978).

Within 60 days of an assessment, the IRS must notify the taxpayer of the amount due and demand payment. IRC §6303(a). Failure by the IRS to follow the appropriate procedures regarding notice could result in invalidation of a lien or levy. If the taxpayer fails to pay what is due, the IRS can file a notice of federal tax lien, which places a lien on all of the taxpayer's property. IRC §6321. The IRS can also levy on a taxpayer's property, after giving the taxpayer 30 days prior notice. IRC §6331. Finally, the IRS may commence a civil case for collection purposes. *Anuforo v. Comm'r*, 614 F.3d 799, 805 (8th Cir. 2010).

Certain Taxes Not Subject to Deficiency Procedures

Some taxes are not considered deficiencies under the Internal Revenue Code. Certain penalties are, by statute, explicitly exempted from deficiency procedures. *Smith v. Comm'r*, 133 T.C. 424, 428 (2009).[i] Other penalties, such as reporting penalties imposed for failing to report participation in various tax-shelter transactions, have been found to be exempt from deficiency procedures based on the fact that the Tax Court is a court of limited, statutory jurisdiction and an analysis of the penalty at issue. *Smith*, 133 T.C. at 429 (finding section 6707A taxes to be exempt from deficiency procedures).[ii] *Our Country Home* notes that, for these non-deficiency taxes, which are not subject to deficiency procedures like prepayment judicial review in Tax Court,[iii] the IRS can make an immediate assessment.

Collection Due Process Hearings – Procedure and Scope

Prior to 1998, the IRS could reach a delinquent taxpayer's assets by lien or levy providing any sort of pre-attachment process or judicial oversight. In response to concerns about this expansive collection power without judicial oversight, Congress enacted sections 6320 and 6330, granting a taxpayer the right to a CDP hearing within the IRS Office of Appeals after the IRS issues a notice of federal tax lien (§6320) or before the IRS levies on the taxpayer's property (§6330).

Importantly, pursuant to section 6330(d)(1), a taxpayer who disagrees with the Appeals Office's decision in a CDP hearing can appeal that decision to Tax Court. When the issue involves liability for the penalty, the Tax Court reviews the Appeals Office's determination *de novo*. *Goza v. Comm'r*, 114 T.C. 176, 181–82 (2000). However, that Tax Court review is only available for items that were at issue in the CDP hearing. Taxpayers or their representatives can be forgiven for often being confused about what may or may not be raised in a CDP hearing, as it is situation specific and even depends on the type of tax at issue. To wit:

- A taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy," including collection alternatives and challenges to the proposed collection action unless "the issue was raised and considered at a ... previous administrative or judicial proceeding" and the taxpayer 'participated meaningfully' in that proceeding." IRC § 6330(c)(2)(A) & (c)(4)(A). [iv]
- A taxpayer may also challenge liability for the tax, but only if the taxpayer "did not receive any statutory notice of

continued on next page

deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." IRC § 6330(c)(2)(B).

- "An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability." Treas. Reg. § 301.6330-1(e)(3) Q&A-E2.
- However, "[a]n opportunity for a conference with [the] Appeals [Office] prior to the assessment of a tax subject to deficiency procedures is not a prior opportunity for this purpose." *Id.*

In *Our Country Home*, the court affirmed the Tax Court's refusal to entertain liability arguments by the taxpayer, because the taxpayer had previously participated in an appeals conference. Even though no judicial review had been available from the appeals conference, the court, upholding the pertinent regulations under a *Chevron* deference analysis, held that this presented two separate prohibitions for the taxpayer, even though there had been no opportunity for judicial review of that appeals conference: (i) a prior opportunity to argue liability and (ii) a prior conference in which the taxpayer meaningfully participated. This reading, upheld by the Seventh Circuit here, has also been recently upheld by the Tax Court and the Fourth Circuit. [v]

Section 6330 and the IRS interpretation of the regulations, supported by the court in *Our Country Home*, raise some risks and considerations for taxpayers who would prefer the opportunity for Tax Court review (i.e., for any judicial review prior to collection). They also present some different and significant procedural considerations for taxpayers in a deficiency context versus taxpayers presented with a non-deficiency case.

Considerations Relating to Non-Deficiency Taxes

With respect to non-deficiency taxes, the regulations provide that any opportunity to go to appeals precludes consideration of liability at a CDP hearing. This means that, for non-deficiency taxes, taxpayers should be aware if they are provided an opportunity for an appeals conference prior to collections and a CDP hearing, they may not have an opportunity for judicial review unless they pay the amount and sue for a refund. [vi]

Pre-collection appeals opportunities are not provided in every non-deficiency case. This raises the somewhat perverse incentive for a taxpayer to hope against a pre-collection appeals conference and certainly not to raise the issue lest they be offered such a hearing in a pre-CDP context that provides no opportunity for Tax Court review. If the taxpayer's first opportunity for an appeals hearing is in the CDP context, then Tax Court review of liability should be available. Pursuant to the IRS' reading of the regulations, upheld in dicta by the Seventh Circuit in *Our Country Home*, for non-deficiency cases this would be the taxpayer's only opportunity for pre-collection judicial review.

Considerations Relating to Deficiency Cases

With respect to taxes subject to the deficiency procedures, however, the opportunity for a pre-assessment appeals conference does not constitute a prior opportunity under the regulations. Nevertheless, it is still the case that CDP consideration of liability is unavailable under section 6330(c)(4)(A) if "the issue was raised and considered at a ... previous administrative or judicial proceeding" and the taxpayer "participated meaningfully" in that proceeding. Therefore, where a taxpayer in a deficiency case is presented with an opportunity for appeals, but for some reason did not receive a statutory notice of deficiency or did not receive one in time to file a Tax Court petition,[vii] that taxpayer may still have the opportunity for judicial review through a CDP hearing.

If, however, the taxpayer had "meaningfully participated" in a prior appeals hearing, then the taxpayer has run into a separate prohibition. If the taxpayer had instead foregone participating in an appeals conference at that time, an appeals conference would likely be provided later, after the taxpayer had filed a Tax Court petition, without threatening the potential for Tax Court review on a CDP hearing. While this is probably an insufficient reason, standing alone, to forego pre-Tax Court petition appeals, it is at least one consideration when determining whether to request appeals pre-Tax Court petition or whether to forego appeals until after the Tax Court petition has been filed.

Tax Court Review

Taxpayers should be aware that Tax Court review is not axiomatic. When it is unavailable, or has been foregone, it leaves the taxpayer in the position of having to pay the tax and seek a refund in order to seek judicial review of the IRS' determinations.

In deficiency cases, Tax Court review should be made available either pre-assessment or in a CDP hearing. However, if for some reason a notice of deficiency is not received in time for the taxpayer to seek Tax Court review, the taxpayer's participation in a pre-assessment appeals conference might ultimately preclude pre-collection review by the Tax Court.

In non-deficiency cases, Tax Court review may only be available if the taxpayer pursues a CDP hearing and has not previously had the opportunity for an appeals hearing. An early awareness of these rules, and the identity of your case as a deficiency or non-deficiency case, is necessary in order to (i) set appropriate client expectations, (ii) make the appropriate strategic calls early in a case to save time/resources and (iii) not accidentally forfeit the opportunity for Tax Court review.

Footnotes

i. Internal citation to sections 6677(e), failure to file information with respect to foreign trust, 6679(b) failure to file returns, etc., with respect to foreign corporations or foreign partnerships, 6682(c) false information with respect to withholding, 6693(d) failure to provide reports on certain tax-favored accounts or annuities, 6696(b) rules applicable with respect to secs. 6694, 6695 and

6695A, 6697(c) assessable penalties with respect to liability for tax of regulated investment companies, 6706(c) original issue discount information requirements, 6713(c) disclosure or use of information by preparers of returns, 6716(e) failure to file information with respect to certain transfers at death and gifts.

ii. Internal citations to *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964) distinguishing section 6672 penalties not subject to deficiency proceedings from section 6651 additions subject to deficiency proceedings; *Medeiros v. Comm'r*, 77 T.C. 1255 (1981) this court lacks jurisdiction to review previously assessed section 6672 penalties, affd. 742 F.2d 1446 (2d Cir. 1983); *Judd v. Comm'r*, 74 T.C. 651 (1981) this court lacks jurisdiction to review assessment of section 6652 additions to tax.

iii. See Internal Revenue Manual §8.17.7.1.1 "When the Tax Court Lacks Jurisdiction" and internal cites therein for information regarding which penalties the IRS views as being outside Tax Court jurisdiction.

iv. It is worth noting that the IRS formerly interpreted section 6330(c)(4)(A) not to apply to liability issues in light of Section 6330(c)(2)(B)'s explicit discussion on that point. See Office of Chief Counsel, Internal Revenue Serv., Notice CC-2003-016, at 20 (2003). But the IRS' current interpretation, affirmed in *Our Country Home* and other cases cited *infra*, simply restates the statutory language. See Office of Chief Counsel, Internal Revenue Serv., Notice CC-2006-019, at 33 (2006).

v. *E.g., Durda v. Comm'r*), T.C. Memo 2017-89 where taxpayer disputed the tax liabilities in a prior appeals hearing, §6330(c)(2)(B) barred him from contesting those liabilities during the CDP process; *lames v. Comm'r*, 850 F.3d 160, 165 (4th Cir. 2017) finding the regulation to be a "straightforward interpretation of [s]ection 6330(c)(2)(B)."

vi. In *Our Country Home*, the Seventh Circuit stated: "Section 6330(c)(2)(B) speaks to opportunities to dispute liability, not opportunities that a taxpayer actually exercised. … Thus, a taxpayer need not pursue that opportunity to be barred from raising a liability challenge in a CDP hearing." 855 F.3d at 788. The Tax Court itself has not yet had to squarely answer the question of whether just the offer of an Appeals conference is enough to preclude review in a subsequent CDP proceeding if the taxpayer declined the offer. See *Bitter v. Comm'r*, T.C. Memo. 2017-46, at footnote 6 (declining to address the question and citing to *Lewis v. Comm'r*, 128 T.C. 48, 61 n.9 (2007); but also citing *Thompson v. Comm'r*, T.C. Memo. 2012-87 for the proposition that "[a] taxpayer has the opportunity to dispute his liability for a trust fund recovery penalty when he receives a Letter 1153" offering an appeals conference). This at least leaves open an opportunity to decline the appeals conference and argue that a CDP hearing and Tax Court review should still be available. However, the Seventh Circuit's opinion and Tax Court dicta raise questions about the strength of this argument.

vii. Treas. Reg. § 301.6330-1(e)(4) Example 2.

Marcus J. Brooks is a shareholder with Winstead, PC, and a member of Winstead's Taxation, Employee Benefits & Private Business Practice Group. His practice focuses on tax controversies and litigation and tax planning at both the federal and state levels. Brooks also serves as an adjunct professor at Baylor Law School.