DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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March 9, 2001

Number: **200124005**
Release Date: 6/15/2001
CC:PA:APJP:BR3

UILC: 6330.00-00
9999.98-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Assistant Chief Counsel (Administrative Provisions and Judicial Practice)
CC:PA:APJP

SUBJECT: The extent to which new evidence may be presented at trial in the Tax Court where such evidence was not presented before or during the collection due process hearing

This Field Service Advice responds to your memorandum dated January 19, 2001. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

Field Service Advice is Chief Counsel Advice and is open to public inspection pursuant to the provisions of section 6110(i). The provisions of section 6110 require the Service to remove taxpayer identifying information and provide the taxpayer with notice of intention to disclose before it is made available for public inspection. Sec. 6110(c) and (i). Section 6110(i)(3)(B) also authorizes the Service to delete information from Field Service Advice that is protected from disclosure under 5 U.S.C. § 552 (b) and (c) before the document is provided to the taxpayer with notice of intention to disclose. Only the National Office function issuing the Field Service Advice is authorized to make such deletions and to make the redacted document available for public inspection. **Accordingly, the Examination, Appeals, or Counsel recipient of this document may not provide a copy of this unredacted document to the taxpayer or their representative.** The recipient of this document may share this unredacted document only with those persons whose official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND

Petitioner =
Taxpayer =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =

Business =

ISSUE

Whether in an appeal of a determination under section 6330, the taxpayer may introduce at trial new testimonial and documentary evidence to challenge the existence or amount of his underlying tax liability when he did not produce that evidence before or during the collection due process hearing.

CONCLUSION

Because the taxpayer presented his concern with the underlying tax liability at the collection due process hearing and had not received a prior opportunity to dispute his underlying tax liability, the issue is properly before the Tax Court. The corresponding standard of review is the de novo standard, and all evidence, whether or not previously presented to Appeals, will be allowable unless other objections are made.

FACTS

Petitioner filed his Form 1040 Federal income tax returns for Year 1 and Year 2 on Date 1 and Date 2, respectively. Both returns were prepared by petitioner's accountant. Both returns listed wages from petitioner's employment with his closely held business, Business. The federal tax liabilities reflected on petitioner's returns for those tax years were subsequently assessed by the Service.

Collection of this matter was assigned to a revenue officer late in Year 4. Due to a reassignment, a second revenue officer took over the case shortly thereafter. Petitioner also obtained counsel at this time.

Petitioner's attorney stated to both revenue officers that there appeared to be an error regarding the wages listed on petitioner's returns for taxable years Year 1 and Year 2, and that the listed amounts were instead payments by Business on loans made by the taxpayer to Business. The second revenue officer stated that opening an audit of those years was not required unless the taxpayer filed amended returns for those years, as collection was based upon the taxpayer's own admissions per his filed tax returns. The second revenue officer stated that he was concerned only with the collection of the listed taxes for those years, but was also interested in gathering information for referral to Exam for opening an audit with respect to taxable years Year 3, Year 4, and Year 5 for which no returns had yet been filed by the taxpayer.[1] The second revenue officer requested, in particular, any documentation of purported loans between petitioner and Business for referral to Exam.

Petitioner's attorney represented to both revenue officers that it was his understanding that amended returns had been filed by petitioner for each of the years at issue (Year 1 and Year 2). Based upon review of the Service's databases, the second revenue officer could find no evidence that those amended returns had been filed.

On Date 3, the Service sent petitioner a Final Notice – Notice of Intent to Levy and Notice of Your Right to a Hearing. Petitioner responded by filing a timely Request for Collection Due Process Hearing on Date 4, alleging that no tax, interest, or penalty was owed, or, in the alternative, requesting collection alternatives.

An Appeals officer in , was assigned to the case on Date 5, but attempts to schedule a meeting were unproductive, so the case was transferred to the Office of Appeals in . In correspondence with the taxpayer, the Appeals officer assigned to the case in stated, "In this case, the unpaid tax is the result of voluntarily filed income tax returns that have not been amended. There is therefore no challenge open regarding the underlying liability." As such, the Appeals officer determined that he need only consider collection alternatives and asked the taxpayer's representative to contact him to arrange a Collection Due Process hearing. After the taxpayer's representative failed to respond to that contact and a subsequent letter attempting to arrange a

[1]Federal income tax returns for taxable years Year 3, Year 4, and Year 5 were filed by petitioner while taxable years Year 1 and Year 2 were in collection. These returns reflected no tax owed and minimal amounts of taxable compensation and income.

hearing, the Appeals officer issued a Notice of Determination upholding the levy on Date 6.

Petitioner timely petitioned from the Notice of Determination on Date 7. Petitioner alleged that the Service "ha[d] not properly and accurately calculated the amounts, if any, owed by the petitioner for Year 1 and Year 2," and, therefore, the Service was not entitled to enforcement of the collection action. Petitioner contends only that the merits of the underlying tax are at issue. An answer was filed by respondent on Date 8, and a Motion for Leave to File an Amendment to Answer is pending with regard to equitable affirmative defenses.

A Motion to Compel Production of Documents was granted by the Court on Date 9. Since that time, the petitioner's attorney has produced several documents for the first time, including copies of ledgers prepared by petitioner's former bookkeeper for Year 1 and Year 2, copies of amended returns for the years in issue, and copies of purported loan documents.

LAW AND ANALYSIS

Under I.R.C. § 6330, a taxpayer is entitled to notice and a hearing prior to a levy being made on any property or right to property. I.R.C. § 6330(c) provides for a collection due process (CDP) hearing with an Appeals officer to address collection issues including spousal defenses, the appropriateness of collection actions, and alternative means of collection. The taxpayer may also raise challenges to the existence or amount of the underlying tax liability, but only if the taxpayer has not received a notice of deficiency for the tax years in issue or did not otherwise have an opportunity to dispute the underlying tax liability prior to the CDP hearing. I.R.C. § 6330(c)(2)(B). In this case, petitioner challenges only the merits of the underlying tax liability.

Following the CDP hearing, the Service issues a Notice of Determination to the taxpayer, which gives a summary of the determination made by Appeals and advises the taxpayer to which court to appeal the determination. I.R.C. § 6330(d) allows a taxpayer to appeal that determination by petitioning the Tax Court (or appropriate U.S. District Court if the Tax Court does not have jurisdiction of the underlying tax liability) within 30 days of the determination.

The Tax Court has recognized that, if a taxpayer has not raised a liability issue at his Appeals Office hearing, he may not raise it for the first time on judicial appeal of the determination resulting from that hearing. Miller v. Commissioner, 115 T.C. No. 40 n. 2 ((Dec. 21, 2000) (noting that, where the record did not show that the petitioner sought a waiver of penalties at the Appeals office hearing, the Court would not consider that request on appeal of a notice of determination); see also Temp. Treas. Reg. § 301.6320-1T(f)(2)A-F5 ("In seeking Tax court or district court review of Appeals' Notice of Determination, the taxpayer can only ask the court to

consider an issue that was raised in the taxpayer's CDP hearing"). Thus, if a taxpayer attempts to introduce evidence on an issue that was not raised at a CDP hearing, we believe that such evidence should be excluded on the grounds of relevance.

In the present case, however, the petitioner did attempt to raise his concerns with the underlying tax liability at the CDP hearing. In his request for a hearing, petitioner presented his concerns with the underlying tax liability to the Appeals officer. The Appeals officer erroneously determined that the merits of the underlying tax liability were not at issue since there was no evidence that petitioner had filed amended returns. It is not Service position that a taxpayer be required to file an amended return to maintain a challenge to the existence or amount of his liability at a CDP hearing. Instead, the Appeals officer should have received all evidence that the taxpayer was willing to submit with respect to his liability and made a determination on the basis of what was submitted. Although it is true that the petitioner did not provide any information to support his claim that no tax, interest, or penalty was owed, the Appeals officer's correspondence made clear that the Appeals officer was not going to consider any such evidence. Under these circumstances, we believe that the taxpayer has sufficiently raised a liability issue that the Court may consider, absent evidence that petitioner received a notice of deficiency for the years at issue or that petitioner had another prior opportunity to dispute the underlying tax liability.

Petitioner did not receive a notice of deficiency for either taxable year at issue, as the Service has not challenged petitioner's self-assessment per his returns for those years. It may be argued that petitioner had a prior opportunity to dispute his underlying tax liability either in discussing it with the revenue officer or by being presented with the opportunity to file amended returns for those years and failing to exhaust his other remedies. Temp. Treas. Reg. § 301.6330-1T(E)(3) Q&A-E2 states that "[a]n opportunity to dispute a liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability." We do not believe that an opportunity to dispute a liability within the meaning of section 6330(c)(2)(B) includes discussions with a revenue officer or the opportunity to file an amended return. Neither a revenue officer nor the personnel who handle amended returns have the kind of independent authority that Appeals or the courts have to review and alter the decisions of other Service personnel with respect to a taxpayer's liability. As such, petitioner was not provided with a prior opportunity to dispute his underlying tax liability which would preclude him from having raised the issue at the CDP hearing under I.R.C. § 6330(c)(2)(B). See Temp. Treas. Reg. § 301.6330-1T(e)(3)Q&A-E2.

Where, as here, the validity of the underlying tax liability is properly at issue in the CDP hearing and the determination of the tax liability is part of the appeal, the amount of the tax liability will be reviewed by the appropriate court on a de novo basis. H.R. Conf. Rep. No. 105-599, 105th Cong. 2d Sess. Part 2, at 266 (1998);

see also Goza v. Commissioner, 114 T.C. 176 (2000). A de novo review of the underlying liability means that it would be necessary to try the matter as if it had not been heard before by Appeals and as if no determination had been previously rendered by Appeals with respect to the existence or amount of the underlying liability. Cf. Kim v. United States, 121 F.3d 1269, 1272 (9th Cir. 1997) ("A trial de novo is a trial which is not limited to the administrative record - the plaintiff 'may offer any relevant evidence available to support his case, whether or not it has been previously submitted to the agency'") (citation omitted). We believe that, under this standard and the facts of the present case, petitioner would be able to present any evidence concerning his liability, if the evidence is not otherwise objectionable, whether presented previously to Appeals or not.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Please call if you have any further questions.

CURTIS G. WILSON
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