Department of the Treasury **Internal Revenue Service** **Office of Chief Counsel**

Notice

CC-2016-008

April 4, 2016

Subject:	Disregarding Frivolous CDP Hearing Requests under Section 6330(g)	**Cancel Date**:	Effective until further notice

Purpose

This Notice provides updated litigation guidance to Chief Counsel attorneys for handling frivolous submission issues that arise in Collection Due Process (CDP) cases in light of *Ryskamp v. Commissioner*, 797 F.3d 1142 (D.C. Cir. 2015). The litigation guidelines stated in Chief Counsel Notice CC-2012-003, *Disregarding Frivolous CDP Hearing Requests under Section 6330(g)*, and incorporated in the Chief Counsel Directives Manual 35.3.23.5.1 are superseded by this Notice.

Background

As explained in Chief Counsel Notice CC-2012-003, sections 6330 and 6702 of the Internal Revenue Code permit the Service to disregard frivolous Collection Due Process hearing requests. Section 6330(g) provides that "[n]otwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review." Section 6702(b)(2)(A) defines a "specified frivolous submission" as one that "(i) is based on a position which the Secretary has identified as frivolous under subsection (c), or (ii) reflects a desire to delay or impede the administration of Federal tax laws." Section 6702(c) states that the Secretary shall prescribe and periodically revise a list of positions identified as frivolous. The Service has released Notice 2010-33 which contains a list of frivolous positions required by section 6702(c). Additionally, section 6330(c)(4)(B) states that an issue may not be raised at a CDP hearing if it meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A).

In *Thornberry v. Commissioner*, 136 T.C. 356 (2011), the taxpayers filed a Tax Court petition in response to a letter from the Service stating that it was disregarding the taxpayer's hearing request under section 6330(g) on the grounds that it had determined that the taxpayers' challenges met the requirements of clause (i) or (ii) of section 6702(b)(2)(A). The Service filed a motion to dismiss for lack of jurisdiction on the ground that section 6330(g) deprives the Tax Court of jurisdiction. The court denied the motion to dismiss. While the court did not question the Service's authority to deny a CDP hearing where no legitimate arguments are raised by the taxpayer, the court held that it has jurisdiction to review whether such denial is proper, and to remand to Appeals where a CDP hearing was erroneously denied. The court found that the taxpayers raised several proper issues and accordingly remanded the case. In Chief Counsel

Notice 2012-03, we explained that we disagree with *Thornberry*'s jurisdictional holding. We advised that Counsel should continue to file motions to dismiss where the taxpayer files a Tax Court petition challenging a denial of a CDP hearing under section 6330(g).

The Tax Court has continued to follow the holding in *Thornberry* that it has jurisdiction to review denials of CDP hearings under section 6330(g). *See Buczek v. Commissioner*, 143 T.C. 301 (2014). In *Buczek*, although the court held that it had jurisdiction to preliminarily review whether the Service properly denied a CDP hearing, the court also held that the Service correctly determined that the taxpayer raised no relevant issues and that the Service properly treated the entire CDP hearing request as if it had never been submitted. The court accordingly held that it lacked jurisdiction under section 6330(g) to further review the case and dismissed the case for lack of jurisdiction. The court distinguished *Thornberry* because in that case the taxpayer in fact raised proper issues and so the Service incorrectly sent a disregard letter.

Most recently, in *Ryskamp* the Court of Appeals for the District of Columbia upheld the Tax Court's decision that, consistent with its precedent in *Thornberry*, the Service's disregard of a taxpayer's CDP hearing request as frivolous under section 6330(g) was subject to judicial review.

In *Ryskamp*, the Service sent a disregard letter to the taxpayer stating that the grounds upon which he requested the hearing were frivolous or reflected a desire to delay or impede the administration of the federal tax laws. This was a standardized letter that did not specifically address any of the taxpayer's numerous frivolous arguments. The taxpayer petitioned the Tax Court, which held, consistent with *Thornberry,* that it had jurisdiction to review the section 6330(g) denial. The court further held that the Service abused its discretion by failing to fully explain its reasons for determining that the hearing request was frivolous. The court remanded the case to Appeals. Following the hearing on remand, Appeals issued a Notice of Determination in which it sustained the Service's proposal to levy, and the court sustained this determination. The taxpayer appealed to the Court of Appeals for the District of Columbia. On appeal, the Service once again argued that the Tax Court lacked jurisdiction over a section 6330(g) denial of a CDP hearing.

In a divided two-to-one decision, a panel of the D. C. Circuit rejected the Service's jurisdictional challenge on the ground that a denial of a hearing under section 6330(g) is a "determination" subject to judicial review under section 6330(d)(1). The court explained that under these provisions the courts may review the Service's initial frivolousness determination. The court described this as a "limited threshold review" to ensure that the Service did not err it its determination. The court additionally affirmed the Tax Court's holding that the Service's boilerplate rejection letter was inadequate, stating that such letters must articulate the Service's grounds for the frivolousness determination. The court stated that "[t]he remedy for an unexplained or flawed frivolousness determination by the IRS is a remand to permit the Appeals Office either to identify why a particular argument is frivolous or to hold a Collection Due Process hearing to address any non-frivolous arguments on their merits." *Ryskamp v. Commissioner*, 797 F.3d at 1149. The dissent agreed with the Service that the Tax Court had no jurisdiction to review the denial.

Litigating Guidelines

Counsel continues to maintain the position that the Tax Court lacks jurisdiction to review a petition filed from the denial of a hearing request as frivolous under section 6330(g).

Section 6330(g) provides that "Notwithstanding any other provision of this section" if the Secretary determines that any portion of a request for a hearing is frivolous, then the Secretary may treat such portion as if it were never submitted "and such portion shall not be subject to any further … judicial review." The introductory phrase "Nothwithstanding any other provision of this section" expressly eliminates a taxpayer's right to judicial review of a section 6330(g) determination.

Counsel also disagrees with *Ryscamp*'s holding that Appeals must articulate the bases of its denial under section 6330(g) by explaining why each argument of the taxpayer is not proper. Section 6330(g) was enacted to alleviate the burdensome administrative costs associated with frivolous CDP hearing requests and to prevent the waste of government resources in responding to such requests. *See* S. Rep. No. 109-336, at 49-50 (2006). To require the Service to specifically address each frivolous argument raised by a taxpayer request would frustrate the purpose of section 6330(g). Counsel maintains that the general letter currently used by the Service to notify a taxpayer that a CDP hearing request has been denied as frivolous under section 6330(g) is sufficient and conforms to the statute and legislative intent and need not specify the grounds for concluding that each of the taxpayer's arguments are frivolous.

Nonetheless, the law of the Tax Court and the D.C. Circuit is now settled and it would be a waste of Counsel's resources to continue to contest the Tax Court's jurisdiction to review the Service's denial under section 6330(g) in those forums. We therefore modify our litigating guidelines as follows. If, after reviewing a Tax Court case where the taxpayer has appealed a denial of a hearing under section 6330(g), Counsel determines that the taxpayer has raised at least one legitimate issue and the CDP hearing request should not have been denied in its entirety, then Counsel should not file a motion to dismiss, but should file a motion to remand the case to Appeals to hold a hearing addressing the legitimate issues and to issue a Notice of Determination. After the Notice of Determination is issued and submitted to the court, the case should be handled like any other docketed CDP case, including filing a motion for summary judgment as appropriate.

If Counsel's review reveals that a CDP hearing was properly denied under section 6330(g), then a remand to Appeals to merely explain the basis of the denial would not be a productive use of Appeals' resources. Instead, Counsel can file a motion to dismiss for lack of jurisdiction in reliance on *Buczek.* In the alternative, a motion to dismiss for failure to state a claim or a motion for summary judgment can be filed as appropriate. Such motions should explain why the taxpayer's arguments meet the criteria in section 6702(b)(2)(A) so as to justify the denial of the hearing. Finally, in section 6330(g) cases that are appealed to circuits other than the D. C. Circuit, Counsel will continue to advise the Department of Justice to contest the Tax Court's jurisdiction to review denials of hearings.

In summary, while we disagree with the jurisdictional holding in *Ryscamp*, Counsel will no longer necessarily file a motion to dismiss to contest the Tax Court's threshold jurisdiction to evaluate whether a CDP hearing was properly denied under section 6330(g). Counsel should request a remand to Appeals where a hearing was improperly denied. Where a hearing was properly denied, instead of filing a motion to remand so Appeals can more fully explain the reasons for rejecting the taxpayer's arguments as frivolous, Counsel should file an appropriate motion with the court to resolve the case through a dismissal or summary judgment. Counsel should also consider filing a motion to permit levy so that the Service can immediately levy after the Tax Court's order. CCDM 35.3.23.9, IRC 6330(e)(2) Motions (Motions to Permit Levy) (07-25-2012).

Please coordinate motions filed in cases described in this notice with Branches 3 and 4 of Procedure and Administration. CCDM 35.3.23.5.1, Motion to Dismiss for Lack of Jurisdiction When CDP Hearing Request Denied Under IRC 6330(g) (07-25-2012), will be revised consistent with this notice. All questions about this notice should be directed to Procedure and Administration, Branch 3 at (202) 317-3600 or Branch 4 at (202) 317-6832.

/s/
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Procedure & Administration