

2017

A Reflection on Tax Collecting: Opening a Can of Worms to Clean Up a Collection Due Process Jurisdictional Mess

Pippa Browde

Alexander Blewett III School of Law at the University of Montana, pippa.browde@umontana.edu

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A REFLECTION ON TAX COLLECTING: OPENING A CAN OF WORMS TO CLEAN UP A COLLECTION DUE PROCESS JURISDICTIONAL MESS

*Pippa Browde**

ABSTRACT

Almost 20 years ago Congress enacted the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), with the intention of protecting taxpayers against perceived abuses in tax collection by the Internal Revenue Service (IRS). RRA 98 contained provisions creating the so-called collection due process (CDP) provisions. CDP changed existing law by providing taxpayers with a pre-deprivation right to an administrative hearing and judicial review of any proposed collection actions by the IRS such as liens or levies.

CDP has been both championed as a valuable mechanism to protect taxpayers from improper collection and criticized as a tool used by taxpayers making meritless arguments to further delay payment of tax. Regardless, the CDP provisions have exacted a toll on the tax administrative system, particularly on the IRS Office of Appeals, which conducts the CDP hearings, and the U.S. Tax Court, which generally has judicial review of the administrative hearings. CDP cases often require a disproportionate share of resources to resolve. One reason for this is that CDP cases can be messy. CDP cases can involve mistakes or anomalies made by the IRS and are often brought by taxpayers pro se. One particularly messy factual scenario occurs when a taxpayer raises an issue in a non-CDP tax year and asks the IRS and the Tax Court to adjudicate as to the non-CDP year. For example, if a taxpayer alleges that he or she has a credit from a prior year that should carry forward to satisfy a tax liability that remains unpaid or alleges that he or she has made payments that were applied to a non-CDP year that were meant to apply to the CDP year, the Tax Court has struggled with whether and how it can properly exercise jurisdiction over the non-CDP year.

* Assistant Professor, Alexander Blewett III School of Law at the University of Montana. The Author wishes to thank Professors Joshua Blank, Kristin Hickman, Leandra Lederman, Michael Hatfield, Steve Johnson, David Hansen, and Roberta Mann for their insightful comments on an earlier draft of this Article; the University of Washington School of Law and all of the participants at the 2015 UW Annual Tax Symposium; and Nick VandenBos for research assistance. The Author also wishes to thank the editorial staff of the *Drake Law Review*, in particular Jenna Bishop, Kylie Crawford, Tucker Levis, and Alexis Warner, for their thoughtful and careful editing. All errors are the Author's.

This Article makes two novel contributions. First, it highlights how CDP cases can be particularly messy and how the IRS and Tax Court have struggled in resolving CDP cases. In particular, this Article examines the Tax Court's difficulty in determining its proper jurisdiction in CDP cases in which the taxpayer raises issues in non-CDP years by examining two relevant cases, Freije v. Commissioner and Weber v. Commissioner. Concluding that the Tax Court has properly exercised (or limited) its jurisdiction in both Freije and Weber, this Article reconciles the two cases in light of the purpose of the CDP provisions on the one hand and the Tax Court's limited jurisdictional grant on the other. Second, this Article makes recommendations to the IRS on how to encourage administrative resolution of messy CDP cases to prevent litigation and reduce the cost of CDP.

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I. INTRODUCTION

Resolving domestic collection cases arising out of the so-called collection due process (CDP) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) has become a serious challenge for the U.S. Tax Court, the Internal Revenue Service (IRS), and the taxpayers embroiled in those disputes.¹ CDP cases often involve smaller dollar amounts and pro se litigants.² For the individual taxpayer and small-scale practitioners, however, the resolution of CDP cases can be a mysterious and time-consuming process.³ Exacerbating these challenges are the facts that

1. Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746–50 (codified as amended at I.R.C. § 6320 (West 2011 & Supp. 2016); I.R.C. § 6320 note (2012); I.R.C. § 6330 (West 2011 & Supp. 2016)). The challenges facing taxpayers, the IRS, and the Tax Court in CDP cases have been raised in the National Taxpayer Advocate’s (NTA) reports to Congress. *See* 1 NINA E. OLSON, TAXPAYER ADVOCATE SERV., IRS, PUB. 2104 (REV. 12-2015), ANNUAL REPORT TO CONGRESS 2015, at 488–98 (2015) [hereinafter NTA 2015 REPORT], https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf. In the report, the NTA noted, “Since 2001, CDP has been one of the federal tax issues most frequently litigated in the federal courts The trend continues this year” *Id.* at 481. The NTA examined the 79 opinions on CDP cases issued by courts from June 1, 2014, through May 31, 2015. *Id.* For a list of cases reviewed, see *id.* 592–96 app. 3, tbl.5.

Throughout this Article, *CDP* and *collection cases* are used somewhat interchangeably.

2. The Tax Court faces generally high percentages of pro se petitioners. Recent numbers from the Tax Court estimate that 82 percent of petitions were pro se. James S. Halpern, *What Has the U.S. Tax Court Been Doing? An Update*, 151 TAX NOTES 1277, 1282 (2016). Judge Halpern’s remarks were presented at the 2016 Laurence Neal Woodworth Memorial Lecture in Washington, D.C., on May 5, 2016.

3. *See infra* Parts II.A.4, II.A.5. The Foreign Account Tax Compliance Act generally affects cosmopolitan wealthy international individuals with access to global banking, NTA 2015 REPORT, *supra* note 1, at 74, whereas CDP cases often are quite the opposite. *See infra* Part II.A.5.

the IRS is being pushed to resolve CDP cases in a declining budgetary environment and that CDP cases are often difficult and unnecessarily complex.⁴ Litigated CDP cases often involve prior actions by the IRS that resulted in erroneous assessments or failure of the IRS to give proper and adequate notice.⁵ Coupling the mistakes made by the IRS with an unsophisticated and unrepresented taxpayer, CDP cases inevitably result in a complexity of issues that require a disproportionate share of administrative and judicial resources to resolve. By the time such a collection case gets to litigation, it has slipped through all the cracks, and the administrative procedures intended to fix or solve the problems have failed. The Tax Court, seeking to comply with the spirit of CDP provisions, often struggles mightily and with questionable success to fashion a remedy that fits neatly within its limited jurisdiction involving collection cases.⁶ After explaining the historical background of the problem of IRS tax collection and the enactment of the CDP provisions of the RRA 98, this Article focuses on how, in the absence of a legislative fix, the Tax Court may remain flexible in resolving these cases and how the IRS might develop and implement policies to support early resolution of these cases at the administrative level.

This Article proceeds as follows: Part II provides a brief review of the development of the law on tax procedure and collection, including the passage of the CDP provisions. Part III of the Article addresses the jurisdiction of the Tax Court; policies supporting judicial efficiency; and the Tax Court's struggle to define the extent to which it can assert jurisdiction over tax years or periods not subject to the proposed collection action, including the two principal cases on the subject: *Freije v. Commissioner* and *Weber v. Commissioner*.⁷ Part IV critiques the Tax Court's analysis in *Freije* and looks at how the Tax Court can maintain flexibility to meet the goals of CDP within the confines of the court's limited jurisdictional grant. That analysis demonstrates that the Tax Court properly analyzes its jurisdiction in CDP cases by analogizing to the court's jurisdiction in deficiency cases and that the court properly takes a functional and flexible approach to resolving legitimate taxpayer disputes in CDP cases. Part IV concludes with suggestions on how the IRS can best support the policies of CDP by

4. For complete discussion on the underfunding of the IRS, see Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 763–72 (2015).

For an explanation on why CDP cases are complex, see *infra* Parts II.A.4, II.A.5.

5. For an example, see *infra* Part III.B.

6. See *infra* Part III.

7. *Weber v. Comm'r*, 138 T.C. 348 (2012); *Freije v. Comm'r*, 125 T.C. 14 (2005).

encouraging administrative resolution of these CDP cases prior to litigation.

II. BACKGROUND

A. Historical and Current Law on Tax Collection

This Part provides a brief overview of tax procedure, the historical context of tax collection law leading up to the enactment of CDP, and a sketch of the CDP procedures with an emphasis on taxpayer's rights to judicial review of administrative CDP hearings.

1. General Tax Procedure Prior to Collection of Tax

Before the IRS can collect a penny of tax, the tax must be assessed or recorded on the government's books.⁸ Assessments arise in a variety of contexts; the most common form is a summary assessment resulting from the IRS recording the amount a taxpayer shows as tax due on a return.⁹ Deficiency assessments result from a determination of tax liability following a dispute, if the IRS determines a taxpayer's liability is greater than the amount shown on a return.¹⁰

Once the tax is assessed, if it remains unpaid, the IRS must issue the taxpayer notice of the amount of the liability due and demand immediate

8. *E.g.*, I.R.C. § 6201(a)(1) (2012). The assessment against a taxpayer is akin to a judgment against a debtor; it is the government's formal record of a taxpayer's liability for a tax. *See, e.g.*, *United States v. Klimek*, 952 F. Supp. 1100, 1109 (E.D. Pa. 1997) (citing *Bull v. United States*, 295 U.S. 247, 260 (1935)).

Withholding is, in effect, a prepayment of tax that is credited to the taxpayer, but the withheld amounts are not actually credited against the taxpayer's debt until the taxpayer calculates and submits his or her return. I.R.C. § 31(a); *see also* *United States v. Roberts*, 425 F. Supp. 1281, 1283 (D. Del. 1977) (discussing the withholding mechanism for taxable income). Thus, when the taxpayer files his or her return at the end of the year, he or she either pays the balance due or is refunded the overpaid amount. *Roberts*, 425 F. Supp. at 1283. Withholding is required on wages paid to employees by employers. I.R.C. § 3402(a).

9. *See* I.R.C. § 6201(a)(1). Other types of assessments include deficiency and jeopardy assessments. *See id.* § 6215(a) (deficiency assessments); *id.* §§ 6851(a), 6861(a), 6862(a) (jeopardy assessments).

10. *Id.* § 6211(a) (defining *deficiency*); *id.* § 6215 ("If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary.").

payment (called “notice and demand”).¹¹ At the time of the assessment, a federal tax lien in favor of the government attaches to all of the taxpayer’s property.¹² This lien is referred to as a silent or secret lien because it applies automatically when a taxpayer does not pay.¹³ The IRS may file a notice of federal tax lien to put other creditors of the taxpayer on notice.¹⁴ If the taxpayer does not pay after the IRS issues notice and demand, the IRS may also collect by levying on the taxpayer’s property.¹⁵ The United States also has authority to bring civil suits to collect taxes and enforce liens.¹⁶

2. *The History of the Law of Tax Collection Before Enactment of CDP*

Prior to the enactment of RRA 98, a taxpayer had few pre-collection remedies, and none afforded the taxpayer judicial review.¹⁷ A taxpayer could not enjoin the government or prevent collection—he or she had to pay the

11. *Id.* § 6303(a). Notice and demand for payment must be made as soon as practicable but not later than 60 days after the tax is assessed. *Id.*

12. *Id.* § 6321. The automatic lien attaches to “all property and rights to property, whether real or personal,” of the taxpayer. *Id.*

13. *Id.*; *see, e.g.*, *Pansier v. United States*, 225 B.R. 657, 660–61 & n.3 (Bankr. E.D. Wis. 1998) (discussing liens under § 6321 as secret liens).

14. I.R.C. § 6323(a)–(b) explains priorities over federal tax lien: If a creditor has actual knowledge of a federal tax lien, the creditor will lose protected status even absent the IRS filing a notice of federal tax lien, i.e., through constructive notice under § 6323(f). *See id.* § 6323(a); *see also* *Brightwell v. United States*, 805 F. Supp. 1464, 1470 (S.D. Ind. 1992).

15. I.R.C. § 6331(a) (granting authority to levy if taxpayer fails to pay within 10 days after notice and demand given). Typically, levy is made on taxpayer’s property within the control of a third party, such as bank accounts. *See* WILLIAM D. ELLIOTT, *FEDERAL TAX COLLECTIONS, LIENS & LEVIES* ¶ 13.06 (2016), Westlaw. Section 664(h) authorizes continuing levy on wages. I.R.C. § 6331(h) (West 2011 & Supp. 2016).

16. I.R.C. §§ 7401–7403 (2012).

17. The RRA 98 and the American Jobs Creation Act of 2004, in addition to CDP provisions explained *infra*, codified what had been administrative practice to allow administrative review of certain types of collection determinations by the IRS. *See id.* § 6159(d) (codifying administrative review of IRS termination of installment agreements); *id.*

§ 7122(d) (codifying administrative review of termination of offers in compromise); *see also* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 843(b), 118 Stat. 1418, 1600 (codified as amended at I.R.C. § 6159(d)–(f)); RRA 98, Pub. L. No. 105-206, § 3462(a), 112 Stat. 685, 764–65 (current version at I.R.C. § 7122(d)). I.R.C. § 6326 was added in 1988 by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6238(a), 102 Stat. 3342, 3743, to allow a taxpayer administrative appeal of a notice of federal tax lien.

tax and pursue a claim for a refund.¹⁸ Furthermore, it is well-settled that principles of due process do not apply to tax collection.¹⁹ The U.S. Supreme Court has consistently held that the government's interest in efficient tax collection is more important than notions of due process.²⁰

Almost 20 years ago, the IRS was faced with a public relations nightmare as Congress conducted hearings on perceived abuses that IRS employees engaged in to effectuate collection of taxes.²¹ Out of those

18. See I.R.C. § 7421 (prohibiting suits “for the purpose of restraining the assessment or collection of any tax”). *But see, e.g., id.* § 7426(a)(1), (b)(1) (providing an injunctive remedy for third parties if property wrongfully subject to levy); *O’Hagan v. United States*, 86 F.3d 776, 779 (8th Cir. 1996).

“The United States, as a sovereign entity is immune from suit unless it consents to be sued.” *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1188 (11th Cir. 2011) (citations omitted). Congress has partially waived sovereign immunity for tax refund actions, as long as taxpayers meet the prescribed requirements. *Id.* (citing I.R.C. §§ 6532(a), 7422(a)). In general, a taxpayer seeking a refund of “erroneously or illegally assessed” taxes may commence a civil action against the United States but only after first filing a claim with the IRS and exhausting his or her administrative remedies. I.R.C. § 7422(a) (prohibiting suits in district court “until a claim for refund or credit has been duly filed with the [IRS]”); 28 U.S.C. § 1346 (2012 & Supp. II 2014) (providing district courts with subject matter jurisdiction for tax refund suits); *see also* *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) (citing *United States v. Dalm*, 494 U.S. 596, 602 (1990)). Any claim for a tax credit or refund must be brought “within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires . . . later.” I.R.C. § 6511(a) (2012).

19. CDP is not the same as constitutional due process, and it has long been held that the IRS does not have to afford traditional procedural due process (notice and opportunity for a hearing) prior to collecting tax. *Phillips v. Comm’r*, 283 U.S. 589, 595–97 (1931) (holding tax collection is an essential government need justifying post-deprivation hearing). For further discussion, see Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1177–78 (2004) (“Given the limited constitutional nature of tax cases, it is generally thought that the CDP provisions have little to do with constitutional procedural due process protections.” (citation omitted)).

20. See *Phillips*, 283 U.S. at 595 (“Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.” (citations omitted)).

21. For a thorough discussion of the political history, see Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 78–87 (2004) [hereinafter Camp, *Paradigm Shift*]. Professor Bryan Camp describes the “heat of the moment [from which] RRA 98 emerged”—out of hearings that “were high political theater and, as with most theater, were mostly fictional.” *Id.* at 81.

hearings and political criticism, Congress enacted RRA 98, which enhanced taxpayers' rights to process prior to enforced collection by creating the CDP regime.²² Despite resulting policy-based criticisms by tax professionals and academics, CDP provisions remain on the books, largely unaltered from the original RRA 98 statute.²³ The statute requires that, in the period between the assessment of a tax and its enforced collection (usually by lien or levy), the IRS both provides the taxpayer notice of the proposed collection action and offers an administrative hearing for the taxpayer to raise any relevant issues challenging the collection, such as offering collection alternatives or raising any appropriate spousal defenses.²⁴ The hearing officer must balance the government's interest in efficient tax collection with the taxpayer's "legitimate concern" that collection "be no more intrusive than necessary."²⁵ The U.S. Tax Court has jurisdiction to review the hearing officer's determination.²⁶

This history became particularly relevant in 2016, as the IRS was under attack for a number of reasons, including a scandal involving political biases with respect to tax exempt organizations. See Forman & Mann, *supra* note 4, at 763–81 (discussing key problems with the IRS); Dylan Matthews, *Everything You Need to Know About the IRS Scandal in One FAQ*, WASH. POST (May 14, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/05/14/everything-you-need-to-know-about-the-irs-scandal-in-one-faq/>.

22. RRA 98 § 3401, 112 Stat. at 746–50. RRA 98 stemmed from years of political frustration with what some lawmakers, with tremendous public support, viewed as an overaggressive IRS. See Camp, *Paradigm Shift*, *supra* note 21.

23. For scholarly commentary on the value of CDP provisions, see Book, *supra* note 19, at 1149 ("Although CDP embraces rule of law principles, it is far from perfect. It is both overbroad and underinclusive."); Camp, *Paradigm Shift*, *supra* note 21, at 91–132.

The CDP provisions in RRA 98 were amended in 2000 and 2006. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 407(b)(2)–(3), 120 Stat. 2922, 2961–62 (codified as amended at I.R.C. § 6330(b)(1), (c)(4)); Pension Protection Act of 2006, Pub. L. No. 109-280, § 855(a), 120 Stat. 780, 1019 (codified as amended at I.R.C. § 6330(d)(1) (West 2011 & Supp. 2016)); Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, app. G, § 313(b)(2)(A), (d), 114 Stat. 2763, 2763A-587, 2763A-642, 2763A-643 (codified as amended at I.R.C. § 6330(d)(1)(A); I.R.C. § 6330(e)(1) (2012)). By and large, the amendments to the statute have been minimal. The most notable was in 2006, when Congress vested the Tax Court with exclusive jurisdiction for judicial review of CDP cases. See Pension Protection Act of 2006 § 855(a), 120 Stat. at 1019.

24. I.R.C. § 6330(a) (requiring IRS to provide notice of proposed collection); *id.* § 6330(b) (right of taxpayer to hearing); *id.* § 6330(c) (matters considered at the hearing).

25. *Id.* § 6330(c)(3).

26. I.R.C. § 6330(d) (West 2011 & Supp. 2016).

Judicial review of an agency determination may seem quite commonplace to those familiar with the practice of administrative law, but the grant of jurisdiction to the Tax Court to review CDP determinations is regarded as “one of the most significant modern developments in the operation of the Tax Court.”²⁷ Senior Tax Court Judge James S. Halpern seemed to acknowledge the challenges the Tax Court has had with its jurisdiction in CDP cases when, nearly 20 years after the enactment of the CDP provisions, he described the Tax Court as “adjusting to [its] new responsibilities,” in reviewing exercises of agency discretion.²⁸

Leading up to the enactment of RRA 98, the Senate Finance Committee conducted hearings at which individuals testified about alleged abuses by the IRS in its collections activities.²⁹ Aside from the political rhetoric, leaders in the tax community, including the current National Taxpayer Advocate Nina Olson, also testified about protecting taxpayers’ rights in the collection proceedings.³⁰ In the spirit of Congress’s desire to impose limitations on the IRS’s collection discretion and protect taxpayers, RRA 98 created the CDP provisions to give taxpayers an opportunity for a pre-deprivation administrative hearing and judicial review of the outcome of the hearing.³¹

3. The CDP Hearing and Judicial Review

The CDP provisions changed the law by requiring the IRS to provide notice to a taxpayer of a right to request a hearing prior to levying and within

27. HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 481 (2d ed. 2014), https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf.

28. Halpern, *supra* note 2, at 1289.

29. Commentators documented much of the “circus” of the Senate Finance Committee’s hearings. As Professor Cords notes, “Much of the testimony presented at the hearings has since been either disputed or entirely discredited.” Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 52 & n.7 (2004) [hereinafter Cords, *How Much Process Is Due?*].

30. *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Fin.*, 105th Cong. 124–26 (1998) (statement of Nina E. Olson, Executive Director, Community Tax Law Project, Richmond, VA).

31. I.R.C. § 6330(c) (2012); I.R.C. § 6330(d) (West 2011 & Supp. 2016); *see* RRA 98, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746–50 (codified as amended at I.R.C. § 6320; I.R.C. § 6320 note (2012); I.R.C. § 6330 (West 2011 & Supp. 2016)). For further discussion, *see* Book, *supra* note 19, at 1156.

five days of a filing notice of federal tax lien.³² The taxpayer has 30 days from the issuance of the collection notices within which to request a hearing.³³ If a taxpayer makes a timely request for a hearing, he or she is entitled to one hearing per period at issue to be conducted by an impartial appeals officer.³⁴ CDP hearings are informal, and the procedural rules governing the nature of CDP hearings are spelled out in the regulations and case law.³⁵

32. I.R.C. § 6320(a) (requiring written notification of filing of a notice of federal tax lien (NFTL) within five days of filing the lien); I.R.C. § 6330(a) (2012) (requiring written notification of intent to levy).

Often the IRS issues both notice of intent to levy and notice of federal tax lien. See IRM 5.19.8.2 (Aug. 5, 2016), https://www.irs.gov/irm/part5/irm_05-019-008.html#d0e274. I.R.C. § 6330(f) does not require the IRS to provide a taxpayer CDP rights if the collection of tax is in jeopardy. A taxpayer whose assets are seized in a jeopardy collection, however, will be entitled to post-deprivation administrative review. Treas. Reg. § 301.6330-1(a)(2)(ii) (2016).

33. I.R.C. §§ 6320(a)(3)(B), 6330(a)(3)(B). Hearing requests are often made via Form 12153, Request for a Collection Due Process or Equivalent Hearing. IRM 5.1.9.2 (Feb. 7, 2014), https://www.irs.gov/irm/part5/irm_05-001-009.html#d0e119. If the hearing request is not made within 30 days but is made within one year of the issuance of the notice, a taxpayer is still entitled to an administrative hearing, referred to as an equivalent hearing. Treas. Reg. § 301.6330-1(i). The difference between a CDP hearing and an equivalent hearing is that a taxpayer who engages in the latter is not issued a notice of determination and is thus precluded from seeking judicial review of the administrative appeals review of the proposed collection action. *Id.* § 301.6330-1(i)(2), Q&A (6).

34. I.R.C. § 6330(b)(2), (3) (granting one hearing per period of unpaid tax, to be conducted by officer with no prior involvement regarding the unpaid tax). For example, if a taxpayer receives a levy notice and a NFTL for the same period, he or she is entitled to only one CDP hearing for that period. See *Inv. Research Assocs., Inc. v. Comm'r*, 126 T.C. 183, 188 (2006) (holding time period for filing petition runs from first NFTL, not from subsequent NFTL). If practicable, CDP hearings on a lien shall be held in conjunction with CDP hearings on a levy. I.R.C. § 6320(b)(4); see also Treas. Reg. § 301.6330-1(d) (“To the extent practicable, the CDP hearing requested under section 6330 will be held in conjunction with any CDP hearing the taxpayer requests under section 6320.”).

The impartial hearing officer requirement mandates that the appeals officer conducting the hearing must have “no prior involvement with respect to the unpaid tax.” I.R.C. § 6330(b)(3); see also Treas. Reg. §§ 301.6320-1(d)(2), Q&A (4), § 301.6330-1(d)(2), Q&A (4).

35. The formal hearing requirements of the Administrative Procedures Act do not apply. Treas. Reg. §§ 301.6320-1(d)(2), Q&A (6), 301.6330-1(d)(2), Q&A (6); see, e.g., *Robinette v. Comm'r*, 439 F.3d 455, 461 (8th Cir. 2006) (reviewing CDP hearings under traditional standards for administrative law, even though appeals officers conduct hearings informally). CDP hearings need not be conducted face-to-face; telephone or document exchanges may suffice. Treas. Reg. §§ 301.6320-1(d)(2), Q&A (6),

The substantive issues considered at a CDP hearing can be divided as follows: those on which the IRS has the burden and those on which the burden falls on the taxpayer.³⁶ The IRS, by way of the appeals officer conducting the hearing, must verify that administrative procedure and applicable law have been followed with respect to the alleged unpaid tax.³⁷ For example, the hearing officer must verify that the assessment was made and made lawfully; that there is an unpaid assessment; that, if the taxpayer disputes the underlying liability, the taxpayer did or did not have a prior opportunity to dispute the tax liability at issue; and that all notices have been issued.³⁸ While the verification requirements are often thought of as a routine checklist, in a messy CDP case there are so many potential avenues for verification that an appeals officer may miss some of the nuances.³⁹

The taxpayer may raise any relevant issues relating to the unpaid tax including appropriate spousal defenses; challenges to the appropriateness of the proposed collection action; offers of collection alternatives; and challenges to the underlying liability.⁴⁰ A taxpayer is only entitled to dispute

301.6330-1(d)(2), Q&A (6). Taxpayers do not have the rights to subpoena and examine witnesses at CDP hearings. *Id.*

36. *See* I.R.C. § 6330(c)(1), (2) (2012).

37. *Id.* § 6330(c)(1).

38. Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1). Verification can be made anytime prior to the issuance of the notice of determination. *Id.* The appeals officer is verifying that the IRS has complied with all requirements in the code, regulations, and Internal Revenue Manual. *See id.*

39. As a simple example, if a taxpayer disputes the underlying liability, an appeals officer may be tempted to prove that a taxpayer had a prior opportunity to dispute the liability because of a transcript entry showing that a statutory notice of deficiency was issued to the taxpayer. As a matter of proof, however, the IRS must demonstrate that the notice was left at the taxpayer's last known address. *See* I.R.C. § 6212(b). This involves obtaining proof beyond a transcript entry, such as a list of documents mailed via certified mail to the taxpayer's last known address. Other issues, such as invalid assessments, will require the appeals officer to examine underlying documents in addition to the tax transcripts.

40. *Id.* § 6330(c)(2). With respect to the spousal defenses, a taxpayer may be estopped from requesting relief if the IRS has already made a final determination on spousal defenses from which the taxpayer had a prior opportunity for a judicial appeal. Treas. Reg. § 301.6330-1(e)(3), Q&A (4).

With respect to appropriateness of collection actions, a taxpayer may argue that the IRS is enjoined from collecting a tax liability if the taxpayer has received a bankruptcy discharge and that taxpayer's liabilities were dischargeable. *See* 11 U.S.C. § 524(a) (2012); e.g., *United States v. Rivera Torres* (*In re Rivera Torres*), 309 B.R. 643, 647 (B.A.P. 1st Cir. 2004), *rev'd in part on other grounds*, 432 F.3d 20 (1st Cir. 2005).

or challenge the underlying liability—that is, to assert he or she does not owe the tax at issue—if the taxpayer did not receive a statutory notice of deficiency or have a prior opportunity to challenge the liability.⁴¹ This limitation prevents a taxpayer from having “two bites at the apple.”⁴²

The scope of when a taxpayer may or may not raise a challenge to the underlying tax liability sought to be collected is critical to the analysis of this Article. “Underlying tax liability” refers to the amount of tax (including interest and penalties) assessed, including tax assessed under deficiency procedures, reported on a return, or a combination of both.⁴³ For example, if a taxpayer reports a tax liability on a return but does not pay the tax and the IRS assesses the liability and does not issue a statutory notice of deficiency, the taxpayer may properly challenge the liability at a CDP hearing because the taxpayer has not had a prior opportunity to do so.⁴⁴ However, if a taxpayer has received a statutory notice of deficiency with respect to a period, regardless of whether the taxpayer exercised his or her rights with respect to the deficiency procedures and sought review of the deficiency in Tax Court, the taxpayer would be barred under principles of *res judicata* from disputing the liability again in a CDP proceeding.⁴⁵

A common issue raised at CDP hearings is collection alternatives such as posting of a bond, substitution of assets, installment agreement, offer-in-compromise, and withholding collection to facilitate future payment. *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A (6), 301.6330-1(e)(3), Q&A (6).

41. I.R.C. § 6330(c)(2)(B) (2012).

42. Consistent with principles of the preclusion doctrines of collateral estoppel and *res judicata*, a taxpayer may not raise the issue of liability twice. If a taxpayer is precluded from raising the issue in the CDP hearing, he or she is also precluded from raising the issue in a judicial review proceeding under § 6330(d). *E.g.*, *Goza v. Comm’r*, 114 T.C. 176, 182–83 (2000).

43. *Montgomery v. Comm’r*, 122 T.C. 1, 7–8 (2004), *action on dec.*, 2005-03 (Dec. 19, 2005).

44. *Id.*

45. *See* *Golden v. Comm’r*, 90 T.C.M. (CCH) 33, 35 (2005), *aff’d*, 548 F.3d 487 (6th Cir. 2008); *Newstat v. Comm’r*, T.C.M. (RIA) 2004-208, at 1300 (2004). Furthermore, the notice of deficiency is not required so long as process where the IRS appeals division could review the liability as a prior opportunity. Treas. Reg. §§ 301.6320-1(e)(3), Q&A (2), 301.6330-1(e)(3), Q&A (2); *see also* *Bailey v. Comm’r*, 90 T.C.M. (CCH) 392, 395 (2005). Examples of other opportunities to dispute a deficiency pre-assessment include notice of proposed excise tax assessment; notice of proposed trust fund recovery penalty assessment; notice that § 6682 penalty will be assessed; notice of proposed employment tax assessment; and notice of proposed return preparer penalty assessment. *E.g.*, *Jackling v. IRS*, 352 F. Supp. 2d 129, 132 (D.N.H. 2004) (proposed trust fund recovery penalty assessment); *Chun Hwan Lee v. IRS*, No. 3-00-741, 2002 WL 508333, at *4 (M.D.

Notably, the Tax Court held that the CDP provisions do not give the court jurisdiction to determine an overpayment or order a refund or credit of taxes paid.⁴⁶ Compared to deficiency proceedings, where the Tax Court may redetermine a deficiency or, if appropriate, an overpayment,⁴⁷ in CDP cases the Tax Court has circumscribed its own jurisdiction to consider a taxpayer's claim for an overpayment.⁴⁸

Once the appeals officer has verified that all applicable law and procedures have been met and has considered the relevant issues raised by the taxpayer, the appeals officer must apply the CDP balancing test.⁴⁹ The test articulated by the statute is "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the [taxpayer] that any collection action be no more intrusive than necessary."⁵⁰ Upon conclusion of the CDP hearing, the appeals officer must issue a notice of determination setting forth the findings of the officer and applying the balancing test.⁵¹ The notice must also inform the taxpayer of the right to judicial review by the Tax Court or district court.⁵²

The CDP provisions provide that a taxpayer may seek judicial review by the Tax Court within 30 days of the issuance of the notice.⁵³ The jurisdictional grant in the statute does not proscribe the Tax Court's remedies, standard of review, or scope of review.⁵⁴

Tenn. Feb. 21, 2002) (proposed excise tax assessment); *Adams v. United States*, No. CV-S-01-0580-RLH LRL, 2002 WL 471765, at *1-3 (D. Nev. Feb. 14, 2002) (notice of I.R.C. § 6682 penalty).

46. *Greene-Thapedi v. Comm'r*, 126 T.C. 1, 13 (2006).

47. I.R.C. § 6512(b) (2012), amended by Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101(f)(7), (g), 129 Stat. 584, 637-38 (striking the second sentence in subsection (b)(3), effective January 1, 2018).

48. *Greene-Thapedi*, 126 T.C. at 11-14; *id.* at 14-15 (Colvin, J., concurring); *id.* at 15-16 (Vasquez, J., dissenting). The Tax Court's jurisdiction is discussed *infra*, Part III.B.

49. I.R.C. § 6330(c)(3)(C).

50. *Id.*

51. Treas. Reg. §§ 301.6320-1(e)(3), Q&A (8), 301.6330-1(e)(3), Q&A (8) (2016).

52. *Id.*

53. I.R.C. § 6330(d) (West 2011 & Supp. 2016).

54. *See id.* The Tax Court has addressed these issues in its review of CDP cases and scholars have provided commentary. *See Danshera Cords, Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021, 1023 & n.13 (2005) [hereinafter Cords, *Collection Due Process*]; Diane L. Fahey, *The Tax Court's Jurisdiction over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453, 500 (2003) [hereinafter Fahey, *Tax Court's Jurisdiction*].

4. Scholarly Commentary on CDP

Since enactment of the CDP provisions, scholars, practitioners, and policymakers have disputed the value and efficacy of CDP. Some scholars and policymakers generally favor the policies underlying CDP—specifically, increased taxpayer protections against intrusive government collection actions.⁵⁵ On the other hand, critics have claimed that CDP wastes government resources, is used by tax protestors as a tool to delay or impede tax administration, and is generally unwieldy and unworkable.⁵⁶ There are others who find virtue in CDP despite its costs. For example, Professor Steve Johnson noted that the cost of CDP is extremely high compared to the value it brings to protecting taxpayer rights, but nonetheless he asserted the value of CDP as a “tripwire alerting the IRS to, and prodding it to correct, its breaches of tax collection rules.”⁵⁷ The majority of recent scholarship examines the failures of CDP to provide meaningful adversarial checks on IRS collection actions at a broad theoretical level.⁵⁸

55. See Book, *supra* note 19, at 1147–49 (defending CDP as “a progression toward adopting broader rule of law principles in the tax system”); see also NTA 2015 REPORT, *supra* note 1, at 481–82.

56. Camp, *Paradigm Shift*, *supra* note 21, at 121–22 (suggesting that outcomes in CDP cases show how “CDP provisions do little good and much harm”); Cords, *How Much Process Is Due?*, *supra* note 29, at 54 (“CDP provisions as currently applied provide few taxpayer rights, require significant administrative and judicial resources, delay the collection of unpaid tax liabilities, and may adversely impact the public’s perception of the fairness of the tax system.”); see also Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. U. L. REV. 205, 265–67 (2013) [hereinafter Johnson, *Reforming Federal Tax Litigation*].

The most recent exhaustive work is by Professor Bryan Camp. Professor Camp argues that CDP does not add value to the collection process. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 58 (2009) [hereinafter Camp, *Failure of Adversarial Process*]. Professor Camp’s thesis is supported by an empirical study of decisions and orders in 976 CDP cases issued by courts in years 2000–2006. *Id.* at 111–18.

Professor Steve Johnson argues that CDP’s costs to the tax administrative system have not been justified by the gains to taxpayer protection. Johnson, *Reforming Federal Tax Litigation*, *supra*, at 266–67. Unlike Professor Camp, Professor Johnson calls for modification of the CDP rules by removing judicial review from some types of agency review. *Id.* at 267.

57. Johnson, *Reforming Federal Tax Litigation*, *supra* note 56, at 266–67.

58. See Camp, *Failure of Adversarial Process*, *supra* note 56; see also Johnson, *Reforming Federal Tax Litigation*, *supra* note 56.

5. Empirical Data on CDP Cases and Outcomes

As noted, CDP cases make up approximately 5 percent of the Tax Court's litigation docket, but the cases require a disproportionate amount of resources by the court to resolve.⁵⁹ CDP cases account for 28 to 35 percent of the cases pending before the IRS Office of Appeals.⁶⁰ One empirical study reported that the IRS Office of Appeals closed an estimated 149,311 CDP cases from 1999 to approximately 2006.⁶¹ Of those CDP cases considered by the IRS Office of Appeals, 2 percent, or approximately 3,000, were appealed to the U.S. Tax Court.⁶²

The vast majority of CDP litigants are pro se.⁶³ Additionally, some commentary links the inefficiencies of CDP to dilatory and frivolous taxpayers who are seeking to delay collection.⁶⁴

59. DUBROFF & HELLWIG, *supra* note 27; *see infra* Part III.A.

60. NINA E. OLSON, TAXPAYER ADVOCATE SERV., IRS, PUB. 2104 (REV. 12-2003), 2003 ANNUAL REPORT TO CONGRESS 46 tbl.1.4.1 (2003), https://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf (giving statistics on the percentage of IRS Office of Appeals receipts that were CDP receipts in recent years). By comparison, prior to enactment of RRA 98, fewer than 14 percent of the caseload of IRS Office of Appeals involved appeals of collection matters. *Id.* at 50.

61. Camp, *Failure of Adversarial Process*, *supra* note 56, at 112.

62. *Id.* at 112 & n.279.

63. *See supra* note 2 and accompanying text. Additionally, the NTA has documented the likelihood of pro se litigants prevailing in CDP litigation. Of the 46 pro se cases out of 79 CDP cases total brought before the Tax Court from 2014 to 2015 (a decrease from 2013 to 2014), 89 percent of the pro se cases were decided for the IRS, whereas in cases with represented taxpayers, the IRS prevailed 73 percent of the time. NTA 2015 REPORT, *supra* note 1, at 429–30 & figs. 3.0.1 & 3.0.2.

Professor Camp's empirical analysis reveals that roughly 76 percent of CDP cases were brought by pro se taxpayers. Camp, *Failure of Adversarial Process*, *supra* note 56, at 114. In his analysis, he notes that taxpayers were less likely to prevail if they were unrepresented. *Id.* at 114–15 (comparing 4.5 percent prevail rate for pro se taxpayers to 12.7 percent prevail rate for represented taxpayers). Professor Camp cautions the use of this data to correlate success with representation because while represented taxpayers may be better able to navigate the procedural process, the presence of lawyers or other representation may act as a screening mechanism. *Id.* at 115.

64. Camp, *Paradigm Shift*, *supra* note 21, at 122 & n.620; *see also* Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1061 (2003) [hereinafter Johnson, *Compliance and Tax Simplification*] (citing *Montijo v. United States*, No. CVS011227LRH(LRL), 2002 WL 1466096, at *3 (D. Nev. May 14, 2002)).

Professor Camp noted that while there were numerous “tax protestor” and “frivolous” arguments made in CDP cases in 2002 and 2003, there was a decline in the

The percentage of cases that result in pro-IRS outcomes in CDP cases is staggering. One empirical study shows that out of the 80 opinions issued by courts from 2014 to 2015, taxpayers prevailed in only 17 cases.⁶⁵ Another study examines CDP cases from 2000 to 2006 and found that only 63 of the 976 cases were a “win” for the taxpayer.⁶⁶ Experts disagree as to the reasons why taxpayers are losing CDP cases. Some commentators focus on the fact that CDP cases are likely to involve taxpayers making frivolous arguments, who thus are more likely to lose.⁶⁷ On the other hand, another commentator has suggested that maybe the government usually wins CDP cases because, “contrary to public perception,” perhaps the IRS “does not utilize oppressive and unreasonable collection tactics.”⁶⁸ Furthermore, it is suggested that CDP cases are usually resolved in favor of the government because the CDP process works to resolve cases at the appellate level.⁶⁹

III. THE TAX COURT’S STRUGGLE WITH THE SCOPE OF ITS JURISDICTION IN CDP CASES

This Part examines the U.S. Tax Court historically and compares the Tax Court’s jurisdiction in deficiency cases with that in CDP cases. This Part also provides a detailed explanation of the court’s struggle in determining its proper jurisdiction in CDP cases in which the taxpayer raises issues in non-CDP years by examining two relevant cases, *Freije* and *Weber*.⁷⁰

percentage of cases attributable to these types of arguments. Camp, *Failure of Adversarial Process*, *supra* note 56, at 116. This decline can be attributed to the imposition of monetary sanctions made pursuant to § 6673. *Id.*

65. NTA 2015 REPORT, *supra* note 1, at 477. The data from 2014 to 2015 is not unique. In an analysis of success rates in CDP cases from 2003 to 2015, the NTA reports that court decisions range from 82 to 95 percent in favor of the government. *Id.* at 489, fig. 3.5.2. In the years analyzed, taxpayers prevailed anywhere from 1 to 14 percent of the time. *Id.*

66. Camp, *Failure of Adversarial Process*, *supra* note 56, at 111–12. This data is both over- and under-inclusive. Looking at Professor Camp’s analysis reveals that the odds are 99.999 percent that a collection decision will not be overturned. *See id.* at 114. Professor Camp categorized each of the 63 taxpayer victories, and in 37 of those the court found that the IRS made an error in its collection decision. *Id.* at 129–33 tbl.2.

67. E.g., Camp, *Paradigm Shift*, *supra* note 21, at 122–23; Johnson, *Compliance and Tax Simplification*, *supra* note 64, at 1061–62.

68. Nick A. Zotos, *Service Collection Abuse of Discretion: What Is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals?*, 62 TAX LAW. 223, 235–36 (2008).

69. *Id.* at 237–38.

70. *Weber v. Comm’r*, 138 T.C. 348 (2012); *Freije v. Comm’r*, 125 T.C. 14 (2005);

A. The U.S. Tax Court

The U.S. Tax Court originated as the Board of Tax Appeals in 1924 to adjudicate disputes involving federal income and profits taxes.⁷¹ Initially the Board of Tax Appeals was “an independent agency in the Executive Branch of the Government.”⁷² In 1942, Congress changed the name of the Board to the Tax Court of the United States, but it remained an agency within the Executive Branch.⁷³ In 1969, Congress established the Tax Court as a legislative court under Article I of the Constitution, and the name was changed to the U.S. Tax Court.⁷⁴ Despite its history in the Executive Branch, the Tax Court—and its predecessor, the Board of Tax Appeals—has always operated as an adjudicative body and not as an executive agency.⁷⁵

Article I courts are courts of limited jurisdiction, and the Tax Court is no exception.⁷⁶ It only has jurisdiction to the extent expressly authorized by Congress.⁷⁷ Historically, the Tax Court’s exercise of jurisdiction primarily has been to resolve disputes between taxpayers and the IRS regarding redetermination of tax deficiencies.⁷⁸ There are three statutory requirements

see infra Part IV.

71. DUBROFF & HELLWIG, *supra* note 27, at 1.

72. *Id.* at 175 (quoting Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 253, 338).

73. *Id.* (citing Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957).

74. *Id.* (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730).

75. *Id.* at 349 (noting that the Tax Court never functioned in any “administrative, investigative, regulatory or policymaking capacit[ies]”).

76. *Id.* at 384 (citing *Flight Attendants Against UAL Offset v. Comm’r*, 165 F.3d 572, 578 (7th Cir. 1999)) (“All federal courts are courts of limited jurisdiction. [There is] no reason to suppose that statutes of limitations are intended to be administered differently in the Tax Court than in federal district courts, which share jurisdiction in federal tax cases with the Tax Court.” (quoting *Flight Attendants*, 165 F.3d at 578)).

77. *Henry Randolph Consulting v. Comm’r*, 112 T.C. 1, 4 (1999) (citations omitted).

78. DUBROFF & HELLWIG, *supra* note 27, at 269. The Tax Court’s authority for redetermining deficiencies is codified at I.R.C. § 6214(a) (2012). The majority of deficiency cases involve income taxes, although the Tax Court also has jurisdiction over deficiencies in excess profits, estate, and gift taxes. DUBROFF & HELLWIG, *supra* note 27, at 269–70.

The Tax Court has jurisdiction over other matters with respect to determining the underlying liability. For example, the Tax Court has jurisdiction to hear claims that a taxpayer has overpaid taxes in cases in which the Tax Court has deficiency jurisdiction. I.R.C. § 6512(b). The Tax Court also has jurisdiction to hear appeals made with respect to jeopardy assessments. *Id.* § 7429(b)(2)(B). The scope of the Tax Court’s jurisdiction in overpayment and jeopardy assessment cases is beyond the scope of this Article. See DUBROFF & HELLWIG, *supra* note 27, at 301–49, for a thorough explanation of the Tax Court’s jurisdiction in overpayment and jeopardy assessment cases.

that must be met for the Tax Court to have deficiency jurisdiction. First, the IRS must have determined a deficiency in tax.⁷⁹ Second, the taxpayer must be notified of the deficiency by way of a statutory notice of deficiency.⁸⁰ Third, a taxpayer must timely petition the Tax Court for review of the deficiency.⁸¹ Once all three statutory requirements have been met, the Tax Court has authority to review the deficiency for the year(s) or period(s) for which the deficiency has been determined.⁸² In limited circumstances, the Tax Court may “consider such facts with relation to the taxes for other years,” only if doing so is necessary to determine correctly the amount of the deficiency with respect to the year at issue.⁸³

With the creation of CDP, the Tax Court also has jurisdiction to review administrative hearings.⁸⁴ The statute that grants jurisdiction over CDP cases does not mention the scope of the Tax Court’s jurisdiction with respect to non-CDP years.⁸⁵ Furthermore, there is no statute analog for CDP as there is in deficiency cases allowing the Tax Court to consider years not properly before it if necessary to determine the CDP matter correctly.⁸⁶

Unlike federal courts established under Article III of the Constitution, the U.S. Tax Court, like other Article I courts, lacks general equitable jurisdiction.⁸⁷ The Tax Court has, on occasion, applied equitable doctrines to resolve cases such as equitable recoupment, equitable estoppel, and equitable innocent spouse relief.⁸⁸ Absent a direct statute, however, the Tax Court’s exercise of equitable jurisdiction may be unconstitutional.⁸⁹

79. I.R.C. § 6211(a) (defining deficiency as the difference between the proper amount of tax and the amount shown on the return).

80. *Id.* § 6212(a).

81. *Id.* § 6213(a).

82. *See, e.g., id.* § 6214(a); *Logan v. Comm’r*, 86 T.C. 1222, 1226, 1229 (1986).

83. I.R.C. § 6214(b). The statute expressly prohibits the Tax Court from determining whether the year not properly before the court is over or underpaid. *Id.*

84. I.R.C. § 6330(d) (West 2011 & Supp. 2016). As discussed in Part II.A.3, the Tax Court’s jurisdiction in CDP cases has not been well defined by statute as to scope of review, standard of review, and remedies available. *See supra* Part II.A.3.

85. *See* I.R.C. § 6330(d).

86. *See* discussion *infra* notes 104–11 and accompanying text.

87. Leandra Lederman, *Equity and the Article I Court: Is the Tax Court’s Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 356, 393–98 (2001).

88. *Id.* at 378. For further discussion regarding equitable recoupment, equitable estoppel, and equitable innocent spouse relief, see *id.* at 379–92.

89. *Id.* at 411–13.

The Tax Court, as a court of limited jurisdiction and lacking general equitable jurisdiction, is somewhat trapped when presented with a CDP case in which a taxpayer seeks review of matters outside the boundaries of the years or periods for which the IRS seeks to enforce collection. Tension exists between a court of limited jurisdiction and traditional principles of judicial efficiency.⁹⁰ Add to that tension the policy and purpose of the CDP provisions—to give taxpayers a pre-deprivation forum in collection cases—and the Tax Court can easily find itself trapped. Generally and historically, the Tax Court errs on the side of caution and does not exercise jurisdiction where the issue is close.⁹¹ Like other federal courts, the Tax Court follows traditional preclusion doctrines of *res judicata* and collateral estoppel to ensure efficiency.⁹²

As our tax system is one based on annual accounting, the jurisdictional scope of most cases before the Tax Court is defined by taxable periods, namely years or quarters.⁹³ However, the scope of the jurisdiction of the Tax Court in some types of collection cases is not certain. Uncertainty as to jurisdiction leaves all parties with a feeling of unease. When the Tax Court looks beyond the taxable period, it is like opening up a can of worms, the shape and size of which are unknown. Sometimes opening up the can of worms works out to align with the congressional intent behind the CDP provisions—to ensure taxpayers have meaningful pre-deprivation procedural checks on IRS collection actions. If the Tax Court can resolve legitimate taxpayer issues that remain unresolved otherwise, opening up the can of worms is necessary. There are times, however, where the Tax Court need not open the can of worms and limiting the Tax Court's jurisdiction to review CDP cases is more appropriate. This Article explores if and when the Tax Court should open up the can of worms that is a non-CDP tax year.

CDP cases represent approximately 5 percent of the Tax Court's

90. See Cords, *Collection Due Process*, *supra* note 54, at 1023.

91. DUBROFF & HELLWIG, *supra* note 27, at 269–73 (citing and summarizing cases in which the Tax Court determined it lacked subject matter jurisdiction).

92. *E.g.*, *Koprowski v. Comm'r*, 138 T.C. 54, 59–60 (2012). *Res judicata*, or claim preclusion, is a judicial doctrine to prevent repetitious lawsuits on the same cause of action. *Id.* *Res judicata* promotes judicial efficiency in that unnecessary or redundant litigation is precluded. *Id.* at 59.

93. I.R.C. § 441(a) (2012) (annual accounting rules); *id.* § 6214(a) (granting Tax Court jurisdiction to redetermine deficiencies); *id.* § 6214(b) (limiting scope of jurisdiction to tax years subject to determination by the IRS). While the specific type of messy cases may be rare, they have arisen and will continue to present challenges to taxpayers, the IRS, and the courts.

overall docket.⁹⁴ While the percentage of CDP cases on the Tax Court's docket seems quite small, the workload and resources devoted to resolving CDP cases by the Tax Court is disproportionately burdensome.⁹⁵ Why are CDP cases so time-consuming and challenging for the Tax Court? As mentioned above, CDP cases are messy.⁹⁶ Part of the problem is that the CDP provisions provide a terse jurisdictional grant. I.R.C. § 6330(d) provides that after a hearing a taxpayer "may, within 30 days of a determination under [§ 6330], petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)."⁹⁷ The Tax Court has expended considerable energy answering questions about how it should resolve CDP judicial appeals.⁹⁸ The statute's

94. DUBROFF & HELLWIG, *supra* note 27.

95. *Id.*

96. CDP cases are messy for a number of reasons. First, CDP cases often involve unsophisticated pro se litigants who are often inefficient in their attempt to resolve their disputes. In 70 percent of cases seeking judicial review of CDP determinations in 2002, taxpayers represented themselves. NINA E. OLSON, TAXPAYER ADVOCATE SERV., IRS, PUB. 2104 (REV. 12-2002), FY 2002 ANNUAL REPORT TO CONGRESS 276 (2002), https://www.irs.gov/pub/tas/nta_2002_annual_rpt.pdf. One commentator has suggested another contributing factor is that the CDP form, Form 12153 Request for a Collection Due Process or Equivalent Hearing, is vague and does not provide a checklist for taxpayers to indicate the issues he or she intends to raise. Book, *supra* note 19, at 1193–94 n.183.

Second, CDP cases arise after an administrative hearing (or the opportunity for a hearing) with the IRS appeals division. See Cords, *Collection Due Process*, *supra* note 54, at 1025–26. The IRS, like pro se litigants, is not known for its efficiencies. See *id.* at 1022 & nn.7–8.

Third and finally, CDP cases may be inherently messy because they arise out of long-standing confusion or dispute between the IRS and the taxpayer that was not resolved at any of the possible prior stages where resolution may have been possible—from examination, administrative appeals, deficiency proceedings, administrative collections, and finally administrative review of the collection. See, e.g., Freije v. Comm'r, 125 T.C. 14, 16–21 (2005).

In full disclosure, the Author worked for a number of years in the Small Business/Self-Employed Division of the IRS Office of Chief Counsel, litigated a number of CDP cases, and personally witnessed the challenges of resolving collection cases with both unsophisticated pro se taxpayers and administrative errors made by the IRS. For an example, see *Leibold v. Comm'r*, 104 T.C.M. (CCH) 104, 104 (2012). Contributing to the confusion in *Leibold v. Commissioner* were assessment anomalies based on substitute returns, amended returns, and the treatment of a prior separate return. *Id.* at 105 n.2.

97. I.R.C. § 6330(d)(1) (West 2011 & Supp. 2016).

98. DUBROFF & HELLWIG, *supra* note 27. "Given the number of division opinions concerning the court's jurisdiction in the collection due process setting and, in particular,

jurisdictional grant does not identify the level of deference the Tax Court ought give to the hearing officer's determination, nor does it articulate the scope of the Tax Court's review.⁹⁹ Much of the literature has focused on gaps in the CDP provisions and how best to effectuate CDP with the competing goals of protecting taxpayer rights and interest of the government in efficient tax collection.¹⁰⁰ To answer these questions, the Tax Court and scholars have debated the role of the Administrative Procedures Act and federal administrative law.¹⁰¹ The Tax Court generally has not turned to administrative law for guidance as it struggles with how to exercise its jurisdiction properly in CDP cases.¹⁰² Instead, the Tax Court has turned to its jurisdiction in deficiency proceedings to help by analogy.¹⁰³

The Tax Court's limited jurisdiction in CDP cases is for good reason. As Professor Brian Camp argued, one of the costs of CDP is that it may "undermine[] the foundational role of the assessment in tax administration."¹⁰⁴ The fear in CDP cases is that taxpayers may be able to manipulate the system to litigate the underlying tax liability when, absent CDP, they would be precluded from doing so. One example of this issue is when a taxpayer seeks the Tax Court to consider a non-CDP year or period in the Tax Court's adjudication of the collection issue. The Tax Court

the number of these cases yielding court-reviewed divided opinions, the perceived portion of the court's resources allocated to these cases perhaps exceeded this statistical evidence." *Id.*

99. *Robinette v. Comm'r*, 439 F.3d 455, 459–62 (8th Cir. 2006) (addressing scope of review under § 6330 and limiting the appellate review to "information which was before the IRS"); *Goza v. Comm'r*, 114 T.C. 176, 181 (2000) ("[S]ection 6330 does not prescribe the standard of review that the Court is to apply in reviewing the Commissioner's administrative determinations . . .").

100. *E.g.*, Cords, *How Much Process Is Due?*, *supra* note 29, at 53–54.

101. The Tax Court has consistently concluded that administrative law is inapplicable in tax collection cases. *See Robinette v. Comm'r*, 123 T.C. 85, 96 (2004), *rev'd*, 439 F.3d 455; *Vierow v. Comm'r*, T.C.M. (RIA) 2004–255, at 1529 (2004). Scholars, on the other hand, suggest application of administrative law principles in collection cases as a mechanism for consistency and to provide a substantive body of law in the absence of statutory details in the CDP provisions. *See Danshera Cords, Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 474–78 (2008); Cords, *Collection Due Process*, *supra* note 54, at 1056–57.

102. Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence when Acting as a Reviewing Court?*, 58 CLEV. ST. L. REV. 603, 604 (2010).

103. *Id.*

104. Camp, *Failure of Adversarial Process*, *supra* note 56, at 104.

examined the issue, with differing results, in the cases of *Freije* and *Weber*.¹⁰⁵

B. *Example of Freije as the Tax Court Extending Its Jurisdiction to Non-CDP Years*

In *Freije*, a CDP case in which the IRS issued a notice of determination to proceed with collection by levy for the Freijes' allegedly unpaid liabilities for 1997, 1998, and 1999, the taxpayers argued that the liability the IRS sought to collect had already been paid.¹⁰⁶ The Freijes made a remittance they intended to apply to a CDP year—1997—but they did not specifically designate their intention.¹⁰⁷ Instead of applying it to 1997, the IRS applied the remittance to a prior, non-CDP year in which the Freijes' had an outstanding liability based on late filing and late payment penalties.¹⁰⁸ The CDP year remained unpaid, and the IRS instituted enforced collection action by levy.¹⁰⁹ That decision was affirmed by the IRS Office of Appeals.¹¹⁰ On review, the Tax Court considered the liability in the prior year, reasoning that the proposed collection action would have been inappropriate if the IRS had improperly applied the remittance to a non-CDP year's tax for which the taxpayer was not liable.¹¹¹ As the legal basis for expanding its jurisdiction to consider the non-CDP year, the court stated that the issue in the prior year was a "relevant issue relating to the unpaid tax or the proposed levy" and that the taxpayer was entitled to raise the issue.¹¹²

In arriving at the conclusion that jurisdiction was proper, the Tax Court compared its jurisdiction in CDP cases to its jurisdiction in deficiency cases.¹¹³ Specifically, the Tax Court cited I.R.C. § 6214(b), a provision limiting the court's jurisdiction in deficiency cases to years in which a deficiency has been determined.¹¹⁴ Section 6214(b), allows (and even requires) the court to consider facts from other years "as may be necessary

105. *Weber v. Comm'r*, 138 T.C. 348 (2012); *Freije v. Comm'r*, 125 T.C. 14 (2005).

106. *Freije*, 125 T.C. at 19–21.

107. *Id.* at 17.

108. *Id.* at 16–17.

109. *Id.* at 19–20.

110. *Id.* at 20–21.

111. *Id.* at 28–29.

112. *Id.* at 26–27. The applicable CDP provisions provide that the IRS Office of Appeals "shall" consider the issues raised by the taxpayer, including "any relevant issue relating to the unpaid tax or the proposed levy." I.R.C. § 6330(c)(3)(B), (2)(A) (2012).

113. *Freije*, 125 T.C. at 27–28.

114. *Id.* at 27.

correctly to redetermine the amount of such deficiency” for the years properly before the court.¹¹⁵ Noting that there is no analogous provision to § 6214(b) in the CDP context, the court took the position that its exercise of jurisdiction was consistent with the principles of § 6214(b) because the court only considered facts from non-CDP years “insofar as the tax liability for that year . . . affect[ed] the appropriateness of the [proposed levy] for the [CDP year].”¹¹⁶

The Tax Court thus heard evidence and considered the merits of the late payment and late filing penalties in the non-CDP year.¹¹⁷ Essentially, the court considered a challenge to the underlying liability of a non-CDP year on the issue of whether the Freijes were subject to penalties in the prior year.¹¹⁸

The ultimate result in *Freije* on the issue of considering a tax year not in CDP favored the government. The Tax Court held that the taxpayers were liable for the late filing and late payment penalties in the non-CDP year; that the IRS properly applied the non-designated remittances to the non-CDP year; and therefore, the CDP year remained unpaid.¹¹⁹ Despite this favorable

115. *Id.* at 28.

116. *Id.*

117. *Id.* at 28–29.

118. *Id.* The Freijes were entitled to challenge the underlying liability for tax year 1997 under § 6330(c)(2)(B). *Id.* at 22. The Freijes’ assessment for 1997 was based on self-reported income for which a statutory notice of deficiency was not issued. See *Montgomery v. Comm’r*, 122 T.C. 1, 9 (2004) (allowing taxpayers to challenge self-reported liability under § 6330(c)(2)(B)), *action on dec.*, 2005-03 (Dec. 19, 2005).

119. *Freije*, 125 T.C. at 37. Unfortunately, the dispute between the Freijes and the IRS was fraught with more errors than misapplied payments. *Freije* was a particularly messy CDP case because of other errors made by the IRS. Most notably, the Freijes sent a check for \$1,776 and the IRS erroneously posted the Freijes’ account with a payment for \$11,776. *Id.* at 20. The IRS then accused the Freijes of writing a bad check. *Id.* When the IRS erroneously credited the Freijes’ account for tax year 1997 by an excess of \$10,000, it exceeded the amount of all unpaid assessments and the IRS generated a refund of more than \$5,000 to the Freijes which was issued in 1998. *Id.* at 30. When the IRS became aware of the \$10,000 error, it reversed the entries on the Freijes’ 1997 account and applied remittances the Freijes’ made for tax year 1998 to recover the erroneously issued refund, contrary to law. *Id.* (discussing *O’Bryant v. United States*, 49 F.3d 340 (7th Cir. 1995), which holds the IRS may not use post-assessment collection powers to recover an erroneous non-rebate refund). All is well that ends well, however, and the IRS conceded in *Freije* that it could not levy on the portion that resulted from the IRS’s improper actions with respect to the collection of the erroneous refund. *Id.* at 37.

outcome, the IRS bristled at the general rule established by the case: that in reviewing IRS determinations to proceed with collection actions, the Tax Court could consider facts and issues in non-CDP years to the extent they are relevant to computing the unpaid tax.¹²⁰

In 2011, the IRS took the position that “*Freije* [was] incorrectly decided to the extent it holds that a non-CDP period liability is a relevant issue in a CDP hearing and that the Tax Court has jurisdiction to determine or otherwise review the taxpayer’s liability for a non-CDP period.”¹²¹ The potential consequences of the *Freije* opinion, which expanded the issues a taxpayer could raise in CDP, include increasing the workload of the IRS, the IRS Office of Appeals, and the Tax Court and creating an additional avenue for a taxpayer to delay collections in CDP proceedings.

These potential consequences, however, did not come to pass. There was no flood of CDP litigation with taxpayers seeking to litigate non-CDP years via the CDP process.¹²² Seven years after *Freije*, the Tax Court confronted a similar issue and narrowed its holding from *Freije*. That case was *Weber v. Commissioner*.¹²³

C. Example of *Weber* as the Tax Court Limiting Its Jurisdiction to the CDP Year

Weber was a CDP case in which the IRS issued a notice of determination to proceed with collection by levy for the taxpayer’s income taxes for 2008.¹²⁴ *Weber* argued that his 2008 liability had been paid by an alleged overpayment on a trust fund recovery penalty (TFRP), for which he had been determined a responsible person.¹²⁵ *Weber* had overpaid his 2006

120. I.R.S. Notice CC-2011-021, at 2 (Sept. 19, 2011) [hereinafter I.R.S. Notice CC-2011-021], <https://www.irs.gov/pub/irs-ccdm/cc-2011-021.pdf>.

121. *Id.* at 3.

122. Despite commentators addressing the consequences of *Freije*, after *Freije* there was no floodgate of litigation involving taxpayers raising non-CDP years during CDP proceedings. See Ira B. Shepard & Martin J. McMahon, Jr., *Recent Developments in Federal Income Taxation: The Year 2005*, 8 FLA. TAX REV. 5, 128–29 (2006) (summarizing the holding in *Freije*); Recent Development, *Tax Court Can Consider Facts and Circumstances of Nondetermination Year Liabilities*, 103 J. TAX’N 68, 68 (2005) (same). Why not? It takes a special set of factual circumstances to create a *Freije* situation.

123. *Weber v. Comm’r*, 138 T.C. 348 (2012).

124. *Id.* at 349.

125. *Id.* at 350. The TFRP is a mechanism for collecting from an employee, officer, or owner of an employer those taxes the employer holds in trust. An employer is

income tax liability and elected to apply overpayment to his 2007 personal income tax liability.¹²⁶ Before the end of the 2007 tax year, the IRS applied the 2006 credit elect overpayment against the TFRP liability that was assessed against Weber earlier in 2007.¹²⁷ The TFRP was assessed against Weber because he was determined to be a responsible person of S & G Services, Inc., an entity that failed to pay trust fund taxes withheld for three quarter periods in 2005.¹²⁸ One or more other individuals were also determined by the IRS to be responsible persons.¹²⁹ The record in the case shows the TFRP was satisfied, in part because other responsible persons made payments on the liability.¹³⁰ In an agreement to which Weber was a party, Weber waived his rights to an appeals hearing on the TFRP.¹³¹ Weber made an administrative claim for a refund of the portion of the TFRP he had paid, which the IRS denied.¹³² Weber then filed suit in federal district court challenging the disallowed refund.¹³³ The IRS gave notice to Weber that the credit elect overpayment from his 2006 tax year was credited to the TFRP.¹³⁴ Despite the IRS's application of the overpayment credit elect to the TFRP, Weber reported the same credit elect overpayment on his 2007 income tax return.¹³⁵ The IRS notified Weber that the 2007 credits he claimed, based on the credit elect overpayment from 2006, were excessive.¹³⁶ Nevertheless, in

required to withhold income tax and an employee's share of Social Security and Medicare tax (Federal Insurance Contributions Act (FICA) tax) from an employee's wages and remit the withheld amounts to the IRS. I.R.C. § 3102 (2012) (FICA withholding); *id.* § 3402 (income tax withholding). The amount of tax withheld by an employer is held in trust for the United States, and withheld taxes are referred to as "trust fund taxes." *Id.* § 7501(a). To ensure that an employer pays the trust fund taxes over to the IRS, § 6672 exists as a penalty mechanism. Section 6672 provides that the officers or employees of the employer who are responsible for collecting and paying trust fund taxes are "liable to a penalty equal to the total amount of the tax" that remains unpaid. *Id.* § 6672(a). Thus, the TFRP is a 100 percent penalty, equal to the amount of unpaid employment tax. Responsible persons are held jointly and severally liable for unpaid employment taxes. *See id.* § 6672(a), (d).

126. *Weber*, 138 T.C. at 349.

127. *Id.* at 350–51.

128. *Id.* at 350.

129. *Id.*

130. *Id.* at 351.

131. *Id.*

132. *Id.*

133. *Id.* at 351–52.

134. *Id.* at 352.

135. *Id.*

136. *Id.*

2008 Weber reported the credit carried over from 2006 and 2007 to satisfy his income tax liability.¹³⁷ Again, the IRS gave him notice that the 2008 credits claimed were excessive and that he had a balance due for 2008.¹³⁸ When Weber failed to pay his 2008 liability, the IRS issued a notice of proposed levy.¹³⁹ Weber requested a CDP hearing, claiming the TFRP liability was more than fully satisfied and the IRS should restore the credit elect overpayment from his 2006 income taxes to 2007, which would carry to 2007 and 2008 and satisfy his personal income tax liability for 2008.¹⁴⁰

Weber raised two alternative arguments: (1) that the IRS Office of Appeals should apply the claimed credit elect overpayment from 2007 (derived from the claimed credit elect overpayment from 2006); or (2) that the IRS Office of Appeals should credit his 2008 income tax liability with the alleged TFRP overpayment.¹⁴¹

The Tax Court denied both of Weber's requests. With respect to the first argument, the Tax Court considered the merits of Weber's request to apply the credit elect overpayment carried over from his 2006 income taxes.¹⁴² Citing *Landry v. Commissioner*, the court said it had jurisdiction to consider claims of credit elects that would satisfy a liability at issue.¹⁴³ In *Landry*, the Tax Court held it had jurisdiction to conduct a de novo review of whether a taxpayer is entitled to the application of credits, reported on prior years' tax returns, to satisfy an unpaid liability in a CDP year.¹⁴⁴ The court's decision in *Landry* was based on the fact that "the validity of the underlying tax liability, i.e., the amount unpaid after application of credits to which petitioner [was] entitled, [was] properly at issue."¹⁴⁵

Having asserted jurisdiction, the Tax Court turned to the merits of Weber's credit elect overpayment argument.¹⁴⁶ The court held the IRS acted within its discretion to apply the credit elect overpayment from Weber's

137. *Id.* at 352–53.

138. *Id.* at 353.

139. *Id.*

140. *Id.*

141. *Id.* at 359–60.

142. *Id.* at 360.

143. *Id.* (citing *Landry v. Comm'r*, 116 T.C. 60, 62 (2001)).

144. *Landry*, 116 T.C. at 62.

145. *Id.* (citing *Goza v. Comm'r*, 114 T.C. 176, 181–82 (2000)).

146. *Weber*, 138 T.C. at 360.

2006 income tax return to Weber's TFRP liability.¹⁴⁷ The court noted that "if the IRS holds Mr. Weber's money wrongly, it holds it not as an overpaid 2006 income tax but as an overpaid [§] 6672 penalty."¹⁴⁸ The court's analysis, however, pointed out that there is no procedural mechanism for reporting an overpaid TFRP liability as a credit to a taxpayer's income taxes.¹⁴⁹

The court next addressed Weber's second argument: that the TFRP liability was overpaid and the overpayment should be credited to his income tax liability at issue in the CDP case.¹⁵⁰ This required the court to determine "whether, in a CDP case, [it had] jurisdiction to determine an overpayment of an unrelated liability."¹⁵¹ The court held that it did not because the court lacks refund jurisdiction in CDP proceedings.¹⁵² The court distinguished the facts of *Weber*—holding the rule announced in *Freije* to be inapplicable.¹⁵³ In *Freije*, the court held that a claim that an unpaid tax had been paid was a "relevant issue relating to the unpaid tax or the proposed levy," under the CDP provisions.¹⁵⁴ Specifically, in *Freije*, the court said "meaningful review of a claim that a tax sought to be collected by levy has been paid by means of a remittance or an available credit will . . . [warrant] consideration of" non-CDP years.¹⁵⁵ In *Weber*, however, the court narrowed the scope of what constitutes an "available credit."¹⁵⁶ An available credit might include credit carryover prescribed by statute that affects the liability for a CDP year, an overpayment determined in a refund or other suit that had not yet been refunded or credited, or an overpayment the IRS determined administratively that had not yet been refunded or credited.¹⁵⁷ An undetermined claim for refund of an alleged overpayment of an unrelated tax does not constitute an available credit so as to justify the court's jurisdiction over a period (and type of tax) not subject to the CDP proceedings.¹⁵⁸

147. *Id.* at 361.

148. *Id.* at 362.

149. *Id.* at 369.

150. *Id.* at 362.

151. *Id.* at 366.

152. *Id.*

153. *Id.* at 368–69.

154. *Id.* at 362–63 (quoting *Freije v. Comm'r*, 125 T.C. 14, 26 (2005)).

155. *Id.* at 363 (emphasis omitted) (quoting *Freije*, 125 T.C. at 26).

156. *Id.* at 361–62 (quoting *Freije*, 125 T.C. at 26).

157. *Id.* at 368.

158. *Id.*

As support for its position, the court discussed how the CDP provisions do not confer any refund jurisdiction on the court.¹⁵⁹ Instead, CDP litigation is generally restricted to the periods for which the IRS seeks to enforce collection in the notice of lien or levy.¹⁶⁰ The court also highlighted other problems with exercising jurisdiction over Weber's allegation that the TFRP was overpaid.¹⁶¹ First, the court noted how Weber waived his right to an IRS Office of Appeals hearing on TFRP liability.¹⁶² The CDP provisions prohibit review of underlying liability if a taxpayer had a prior opportunity to be heard on that issue; therefore, to consider the underlying liability in a subsequent proceeding after Weber waived such review would frustrate the congressional intent to offer one opportunity for review of the liability.¹⁶³ Second, the court speculated the potential wait on resolution of the collection of the 2008 income tax could be significant to the IRS because of the complexities and nature of resolving TFRP cases.¹⁶⁴ Third, the court struggled with how, if a taxpayer could raise an unrelated liability in a CDP case, such a decision could cut against taxpayers.¹⁶⁵ Could, for example, the IRS in turn raise unrelated liabilities or counterclaims in refund suits?¹⁶⁶ Fourth, the court raised the problem of parallel litigation and the lack of statutory authority to resolve which court should cede jurisdiction pending the other court's resolution.¹⁶⁷ Commentary about the *Weber* case generally noted the pro-government holding of the case.¹⁶⁸

159. *Id.* at 369.

160. *Id.* Weber's argument would have the effect of turning the CDP process into "an almost plenary review of the taxpayer's situation vis-à-vis the IRS for all liabilities and for all periods; and a delinquent taxpayer would have the power to halt IRS collection of any given tax simply by filing a refund claim for any other tax, however unrelated it might be to the tax that the IRS proposed to collect." *Id.* at 369–70.

161. *Id.* at 370.

162. *Id.*

163. *Id.*

164. *Id.* at 370–71.

165. *Id.* at 371.

166. *Id.*

167. *Id.*; cf. I.R.C. § 7422(e) (2012) (resolving conflict between Tax Court and district court jurisdiction in deficiency cases and refund litigation, but not CDP cases).

168. See Martin J. McMahon, Jr. et al., *Recent Developments in Federal Income Taxation: The Year 2012*, 13 FLA. TAX REV. 503, 694–95 (2013) (commenting "Ca-ching! The IRS collects twice").

IV. ANALYSIS OF THE PROPER SCOPE OF THE TAX COURT'S JURISDICTION OVER NON-CDP YEARS AND RECOMMENDATIONS FOR EXTRA-JUDICIAL RESOLUTION

A. *The Proper Scope of the Tax Court's Jurisdiction and Critique of Freije*

The proper scope of the Tax Court's jurisdiction over non-CDP years depends on the factual circumstances of a taxpayer's case and the arguments a taxpayer makes. This Article categorizes the types of facts and arguments into three scenarios. Two of the three scenarios present cases in which the question of the Tax Court's jurisdiction is answered relatively simply. The third scenario, as exemplified in the *Freije* case, is more difficult. This Part addresses the three scenarios and provides critical analysis of the Tax Court's exercise of jurisdiction in *Freije*.

1. *Scenarios One and Two: The Easy Cases to Resolve in Which a Taxpayer Asks the Tax Court to Consider Facts from a Non-CDP Period*

The question of to what extent the Tax Court ought to consider facts from non-CDP years can arise in three different factual scenarios.¹⁶⁹ The first scenario occurs when a taxpayer alleges that a credit from a prior or later year applies to satisfy the tax liability in the CDP year or period. The second scenario is when a taxpayer alleges that an overpayment of an unrelated tax liability of the same taxpayer would satisfy the tax liability in the CDP period. The third scenario is when a taxpayer alleges that he or she has made remittances or payments that were improperly applied or otherwise should have been applied to the tax liability in the CDP year or period.¹⁷⁰ The proper scope of the Tax Court's jurisdiction depends on which factual scenario the case arises under. Each scenario and the scope of the Tax Court's jurisdiction in each scenario are discussed in turn.

With respect to the first scenario, a taxpayer might claim that the tax liability in the CDP year has already been satisfied by payment, credit, or adjustment from a year either before or after the CDP periods.¹⁷¹ The Tax

169. There may be other reasons in a CDP case for a taxpayer to request appeals and the Tax Court to consider facts outside the CDP year. I am not aware of any such cases.

170. See *infra* Part IV.A.2.

171. For example, net operating losses that carry forward or back under § 172, general business credits under § 39, and overpayment credit elects from a prior year are all types of credits from prior or subsequent years that operate to reduce the liability at issue in a given tax year. I.R.C. § 39; I.R.C. § 172 (2012 & Supp. II 2014); Treas. Reg.

Court has jurisdiction to consider the fact or existence of a credit, from a prior or later year, because the non-CDP year credit directly relates to the existence of the tax liability in the CDP year.¹⁷² The allegation of a credit from a prior or later year that would effectively eliminate the tax liability in the CDP year is an argument by the taxpayer relating to the underlying liability in the CDP year itself.¹⁷³ Therefore, in cases where the taxpayer claims credits from other years that affect the tax imposed for the CDP period, the IRS and Tax Court can properly consider the facts from non-CDP years as part of the determination of the liability for the CDP year. There is one major limitation to the Tax Court's jurisdiction in such a case. The CDP provisions preclude relitigation of the tax liability when a taxpayer has already had a prior opportunity to dispute the liability.¹⁷⁴ However, the limitation prohibiting relitigation is unrelated to the issue of whether the Tax Court can consider facts from a non-CDP year. If a taxpayer is not otherwise precluded from raising the underlying liability, the Tax Court properly exercises jurisdiction in considering whether a prior or later year tax credit applies to eliminate the liability for the CDP year or period.

The second scenario occurs when a taxpayer might claim he or she overpaid or has a credit from an unrelated liability and is seeking to apply the alleged overpayment from the unrelated liability to the CDP period. Such was the case in *Weber* where the taxpayer argued the IRS should apply an alleged overpayment of the taxpayer's employment tax liability for a corporation to offset the taxpayer's personal income tax liabilities.¹⁷⁵ In *Weber*, the Tax Court declined to consider the merits of the taxpayer's allegations that he had overpaid his employment tax liability.¹⁷⁶ Instead, the Tax Court held it lacked jurisdiction to consider the application of alleged

§ 301.6402-3(a)(5) (2016) (allowing election for overpayment credit to apply in succeeding taxable year). In *Weber*, the Tax Court refers to this scenario as when a taxpayer has an "available credit," or a credit that affects the liability for the CDP period directly. See 138 T.C. at 368.

172. *Landry v. Comm'r*, 116 T.C. 60, 62 (2001); see *supra* notes 121-22 and accompanying text.

173. See *Landry*, 116 T.C. at 62.

174. I.R.C. § 6330(c)(2)(B) (2012); see *supra* Part II.A.3; *supra* note 43 and accompanying text. The preclusion from relitigating operates whether or not a taxpayer has availed himself or herself of the opportunity to dispute the liability. See Treas. Reg. § 301.6330-1(e)(3), Q&A (2).

175. *Weber v. Comm'r*, 138 T.C. 348, 362 (2012); see *supra* note 151 and accompanying text.

176. See *Weber*, 138 T.C. at 366.

overpayments in unrelated liabilities during the course of a CDP appeal.¹⁷⁷

2. Scenario Three: The Tax Court's Jurisdiction over Non-CDP Years Where the Taxpayer Alleges Remittances Were Improperly Applied and a Critique of Freije

The third scenario occurs when a taxpayer alleges the IRS improperly applied payments or remittances the taxpayer intended to be applied to liability in the CDP year. If a taxpayer alleges the IRS improperly applied payments to other tax periods or liabilities, the Tax Court is called on to resolve whether the IRS properly applied the payments.¹⁷⁸ Resolving the issue of whether the IRS properly applied payments made by a taxpayer requires the Tax Court to address the merits of an issue with respect to tax years or periods not at issue in the CDP case.¹⁷⁹ This third scenario is the most troubling to the Tax Court, and there is no simple answer for the appropriate scope of the Tax Court's jurisdiction in this scenario.

When a taxpayer makes a voluntary payment, the taxpayer is entitled to designate the liability the taxpayer wishes to pay.¹⁸⁰ If a taxpayer fails to designate the payment, the IRS has discretion to apply the payment.¹⁸¹ An allegation by a taxpayer that he or she has paid the liability with a remittance (as in *Freije*) is not the same as an allegation that a credit from a prior or later year applies to satisfy the liability (as in the first scenario).¹⁸² The Tax Court has been quite clear on this issue. In a memorandum opinion in a later case, the Tax Court said, “[Q]uestions about whether a particular check was properly credited to a particular taxpayer’s account for a particular tax year are not challenges to [the] underlying tax liability.”¹⁸³ In contrast, a taxpayer who alleges that a credit from a prior or later tax year was improperly applied is challenging the underlying liability.¹⁸⁴

177. *Id.*

178. *See id.* at 366–67.

179. *E.g.*, *Freije v. Comm’r*, 125 T.C. 14, 37 (2005).

180. *See Tull v. United States*, 69 F.3d 394, 396 (9th Cir. 1995); Rev. Proc. 2002-26, 2002-1 C.B. 746, 746.

181. Rev. Proc. 2002-26, 2002-1 C.B. at 746 (allowing the IRS to apply partial payment in “order of priority that [it] determines will serve its best interest”); *see* Rev. Rul. 73-305, 1973-2 C.B. 43, 43 (allowing the IRS to apply partial payment in specific order), *superseded by* Rev. Proc. 2002-26, 2002-1 C.B. 746.

182. *See Freije*, 125 T.C. at 25–26; *supra* Part IV.A.1.

183. *Kovacevich v. Comm’r*, 98 T.C.M. (CCH) 1, 4 (2009) (footnote omitted).

184. *See supra* note 182 and accompanying text.

At the same time, allegations that a taxpayer has paid a liability (and that the IRS failed to apply the payments as the taxpayer intended) are different from the facts in *Weber*.¹⁸⁵ A taxpayer who alleges he or she intended for remittances to apply to a CDP year is not arguing that an overpayment in an unrelated liability should eliminate the CDP liability.¹⁸⁶

In *Freije*, the court explained how it interprets the question of application of payments. The application of remittances is an issue relevant to the unpaid tax in the CDP year.¹⁸⁷ While the remittance is a “relevant issue,” the Tax Court implies the remittance is not a challenge to the liability that would be precluded.¹⁸⁸ The proper application of a remittance goes to the existence of the unpaid tax, but it is not a challenge to the amount or existence of the underlying liability.¹⁸⁹ It is a ministerial matter, rather than a substantive argument.

Having distinguished remittances from liability challenges and overpayments on unrelated liabilities, the next issue is whether the court should exercise jurisdiction over a non-CDP period if the facts and issues that require resolution do not relate to the liability for the CDP period. The CDP provisions simply grant the Tax Court jurisdiction to review administrative hearings if the taxpayer seeks review within a specific time frame.¹⁹⁰ The statute granting jurisdiction to the Tax Court does not specifically address the scope of the jurisdiction, and the limitation is implied by the scope of what is properly in dispute in the administrative hearing.¹⁹¹

In *Freije*, the court analogized a statute that allows the court in deficiency cases to consider issues in a non-deficiency year if necessary to the resolution of the deficiency year.¹⁹² The court in *Freije* used the analogy

185. See *supra* Part III.C.

186. See, e.g., *Weber v. Comm’r*, 138 T.C. 348, 368 (2012).

187. I.R.C. § 6330(c)(2)(A) (2012) (“The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy . . .”); *Freije*, 125 T.C. at 26.

188. *Freije*, 125 T.C. at 26–27, 27 n.14.

189. See *id.* at 26.

190. I.R.C. § 6330(d) (West 2011 & Supp. 2016). The statute provides that a taxpayer “may, within, 30 days of a determination under [§ 6330], petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).” *Id.*

191. I.R.C. § 6330(c)(2) (2012); see *supra* Part II.A.3; *supra* notes 104–08 and accompanying text.

192. *Freije*, 125 T.C. at 27–28 (citing I.R.C. § 6214(b) (2000)).

to support its decision to exercise jurisdiction over the non-CDP year for which the Freijes allegedly remitted payment.¹⁹³

In general, it is not useful to compare the Tax Court's jurisdiction in deficiency cases to that in collection cases. The standards of review are generally different, as are the remedies the court fashions.¹⁹⁴ However, the Tax Court is called on to resolve questions in collection cases and it must do so despite the lack of express statutory guidance. The extensive statutory scheme that guides the Tax Court in deficiency cases is instructive as to the boundaries of the Tax Court's jurisdiction. In cases such as *Freije*, analogizing the Tax Court's jurisdiction in deficiency cases is a useful guide for the Tax Court because Congress has spoken so clearly with respect to deficiency cases.¹⁹⁵ As the Tax Court did in *Freije*, the court should continue to look to its jurisdiction in deficiency cases as a basis for comparison in CDP cases. The Tax Court can remain flexible in order to resolve messy CDP cases when there is no other available arena for resolving the issue.

The Tax Court's opinion in *Freije* aligns with the purpose of CDP. The intent behind CDP is to give taxpayers pre-deprivation review of proposed collection actions.¹⁹⁶ The Tax Court's refusal to consider the merits of an issue in a non-CDP period in *Weber*, though it appears not to permit pre-deprivation review, were justified because the taxpayer in that case had another remedy and other judicial review available through other procedures.¹⁹⁷ In *Weber*, the Tax Court suggested that the taxpayer could seek review via other statutorily granted procedures (i.e., a claim for refund on the allegedly overpaid trust fund recovery penalty).¹⁹⁸ In *Freije*, there was no other avenue available for the taxpayers to have their allegation considered that remittances should apply to the CDP year.¹⁹⁹

Finally, the Tax Court's exercise of jurisdiction in *Freije* has not opened the floodgates of litigation with respect to non-CDP years.²⁰⁰ The Tax Court

193. *Id.* at 28.

194. See *Robinette v. Comm'r*, 439 F.3d 455, 461 (8th Cir. 2006); *supra* Part II.A.3. See generally Cords, *How Much Process Is Due?*, *supra* note 29 (providing background on the CDP provisions and procedures).

195. See *Freije*, 125 T.C. at 27–28.

196. Cords, *How Much Process Is Due?*, *supra* note 29, at 52–53.

197. *Weber v. Comm'r*, 138 T.C. 348, 369–72 (2012).

198. *Id.* at 371.

199. See *Freije*, 125 T.C. at 26–37.

200. See, e.g., *Weber*, 138 T.C. at 369 (finding the petitioner extended *Freije* beyond its “breaking point”).

is traditionally mindful of the limited nature of its jurisdiction and has not sought to expand it.²⁰¹ As evidenced by the Tax Court's restraint in *Weber*, the Tax Court is not eager to expand its jurisdiction.²⁰² The Tax Court's flexible and functional approach to cases involving non-CDP year issues allows it to serve as the final arbiter when absolutely necessary but not to engage in every dispute.

B. Recommendations for Pre-litigation Resolution

Messy CDP cases persist. Clarification from Congress in the form of a statutory fix is not a reliable solution.²⁰³ The Tax Court does a commendable job of sorting out the cases in which it should extend its jurisdiction and those in which it should not.

The most efficient resolution of CDP cases is for them to be resolved prior to litigation. Professor Camp opined, "At bottom, it is simply not

201. *See id.* at 369–70 ("Most tax litigation is restricted to a specific taxable period at issue, and in a CDP hearing Appeals 'review[s] only a particular collection episode—a given notice of lien or notice of proposed levy.'" (quoting *Tucker v. Comm'r*, 135 T.C. 114, 164 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012))).

202. *See id.*

203. While Congress has the authority to expand the Tax Court's jurisdiction to resolve the jurisdiction dispute that arose in *Freije*, as a practical matter, a comprehensive statutory solution would be cumbersome and potentially unworkable. There are too many possible variations of facts involving issues from non-CDP years. A statutory fix that addresses all of the possible permutations would be cumbersome. Congress would have to specify the various issues a taxpayer would be permitted to raise from non-CDP years. For example, as spelled out in the case law, the statute would most likely have to provide for consideration of non-CDP years in a case where the taxpayer was requesting an examination of the application of payments (assuming the underlying liability was not properly at issue); versus an examination of the application of credits from a prior or subsequent year (only if the underlying liability is properly at issue); versus an entirely separate liability, such as a trust fund recovery penalty overpayment. On the other hand, if Congress wished to divest the Tax Court of jurisdiction in non-CDP years entirely, that would be simple.

Divesting the court of jurisdiction to resolve messy cases involving non-CDP years would go against the purpose of CDP, which is to grant non-frivolous taxpayers pre-deprivation judicial review of collection actions. *See supra* Part II.A.2.

Whether Congress will address this is an entirely different issue. There is some argument that the Tax Court's jurisdiction in CDP cases where a taxpayer raises the underlying liability is unconstitutional. *See Fahey, Tax Court's Jurisdiction, supra* note 54 (positing that the Tax Court's *de novo* review of a taxpayer's challenge to the underlying liability in CDP cases raise both due process and separation of powers concerns).

possible for CDP judicial review to either catch or correct the IRS's abuse of taxpayers."²⁰⁴ As Benjamin Franklin said, "an ounce of prevention is worth a pound of cure."²⁰⁵ A number of potential administrative solutions could prevent litigation of these messy cases. These are not novel or profound suggestions; to the contrary, they are intensely practical. These suggestions are politically unpopular at a time when Congress is more interested in decimating the budget of the IRS.²⁰⁶ The National Taxpayer Advocate predicts that with the reduction of customer-facing services by the IRS, as planned in the IRS's "Future State" initiative, there will be an increase in tax litigation because taxpayers will lose their ability to resolve their disputes with the IRS.²⁰⁷ As Judge Halpern said, "Recourse to the Tax Court is a high-cost alternative to resolving disputes that, in many cases, could more efficiently be resolved by telephonic or face-to-face contact within the agency."²⁰⁸ These comments and predictions are probably especially true for messy CDP cases.

1. *The IRS Should Resolve More CDP Cases*

The IRS took the position that *Freije* was wrongly decided, perhaps because the IRS feared floodgates of litigation,²⁰⁹ but most definitely because the IRS is concerned about the workload of its departments. In response to the IRS's position, history has not borne out the fear that CDP litigants would attempt to litigate in non-CDP years at every opportunity. There are other sufficient protections for frivolous CDP requests by way of court-imposed monetary sanctions.²¹⁰ The IRS ought to embrace *Freije* cases as opportunities to rectify past errors in a less costly manner.

In recent years, Congress has decreased the budget for the IRS Office

204. See Camp, *Failure of Adversarial Process*, *supra* note 56, at 89.

205. Letter from B Franklin to Samuel Johnson (Sept. 13, 1750), in *The Papers of Benjamin Franklin*, FRANKLINPAPERS.ORG, <http://franklinpapers.org/franklin/framedVolumes.jsp;jsessionid=8433D04B670A52689FCE32ADC7849A67> (last visited Feb. 9, 2017). Though technically this Part is about how the Tax Court can efficiently resolve questions about its jurisdiction, the suggestions contained are to prevent messy CDP cases from being litigated in the first instance.

206. See Forman & Mann, *supra* note 4, at 728.

207. NTA 2015 REPORT, *supra* note 1, at 3–4.

208. Halpern, *supra* note 2, at 1289.

209. See I.R.S. Notice CC-2011-021, *supra* note 120, at 3; *supra* note 130 and accompanying text.

210. I.R.C. § 6673 (2012).

of Appeals, and there are fewer Appeals Officers to resolve pending cases.²¹¹ The number of hearing officers with the Office of Appeals has declined from 924 in fiscal year 2013 to 705 in fiscal year 2016.²¹² A messy case like *Freije* may take longer to resolve; therefore, the IRS Office of Appeals needs sufficient and competent hearing officers to consider thoroughly such cases. Typically, in CDP cases, hearing officers heavily rely on transcripts of a taxpayer's account.²¹³ The transcripts contain information, using IRS codes, regarding correspondence between taxpayers and the IRS.²¹⁴ To build and analyze the facts of a CDP case, if not in all cases, the IRS Office of Appeals should develop the administrative record with copies of the actual underlying documents rather than rely on the transcript information alone. For example, in *Freije*, if the hearing officer had obtained copies of the canceled checks the taxpayer remitted, the hearing officer would have been more likely to see the errors the IRS made, and the IRS Office of Appeals could have corrected the errors prior to litigation.²¹⁵

This recommendation, though it would create a more efficient system for resolving cases, depends on Congress adequately funding the IRS so that the IRS can have sufficient staff to work the cases.

2. The Taxpayer Advocate Service Should Resolve More CDP Cases

Administratively, taxpayers could also benefit from general taxpayer service representatives with problem-solving skills. In the spirit of RRA 98, providing taxpayers with helpful taxpayer services—that have the capability to analyze messy cases involving multiple tax years—could go a long way toward resolving cases before litigation.²¹⁶ Unfortunately, the IRS appears to be moving away from providing taxpayer services in its “Future State.”²¹⁷

211. 1 NINA OLSON, TAXPAYER ADVOCATE SERV., IRS, Annual Report to Congress 2016, at 203–04 (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016ARC/ARC16_Volume1_MSP_14_Appeals.pdf. According to the National Taxpayer Advocate, the overall increasing caseload with fewer Appeals Officers to work the cases contributes to the increasing case load of cases pending before the U.S. Tax Court. *Id.* at 205.

212. *Id.* at 204.

213. See IRM 21.2.3 (Sept. 2, 2016), https://www.irs.gov/irm/part21/irm_21-002-003r.html (setting forth IRS policy on transcripts).

214. *Id.*

215. See *Freije v. Comm’r*, 125 T.C. 14, 17–19 (2005).

216. See *supra* Part II.A.2.

217. The IRS has set an initiative to move away from in-person and telephone services to a more automated and electronic system. See *IRS Future State*, IRS,

The National Taxpayer Advocate, Nina Olson, raised concerns that moving away from providing live support will actually increase compliance costs because “many taxpayer problems are not ‘cookie cutter.’”²¹⁸ Again, this solution requires Congress adequately to fund and support the National Taxpayer Advocate’s office to provide competent, quality taxpayer services.

V. CONCLUSION

Messy collection cases will continue to hamper our tax administration system. The IRS is too big and cumbersome to be perfect; there is no solution to ensure all taxpayers will have effective representation in their disputes. But questions about how the Tax Court and IRS resolve messy cases, particularly CDP cases involving non-CDP years, do not have to absorb as much of the resources as they have historically. The Tax Court can continue to apply a flexible approach to its jurisdiction, as it did in *Freije*, and the IRS can create administrative solutions to the problem.

<http://www.irs.gov/uac/newsroom/irs-future-state> (last visited Nov. 8, 2016).

218. NTA 2015 REPORT, *supra* note 1, at 4–5. The NTA recognizes that the messy cases are the difficult ones to solve. Olson argues the future state will be ineffective to resolve complex or messy cases because (1) many taxpayers do not use the Internet; (2) taxpayers may not feel comfortable resolving complex financial transactions over the internet; and (3) even assuming Internet use, a taxpayer may find that the tax issue or money at stake makes online resolution impractical or undesirable. *Id.* at 7–8.