20-1635

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEFA CASTILLO,
Petitioner-Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court
Docket No. 18336-19L (Foley, C.J.)

AMICUS BRIEF OF THE CENTER FOR TAXPAYER RIGHTS IN SUPPORT OF THE APPELLANT

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INTEREST OF THE AMICUS[1]

The Center for Taxpayer Rights ("the Center") was established in 2019 as a non-profit organization dedicated to furthering taxpayers' awareness of and access to taxpayer rights. The Center accomplishes its mission, in part, by educating the public and government officials about the role taxpayer rights plays in promoting compliance and trust in systems of

[1] Pursuant to FRAP 29(a)(4)(E), this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

taxation. The Executive Director of the Center is Nina E. Olson, who from 2001 through 2019, served as the IRS National Taxpayer Advocate, appointed under § 7803(c)(1)(B).[2] In that role, Ms. Olson submitted reports to Congress twice a year urging administrative and legislative improvements to taxpayer rights. She had also testified to Congress concerning the need for what became the "Collection Due Process" ("CDP") provisions, enacted in 1998.

Counsel for the Center is the Tax Clinic of the Legal Services Center of Harvard Law School ("the Clinic"), which was formed in 2015 to represent low-income taxpayers before the Internal Revenue Service and in tax matters before the courts. The Clinic regularly represents taxpayers in deficiency, CDP, and "innocent spouse" cases in the Tax Court and in the courts of appeals and has also filed many amicus briefs on its own.

The Center believes that the Tax Court has unduly narrowed its CDP jurisdiction in this and other cases.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

ARGUMENT

On December 11, 2018, the IRS sent a CDP notice of determination to Ms. Castillo at her last known address. However, she did not receive that notice prior to filing a Tax Court petition 10 months later. She first saw a copy of the notice as an attachment to the IRS answer in the case, filed on December 2, 2019. The only reason Ms. Castillo knew to petition the Tax Court before seeing the notice was because on September 18, 2019, her counsel saw an entry on an IRS transcript indicating that the IRS had previously issued such a notice. Ms. Castillo filed a Tax Court petition less than 30 days thereafter, on October 8, 2019.

Section 6330(d)(1) provides a 30-day period in which to file a Tax Court petition in response to a CDP notice of determination. In *Guralnik v. Commissioner*, 146 T.C. 230 (2016), the Tax Court had reaffirmed its view that the filing deadline is jurisdictional and not subject to equitable tolling – despite an amicus brief filed by the Clinic arguing that, in light of recent non-tax Supreme Court case law, the deadline was no longer jurisdictional and was subject to equitable tolling.

Finding Ms. Castillo's petition untimely, the Tax Court, following *Guralnik*, dismissed her case for lack of jurisdiction. The Tax Court order dismissing this case also cited its opinion in *Weber v. Commissioner*, 122

T.C. 258, 261-262 (2004), wherein the Tax Court imported from its deficiency jurisdiction precedent the rule that a "ticket" to the Tax Court, if mailed to the taxpayer's last known address, commences the filing period, even if the taxpayer does not receive that ticket during the filing period.

In her objection below to the IRS' motion to dismiss (filed before the Tax Court entered its dismissal order), Ms. Castillo argued that the Tax Court's holding in *Guralnik* was wrong – i.e., that the petition filing deadline is not jurisdictional and is subject to equitable tolling (and should be tolled in this case). Ms. Castillo also argued that *Weber* was incorrectly decided in that it improperly imported into CDP the deficiency jurisdiction precedent. The Tax Court's order dismissing Ms. Castillo's case did not respond to either of these arguments.

Kaplan v. Commissioner, 552 Fed. Appx. 77 (2d Cir. 2014), involved the same fact pattern as Ms. Castillo's case. Ms. Kaplan pursued her case pro se, and in her appeal to this Court she did not argue (1) that the filing deadline is not jurisdictional, (2) that equitable tolling could apply to her case, or (3) that *Weber* was wrongly decided. Rather, she argued that the facts of her case should allow this Court to find that she had timely filed and that Due Process required that result. In its unpublished opinion in *Kaplan*, this Court did not address the Due Process argument, but simply relied on

the *Weber* holding to find that Ms. Kaplan had not timely filed. It sustained the dismissal of her case for lack of jurisdiction, even though she had not received the CDP notice of determination during the 30-day filing period. The *Kaplan* opinion contains no discussion of recent Supreme Court case law that may suggest that the filing deadline is not jurisdictional and is subject to equitable tolling. The opinion merely cited *Weber*, as well as opinions of this Court holding that non-receipt of a notice of deficiency sent to a last known address would not excuse late filing. *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985); *Follum v. Commissioner*, 128 F.3d 118, 120 (2d Cir. 1997).

The Center agrees with Ms. Castillo that the filing deadline is not jurisdictional and is subject to equitable tolling under recent Supreme Court case law. But, the Center anticipates that the appellant will adequately address that argument in her brief. Accordingly, this amicus brief does not address that argument.

However, the Center desires to address more fully the argument made by Ms. Castillo both here and below that, based on the structure of CDP and its legislative history, *Weber* and *Kaplan* were wrongly decided.[3] This

[3] The fact pattern involved in both *Weber* and *Kaplan* – nonreceipt of the CDP notice of determination during the 30-day filing period – is fairly common in the case of overseas taxpayers. *See, e.g.*, an order dismissing the

statutory and legislative history argument was never presented in *Kaplan* and was apparently never presented in *Weber* – both of which were pro se cases. After a diligent search, the Center has not located a single other appellate opinion involving a situation like *Kaplan,* where a notice of determination was not received during the 30-day filing period.[4]

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petition where the taxpayer, who lived in Kenya, stated that he did not even receive the notice of determination until after the 30-day period expired. *Atuke v. Commissioner*, Tax Court Docket No. 31680-15SL (order dated Apr. 15, 2016).

[4] To demonstrate the completeness of its search, the Center notes the following opinions (none discussing recent Supreme Court case law) holding that the section 6330(d)(1) filing deadline is jurisdictional – none of which involves a notice of determination not received in the 30-day period. *Rozday v. Commissioner,* 703 Fed. Appx. 138 (3d Cir. 2017); *Hauptman v. Commissioner,* 831 F.3d 950 (8th Cir. 2016); *Haddix v. Commissioner*, 665 Fed. Appx. 378 (5th Cir. 2016); *Gray v. Commissioner*, 723 F.3d 790 (7th Cir. 2013); *Kaplan v. Commissioner*, 552 Fed. Appx. 77 (2d Cir. 2014); *Thompson v. Commissioner*, 486 Fed. Appx. 682 (9th Cir. 2012); *Tschida v. Commissioner,* 57 Fed. Appx. 715 (8th Cir. 2003). *Duggan v. Commissioner,* 879 F.3d 1029 (9th Cir. 2018), is the only opinion to hold that, even under recent Supreme Court case law, the filing deadline is jurisdictional, but *Duggan* involves a notice of determination that was received in the 30-day period. There have also been a number of Circuit Court opinions where the courts have stated, in dicta, that the timely filing of a CDP petition is a jurisdictional requirement, but where the Tax Court already lacked jurisdiction because no notice of determination had been issued. *See Haddix v. Commissioner*, 2019 U.S. App. LEXIS 22313 (6th Cir. 2019); *Harvey v. Commissioner,* 738 Fed. Appx. 486 (9th Cir. 2018); *Herrera v. Commissioner*, 670 Fed. Appx. 943 (9th Cir. 2016); *Trivedi v. Commissioner*, 525 Fed. Appx. 587 (9th Cir. 2013); *Hartmann v. Commissioner,* 417 Fed. Appx. 191 (3d Cir. 2011); *Springer v. Commissioner*, 416 Fed. Appx. 681, 683 & n.1 (10th Cir. 2011); *Boyd v. Commissioner*, 451 F.3d 8, 10-11 & n.1 (1st Cir. 2006); *Mosby v. United States*, 107 Fed. Appx. 778 (9th Cir. 2004); *Rudd v. Commissioner*, 91 Fed.

Accordingly, this case presents the first opportunity for a court of appeals to address this structure/legislative history argument.

This brief first sets out relevant parallel statutory and judicial background in two non-CDP Tax Court jurisdictions of which Congress was aware when Congress created CDP. The brief then contrasts that statutory background with language in CDP, which uses the words "last known address" in one place, but notably not in § 6330(d)(1). The brief then quotes from the Conference Committee report for CDP, which suggests Congress' concern that taxpayers not timely receiving certain IRS notices (i.e., notices of deficiency and notices of intention to levy) still be given, through CDP, prepayment fora (both administrative and judicial) to contest those notices. The brief argues that, consistent with the structure and legislative history of CDP, § 6330(d)(1) should be interpreted to allow the Tax Court to hear cases where the taxpayer did not actually receive the notice of determination during the 30-day period. The brief concludes with a section on why the interpretation sought herein would not present significant new administrative burdens for the IRS.

Appx. 699 (1st Cir. 2004). Only one of these opinions even mentions any relevant current Supreme Court opinions: In *Springer* at 683 n.1, the court mentioned *Henderson v. Shinseki*, 562 U.S. 428 (2011), and *Bowles v. Russell*, 551 U.S. 205 (2007), in a footnote.

I. Congress Used the Words "Last Known Address" in Creating the Tax Court's Deficiency and Innocent Spouse Jurisdictions, But Did Not Use Those Words in Creating the Tax Court's CDP Jurisdiction.

The IRS collects taxes that have been assessed. Section 6201(a)(1) authorizes the IRS to assess taxes shown by taxpayers on returns. Sometimes taxpayers understate their correct taxes when they file returns. Such understatements are known as "deficiencies", currently defined at § 6211(a). Prior to 1924, taxpayers could contest deficiencies determined by the IRS in court only by paying the deficiencies and suing for a refund in a district court or the Court of Claims. Finding this system burdensome for the recently-enacted income and estate taxes, in 1924, Congress created the Board of Tax Appeals in order to give taxpayers a prepayment forum to contest the IRS' proposed assessment of deficiencies in those taxes. *Flora v. United States*, 362 U.S. 145, 158-163 (1960). Under the system created in 1924, the IRS must have issued a "notice of deficiency" prior to the assessment of any deficiency, and the notice of deficiency became the taxpayer's ticket to appeal to the Board of Tax Appeals. The original statute directed the IRS to send the notice of deficiency by registered mail,[5] but did

[5] As a result of an amendment to § 6212(a) made by the Technical Amendments Act of 1958, Pub. L. 85-866, § 89(b), Congress later also authorized the IRS to mail notices of deficiency by certified mail.

not specify the address to which the notice should be sent. Revenue Act of 1924, ch. 234, §§ 274(a) (for income tax) and 308(a) (for estate tax). This omission was remedied in 1926, with the adoption of language that is currently in § 6212(b)(1), providing that a "notice . . . of deficiency . . . if mailed to the taxpayer at his last known address, shall be sufficient . . . ." Revenue Act of 1926, Pub. L. No. 20, ch. 27, § 281(d); *Commissioner v. Rosenheim*, 132 F.2d 677, 679-680 (3d Cir. 1942). But, Congress has never defined what is the "last known address". The courts have filled that gap and held (at least in recent years) that the "last known address" is the address shown on the most recently-filed tax return, unless the taxpayer has given clear and concise notification to the IRS to use a different address. *Follum v. Commissioner*, *supra*, 128 F.3d at 119; *Abeles v. Commissioner*, 91 T.C. 1019, 1035 (1988).

The Tax Court is the successor to the Board of Tax Appeals. Currently, the filing deadline for Tax Court deficiency jurisdiction cases is at § 6213(a), which usually provides for a 90-day period in which to file a Tax Court petition. A notice of deficiency also does two other things beyond merely serving as a possible ticket to the Tax Court: (1) § 6213(a) also bars the IRS from assessing or collecting (by levy or suit) the deficiency that is the subject of the notice until the 90 days expires or, if a Tax Court suit is

brought, until after the Tax Court suit is final; and (2) § 6503(a)(1) tolls the statutory period of limitations on assessment at § 6501 during the time that the IRS is barred from assessing and collecting the deficiency.

The IRS sends almost all notices of deficiency to taxpayers' last known addresses, allowing taxpayers time to petition the Tax Court under the § 6213(a) deadline. But, what if the usual doesn't happen? The courts have filled in the consequences for deficiency notices either not sent to the last known address or not received in time to petition.

With regard to Tax Court jurisdiction, a notice of deficiency not sent to the taxpayer's last known address becomes an invalid ticket to the court – unless the notice is actually received during the 90-day period in sufficient time to petition the Tax Court. *Clodfelter v. Commissioner*, 527 F.2d 754 (9th Cir. 1975). Because sending a notice of deficiency to the last known address is "sufficient", this is not the exclusive way such a notice can be validly sent.

A notice of deficiency sent to the taxpayer's last known address, but not received during the 90-day period, is a valid ticket to the Tax Court and gives permission to the IRS to assess and collect after no timely Tax Court petition has been filed. *Tadros v. Commissioner*, *supra*; *Follum v. Commissioner*, *supra*. Thus, to further contest the underlying liability in the

notice of deficiency, a late-petitioning taxpayer has to pay the deficiency in full, file a refund claim, and, if the claim is not allowed, sue for a refund in district court or the Court of Federal Claims. *See McCormick v. Commissioner*, 55 T.C. 138, 142 n.5 (1970); *Flora v. United States*, *supra* (full payment rule).

The Center here takes no issue with this well-established law. Indeed, one must understand this well-established law to understand what Congress sought to do in CDP – liberalize at least one consequence of the above holdings, as will be discussed below.

In 1998, Congress enacted two new jurisdictions of the Tax Court, which have become (behind its deficiency jurisdiction), the second- and third-most used jurisdictions: CDP and "stand-alone innocent spouse" cases. *See* Harold Dubroff and Brant Hellwig, *The United States Tax Court: An Historical Analysis* (2d ed. 2014), at p. 909, Appendix B (for 2013, there were 30,046 deficiency petitions, 1,486 CDP petitions, and 342 stand-alone innocent spouse petitions).

Prior to 1998, a spouse seeking to be relieved from joint and several liability on an income tax return could only, in Tax Court, seek such relief as an affirmative defense in a deficiency proceeding. In 1998, by § 3201 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L.

105-206, Congress expanded both the substantive and procedural avenues for innocent spouse relief by replacing an old innocent spouse provision with § 6015. Section 6015(f) expanded substantive relief beyond deficiencies (i.e., understatements of tax) to include underpayments of tax that had been reported on the joint return. In part because innocent spouse relief from mere underpayments could not be raised in deficiency proceedings, Congress created, at § 6015(e)(1)(A), a new Tax Court jurisdiction that stood alone from the court's deficiency jurisdiction (hence, its nickname). Before bringing such a stand-alone proceeding, the taxpayer would have to elect or request relief from the IRS (done today on Form 8857). A stand-alone Tax Court action today may be brought six months after such an election or request is filed, but in no case may be brought more than 90 days after "the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual". § 6015(e)(1)(A)(i)(I). Note that under this provision, unlike in deficiency cases, use of the last known address is mandatory (not merely elective) for a notice of determination to cut off the taxpayer's right to petition the Tax Court. This shows Congress beginning to be more concerned with taxpayers' actual receipt of important IRS notices.

As in the case of the Tax Court's deficiency jurisdiction, Congress enacted provisions in § 6015: (1) prohibiting collection while consideration of the Form 8857 is administratively pending and while any ensuing Tax Court case is pending and (2) tolling the collections statute of limitations during the pendency of such administrative consideration and suit. § 6015(e)(1)(B)(i) and (e)(2)(A).

Section 3401 of the same act, the Internal Revenue Service Restructuring and Reform Act of 1998, created CDP.

Before Congress enacted CDP, there existed little administrative review and virtually no judicial review of collection actions. Congress heard what it considered collection horror stories, so decided to insert into the Internal Revenue Code what it called "Collection Due Process" prepayment administrative and judicial review provisions for certain important collection actions.

Congress designed CDP as a two-step process, both to prevent IRS collection abuses and to allow for prepayment challenges to the underlying liability. First, the IRS issues either a notice of federal tax lien ("NFTL") or a notice of intention to levy ("NOIL"), and the taxpayer has 30 days to request a hearing on the notice before the IRS Independent Office of Appeals. Second, at the end of such hearing, the Office of Appeals issues a

notice of determination, and an unhappy taxpayer may petition the Tax Court in a different 30-day period to review that notice.

Unlike in the case of the Tax Court's deficiency jurisdiction, where Congress was not especially concerned with actual receipt of IRS notices, Congress, in CDP, demonstrated a more serious concern that taxpayers not be deprived of prepayment review rights because of nonreceipt of IRS notices.

The House Bill (H.R. 2767 (105th Cong.)) that eventually became the Internal Revenue Service Restructuring and Reform Act of 1998 contained no provisions analogous to CDP. *See* H.R. Rep. (Conf.) 105-599 at 264. Rather, the Senate Finance Committee amended H.R. 2767 on the Senate floor to add the precursor of the CDP provisions. The text of the Finance Committee amendment relating to CDP, § 3401(a) and (b), is at 144 Cong. Rec. S4163 et seq.

Notably, in the initial Senate Finance version of CDP, proposed § 6330(c)(2)(A) also allowed taxpayers at a CDP hearing to make unlimited prepayment challenges to the underlying liability proposed to be collected. Proposed § 6330(c)(2)(A) would have allowed "challenges to the underlying liability as to existence or amount" – a provision that would have allowed taxpayers to skip filing deficiency petitions in the Tax Court and merely to

await receiving an NFTL or NOIL before petitioning the Tax Court through CDP for a prepayment judicial challenge to the deficiency.

In drafting its version of CDP, the Finance Committee also expressed more concern about the issue of actual notice to the taxpayer than Congress and the courts had given under § 6212(b)(1). Therefore, in both the proposed § 6320 (for NFTLs) and § 6330 (for NOILs), the Finance Committee included a paragraph at subsection (a)(2) providing:

> (2) Time and method for notice.--The notice required under paragraph (1) shall be--
>
> (A) given in person,
>
> (B) left at the dwelling or usual place of business of such person, or
>
> (C) sent by certified or registered mail to such person's last known address . . . .

Thus, unlike in the case of notices of deficiency, for the initial 30-day period in the CDP process, Congress required use of the last known address or another mode of service even more likely to reach the taxpayer.

The Conference Committee generally adopted the Senate legislation on CDP, but made significant changes. As regards receipt of notices important to the CDP process:

First, the Conference Committee made a change for NOILs (but not NFTLs) requiring that their mailing be "return receipt requested". §

6330(a)(2). The only purpose of a return receipt card is to prove that the addressee actually received an envelope. To give meaning to this amendment, therefore, Congress must have intended something different in the case of NOILs that were not received in sufficient time to request a CDP hearing. What Congress intended will be discussed when the Conference Committee Report is quoted in the next section of this brief.

Second, the Conference Committee cut back on the possibility of unlimited challenges to the existence or amount of underlying tax liability by enacting a new § 6330(c)(2)(B) providing CDP challenges to the underlying liability only "if the person did not *receive* any statutory notice of deficiency for such tax liability or otherwise have an opportunity to dispute such tax liability." (Emphasis added.) Thus, the Conference Committee indicated that, for purposes of CDP hearings, it was concerned with actual receipt of notices of deficiency, not merely constructive receipt by mailing of notices of deficiency to a taxpayer's last known address. While the mere mailing of a notice of deficiency to the taxpayer's last known address – in the absence of a timely-filed Tax Court deficiency petition – would allow assessment and collection based on the notice to be valid, nonreceipt of such notice would give rise to the taxpayer's right to challenge the deficiency set forth in the notice during a prepayment CDP hearing and ensuing Tax Court CDP

suit. In effect, this amendment bifurcated the consequences of mailing a notice of deficiency to the taxpayer's last known address in situations where the notice was not received. In such situations, the assessment and collection could be based on the notice, but the Tax Court would have jurisdiction to consider the underlying liability in a later hearing during the CDP process.

II. Interpreting § 6330(d)(1) to Allow for Tax Court Jurisdiction in this Case Is More Consistent with the Statutory Structure and Legislative History of CDP.

The statutory structure and legislative history of CDP (as set out in the Conference Committee Report) strongly suggests that the better interpretation of § 6330(d)(1) provides for Tax Court jurisdiction in a case where a taxpayer does not receive the CDP notice of determination during the 30-day period set forth in that subparagraph, even though mailed to the taxpayer's last known address.

Unlike in the cases involving notices of deficiency, innocent spouse notices of determination, and initial CDP notices (i.e., NFTLs and NOILs), in drafting the Tax Court's jurisdiction under § 6330(d)(1), Congress did not mention the use of a last known address with respect to notice of the Appeals Officer's determination. The current version of that subparagraph provides simply: "PETITION FOR REVIEW BY TAX COURT.—The

person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)."[6] Courts, in performing judicial interpretation, normally accord meaning to differences in statutory provisions enacted at the same time when particular conditions are expressed in one place, but omitted in another place. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)."). Of course, unlike §§ 6320(a)(2) and 6330(a)(2) (pertaining to the notices that give rise to the CDP hearing), because § 6330(d)(1) is so short and lacks instructions concerning how the IRS' CDP determination is to be communicated to a taxpayer, the provision presents an ambiguous statute, requiring the use of tools of judicial interpretation, including consulting Committee Reports. *See Borenstein v. Commissioner*,

[6] The above-quoted language is from the current version of § 6330(d)(1) – the version that applies to the notice of determination issued in this case. Subparagraph (d)(1) underwent significant amendments in 2000, 2006, and 2015, but the earlier versions of the subparagraph were not materially different in that they made no mention of notices of determination or how they should be sent.

919 F.3d 746, 751 (2d Cir. 2019) (relying on Conference Committee report to interpret, in a taxpayer-favorable way, ambiguous language in remedial legislation involving the Tax Court's overpayment jurisdiction in deficiency cases at § 6512(b)(3) (flush language)); *Chai v. Commissioner*, 851 F.3d 190, 219 (2d Cir. 2017) (interpreting other ambiguous language from 1998 Tax Act about penalty approval in § 6751(b)(1) and penalty burden in § 7491(c); "It is particularly useful to consider reliable legislative history in cases like this where the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant. The most enlightening source of legislative history is generally a committee report, particularly a conference committee report, which we have identified as among the most authoritative and reliable materials of legislative history."; cleaned up).

Significant problems with *Kaplan* and *Weber* are (1) their importation of notice of deficiency precedent into CDP ipse dixit, (2) their failure to discuss this interpretive rule, and (3) their failure to use legislative history and the structure of the CDP statute in making their interpretations.

Turning to the legislative history of CDP, the Conference Committee report describing CDP hearings after NOILs reads, in relevant part:

> Subject to the exceptions noted below, no levy could occur within the 30-day period beginning with the mailing of the "Notice of Intent to Levy." . . . . If a hearing is requested within the 30-day period, no levy could occur until a determination is rendered . . . . [T]he validity of the tax liability can be challenged only if the taxpayer did not *actually receive* the statutory notice of deficiency or has not otherwise had the opportunity to dispute the liability.
>
> If a return receipt is not returned, the Secretary may proceed to levy on the taxpayer's property or rights to property 30 days after the Notice of Intent to Levy was mailed. The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice. *If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer.*

H.R. Rep. (Conf.) 105-599 at 265-266 (Emphasis added).

In the first sentence of the second paragraph of the Conference Committee report quoted above, Congress addressed the case where no return receipt is received by the IRS. The sentence reads: "If a return receipt is not returned, the Secretary may proceed to levy on the taxpayer's property or rights to property." Although not stated in that sentence, implicit in it is that it envisions a situation where the NOIL (as required by § 6330(a)(2)(C)) was mailed to the taxpayer's last known address by certified or registered mail, yet the taxpayer did not request a CDP hearing within 30 days after the date of mailing of the notice and no return receipt was received by the IRS within the 30 days. The Committee report sentence suggests an NOIL

mailed to the last known address, whether or not received, is "valid" for purposes of beginning levy, if no CDP hearing is requested in the 30-day period after the date the NOIL is mailed. But, the sentence does not go on to specify what other consequences ensue from such a "valid" NOIL when it is not received within the 30-day period.

The second and third sentences of the second paragraph in the above Conference Committee report quotation are the origin of the so-called "equivalent hearing" in CDP, discussed in detail at 26 C.F.R. § 301.6330-1(i). The IRS gives equivalent hearings to taxpayers who request CDP hearings beyond the 30-day period but within a year after the NOIL or NFTL is issued. These two quoted sentences are also clearly addressed to an NOIL that is properly mailed to the taxpayer's last known address, since only a properly-mailed NOIL can give rise even to an equivalent hearing.

The last sentence of the second paragraph in the above Conference Committee report quoted in this part of the brief states: "*If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer*." (Emphasis added.) This sentence needs some unpacking to be understood.

First, this sentence shows Congress being deeply concerned with the situation of an NOIL not being received and the consequences, as a result thereof, on existing levies begun because no CDP request was mailed to the IRS within 30 days after the issuance of the NOIL.

Second, although, the sentence begins with the phrase, "[i]f the taxpayer did not receive the required notice [of intention to levy]", there can be little doubt that Congress also intended the phrase to encompass the situation of a taxpayer who did not actually receive the NOIL within the 30-day period in which the taxpayer could request a CDP hearing, but who received the original or a copy later. The latter part of the sentence assumes that levying against the taxpayer has begun and also implicitly assumes that a taxpayer could request a hearing after not receiving the NOIL in the 30-day period after its mailing. Where the taxpayer has never received an NOIL, how would the taxpayer know what was contained within the NOIL?

What consequences did Congress intended for a person covered by the initial phrase of the sentence? "[C]ollection shall be suspended" and "a hearing [shall be] provided to the taxpayer."

For collection to be "suspended", the NOIL must have been mailed to the taxpayer at the taxpayer's last known address. If the NOIL was not mailed to the taxpayer's last known address, the NOIL would not be valid

for any purpose and could not be the foundation of any levying or any CDP or equivalent hearing. Levying that relied on an NOIL not mailed to the taxpayer's last known address would be procedurally invalid ab initio and any proceeds of any such levy would have to be returned to the taxpayer. The sentence speaks, however, of "suspend[ing]" levying – not invalidating all previous levying and returning the proceeds thereof. Combining the first sentence of this Committee report paragraph (which authorized the beginning of levying when the return receipt was not returned) and the words "collection shall be suspended", the Committee report indicates that for people covered by this last sentence (i.e., those who did not timely receive the NOIL), the otherwise valid levying may no longer continue once the IRS determines that the taxpayer did not timely receive the NOIL. Thus, we know that the last sentence of the paragraph concerns a person to whom an NOIL was sent at the person's last known address.

Next, what kind of a hearing should be given to a person covered by this last sentence? This person should receive a real CDP hearing, not an equivalent hearing, since the two immediately-preceding sentences in the Committee report state: "The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion

of a hearing that is not requested within 30 days of the mailing of the Notice." That is, *there is no suspension of levying during an equivalent hearing*. Yet the very next sentence of the paragraph states that "collection shall be suspended and a hearing provided to the taxpayer" in the case of nonreceipt of an NOIL where a hearing is to be provided.

If one assumes that the Congress did not intend that a person who did not receive the NOIL in the first 30 days should have forever to request a CDP hearing, but should be put under some time pressure or otherwise be afforded an equivalent hearing, then it seems logical that the taxpayer should make a request for a CDP hearing within 30 days after the taxpayer's actually receiving the NOIL or learning of the issuance of an NOIL.

The argument presented above concerning an NOIL mailed to a taxpayer's last known address, but not received in the 30-day period in which to file a Form 12153, was belatedly presented to the Tax Court in a motion to vacate in a case named *Berkun v. Commissioner*, Docket No. 18437-15L. An order in *Berkun*, dated April 15, 2016 (available on the Tax Court's website), had dismissed the case for lack of jurisdiction after having concluded that the IRS had mailed the NOIL to the taxpayer's last known address, but the taxpayer had not filed a Form 12153 within 30 days after the mailing. After the dismissal, in a motion to vacate, the taxpayer raised the

argument that, even if the NOIL had been mailed to his last known address, he could file a timely Form 12153 within 30 days after he first actually received a copy of the NOIL two months later from a Revenue Officer. In the memorandum of law accompanying that motion, the taxpayer raised the language of § 6330 and the legislative history demonstrating Congress' concern in CDP that taxpayers not lose important prepayment contest rights because of non-receipt of IRS notices. In an order dated December 16, 2016 (also available on the website), the Tax Court denied the motion to vacate. Berkun appealed to the Eleventh Circuit, which ruled that this argument was one of two presented too late to be considered. Yet, the appellate court was very troubled by both arguments (the other being a Due Process argument). The Eleventh Circuit declined to rule on either argument, yet wrote a published opinion that concluded as follows:

> We do not reach the due process or legislative history arguments because Mr. Berkun did not properly raise them in the tax court. Given the lack of any substantive ruling on our part, this may seem like an opinion "about nothing." *Cf. Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992). And maybe it is. But we have chosen to publish it because the issues that Mr. Berkun attempts to raise on appeal may deserve attention from the bench and bar.

Berkun v. Commissioner, 890 F.3d 1260, 1265 (11th Cir. 2018). That attention should be given in this case.

Although the instant case involves a § 6330(d)(1) notice of

determination, and not the NOIL at issue in *Berkun*, nevertheless, given Congress' terse jurisdictional grant in § 6330(d)(1), it would be more appropriate for this Court to interpret § 6330(d)(1) using the Congressional concern about taxpayers not losing prepayment fora simply because they did not actually receive an IRS CDP notice rather than the courts' deficiency jurisdiction "last known address" jurisprudence.

Finally, CDP is a remedial process, so one would normally expect the courts to interpret ambiguities in its language in taxpayer-friendly ways. *See Borenstein v. Commissioner, supra* at 752 ("Our conclusion is supported by 'the longstanding canon of construction that where "the words [of a tax statute] are doubtful, the doubt must be resolved against the government and in favor of the taxpayer,"' a principle of which 'we are particularly mindful.' *Exxon Mobil Corp. & Affiliated Cos. v. Comm'r of Internal Revenue*, 689 F.3d 191, 199-200 (2d Cir. 2012) (quoting *United States v. Merriam*, 263 U.S. 179, 188 (1923)"). This interpretive principle should guide this Court in deciding the issue discussed in this brief.

III. There Would Be No Significant Administrative Problems if this Court Were to Rule that the Tax Court Had Jurisdiction Under These Circumstances.

The Clinic anticipates that the government will argue that there could be severe administrative problems if the Tax Court is held to have

jurisdiction in a CDP case that was filed many months late because the taxpayer had not received the notice of determination in the 30-day petition filing period. As in the case of the Tax Court's deficiency and innocent spouse jurisdictions, Congress in CDP enacted provisions precluding the IRS from levying during the CDP administrative and judicial process and tolling the § 6502 collections statutory period of limitations during the time the IRS is precluded from levying. § 6330(e)(1). The Center expects the government to argue that (1) these provisions could not operate properly because IRS computers are programmed to assume that the prohibition on collection by levy is lifted and the collections statutory period of limitations begins running again when the taxpayer does not file a Tax Court petition within 30 days after the notice of determination and (2) taxpayers would be afforded an unlimited time in which to bring suits precluding collection during those suits.

There is no merit to the government's concerns.

First, the Center is not calling for a taxpayer to have unlimited time to file a Tax Court petition after the taxpayer did not receive the notice of determination during the 30-day period. The courts can establish a rule that, when either the taxpayer first learns of the notice of determination or first sees a copy of it, the 30-day period to file a Tax Court petition commences.

(The Center is not more definite about how this rule should be phrased because, in either case, Ms. Castillo filed her petition before the expiration of 30 days after she became aware of the notice of determination or saw a copy.)

Second, there already exist a number of statutory extensions to the 30-day period with which the IRS computers and personnel have to deal. The IRS is not aware of such statutory extensions until a taxpayer files after the 30 days has expired and specifically seeks one of those extensions. At that point, if the Tax Court finds the statutory extension valid, the IRS manually inputs a stop to further levies and alters the calculation of the collections statute of limitations to add to it the entire time between the mailing of the notice of determination and the filing of the Tax Court petition.

Under § 7502, if a taxpayer sends a CDP petition by certified mail on or before the 30th day and the date of certification by the USPS is the same date, even if the envelope arrives at the Tax Court a year later, the petition would be deemed timely under 26 C.F.R. §§ 301.7502-1(a), (b)(1)(i)(3), and (c)(2). Section 7508(a) suspends filing periods with the IRS and the courts when, for example, a soldier serves in a designated combat zone (or is hospitalized because of that service). Section 7508A(a) allows the IRS to specify a period of up to one year that may be disregarded for filings with

the IRS and the courts by taxpayers affected by Presidentially-declared disasters, terroristic acts, and military action. Rev. Proc. 2018-58, 2018-50 I.R.B. 990, §14.01(3) specifically applies these filing extensions to the deadline in § 6330(d)(1). *Accord* 26 C.F.R. § 301.7508A-1(c)(1)(iv).

In her 18 years as National Taxpayer Advocate, Ms. Olson's staff was alerted to thousands of instances where, say, a taxpayer mailed her deficiency petition near the 90th day, and so it arrived up to a week later, but was timely filed under § 7502, yet the IRS, in ignorance of the filing, had assessed the deficiency shortly after the 90-day period expired and started sending collection notices to the taxpayer. In such cases, the matter was generally fixed by pointing out to the IRS attorney in the case that a timely filing had occurred. In these cases, the IRS attorney routinely instructed other IRS employees to put a hold on further collection notices and to abate the "premature assessment". See, e.g., *Fleming v. Commissioner*, T.C. Memo. 2017-120 at *2-*3 (deficiency case).

If the IRS can already deal with the premature assessment and collection problems in deficiency cases where the IRS did not realize there was a valid statutory extension of the Tax Court filing period because of § 7502, 7508(a), or 7508A(a), surely, it can deal with the premature collection problem that would occur each year in the very few CDP cases where a

judicial extension to the period is occasioned by either following the rule proposed here for petitions in cases of late-received notices of determination or where the court has found the filing deadline subject to equitable tolling.

Moreover, the Conference Committee Report language quoted above has called for the suspension of levying (and, by inference, the collections statute of limitations) when an NOIL is not received in the first CDP 30-day period and a CDP hearing is requested later. There is no reason why a similar rule should not be adopted when a notice of determination is not received in the second CDP 30-day period under § 6330(d)(1) and a Tax Court petition is filed later.[7]

[7] This Court should leave to the Tax Court in the first instance consideration about what to do if any amounts have been levied during the period in which levy was precluded. Section 6330(e)(1) gives the Tax Court injunctive power to enforce the prohibition on levy and presumably order a refund.

CONCLUSION

This Court should reverse the Tax Court and hold that, in the circumstances of this case, the Tax Court had jurisdiction to hear Ms. Castillo's CDP suit.

Respectfully submitted,

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Dated: June 9, 2020

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This is to certify that a copy of this amicus brief was served on counsel for the appellant and appellee through filing the same with the CM/ECF system on June 9, 2020. All counsel in the case are registered with the CM/ECF system.

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