No. 16-1279

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OUR COUNTRY HOME ENTERPRISES, INC.,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM THE FINAL DECISION OF
THE UNITED STATES TAX COURT
(No. 7688-14; SPECIAL TRIAL JUDGE LEWIS R. CARLUZZO)

BRIEF FOR THE APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Commissioner respectfully inform the Court that they believe that oral argument would be helpful in this case, because this case involves interpretation of an ambiguous provision of the Internal Revenue Code and a challenge to a Treasury regulation, as well as a jurisdictional argument argued for the first time on appeal.

GLOSSARY

Abbreviation	Definition
Appeals	Internal Revenue Service Office of Appeals
CDP	Collection due process
Commissioner	Appellee Commissioner of Internal Revenue
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Our Country Home	Appellant Our Country Home Enterprises, Inc.
Palminteri	Appeals Officer Lisa Palminteri
Perales	Appeals Officer Inez R. Perales
Reform Act	Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998)

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OUR COUNTRY HOME ENTERPRISES, INC.,

Petitioner-Appellant,

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ON APPEAL FROM THE FINAL DECISION OF
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(No. 7688-14; SPECIAL TRIAL JUDGE LEWIS R. CARLUZZO)

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The jurisdictional statement contained in appellant's brief is incorrect and incomplete.

On February 27, 2014, the Internal Revenue Service ("IRS") Office of Appeals ("Appeals") issued to Our Country Home Enterprises, Inc. ("Our Country Home"), a notice of determination, sustaining collection by levy of an unpaid tax penalty assessed against Our Country Home for tax year 2007 by the Commissioner of Internal Revenue

("Commissioner"). (JA7-11.)[1] On March 31, 2014, Our Country Home timely challenged the notice of determination by filing a petition with the Tax Court. (JA5-12.)[2] I.R.C. § 6330(d)(1). The Tax Court had jurisdiction pursuant to I.R.C. §§ 6330(d)(1) and 7442.

On June 16, 2015, the Tax Court issued an order and decision sustaining the notice of determination. (JA157-59.) On August 7, 2015, Our Country Home filed timely motions to vacate the order and decision pursuant to Tax Ct. R. 162 and for reconsideration pursuant to Tax Ct. R. 161. (JA160-72.)[3] The Tax Court denied the motions to vacate and for reconsideration on November 4, 2015. (JA215-16.) Our Country

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[1] "JA" refers to the joint appendix. "Br." refers to Our Country Home's opening brief. "Doc." refers to the documents as numbered by the clerk of the Tax Court in docket no. 7688-14. "SA" refers to the supplemental appendix filed by the Commissioner.

[2] Under Tax Ct. R. 22, a document is timely filed if it satisfied the timely mailing rules of I.R.C. § 7502. Under I.R.C. § 7502(a)(1) and (c) and Treas. Reg. § 301.7502-1(a) and (c), a document is timely filed if it is properly addressed and timely mailed by first-class mail, certified mail, or an equivalent private delivery service. Timeliness for both first-class mail and certified mail is determined by reference to the postmark, either on the item's envelope or on a certified-mail receipt. Treas. Reg. § 301.7502-1(c).

[3] The Tax Court extended the time to file the motion to vacate to August 7, 2015. (*See* Doc. 35.) The motions were filed by first-class mail on August 7, 2015. (JA165.)

Home filed a second motion for reconsideration on December 4, 2015. (JA217-33.) The Tax Court denied that motion on December 15, 2015. (JA234.) The order and decision finally disposed of all issues as to all parties.

On January 30, 2016, Our Country Home timely filed a notice of appeal. (JA235-38.) I.R.C. § 7483. The Commissioner argues, *infra*, 20-30, that this Court lacks jurisdiction over this appeal because it is moot. Otherwise, this Court has jurisdiction pursuant to I.R.C. § 7482(a)(1). Venue lies in this Court because Our Country Home is a corporation which has a principal place of business in the state of Indiana. (JA5.) I.R.C. § 7482(b)(1)(B).

STATEMENT OF THE ISSUE

1. Whether this appeal has been rendered moot by the collateral estoppel effect of final decisions entered in related cases.

2. Whether the Tax Court correctly held that Our Country Home was not permitted to challenge its underlying tax liability in its collection-due-process hearing.

STATEMENT OF THE CASE

A. Procedural background

On March 31, 2014, Our Country Home filed a petition with the Tax Court challenging a notice of determination which sustained an IRS levy action. (JA5-12.) On June 16, 2015, the Tax Court issued an order and decision sustaining the notice of determination. (JA157-59.) On August 7, 2015, Our Country Home moved to vacate the order and decision and for reconsideration. (JA160-72.) The Tax Court denied both motions on November 4, 2015. (JA215-16.) The Tax Court denied a second motion for reconsideration on December 15, 2015. (JA234.) On January 30, 2016, Our Country Home timely appealed. (JA235-38.)

B. Factual background

1. Our Country Home's participation in the Sterling Benefit Plan

Our Country Home participated in a purported employee benefit plan known as the Sterling Benefit Plan ("Plan"). (JA174; SA25.)[4] The

[4] Numerous Plan participants filed proceedings in the Tax Court challenging proposed deficiencies and related penalties issued in connection with their Plan participation. (SA25-27.) In a separate motion, we have moved for this Court to take judicial notice of various court-filed documents related to Our Country Home's deficiency proceeding, No. 25764-10 (Tax Ct.). This Court may take judicial

(continued…)

Tax Court has described the Plan as having been established as "a way for employers to fund greater benefits than pension plans allowed." (SA33.) The Plan "offers to pay various benefits, primarily death, medical, and disability benefits, during a participating employee's current employment and/or retirement," and enabled participating employers to "select the extent of those benefits to be provided under a personal plan" established by the employer. (SA33.) Corporate participants in the Plan, including Our Country Home, took deductions on their income tax returns related to participation in the Plan. (*See, e.g.*, SA16.) Shareholder-employees who benefited from the Plan, meanwhile, claimed no income from participation in the plan. (*See, e.g.*, SA 52-57.)

2. Administrative proceedings

As we explain, *infra*, 49-50, 58-59, Congress has created different procedures enabling taxpayers to challenge the imposition of different taxes and penalties. This appeal arises from Our Country Home's

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(…continued)
notice of documents filed in a related case. *Independent Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 943 (7th Cir. 2012); Fed. R. Ev. 201.

administrative challenges to one penalty assessed against it in connection with its participation in the Plan: a reporting penalty under I.R.C. § 6707A.[5] In the meantime, Our Country Home has filed a separate deficiency proceeding opposing the proposed assessment of income tax deficiencies and accuracy-related penalties also connected with its participation in the Plan. We detail these two parallel sets of proceedings below.

a. Examination and Appeals proceedings related to the reporting penalty

The Commissioner proposed a penalty against Our Country Home under I.R.C. § 6707A for Our Country Home's failure to report its

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[5] I.R.C. § 6707A imposes a penalty on "[a]ny person who fails to include on any return or statement any information with respect to a reportable transaction which is required under [I.R.C. § 6011] to be included with such return or statement." I.R.C. § 6707A(a). Section 6707(A) applies to two different kinds of transactions: a "reportable transaction" which is determined under the regulations to have "a potential for tax avoidance or evasion," and a "listed transaction" which "is the same as, or substantially similar to, a transaction specifically identified by the Secretary [of the Treasury] as a tax avoidance transaction for purposes of section 6011." I.R.C. § 6707A(c)(1)-(2). In this case, the Commissioner has determined that the Plan was a listed transaction. Listed transactions are subject to higher maximum penalties than are reportable transactions, I.R.C. § 6707A(b)(2), and the Commissioner may, in his discretion, rescind penalties for reportable transactions, other than listed transactions, I.R.C. § 6707A(d)(1).

participation in a listed transaction with its return for the tax year 2007 ("reporting penalty"). (JA31.) Counsel for Our Country Home filed a protest with the IRS Office of Appeals regarding the proposed reporting penalty. (JA18; JA31-32; JA41.) Appeals Officer Lisa Palminteri reviewed the revenue agent report regarding the proposed penalty, Our Country Home's protest, and supporting documentation. (JA18; JA31-34.) Palminteri also discussed the issues with a technical specialist. (JA18; JA31.) Palminteri held a conference with counsel for Our Country Home on July 26, 2012. (JA18; JA43.) Palminteri subsequently noted that Our Country Home had not submitted additional materials promised during that conference. (JA18; JA43.) Palminteri concluded that the penalty should be sustained in full, issuing a memorandum which explained why participation in the Plan was properly treated as participating in a listed transaction for purposes of Section 6707A. (JA30-40; *see, especially*, JA38-40.) Accordingly, Palminteri closed the case and sustained the penalty. (JA19; JA43.)

On February 18, 2013, the Commissioner assessed the reporting penalty against Our Country Home for tax year 2007. (JA62.) On May

29, 2013, the Commissioner sent Our Country Home a final notice of intent to levy and notice of right to hearing. (JA19; JA44-46.)

On June 25, 2013, counsel for Our Country Home requested a collection-due-process ("CDP") hearing regarding the reporting penalty. (JA47-50.) In its request, Our Country Home did not seek collection alternatives, but sought to challenge its liability for the penalty, asserting that participation in the Plan did not constitute participation in a listed transaction. (JA19; JA48-49.) It stated that it had not had a full opportunity to challenge liability prior to the CDP hearing. (JA19; JA49.)

IRS Appeals Officer Inez R. Perales was assigned to the CDP proceeding. (JA19; JA51-53; JA54.) Perales reviewed the case transcripts for the previous Appeals hearing, and determined that Palminteri had previously considered an appeal of the same reporting penalty, and that, contrary to Our Country Home's claim, all legal procedures were followed. (JA20; JA55.) Accordingly, Perales concluded that Our Country Home was precluded from challenging liability for the penalty in its CDP hearing. (JA20; JA55.) On September 16, 2013, Perales sent Our Country Home's counsel a letter,

which explained that she was handling the CDP hearing, stated her determination that Our Country Home was precluded from challenging liability for the penalty, and sought to schedule a telephonic hearing. (JA51-53.)

On November 19, 2013, Perales held a telephone hearing with Our Country Home's counsel. (JA20; JA55-56.) During this hearing, Our Country Home's counsel stated his intent to petition the Tax Court. (JA20; JA55.) Our Country Home's counsel stated that he wanted to discuss collection alternatives, but Perales told him that Our Country Home would first need to submit required forms and financial information. (JA20; JA55-56.) Our Country Home never submitted the required materials. (JA56.)

On February 27, 2014, the Office of Appeals issued a notice of determination sustaining the proposed levy action to Our Country Home. (JA21; JA57-61.) The notice of determination stated that the only issues raised by Our Country Home in the CDP hearing were challenges to liability, but that those challenges were precluded by virtue of the fact that Our Country Home had previously had the opportunity to challenge liability in a prior Appeals hearing. (JA61.) It

also noted that Our Country Home had failed to submit financial materials necessary to request a collection alternative. (JA61.)

b. Issuance of the deficiency notice regarding income tax and accuracy-related penalties

Meanwhile, on August 19, 2010, the Commissioner had issued a notice of federal income tax deficiency to Our Country Home. (SA12-19.) In the deficiency notice, the Commissioner proposed the following income tax deficiencies and penalties for tax years 2006-08, all related to Plan participation:

Tax year	**2005**	**2006**	**2007**
Tax	$114,549.00	$193,029.00	$45,184.00
IRC § 6662(a) penalty	$22,909.80	$38,605.80	—
IRC § 6662A penalty	—	—	$15,750.00

(SA12.) The notice explained that the Commissioner had proposed disallowing Our Country Home's deductions related to the Plan. (SA16.) The two penalties are different kinds of accuracy-related penalties. An I.R.C. § 6662(a) penalty is assessed where the taxpayer made a substantial understatement and acted with negligence or disregard of the rules or regulations, whereas an I.R.C. § 6662A penalty is assessed

where the taxpayer made a "reportable transaction" understatement (which includes understatements attributable to a listed transaction) which was "not adequately disclosed." (SA17-18.)

3. Tax Court proceedings

a. Appeal of determination in CDP proceeding related to the reporting penalty

On March 31, 2014, Our Country Home filed a Tax Court petition challenging the February 27, 2014 notice of determination. (JA5-12.) The only issues asserted in the petition are that the reporting penalty is improper because the Plan is not a listed transaction, and that an unspecified provision of the Internal Revenue Code is purportedly unconstitutional. (JA6.) Based on subsequent briefing in the Tax Court (*e.g.*, JA67), it appears that the provision referenced in the petition is I.R.C. § 6707A(d)(2), which states that the Commissioner's decision as to whether to rescind a reporting penalty as to reportable transactions is not subject to judicial review.

On December 9, 2014, the Commissioner filed a motion for summary judgment pursuant to Tax Ct. R. 121. (JA16-64.) In that motion, the Commissioner argued that Our Country Home was precluded from challenging its underlying liability for the reporting

penalty in its CDP hearing. Specifically, the Commissioner argued that I.R.C. § 6330(c)(2)(B) barred Our Country Home from challenging liability in its CDP hearing because it had previously had an opportunity to challenge liability in a pre-assessment Appeals hearing. (JA22-23.) After oral argument, the Tax Court authorized the parties to supplement their summary judgment filings. (JA108.) In such a supplement, the Commissioner reiterated that argument, and also argued that I.R.C. § 6330(c)(4) barred Our Country Home from challenging liability in the CDP hearing because that liability for the penalty had previously been decided in an administrative proceeding at which Our Country Home participated meaningfully. (JA118.)

On June 16, 2015, the Tax Court issued an order and decision sustaining the notice of determination. (JA157-59.) The Tax Court first noted that the only arguments that Our Country Home had made in its administrative hearing and before the Tax Court were challenges to the underlying liability. (JA157.) The court then concluded that, because Our Country Home had an opportunity to and in fact did challenge its liability during a prior Appeals hearing, it was precluded from challenging liability under I.R.C. § 6330(c)(2)(B) and Treas. Reg.

§ 301.6330-1(e)(3), Q&A-E2. (JA158.) Because the record otherwise showed that the Commissioner's levy action was proper, the Tax Court granted summary judgment in favor of the Commissioner and sustained the proposed levy action. (JA159.)

On August 7, 2015, Our Country Home moved to vacate the order and decision pursuant to Tax Ct. R. 162 and for reconsideration pursuant to Tax Ct. R. 161. (JA160-72.) Each of the motions was premised on a new statute-of-limitations argument not raised in Our Country Home's petition and not otherwise addressed prior to entry of the Tax Court's final decision. (JA161-63; JA167-70.) The Tax Court denied the motions to vacate and for reconsideration on November 4, 2015, concluding that Our Country Home had failed to assert a challenge to the Commissioner's claim that the period of limitations remained open. (JA215-16.) Our Country Home filed a second motion for reconsideration on December 4, 2015, also based on the statute of limitations. (JA217-33.) The Tax Court denied that motion on

December 15, 2015. (JA234.)[6] The order and decision finally disposed of all issues as to all parties.

On January 30, 2016, Our Country Home timely filed a notice of appeal. (JA235-38.)

b. Deficiency proceedings in related income tax cases

Meanwhile, on November 17, 2010, Our Country Home had filed a petition for redetermination of the deficiency notice issued to it for tax years 2005 to 2007. (SA10-20.) Along with several "test cases," which likewise involved taxpayers who participated in the Plan, Our Country Home engaged in full litigation of the Commissioner's determinations, including several months of discovery, followed by a three-day trial, and submissions of trial briefs. (*See* SA1-9 (docket entries).) On July 13, 2015, the Tax Court issued a precedential opinion, published as *Our*

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[6] Our Country Home has not reasserted its statute-of-limitations challenge on appeal. Accordingly, that issue is waived. *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990). Moreover, the Tax Court's decision not to consider that challenge on reconsideration is appropriate, given that it has held that it will not consider statute-of-limitation defenses not raised in the petition, *see Oliver v. Commissioner*, T.C.M. 1997-84 (1997); Tax Ct. R. 39 (requiring pleading of defenses), and that it will not consider new issues on reconsideration, *see Estate of Quick v. Commissioner*, 110 T.C. 440, 441-42 (1998).

Country Home Enters., Inc., v. Commissioner, 145 T.C. No. 1 (2015). (*See* SA21-133.) In that opinion, the Tax Court upheld the Commissioner's determinations that the corporate employers had improperly deducted their payments to the Plan, and that the employees who benefited from the Plan must recognize income based on their benefits. (SA28.)

The Tax Court also concluded that the test case plaintiffs were subject to Section 6662A penalties because the Plan met the standards for being a "listed transaction" under I.R.C. § 6707A(c)(2) and Treas. Reg. § 1.6011-4(b)(2), because it was substantially similar to a transaction listed in Notice 2007-83, 2007-2 C.B 960, 960. (SA115-19; SA124-25.) The Tax Court explained that this conclusion flowed from the findings that it had reached in upholding the Commissioner's determinations to disallow the deductions related to the Plan and to require employees to recognize income based on benefits from the Plan. (SA124-25.) These findings included the fact that the Plan purported to be a welfare benefit plan, and that Our Country Home and the other corporate employers improperly deducted the full payments made to the Plan. (SA118-19; SA124-25.)

On February 8, 2016, the Tax Court entered a final order and decision in the *Our Country Home* deficiency proceeding. (SA134-36.) Our Country Home did not appeal from that final decision. (*See* SA1-9.)

SUMMARY OF ARGUMENT

Our Country Home desires to use its CDP proceeding to challenge the determination that its participation in the Sterling Benefit Plan was a "listed transaction," which it failed to disclose to the IRS, leading to assessment of a reporting penalty under I.R.C. § 6707A. But Our Country Home has already had two opportunities to challenge that determination: (1) a prior opportunity to dispute liability for the reporting penalty in an Appeals hearing, and (2) a separate Tax Court proceeding challenging a notice of deficiency for taxes and accuracy-related penalties, also linked to Our Country Home's participation in the Plan. This Court should decline to give Our Country Home yet another bite at the apple.

1. Because collateral estoppel would bar Our Country Home from making the only arguments that it has sought to raise in its CDP proceedings, this appeal is now moot, and should be dismissed for lack of jurisdiction. Specifically, in its CDP proceeding, Our Country Home

sought to argue that the Plan was not a listed transaction. But, while this appeal has been pending, that issue has now been definitively rejected in a binding decision. In the *Our Country Home* deficiency proceeding, the Tax Court upheld an accuracy-related penalty based on its findings that—under the same standard that apply to Our Country Home's I.R.C. § 6707A reporting penalty–the Plan *was* a listed transaction. The Tax Court issued a final order and decision in Our Country Home's deficiency proceeding, upholding the Commissioner's determinations, which Our Country Home did not appeal. That final decision precludes Our Country Home from asserting that the Plan was not a listed transaction.

2. Even if this Court concludes that this case is not moot, it should nevertheless affirm the Tax Court on one of two grounds.

a. Pursuant to I.R.C. § 6330(c)(4)(A), a taxpayer may not raise any issue in a CDP hearing if the issue was raised and considered in a prior judicial or administrative proceeding and if the taxpayer participated meaningfully in that proceeding. By its plain terms, Section 6330(c)(4)(A) precludes a taxpayer from raising an issue in a CDP hearing where that taxpayer meaningfully participated in a prior

proceeding before the IRS Office of Appeals and that issue was raised and considered by Appeals. Here, there is no dispute that the issue of Our Country Home's liability for the reporting penalty was raised and considered at a pre-assessment Appeals proceeding, and that Our Country Home participated meaningfully in that proceeding. Indeed, Our Country Home was represented by counsel, and its counsel submitted a written protest and participated in a telephonic hearing in that proceeding. Accordingly, Our Country Home was barred by Section 6330(c)(4)(A) from raising its liability challenge in its CDP proceeding.

b. Moreover, liability challenges are subject to a special limitation in CDP proceedings, found in I.R.C. § 6330(c)(2)(B): they may only be raised if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." The phrase "opportunity to dispute" is not defined in the statute, and could, on its face, refer to judicial or administrative opportunities. In Treas. Reg. § 6330-1(e)(3) Q&A-E2, the IRS interprets the phrase "opportunity to dispute" liability to include prior Appeals proceedings, subject to one inapplicable

exception. Our Country Home seeks to have this Court ignore that regulation, under the legally incorrect claim that it is an impermissible interpretation of the scope of judicial jurisdiction. Instead, it is a permissible interpretation of agency procedure. As such, this Court should analyze the regulation under *Chevron U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837 (1984).

Under step one of *Chevron*, the undefined statutory term "opportunity to dispute" is ambiguous as it could refer to judicial opportunities, administrative opportunities, or both. Under step two, the Treasury Department's interpretation of that term is reasonable. It includes most Appeals proceedings, as well as judicial proceedings, which is consistent with the text of Section 6330(c)(2)(B), as well as other portions of the statute. Our Country Home's attempts to identify inconsistencies in the regulation do not undermine its reasonableness, and its policy arguments are both incorrect and inappropriate in this context. Here, Treasury has reasonably interpreted the statute in such a way as to treat Appeals proceedings with the same seriousness that Congress has done. This Court should uphold that interpretation.

Because Our Country Home's sole challenges to the IRS's levy action were precluded, this Court should affirm the Tax Court's order upholding the levy action.

ARGUMENT

I.

This appeal has been rendered moot by the collateral estoppel effects of final decisions entered in related income-tax cases while this appeal was pending

Standard of review

Mootness is a legal question which this Court reviews *de novo*. *Wisconsin Right to Life, Inc., v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004).

A. Where, as here, a case has become moot while on appeal, this Court lacks jurisdiction

"Under Article III, cases that do not involve actual, ongoing controversies are moot and must be dismissed for lack of jurisdiction." *Wisconsin Right to Life*, 366 F.3d at 490-91 (internal quotations and citation omitted). The mootness doctrine "insures that the court is faithful to the case or controversy limitation in Article III of the Constitution." *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008). Indeed, "[m]ootness. . . is always a threshold jurisdictional question that

[this Court] must address even when it is not raised by the parties." *Worldwide Street Preachers' Fellowship v. Peterson*, 388 F.3d 555, 558 (7th Cir. 2004). "A case may become moot if the court can no longer 'affect the rights of litigants in the case.'" *Evers*, 536 F.3d at 662 (citation omitted). "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993).

B. Because collateral estoppel would bar Our Country Home from arguing the only challenges raised in its CDP and Tax Court petitions, this appeal is moot

Federal law determines the preclusive effect of a "federal-court judgment in a federal-question case." *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001); *Firishchak v. Holder*, 636 F.3d 305, 308 (7th Cir. 2011). "Under the doctrine of collateral estoppel (also known as issue preclusion), 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action

involving a party to the prior litigation.'"[7] *Carter v. Commissioner*, 746 F.3d 318, 321 (7th Cir. 2014) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979).) Collateral estoppel applies in the area of taxation, such that "matters which were actually litigated and determined in the first proceeding cannot later be relitigated," unless there has been "a subsequent modification of the significant facts or a change or development in the controlling legal principles." *Commissioner v. Sunnen*, 333 U.S. 591, 598-99 (1948).

Collateral estoppel applies to both issues of fact and issues of law. *Schellong v. U.S. I.N.S.*, 805 F.2d 655, 659 (7th Cir. 1986).; Rest. (2d) of Judgments § 27 & comment b.[8] "Preclusion generally is appropriate if both the first and second action involve application of the same

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[7] Res judicata, which is also known as claim preclusion, bars a party from asserting a claim resolved on the merits in a previous action, including any issue that could have been raised in the first action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Because the penalties in this case could not have been challenged in the parties' deficiency proceedings, *see*, *infra*, 59, res judicata does not apply in this case.

[8] The Supreme Court has noted that it is appropriate to consider the Restatement (Second) of Judgments "for a statement of the ordinary elements of issue preclusion." *B&B Hardware v. Hargis Indus., Inc.*, — U.S. —, 135 S. Ct. 1293, 1303 (2015).

principles of law to a historic fact setting that was complete by the time of the first adjudication." Wright, et al, 18 Fed. Prac. & Proc. Juris. § 4425 (2d ed. 2016).

This Court has explained the requirements for collateral estoppel as follows:

> Under the doctrine of issue preclusion, an issue may not be litigated if the following conditions are met: (1) the issue sought to be precluded is the same as that involved in a prior action; (2) the issue was actually litigated; (3) the determination of the issue was essential to the final judgment; and (4) the party against whom estoppel is invoked was represented in the prior action."

Adair v. Sherman, 230 F.3d 890, 893 (7th Cir. 2000). Collateral estoppel "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted); *Coleman v. Donahoe*, 667 F.3d 835, 853 (7th Cir. 2012) (same). Here, because the Commissioner can establish each of these five elements in this case, Our Country Home would be collaterally estopped from challenging its liability for the reporting penalty on remand, thereby mooting this appeal.

1 & 2. The same issue of whether the Plan constitutes a listed transaction for purposes of Section 6707A was actually litigated and resolved in the *Our Country Home* deficiency decision. Our Country Home raised one challenge to its tax liability in its CDP proceeding and in its Tax Court appeal: that its participation in the Plan does not constitute participation in a listed transaction for purposes of Section 6707A.[9] (JA6; JA49.) In upholding certain Section 6662A penalties, *Our Country Home* concluded that participation in the Plan does constitute participation in a listed transaction under the principles of Section 6707A. (SA130-31.)

A "listed transaction" is a transaction which "is the same as, or substantially similar to, a transaction specifically identified by the Secretary [of the Treasury] as a tax avoidance transaction for purposes

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[9] Our Country Home sought to raise a second issue, regarding the constitutionality of I.R.C. § 6707A(d)(2), which bars taxpayers from seeking judicial review of the Commissioner's decision whether to rescind a Section 6707A penalty. (JA6; JA67.) However, because the Commissioner is only permitted to rescind the penalty if the transaction in question was a "reportable" transaction, other than a "listed" transaction, I.R.C. § 6707A(d)(1), that argument also turns on the question of whether Our Country Home's participating in the Plan constituted participation in a listed transaction.

of section 6011." I.R.C. § 6707A(c)(1)-(2). The IRS has determined in these related cases that the Plan is a listed transaction, because it is substantially similar to the transaction described in I.R.S. Notice 2007-83, 2007-2 C.B. 960. Notice 2007-83 states that certain "abusive trust arrangements utilizing cash value life insurance policies purportedly to provide welfare benefits" are being used to improperly claim income and employment tax benefits. *Id*. at 960. The notice identifies such arrangements, and similar arrangements, as listed transactions, and states that the tax benefits flowing from the transactions will be disallowed. *Id*. Notice 2007-83 states that any transaction that includes four specified elements, or "that is substantially similar to such a transaction," is a listed transaction.

The first element is that the transaction "involves a trust or other fund described in [I.R.C.] § 419(e)(3) that is purportedly a welfare benefit fund." *Id*. at 961. The second element is that the employer does not rely on I.R.C. § 419A(f)(5)(A) (which deals with collective bargaining plans) to determine what portion of its contributions to the trust or fund is deductible. *Id*. The third element is that the trust or fund pays purported premiums on at least one life insurance policy, and value is

accumulated within the policy or in a side fund or similar structure. *Id.* The fourth element is that the employer takes a deduction in excess of the benefits provided under the plan, as calculated according to the rules provided in the notice. *Id.*

In *Our Country Home*, the Tax Court concluded that the Plan was a listed transaction based on the following findings:

> We have found that the Sterling Plan ostensibly operated as a welfare benefit plan, that Our Country and Environmental made payments to the Sterling Plan that were used to pay the premiums on cash value life insurance policies, and that the Sterling Plan used those policies to fund the "welfare benefits" that it promised to pay under the Sterling Plan. We also have found that those corporate employers deducted the full amounts of the payments that they made to the Sterling Plan and that neither of those corporations nor any of Environmental's owners disclosed its or his participation in the Sterling Plan.

(SA124-25.) The Tax Court made these same findings in the portion of the opinion dealing with disallowing the tax deductions claimed by Our Country Home. *See* SA33 (Plan "ostensibly operates" as a welfare benefit plan); SA35 (Plan purchases, among other things, cash value policies); SA41 (Our Country Home's portion of the Plan's funds were used to purchase cash value policies and other investment vehicles); SA45 (identifying cash value policies purchased for Our Country Home

employees); SA45-49 (Our Country Home deducted the full amount of premiums paid to the Plan and also failed to disclose its participating in the Plan in its tax returns); SA79 ("The corporations essentially deducted the payments of the premiums on the life insurance policies through their deductions of their payments to the Sterling Plan, and the shareholder/employees recognized no income corresponding to those deductions"); SA80 (stating that taxpayers argued that the Plan was a bona fide welfare benefit plan); SA85-96 (making legal conclusions based on facts regarding the life insurance policies purchased through the Plan, including the cash value policies). In short, the same issue of whether the Plan was a listed transaction was actually litigated and resolved in the *Our Country Home* deficiency decision for collateral estoppel purposes.

Further, as explained, *supra*, 26-27, the Tax Court made the findings in question throughout its opinion as the underpinnings for upholding the Commissioner's disallowance of the deductions taken by Our Country Home and for upholding a Section 6662A penalty. Accordingly, the findings were essential to the Tax Court's holdings in *Our Country Home*.

Finally, there can be no dispute that the procedures used in the Tax Court to decide the *Our Country Home* deficiency case were fundamentally fair. To have preclusive effect, the prior case must have provided a "'full and fair opportunity to litigate'." *Coleman v. Commissioner*, 16 F.3d 821, 831 (7th Cir. 1994) (quoting *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-29 (1971)). In determining whether the first proceeding provided a full and fair opportunity to litigate the issue in question, courts look to "whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair." *B&B Hardware v. Hargis Indus., Inc.*, — U.S. —, 135 S. Ct. 1293, 1309 (2015). Here, the parties were given time for discovery, a three-day trial, and a full opportunity to brief the issues. (SA1-9 (docket entries).) Indeed, Our Country Home generally praises the Tax Court's procedures. (Br. 40-41.)

3. The *Our Country Home* deficiency case has been finally adjudicated. A final order and decision has been entered in the *Our Country Home* deficiency proceeding. (SA134-36.) Our Country Home

did not appeal that final decision. (*See* SA1-9.)[10] The fact that Our Country Home declined to appeal does not alter the finality of the judgment for preclusion purposes. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *Local 322, Allied Indus. Workers of Am., AFL-CIO v. Johnson Controls, Inc., Globe Battery Div.*, 969 F.2d 290, 292 (7th Cir. 1992); Wright, et al, 18A Fed. Prac. & Proc. § 4433 (2d ed.). Moreover, the decision would have retained its preclusive effect even if it had been appealed. *Ross ex rel Ross v. Bd. of Educ. of Township High Sch. Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) ("the fact that an appeal was lodged does not defeat the finality of the judgment"); *Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) (explaining that "[t]he vast weight of case law" establishes that the rule in federal courts is that a pending appeal does not alter the preclusive effect of a decision) (citing various cases, including *Deposit Bank v. Bd.*

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[10] Three test case plaintiffs did file notices of appeal, but ultimately dismissed their appeals. *See Netversity, Inc. v. Commissioner*, No. 16-4132, order of dismissal (7th Cir. Apr. 4, 2016); *Mejia, et al, v. Commissioner*, No. 16-4133, order of dismissal (7th Cir. Apr. 4, 2016).

of Councilmen of City of Frankfort, 191 U.S. 499 (1903)); 18A Fed. Prac. & Proc. § 4433; Rest. (2d) of Judgments § 13, comment f (1982). Thus, even if Old Country Home had appealed the decision from its deficiency case, that would not alter the collateral estoppel effect of that decision today.

4. Our Country Home is the same party in both the deficiency proceeding and the instant appeal. The taxpayer in Our Country Home is the same entity as the taxpayer in this appeal. (*See* JA41 (admitting that Our Country Home has related income tax case.) It is therefore appropriate to apply collateral estoppel against Our Country Home as to any issues actually resolved in its deficiency proceeding.

II.

In the alternative, this Court should hold that Our Country Home was barred by I.R.C. § 6330 from challenging its underlying tax liability in its CDP hearing

Standard of review

The Court "review[s] the Tax Court's decision to grant summary judgment *de novo*." *Kindred v. Commissioner*, 454 F.3d 688, 693-94 (7th Cir. 2006). When the underlying tax liability is not properly at issue, this Court "review[s] the administrative determinations of the

IRS appeals officer during the CDP hearing process under an abuse of discretion standard." *Id.* at 694.

A. Congress created CDP proceedings to give certain procedural safeguards to taxpayers facing administrative collection

The Secretary of the Treasury "is authorized and required to make the inquiries, determinations, and assessments of all taxes . . . imposed by [the Code]," I.R.C. § 6201(a), and to "collect the taxes imposed by the internal revenue laws," I.R.C. § 6301.

In order to be able to collect the taxes administratively, the Secretary must assess the taxes, I.R.C. § 6203, and notify the taxpayer of the amount of unpaid tax and demand payment of the assessed amount within 60 days of the assessment. I.R.C. § 6303(a). If the taxpayer fails to pay the assessed amount after notice and demand, a lien arises upon "all property and rights to property" of the taxpayer and continues until the liability "is satisfied or becomes unenforceable by reason of lapse of time." I.R.C. §§ 6321, 6322; *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985). The lien provisions of the Code are intended to ensure prompt and certain

enforcement of the tax laws. *National Bank of Commerce*, 472 U.S. at 721.

The statutory lien is not self-executing, however, and the Commissioner must take affirmative action to enforce the collection of delinquent taxes. The Government may enforce its tax liens through administrative collection methods (such as the levy and distraint procedures) authorized by I.R.C. §§ 6331 to 6340, or it may enforce them through judicial collection methods (such as an action or counterclaim to reduce assessments to judgment or to foreclose upon liens) authorized by I.R.C. §§ 7401 to 7403. In order to be able to collect through an administrative levy, the Commissioner must first give the taxpayer 30-days notice of intent to do so. I.R.C. § 6331(d)(1)-(2).

Prior to 1998, "the IRS could reach a delinquent taxpayer's assets by lien or levy without providing any sort of pre-attachment process." *Dalton v. Commissioner*, 682 F.3d 149, 154 (1st Cir. 2012). In order to provide taxpayers facing administrative collection activity with additional procedural safeguards, Congress in 1998 enacted I.R.C. §§ 6320 and 6330. *See* Internal Revenue Service Restructuring And Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 746, §§ 3401

(1998) ("Reform Act"). These provisions provide taxpayers the right to a CDP hearing after an IRS notice of federal tax lien is filed upon all their property and rights to property (I.R.C. § 6320), or before a levy is made on their property (I.R.C. § 6330).

The CDP hearing "shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax . . . before the first [CDP] hearing." I.R.C. § 6330(b)(3). As part of the CDP hearing, the Appeals officer "shall . . . obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." I.R.C. § 6330(c)(1); Treas. Reg. § 301.6330-1(e). The taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy," including offers of collection alternatives, but may only raise issues regarding liability if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." I.R.C. §§ 6330(c)(2)(A)-(B); Treas. Reg. § 301.6330-1(e).

CDP determinations are decided on the basis of the administrative record created during the Appeals proceedings. *See, e.g.*, *Fifty Below Sales & Marketing, Inc. v. United States*, 497 F.3d 828, 829 (8th Cir.

2007); *Murphy v. Commissioner*, 469 F.3d 27, 31 (1st Cir. 2006). However, in the Reform Act, Congress "overlaid" the CDP process "on a previous system that involved very little judicial oversight. The result is a surprisingly scant record." *Living Care Alternatives of Utica, Inc., v. United States*, 411 F.3d 621, 625 (6th Cir. 2005). "The CDP process has its own standards: there is no obligation to conduct a face-to-face hearing, no formal discovery, no requirement for either testimony or cross-examination, and no transcript." *Dalton*, 682 F.3d at 155. Moreover, CDP proceedings do not necessarily include all parties in interest. *Id.* (explaining that all parties with interest in ownership of property are not involved in CDP proceedings).

B. I.R.C. § 6330(c)(4)(A) precluded Our Country Home from challenging its underlying tax liability in its CDP proceeding because that issue was raised and considered at a prior administrative hearing at which Our Country Home participated meaningfully

Pursuant to I.R.C. § 6330(c)(4)(A), "[a]n issue may not be raised at the [CDP] hearing if—(A) (i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and (ii) the person seeking to raise the issue participated meaningfully in such hearing or

proceeding." Under the plain language of this statute, Our Country Home is precluded from challenging its liability for the reporting penalty because that issue was raised and considered at the prior Appeals hearing, at which Our Country Home participated meaningfully.[11] *See Shaffer v. Commissioner*, 55 F. App'x 532, 534 (10th Cir. 2003) (unpublished) (prior judicial proceeding); *Ruggiero v. United States*, 242 F.R.D. 437, 442 (N.D. Ill. 2007) (prior CDP hearing before Appeals).

When interpreting a statute, this Court begins its "interpretive task by examining the language of the statute." *Trustees of the Chicago Truck Drivers, Helpers, and Warehouse Workers Union (Ind.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 (7th Cir. 1996). "The

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[11] Although the Tax Court did not decide the case on the basis of I.R.C. § 6330(c)(4)(A), this Court "may affirm on any ground supported in the record, 'so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue.'" *Peretz v. Sims*, 662 F.3d 478, 480 (7th Cir. 2011) (citation omitted). As a legal issue, being applied to undisputed facts, this argument is adequately supported by the record. Moreover, the Commissioner raised Section 6330(c)(4) in a supplement to the motion for summary judgment. (JA118.) Our Country Home was provided with an opportunity to respond to that argument in its supplement to its objection to the summary judgment motion. (JA144-56.)

plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "When a statute is unambiguous, 'we must enforce the plain meaning of the language enacted by Congress.'" *Chicago Truck Drivers*, 76 F.3d at 828 (citation omitted).

Under the plain language of Section 6330(c)(4)(A), a taxpayer is barred from raising any issue—regardless of whether it is related to liability or not—if (1) the same issue had been raised and considered (2) in any judicial *or* administrative hearing (3) at which taxpayer meaningfully participated. Under any reasonable reading of the statute, an Appeals conference constitutes a "judicial or administrative hearing." Moreover, here, it is undisputed that, in its Appeals protest, Our Country Home specifically challenged its liability for the Section 6707A penalty, and that the Office of Appeals considered that challenge. (JA18; JA33.) Finally, Our Country Home did meaningfully participate in the Appeals protest. Our Country Home was represented by counsel, who submitted a written protest to the IRS and who

participated in a conference with an Appeals officer. (JA31-34; JA41; JA43.) Appeals officer Palminteri fully explained Appeals' position regarding the penalty. (JA30-40.)

Because the issue of Our Country Home's liability for the reporting penalty was raised and considered during the 2013 Appeals protest, and because Our Country Home meaningfully participated in the Appeals hearing of that protest, Section 6330(c)(4)(A) precludes Our Country Home from raising liability issues in its CDP proceeding. The case may be affirmed on this basis, without even considering the Section 6330(c)(2)(B) issue, discussed below, that is the basis of Our Country Home's appeal.

C. I.R.C. § 6330(c)(2)(B) precluded Our Country Home from challenging its underlying tax liability in its CDP proceeding because Our Country Home had an opportunity to dispute its tax liability — in its prior Appeals hearing

In all events, the Tax Court was correct to conclude that I.R.C. § 6330(c)(2)(B) bars Our Country Home from challenging its underlying tax liability in its CDP proceeding, because its Appeals protest constituted a prior opportunity to be heard.

1. I.R.C. § 6330(c)(2)(B) and the associated regulation should be evaluated under the *Chevron* framework

Where, as here, a party seeks to challenge a regulation issued by an agency with rulemaking authority interpreting a statute, *Chevron U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837 (1984), defines the Court's role. "The principles underlying [the Supreme Court's] decision in *Chevron* apply with full force in the tax context." *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 55 (2011). *Accord King v. Commissioner*, — F.3d —, 2016 WL 3916013, at *3 (7th Cir. 2016). "Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation at least as complex as the ones other agencies must make in administering their statutes." *Mayo*, 562 U.S. at 56. Indeed, "ever since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws." *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983). This authority is broad as a matter of statute, I.R.C. § 7805(a), and as a matter of necessity: "In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able

to exercise its authority to meet changing conditions and new problems." *Bob Jones*, 461 U.S. at 596.

Our Country Home argues (Br. 45-47) that *Chevron* deference is inappropriate here because Treas. Reg. § 301.6330-1(e)(3) Q&A-E2 purportedly interprets the scope of judicial jurisdiction. Our Country Home is incorrect. First, the regulation does not directly regulate judicial jurisdiction.[12] Indeed, the Tax Court has held that the question of whether liability is precluded by Section 6330(c)(2)(B) is not jurisdictional. *See, e.g.*, *Van Fossen v. Commissioner*, T.C. Memo. 2000-163, 2000 WL 637458, at *1 (2000). Instead, it interprets the scope of *agency* jurisdiction, by addressing what issues may be included in a CDP proceeding and resolved in a notice of determination.[13] Treas. Reg.

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[12] Our Country Home asserts (Br. 45) that the Commissioner conceded that this issue is jurisdictional by moving for summary judgment. But the motion in question never asserted that the issue was jurisdictional; it solely argued that the levy action should be upheld because Our Country Home was precluded from raising tax liability in its CDP hearing and had waived any other challenges that it might have had. (JA17-26.)

[13] In *Goza v. Commissioner*, 114 T.C. 176, 182-83 (2000), the Tax Court adopted the judicial rule that a taxpayer is precluded from obtaining a determination of liability in the Tax Court if that taxpayer

(continued…)

§ 301.6330-1(e)(3) Q&A-E2. As such, this is not a situation, as in the cases cited by Our Country Home, where an agency regulation interpreted a statute which directly regulated the availability of judicial review. *See, e.g.*, *Shweika v. Dept. of Homeland Sec.*, 723 F.3d 710, 717-18 (6th Cir. 2013) (no deference to regulation that sought to bar "judicial review" in certain contexts); *NetCoalition v. S.E.C.*, 715 F.3d 342, 348 (D.C. Cir. 2013) (no deference to executive interpretation of statute allowing judicial "review"); *Lindstrom v. United States*, 510 F.3d 1191, 1195 n.3 (10th Cir. 2007) (no deference to agency letter regarding right to sue); *Murphy Expl. & Prod. Co. v. U.S. Dept. of Interior*, 252 F.3d 473, 478 (D.C. Cir.) (no deference to regulation that sought to define statute allowing "judicial review"), *modified on other grounds on denial of reh'g*, 270 F.3d 957 (D.C. Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000) (no deference over agency interpretation of statute which barred courts from taking "jurisdiction" over class of

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(…continued)
was precluded by Section 6330(c)(2)(B) from disputing liability in the administrative CDP proceeding.

"final orders"). At most, Treas. Reg. § 301.6330-1(e)(3) has a collateral effect on judicial jurisdiction.

Moreover, taken to its logical extremes, Our Country Home's argument would preclude deference to *any* agency regulation which interpreted the scope of agency jurisdiction because of the potential ancillary effect on judicial jurisdiction. But the Supreme Court has held that regulations that interpret agency jurisdiction *are* subject to *Chevron* deference. *City of Arlington, Tex., v. FCC*, — U.S. —, 133 S. Ct. 1863, 1874-75 (2013).[14] In so doing, the Supreme Court made clear that attempting to enforce a jurisdictional/nonjurisdictional dichotomy is not merely "false" but, in fact, "dangerous," as it risks "transfer[ring] any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts." *Id*. at 1872-73. Congress has committed to the Secretary of the Treasury the authority to "prescribe all needful rules

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[14] It is not clear to what extent *City of Arlington* alters the viability of the string of cases cited by Our Country Home in its brief regarding the lack of deference to regulations interpreting "jurisdictional" statutes.

and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." I.R.C. § 7805(a). In light of that clear congressional directive to Treasury to interpret the Internal Revenue Code, Treas. Reg. § 301.6330-1(e)(3) Q&A-E2 is subject to *Chevron* deference. *Mayo*, 562 U.S. at 55-56.

2. Because Section 6330(c)(2)(B) is ambiguous, this Court should defer to Treasury's reasonable interpretation of the statute in Treas. Reg. § 301.6330-1(e)(3) Q&A-E2

Chevron requires a two-step analysis, under which courts "must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). Thus, "[a]s long as a regulation is a reasonable reading of the statute, [this Court] give[s] deference to the Commissioner's interpretation." *Square D. Co. & Subs. v. Commissioner*, 438 F.3d 739, 744 (7th Cir. 2006).

a. Section 6330(c)(2)(B) does not unambiguously apply only to a prior judicial opportunity to dispute liability

Under step one of the *Chevron* analysis, this Court "examine[s] the text of the statute—in this case the relevant section of the tax code." *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998). "If the plain meaning of the text either supports or opposes the regulation, then we stop our analysis and either strike or invalidate the regulation." *Id.* If the statutory text "is either ambiguous or silent on the issue," this Court turns to step two of the Chevron analysis. *Id.* In determining whether the statute in question is plain or ambiguous, "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, Section 6330(c)(2)(B) only permits a taxpayer to raise a challenge to liability in a CDP proceeding if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." Our Country Home correctly concedes (Br. 22) that "[t]here are two ways in which a taxpayer can dispute a tax liability: (1) administratively; and (2) judicially." As such, on its face, Section

6330(c)(2)(B) is ambiguous as to what kinds of prior opportunities to dispute liability will preclude a taxpayer from challenging liability in a CDP proceeding.

Our Country Home asserts that Section 6330(c)(2)(B) unambiguously permits liability challenges in CDP proceedings *only* where a taxpayer previously had a judicial opportunity to dispute liability. Its reasoning is deeply flawed. As Our Country Home admits (Br. 22-23), the statute "does not specifically state whether only a prior judicial opportunity to dispute the tax prevents a taxpayer from challenging the merits of a tax liability in a CDP case or whether a prior administrative opportunity" likewise bars liability challenges in a CDP hearing. Indeed, Our Country Home is correct: the statute does not define the phrase "an opportunity to dispute such tax liability." As such, the Tax Court has correctly concluded that Section 6330(c)(2)(B) is ambiguous as to the definition of an "opportunity to dispute" tax liability. *See Lewis v. Commissioner*, 128 T.C. 48, 55 (2007). Moreover, there is nothing in the statutory text denigrating administrative opportunities to be heard, or otherwise indicating that an administrative opportunity to be heard does not count for purposes of

Section 6330(c)(2)(B).[15] Indeed, as we explain, *infra*, 53-54, if anything, other portions of the Reform Act support the claim that Congress viewed administrative hearings as important taxpayer protections and as adequate means of resolving taxpayer disputes.

Unable to find plain language in the statute to support its interpretation, Our Country Home incorrectly relies (Br. 23-24) on the doctrine of *noscitur a sociis* to try to bolster its argument. *Noscitur a sociis*, "literally translated as 'it is known by its associates,' . . . counsels lawyers reading statutes that 'a word may be known by the company it keeps." *Graham County Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 287 (2010) (internal citations omitted). This Court

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[15] This Court has suggested that it is inappropriate to consider legislative history as part of the *Chevron*-step-one analysis. See *Banker's Life*, 142 F.3d at 983. In all events, we agree with Our Country Home that the legislative history is not very helpful. (Br. 21 n.9.) That history establishes that the Senate Finance Committee initially proposed permitting liability to be raised in CDP hearings, without any additional limitations. *See* S. Rep. No. 105-174, at 68, *reprinted in* 1998-3 C.B. 537 (1998). The Conference Report notes that Congress had adopted the language currently found in Section 6330(c)(2)(B), but provides no additional information as to how that language was intended to operate. *See* H. Conf. Rep. No. 105-599, at 265, *reprinted in* 1998-3 C.B. 747 (1998). *See also Lewis*, 128 T.C. at 56-57 (finding legislative history to be inconclusive).

has similarly defined *noscitur a sociis* as involving "several items in a list [that] share an attribute." *CFTC v. Worth Bullion GP, Inc.*, 717 F.3d 545, 550-51 (7th Cir. 2013) (internal quotations and citation omitted). Essentially, Our Country Home argues that the phrase "opportunity to dispute" must be limited to judicial opportunities because the only other term in Section 6330(c)(2)(B) references the opportunity for a deficiency proceeding, which is a judicial opportunity to be heard.

This argument misuses the *noscitur a sociis* doctrine. In *Graham County*, 559 U.S. at 288, the Supreme Court rejected the argument that a statute referencing "congressional, administrative, or Government Accounting Office reports" was limited to federal reports, because two of the three terms were federal in nature. As the Supreme Court explained: "We find this use of *noscitur a sociis* unpersuasive. A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Id.* It further stated that the terms "are too few and too disparate to qualify as 'a string of statutory terms' . . . or 'items in a list,'" for *noscitur a sociis* purposes. *Id.* at 288-89 (citations omitted). Analyzing the Supreme Court's

Graham County decision, the Tenth Circuit has determined that use of *noscitur a sociis* with a list of only two items is "invalid as a matter of law. The Supreme Court has held that a list of three words is too short for application of the canon of *noscitur a sociis*. . . . If three words is too short for the canon, a list of two words . . . must also be too short." *United States v. Franklin*, 785 F.3d 1365, 1369 (10th Cir. 2015) (citation omitted).

Our Country Home's misuse of *noscitur a sociis* is no mere technicality, but in fact highlights a serious error in its logic. Ultimately, Our Country Home "purports to extrapolate a common feature from what amounts to a single item." *S.D. Warren Co. v. Maine Bd. of Env. Protection*, 547 U.S. 370, 379 (2006). Although Our Country Home "seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one," in fact, "there is no such general usage; giving one example does not convert express inclusion into restrictive equation, and *noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *Id.* at 379-80. Our Country Home's attempt to apply *noscitur a sociis* to Section 6330(c)(2)(B) exemplifies the problem identified by the Supreme Court.

Our Country Home looked at a single statutory example (the non-receipt of a notice of deficiency), and chose one characteristic of that example (that a deficiency proceeding is judicial). But it would be equally valid to focus on other characteristics of deficiency proceedings—such as the fact that they are heard before independent decision makers, or the fact that the IRS provides notice of the opportunity to be heard. Those other characteristics are consistent with Appeals hearings.

Rather than use *noscitur a sociis* in the illegitimate way Our Country Home suggests, courts should instead consider the full statute, looking for contextual clues in other sections of the statute to interpret the phrase in question. *Graham County*, 559 U.S. at 289-90. Here, as explained, *infra*, 53-54, looking at the full statute indicates that Section 6330(c)(2)(B) should be interpreted as barring liability challenges in CDP proceedings where the taxpayer was provided with either a prior judicial *or* administrative opportunity to challenge liability.

Similarly, Our Country Home incorrectly argues that its interpretation is necessary in order to avoid rendering Section 6330(c)(2)(B) superfluous. (Br. 11, 43-44.) Essentially, Our Country

Home asserts that, if Section 6330(c)(2)(B) is interpreted to include administrative, as well as judicial, opportunities to dispute liability, then "taxpayers would never be able to challenge the merits of the underlying tax liability in a CDP case." (Br. 44.) But, as Our Country Home admits throughout its brief, there *are* situations in which a taxpayer had no opportunity to dispute liability prior to the CDP process. For example, Our Country Home acknowledges that taxpayers are "sometimes" offered a pre-assessment Appeals conference in some penalty cases, and sometimes offered no pre-assessment conference. (Br. 29 (emphasis removed).) Our Country Home also admits that "there are situations where taxpayers, for whatever reason, are not afforded the right to a pre-assessment hearing with the Office of Appeals for additional taxes and/or penalties which the IRS can assess without issuing" a deficiency notice. (Br. 29.) The IRS may also summarily assess taxes, without offering an Appeals conference or issuing a deficiency notice, where a taxpayer failed to pay all of the taxes shown on its income tax return. (Br. 37.) There may also be cases where, for whatever reason, a particular taxpayer did not receive notice of its pre-assessment opportunity to be heard. Indeed, Section

6330(c)(2)(B) references one such situation: a case involving a deficiency where the taxpayer did not actually receive a deficiency notice. (*See also* Br. 38.) Thus, even Our Country Home correctly limits its claim to one that "administrative opportunities can be pursued in *almost* every collection case" before the CDP process. (Br. 12 (emphasis added).) Accordingly, reading Section 6330(c)(2)(B) to include administrative proceedings, as well as judicial proceedings, would not render Section 6330(c)(2)(B) superfluous.

In short, Our Country Home is incorrect to claim that Section 6330(c)(2)(B) unambiguously bars liability challenges in CDP proceedings only where the taxpayer was offered a prior judicial opportunity to dispute the liability. It is necessary, therefore, to turn to step two of the *Chevron* analysis.

b. Treas. Reg. § 301.6330-1(e)(3) reasonably interprets Section 6330(c)(2)(B) as meaning that opportunities to participate in Appeals proceedings are "opportunities to dispute" liability

Step two of the *Chevron* analysis addresses whether Treas. Reg. § 301.6330-1(e)(3) presents a "reasonable reading" of Section

6330(c)(2)(B). *Square D*, 438 F.3d at 744. If it does, this Court defers to that reasonable reading. *Id.*

In Treas. Reg. § 301.6330-1(e), the Secretary interprets a prior opportunity to dispute in Section 6330(c)(2)(B) as including an Appeals conference before or after assessment of the tax in question:

> (e) Matters considered at CDP hearing –
>
> (3) Questions and answers. The questions and answers illustrate the provisions of this paragraph (e) as follows:
>
> . . .
>
> Q-E2. When is a taxpayer entitled to challenge the existence or amount of the tax liability specified in the CDP Notice?
>
> A-E2. A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for such liability or did not otherwise have an opportunity to dispute such liability. Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. An opportunity for a conference with Appeals prior to the assessment of a tax subject to deficiency procedures is not a prior opportunity for this purpose.

Treas. Reg. § 301.6330-1(e)(3) Q&A-E2. Thus, Treasury has interpreted Section 6330(c)(2)(B) as extending to one category of administrative

opportunities to dispute tax liability: Appeals conferences, excluding Appeals conferences prior to assessment of a tax subject to deficiency procedures.

Treasury's regulatory interpretation of Section 6330(c)(2)(B) is reasonable. As explained *supra*, 43-45, an "opportunity to dispute" tax liability could, on its face, include administrative opportunities. Thus, Treasury's interpretation, which reads Section 6330(c)(2)(B) as including certain administrative opportunities to dispute, is facially reasonable. As such, it is unsurprising that both the Eighth Circuit and the Tax Court have upheld Treasury's interpretation. *Hassel Family Chiropractic v. Commissioner*, 368 F. App'x 695, 695 (8th Cir. 2010) (unpublished; *per curiam*); *Lewis*, 128 T.C. at 60-61 (addressing regulatory predecessor).

In addition, other provisions of the Reform Act support the Commissioner's reading of Section 6330(c)(2)(B). *See Robinson*, 519 U.S. at 341 (interpretation of statutory text includes context). First, as explained, *supra*, 34-37, in I.R.C. § 6330(c)(4)(A), Congress barred taxpayers from raising *any* issue that was raised and considered in any judicial *or* administrative hearing, as long as the taxpayer meaningfully

participated. There is simply no reason to believe that Congress viewed an administrative hearing as adequate for purposes of Section 6330(c)(4)(A), but not for purposes of Section 6330(c)(2)(B).

Second, looking more broadly at the Reform Act, Congress made a deliberate decision to strengthen the independence of the Office of Appeals and to ensure that taxpayers had the opportunity to raise disputes before that office. In the very first section of the Reform Act, Congress directed the Commissioner to reorganize the IRS, including taking steps to "ensure an independent appeals function within the Internal Revenue Service. . . ." Reform Act, 112 Stat. at 689, § 1001. Congress also enacted provisions seeking to increase availability of the Appeals function and to ensure that information regarding the opportunity to have an Appeals hearing be made available to taxpayers. Reform Act, 112 Stat. at 767, 770, §§ 3465, 3504.[16] Treating Appeals hearings as adequate opportunities to dispute tax liability is consistent

[16] Senator Roth, the chairman of the Senate Finance Committee, specifically praised the provisions of the Reform Act strengthening the appeals process as providing a "place to turn that is truly independent and structured to represent [taxpayers'] concerns," with increased availability. 144 Cong. Rec. S4147, S4182 (May 4, 1998).

with these provisions. *See also Porter v. Commissioner*, 130 T.C. 115, 138 (2008) (concluding that these provisions of the Reform Act establish that "Congress saw the informal Appeals process as serving an important function in resolving tax disputes while giving taxpayers a meaningful opportunity to voice their concerns").

Our Country Home complains that the regulation is "internally inconsistent" because it (1) only includes Appeals conferences, and not opportunities to dispute liability before the Examination Division of the IRS, and (2) excludes Appeals conferences in deficiency cases prior to the issuance of a notice of deficiency. (Br. 14-15; 47-49.) Our Country Home's complaints stem from its incorrect assumption that Section 6330(c)(2)(B) either must include *all* administrative opportunities to dispute liability or *none*. (*See, e.g.*, Br. 14.) But Our Country Home cites nothing to support such an assumption. Given that the statutory text does not define "opportunity to dispute," we submit that an interpretation that includes some, but not all, administrative opportunities may be adopted.

Here, the IRS only included Appeals conferences, which are held before independent Appeals officers who have had no role in examining

the taxpayer's returns or in preparing the Commissioner's position. As we explain, *supra*, 53-54, Congress viewed the availability of hearings before independent Appeals officers to be important protections for taxpayers; the regulation, thus, is consistent with the Reform Act as a whole. Moreover, it is reasonable for the regulation to treat prior opportunities to dispute liability before the Office of Appeals differently from prior opportunities to dispute liability before the Examinations division. Notably, it is the Office of Appeals that conducts CDP hearings, whereas the Examinations division is the entity which conducts civil tax audits and proposes potential tax liability. *See, e.g.*, *United States v. Peters*, 944 F. Supp. 646, 648 (N.D. Ill. 1996), *aff'd*, 153 F.3d 445 (7th Cir. 1998). The Examinations division is thus, by definition, not independent of the audit function.

The regulatory exclusion of Appeals conferences in deficiency cases is likewise appropriate. Through this interpretation, Treasury ensured that the ability to challenge tax liability subject to deficiency procedures in a CDP proceeding is consistently determined by reference to whether the taxpayer received a notice of deficiency. This is

consistent with the portion of Section 6330(c)(2)(B) specifically referencing non-receipt of a deficiency notice.

Part of Our Country Home's brief (Br. 47-53) is devoted to asserting that limiting the "opportunity to dispute" in Section 6330(c)(2)(B) to judicial opportunities is the better policy. But policy arguments do not justify rejecting Treasury's regulatory interpretation. Rather, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Moreover, it is inappropriate to read ambiguous language in a statute in a way that fundamentally alters a regulatory scheme, as Our Country Home proposes. Adoption of Our Country Home's restrictive interpretation would allow taxpayers a pre-payment judicial opportunity to challenge tax liabilities not subject to deficiency procedures in virtually every case. Pre-payment judicial opportunities to challenge taxes, not subject to deficiency procedures, are rare, limited

to either government-initiated suits to reduce assessments to judgment or to foreclose tax liens under I.R.C. §§ 7402 or 7403, or a suit to determine tax liability under 11 U.S.C. § 505 in a bankruptcy proceeding. As the Supreme Court has explained, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assocs.*, 531 U.S. 457, 468 (2001). The Supreme Court has applied the "elephants-in-mouseholes" doctrine to reject novel readings of statutes in a variety of contexts, including statutes governing the method of calculating air quality standards, *id.*, availability of municipal bankruptcy, *Puerto Rico v. Franklin Calif. Tax-Free Trust*, — U.S. —, 136 S. Ct. 1938, 1947 (2016), and the standard of review for ERISA claim denials, *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008). This Court has similarly used the doctrine to reject a novel reading of a regulation as altering a clear agency policy in favor of arbitration. *See Exelon Gen. Co. v. Local 15, Int'l B'hood of Elec. Workers, AFL-CIO*, 676 F.3d 566, 575 (7th Cir. 2002).

Our Country Home's reading of Section 6330(c)(2)(B) is a clear example of trying to find an elephant in a mousehole. "In waiving sovereign immunity and creating rights in individuals against the United States, Congress may provide 'only an administrative remedy,' or it may grant the claimant only a judicial remedy, or it 'may give to the individual the option of either an administrative or a legal remedy.'" *Nash Miami Motors, Inc. v. Commissioner*, 358 F.2d 636, 638 (5th Cir. 1966) (quoting *Tutun v. United States*, 270 U.S. 568, 576-77 (1926)). Outside of those situations where Congress has authorized prepayment judicial challenges to tax liability, taxpayers are expected to pay their taxes prior to seeking judicial relief, in the form of a refund suit pursuant to I.R.C. § 7422(a). *Flora v. United States*, 362 U.S. 145, 176-77 (1960). This reflects the important policy of ensuring that taxes are collected on a timely basis. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (discussing the Anti-Injunction Act, I.R.C. § 7421(a)). Congress has made a decision to permit prepayment challenges in the Tax Court for some tax liabilities, but not for others. *Nash Miami Motors*, 358 F.2d at 638. Thus, although income-tax liability and some penalties are subject to deficiency jurisdiction in the Tax Court, I.R.C.

§§ 6212-14, other liabilities, including the I.R.C. § 6707A penalty, are not. *See, e.g.*, *Smith v. Commissioner*, 133 T.C. 424, 429-30 (2009) (deficiency jurisdiction over income-tax liability and accuracy-related penalties, but not Section 6707A penalty). Our Country Home's brief provides ample proof that Congress has chosen to provide very different procedures for different tax situations. (Br. 24-44.) But it provides no proof that Congress decided to use Section 6330(c)(2)(B) to eliminate those differences, and to eviscerate the long-standing principle that refund suits are generally the appropriate mechanism for challenging tax liability, in the absence of an express statute permitting prepayment judicial challenges. If, in fact, Congress had decided to grant *every* taxpayer the right to prepayment judicial challenge of *every* form of tax liability, Congress would have done so clearly and expressly, as it did when it created deficiency proceedings.

Moreover, in making its policy arguments, Our Country Home ignores key characteristics of the CDP process which make it a poor vehicle for routine consideration and judicial review of liability challenges. CDP determinations are reviewed on the basis of the administrative record created during the CDP proceedings. *See, e.g.*,

Fifty Below Sales & Marketing, Inc., 497 F.3d at 829; *Murphy*, 469 F.3d at 31. But the scope of the CDP proceeding is notably limited, without the benefit of formal discovery, and the administrative record produced is typically minimal, not even resulting in any transcript. *Dalton*, 682 F.3d at 155-56; *Living Care Alternatives*, 411 F.3d at 625.

Further, interpreting Section 6330(c)(2)(B) "to hold that every taxpayer is entitled to litigate his underlying nondeficiency liability once a collection action is initiated would only encourage a taxpayer to wait until a collection action begins before disputing his liability." *Lewis*, 128 T.C. at 58. Thus, Our Country Home's argument (Br. 15-16, 50) that its interpretation of Section 6330(c)(2)(B) is necessary to prevent game playing by taxpayers actually has it backwards. Because Section 6330(c)(4) precludes a taxpayer from asserting in a CDP proceeding any argument that was raised and considered in any proceeding at which taxpayers meaningfully participated, interpreting Section 6330(c)(2)(B) to exclude administrative hearings would give strategic taxpayers an incentive to decline to accept invitations to challenge tax liability in pre-assessment Appeals conferences. This would seriously undermine the pre-payment Appeals process, and

would ensure that CDP proceedings become bogged down in liability challenges.

Treasury's interpretation of Section 6330(c)(2)(B) is much more reasonable from a policy perspective. It ensures that questions of liability should routinely be decided outside of the CDP context and, if challenged, should be reviewed either by the Tax Court in a deficiency proceeding or by a federal district court in a refund action. It also encourages the IRS to increase the availability of pre-assessment Appeals conferences, and to ensure that taxpayers are provided with notice of the opportunity for such conferences—consistent with Congress's intent in the Reform Act. But on those rare occasions when a taxpayer was otherwise provided no pre-collection opportunity to challenge tax liability, the CDP process is available as a "stopgap" to provide that opportunity.

Finally, Our Country Home argues that a ruling in its favor is necessary in order to resolve a "much-litigated" question regarding the meaning of Section 6330(c)(2)(B). (Br. 16-17, 53.) Unsurprisingly, Our Country Home cites nothing indicating that reducing litigation is a legitimate reason for rejecting an otherwise valid regulation. Nor does

Our Country Home actually establish that this is a particularly troublesome question. The fact that Section 6330(c)(2)(B) has been cited in a number of cases (Br. 5 n.4) does not mean that those cases addressed a difficult question, or even directly addressed the issue of what it means for a taxpayer to have had an "opportunity to dispute" liability.[17]

We submit that the Commissioner's interpretation of Section 6330(c)(2)(B) as barring liability challenges where a taxpayer was previously offered either a judicial or administrative opportunity to dispute its tax liability is the more reasonable one. At a minimum,

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[17] Our Country Home asserts that the Tax Court's treatment of prior administrative opportunities to dispute liability has been inconsistent (Br. 47-49.) In particular, it asserts that, in *Yari v. Commissioner*, 143 T.C. 157 (2014), *appeal pending*, No. 14-73914 (9th Cir.), the taxpayer "was able to challenge the merits of a penalty assessment in the CDP case even though the taxpayer had had a pre-assessment hearing with the Office of Appeals." (Br. 49 (emphasis omitted).) However, neither the stipulation of facts nor the Tax Court opinion in *Yari* states that the taxpayer had had a prior hearing with Appeals. (JA84-92.) The IRS never argued that the taxpayer in *Yari* was precluded from challenging liability by Section 6330(c)(2)(B). The Commissioner has also explained that the taxpayer in *Yari* did not actually receive a prior opportunity to dispute liability, but received an opportunity to dispute liability *after* the taxpayer filed his request for a CDP hearing. (JA116.) Thus, the Tax Court in this case properly rejected Our Country Home's analysis of *Yari*. (JA158.)

because the Commissioner's interpretation is a reasonable one, this Court should uphold Treas. Reg. § 301.6330-1(e)(3) Q&A E-2, and conclude that Our Country Home was barred from challenging its tax liability in its CDP hearing.

D. Because Our Country Home failed to raise any issues other than as to liability (which it was precluded from challenging), the Office of Appeals properly sustained the levy action.

In its CDP request, Our Country Home solely asserted liability challenges, and did not otherwise challenge the validity of the proposed levy action, assert any procedural irregularities with the levy action, or seek collection alternatives. (JA19; JA48-49.) Similarly, during his telephone hearing with Appeals officer Perales, Our Country Home's counsel solely sought to raise challenges to liability. (JA20; JA55.) Perales gave Our Country Home the opportunity to seek collection alternatives, but Our Country Home never submitted the required forms and financial information. (JA55-56.)

As such, the Office of Appeals was correct to sustain the proposed levy action. (JA21; JA59-61.) In its notice of determination, Appeals correctly found that the only issues raised by Our Country Home in the CDP hearing were precluded challenges to liability. (JA60.) Under

these facts, this Court should affirm the Tax Court's decision sustaining the levy action.

CONCLUSION

This Court should either dismiss this appeal as moot, or in the alternative, affirm the Tax Court's decision to sustain the Commissioner's levy action.

Respectfully submitted,

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Case No. 16-1279

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Attorney for Appellee

Dated: August 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system and that fifteen (15) papers copies were sent to the Clerk by First Class Mail. Counsel for the appellant were served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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/s/ Jennifer M. Rubin
JENNIFER M. RUBIN
Attorney

STATUTORY AND REGULATORY ADDENDUM

I.R.C. § 6330: Notice and opportunity for hearing before levy

(a) Requirement of notice before levy

> **(1) In general**
> No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

* * *

(b) Right to fair hearing

> **(1) In general**
> If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.
>
> **(2) One hearing per period**
> A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.
>
> **(3) Impartial officer**
> The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing. In the case of any hearing conducted under this section—

(1) Requirement of investigation
The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing

(A) In general. The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability

The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination. The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded. An issue may not be raised at the hearing if—

(A)

(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding; or

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A).

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing

(1) Judicial review of determination

The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Jurisdiction retained at IRS Office of Appeals. The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

I.R.C. § 6707A: Penalty for failure to include reportable transaction information with return

(a) Imposition of penalty

Any person who fails to include on any return or statement any information with respect to a reportable transaction which is required under section 6011 to be included with such return or statement shall pay a penalty in the amount determined under subsection (b).

(b) Amount of penalty

(1) In general
Except as otherwise provided in this subsection, the amount of the penalty under subsection (a) with respect to any reportable transaction shall be 75 percent of the decrease in tax shown on the return as a result of such transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes).

(**2) Maximum penalty.** The amount of the penalty under subsection (a) with respect to any reportable transaction shall not exceed—

(A) in the case of a listed transaction, $200,000 ($100,000 in the case of a natural person), or

(B) in the case of any other reportable transaction, $50,000 ($10,000 in the case of a natural person).

(3) Minimum penalty
The amount of the penalty under subsection (a) with respect to any transaction shall not be less than $10,000 ($5,000 in the case of a natural person).

(c) Definitions. For purposes of this section:

(1) Reportable transaction
The term "reportable transaction" means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

(2) Listed transaction
The term "listed transaction" means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011.

(d) Authority to rescind penalty

(1) In general. The Commissioner of Internal Revenue may rescind all or any portion of any penalty imposed by this section with respect to any violation if—

(A) the violation is with respect to a reportable transaction other than a listed transaction, and

(B) rescinding the penalty would promote compliance with the requirements of this title and effective tax administration.

(2) No judicial appeal

Notwithstanding any other provision of law, any determination under this subsection may not be reviewed in any judicial proceeding.

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Treas. Reg. § 301.6330-1: Notice and opportunity for hearing prior to levy

* * *

(e) Matters considered at CDP hearing –

(1) In general. Appeals will determine the timeliness of any request for a CDP hearing that is made by a taxpayer. Appeals has the authority to determine the validity, sufficiency, and timeliness of any CDP Notice given by the IRS and of any request for a CDP hearing that is made by a taxpayer. Prior to issuance of a determination, Appeals is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure with respect to the proposed levy have been met. The taxpayer may raise any relevant issue relating to the unpaid tax at the hearing, including appropriate spousal defenses, challenges to the appropriateness of the proposed levy, and offers of collection alternatives. The taxpayer also may raise challenges to the existence or amount of the underlying liability, including a liability reported on a

self-filed return, for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute the tax liability. Finally, the taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6320 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding. Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.

. . .

(3) Questions and answers. The questions and answers illustrate the provisions of this paragraph (e) as follows:

. . .

Q-E2. When is a taxpayer entitled to challenge the existence or amount of the tax liability specified in the CDP Notice?

A-E2. A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for such liability or did not otherwise have an opportunity to dispute such liability. Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. An opportunity for a conference with Appeals prior to the assessment of a tax subject to deficiency procedures is not a prior opportunity for this purpose.

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General Information

Court	US Court of Appeals for the Seventh Circuit; US Court of Appeals for the Seventh Circuit
Docket Number	16-01279