ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 16-1407

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES J. WEISS,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Appellee

ON APPEAL FROM THE DECISION
OF THE UNITED STATES TAX COURT

ANSWERING BRIEF FOR THE COMMISSIONER (FINAL)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. The parties, intervenors, and amici appearing in the Tax Court and in this Court are Charles J. Weiss and the Commissioner of Internal Revenue. There were no amici or intervenors appearing before the Tax Court, and there are no amici or intervenors who have appeared in this Court.

B. Rulings Under Review. The ruling under review is the Tax Court decision by Judge Lauber entered on August 22, 2016, in accord with the opinion published at 147 T.C. 179.

C. Related Cases. This case was not previously before this Court or any other appellate court. Counsel is not aware of any related cases currently pending in this Court or in any other court, as provided in Cir. R. 28(a)(1)(C).

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GLOSSARY

Acronym	Definition
CDP	Collection due process
CSED	Collection statute end date (acronym used in the administrative record and in the Tax Court)
IRS	Internal Revenue Service
RRA 1998	Internal Revenue Service Restructuring and Reform Act of 1998
Treas. Reg.	Treasury Regulations, 26 C.F.R.

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STATEMENT OF JURISDICTION

Charles J. Weiss (taxpayer) petitioned the Tax Court on June 8, 2011, for review of a determination, issued by the IRS Office of Appeals after a collection due process (CDP) hearing, to proceed with a proposed administrative levy. (JA 6.) The Tax Court has jurisdiction to review such determinations under § 6330(d)(1) of the Internal Revenue Code of 1986 (26 U.S.C.) (I.R.C.). Taxpayer's petition was timely mailed within

30 days of the notice of determination, which was sent on May 6, 2011. (JA 66, 249.) *See* I.R.C. § 7502(a).

Since the creation of its CDP jurisdiction in 1998, Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. No. 105-206, 112 Stat. 685, the Tax Court has maintained that its jurisdiction to review notices of determination does not depend on the underlying administrative actions, but requires only a timely petition for review of a facially valid notice of determination. *Lunsford v. Commissioner*, 117 T.C. 159, 161 (2001); *Sarrell v. Commissioner*, 117 T.C. 122, 125 (2001); *Offiler v. Commissioner*, 114 T.C. 492, 498 (2000). *Cf. Adolphson v. Commissioner*, 842 F.3d 478, 484 (7th Cir. 2016) ("absent a notice of determination, the tax court lacks jurisdiction under 26 U.S.C. § 6330(d)"). Because taxpayer received a facially valid notice of determination, the Tax Court had jurisdiction here.

On August 22, 2016, the Tax Court issued a decision sustaining the administrative determination to proceed with the proposed levy. (JA 155.) This was a final decision resolving all claims of all parties. On November 17, 2016, within 90 days of the decision, *see* I.R.C. § 7483,

taxpayer filed a timely notice of appeal. (JA 5.) This Court has jurisdiction over the appeal pursuant to I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUES

In this apparently upside-down case, taxpayer takes the position that his own CDP request was *not* timely filed, so that the IRS should *not* have granted him the CDP hearing he requested. To prevail, he must show that the 30-day period of I.R.C. § 6330(a)(2) began to run on the date printed on the notice (February 11, 2009), rather than the date the notice was mailed (February 13, 2009).

Three issues are presented:

1. Whether the Tax Court correctly held that, under the plain language of the statute, it is the date of mailing and not the date printed on the notice that starts the running of the 30-day period.

2. Whether the Tax Court correctly rejected taxpayer's argument that the statutory 30-day period can — or, under the circumstances of this case — should, be *shortened* pursuant to what might be described as "reverse equitable tolling."

3. Assuming the request was timely filed, whether the Tax Court correctly determined that the Appeals Officer did not abuse her

discretion in determining that the IRS should proceed with the proposed administrative levy notwithstanding the fact that the notice was dated February 11, 2009, but mailed February 13, 2009.

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the addendum, *infra*.

STATEMENT OF THE CASE

Taxpayer petitioned the Tax Court for review of a determination to proceed with administrative collection action made by the IRS Office of Appeals after a collection due process (CDP) hearing. In an unusual twist, the parties' positions are the reverse of what one might expect: taxpayer argues that his own CDP request was untimely, and that the Commissioner should not have granted him a hearing, while the Commissioner maintains that the administrative request was timely and the hearing proper. After a trial *de novo*, the Tax Court agreed with the Commissioner that taxpayer's CDP request was timely. On the merits, the Tax Court sustained the determination to proceed with an administrative levy. Taxpayer appeals.

1. The underlying liabilities and serial bankruptcies

Taxpayer owes well over $500,000 in unpaid income tax, including penalties and interest, with respect to his 1986, 1987, 1988, 1989, 1990, and 1991 tax years. (JA 174.) These liabilities were reported by taxpayer on returns filed by him in August and September 1994, and assessed by the Commissioner in October 1994. (JA 51.)

Ordinarily, the Commissioner has ten years from the date of assessment to collect a tax. I.R.C. § 6502(a). The final date of this period is referred to throughout the record as the "collection statute expiration date" or CSED. (JA 51.) The running of this limitations period is suspended by the filing of a petition in bankruptcy "for the period during which the Secretary is prohibited by reason of such case from . . . collecting," and for six months thereafter. I.R.C. § 6503(h). Taxpayer has filed, as relevant here, three bankruptcies. (JA 52-53.) In his Chapter 7 bankruptcy, the District Court found that the six tax years here at issue were not dischargeable on the ground that he had willfully failed to pay those liabilities, or at least, that his "continued non-payment became willful over time." *United States v. Weiss*, No. 97-31204, 2000 WL 1708802, at *4 (E.D. Pa. Nov. 15, 2000), *aff'd sub nom.*

In re Weiss, 276 F.3d 582 (3d. Cir. 2001), *opinion amended and superseded*, 32 Fed. Appx. 32 (3d Cir. 2002).

Together, taxpayer's three bankruptcies suspended the collection statutes for the six years at issue so that all six remained open in February 2009.[1] (JA 59.)

2. Administrative proceedings

a. The notices of intent to levy (Letters 1058)

On February 11, 2009, an IRS Revenue Officer prepared (as relevant here) two Letters 1058A, Final Notice of Intent to Levy and of Your Right to a Hearing (the notices). (JA 53-54.) One notice was addressed to taxpayer, and covered the six tax years here at issue (1986, 1987, 1988, 1989, 1990, and 1991), as well as the year 2001, for which year he had an outstanding joint liability with his wife. (JA 53, 173-174.) The notice shows that as of February 2009, taxpayer owed

[1] The parties have stipulated that, at the time taxpayer submitted his CDP request, the statute was due to expire on July 21, 2009. (JA 59.) We do not disavow that stipulation. But we note that the IRS employees involved did not realize they were working so close to the deadline: In February 2009, IRS records showed the statutes expiring in March, July, and August 2010. (*See* JA 176, 252.) The recalculation of the CSED was made at taxpayer's behest, as part of the CDP hearing, discussed *infra*. (JA 252-253.)

over $550,000 for the six years at issue, while he and his wife were jointly and severally liable for almost $5,000 for their 2001 tax year. (JA 174.) The other notice was addressed to taxpayer's wife, and listed only the 2001 liability. (JA 53-54.)

The Revenue Officer placed these notices in envelopes with certain IRS publications, and carried them to taxpayer's residence, where he intended to hand-deliver them. (JA 54.) He was unable to pull up to the house, however, because a dog was blocking the driveway. (JA 177.) He returned to his office with the notices and, on Friday, February 13, 2009, without reopening the envelopes, prepared for the notices to be sent to taxpayer and his wife by certified mail, and placed them in his office's outgoing mail bin. (JA 54-56.) He then entered a code into the IRS's records indicating that he had mailed the notices. (JA 56.)

Because of the President's Day holiday, that IRS Office was closed for the next three days (February 14-16). (JA 57.) The postal service was closed on Sunday, February 15, and Monday, February 16. (JA 57.) On Tuesday, February 17, taxpayer's wife signed both certified mail notices indicating that she had received the letters. (JA 59.) At the Tax

Court trial she testified that she had opened both envelopes, removed the contents, and destroyed the envelopes.[2] (JA 81.)

b. The CDP requests (Forms 12153)

One month later, on Monday, March 16, 2009, the Revenue Officer received two Forms 12153, Request for a Collection Due Process or Equivalent Hearing, both signed by taxpayer on March 13, 2009. (JA 59, 212, 214.) One form also was signed by taxpayer's wife (on March 10, 2009); that form relates only to their joint 2001 tax year. (JA 213-214.) The other form was signed by taxpayer alone, and lists six tax years: "1986, 1987, 1988, 1999, 2000, 2001." (JA 211.) One form was transmitted in an envelope postmarked March 13, 2009, which was a Friday; the other was transmitted in an envelope

[2] In the Tax Court, testimony suggested it was possible that the notice had not been collected by the Postal Service until Saturday, February 14, 2009. As the Tax Court explained (JA 154 n.12), it is immaterial whether the notice was mailed on Friday, February 13, or Saturday, February 14, because under I.R.C. § 7503, both 30-day periods would have expired on Monday, March 16, 2009, which is the date taxpayer's Form 12153 was received by the Commissioner. Taxpayer does not contest this matter on appeal. For simplicity, we join him in using February 13, 2009, as the date the notice of intent to levy was mailed.

postmarked Saturday, March 14, 2009. (JA 59.) The physical envelopes, however, became separated from the physical Forms 12153 in the IRS file. In his notes, the Revenue Officer indicated that both Forms had been postmarked March 13, 2009. (JA 180.)

Suspecting that taxpayer had meant to list tax years 1989, 1990, and 1991 rather than 1999, 2000, and 2001 on his individual Form 12153, the Revenue Officer called taxpayer to ask him to perfect the form by filing a new form listing the correct years. (*See* JA 215.) Taxpayer responded with a letter dated April 2, 2009, asking the Revenue Officer to "send me a letter explaining what the problem is with the paperwork I submitted." (JA 215.) In the letter, taxpayer stated that he "did do it in a hurry at the last minute, but I thought I followed the instructions properly." (JA 215.)

The Revenue Officer sent a letter reiterating his request. (JA 61, 216.) Taxpayer submitted a corrected Form 12153 on April 23, 2009, listing the six tax years here at issue. (JA 61, 217-218.) In processing the form, the Revenue Officer treated it as perfecting, and thus relating back to, taxpayer's earlier Form 12153. (JA 218.) *Cf.*

Craig v. Commissioner, 119 T.C. 252 (2002) (IRS erred in *not* treating a late-filed correction as perfecting the original Form 12153).

On both Forms 12153 submitted by taxpayer alone, taxpayer stated that the reason he was seeking a CDP hearing was that he couldn't pay the tax owed, but needed an installment agreement. (JA 212, 218.) He also contended that "penalties, if any, should be abated for reasonable cause," and that "levy action will cause a hardship." (JA 212, 218.) The joint form does not make any of these claims. (JA 213-214.)

At the top of the first page, highlighted and in bold, the form 12153 (2006 revision) used by taxpayer states: "You can find a section explaining the deadline for requesting a Collection Due Process hearing in this form's instructions. If you've missed the deadline for requesting a CDP hearing, you must check line 6 (Equivalent Hearing) to request an equivalent hearing." (JA 202, 211, 213, 217.) The instructions included with the Form 12153 state: "Your request for a CDP hearing about a proposed levy must be postmarked within 30 days after the date of the *Notice of Intent to Levy and Notice of Your Right to a Hearing*." (JA 204.) They also state that "Your timely request for a CDP hearing

will prohibit levy action in most cases" and "will also suspend the 10-year period we have, by law, to collect your taxes." (JA 204.)

The equivalent hearing box on line six is not checked on any of the three forms. (JA 212, 214, 218.)

c. Proceedings before IRS Appeals

On June 5, 2009, the IRS sent taxpayer a letter relating to his 1986 through 1991 tax years, marked "In Re: Collection Due Process – Levy." (JA 61, 219.) Included with the letter was a copy of IRS Publication 4165, Introduction to Collection Due Process Hearings. (JA 61, 220.)

Also on June 5, 2009, the case was assigned to an IRS Settlement Officer. (JA 221.) Upon physical receipt of the case, she confirmed that the CDP had been timely filed. (JA 221.) At first she thought it was not timely: IRS records showed that the notice of intent to levy had been generated on February 11, 2009, and the Form 12153 was stamped delivered on April 27, 2009. (JA 221.) But she then she consulted other records, which showed that the original request for a CDP hearing had been postmarked February 13, 2009. (JA 221 ("Ran ICS history. It

shows the original request was postmarked 3/13/2009.")), and only perfected on April 27, 2009. (JA 221.) She concluded: "I will consider the request timely." (JA 221.)

On November 25, 2009, the Settlement Officer sent taxpayer a letter entitled "Appeals Received Your Request for a Collection Due Process Hearing," informing him that a telephone conference had been scheduled for December 10, 2009. (JA 62, 228.) The letter states that "[a]t the conclusion of the hearing, we will issue a determination letter . . . for the tax periods for which your CDP hearing request was received timely" and "a decision letter for the tax periods for which your CDP hearing request was determined not to be timely." (JA 229.)

Taxpayer responded to this letter with a request that the hearing be delayed so that he could obtain representation. (JA 231-232.) The settlement officer responded on December 10, 2009 (JA 62, 233), and taxpayer provided some of the documents she requested on December 24, 2009 (JA 62, 234-235). Taxpayer and (after he was retained) taxpayer's representative Daniel Pilla sent additional letters

and information to the Settlement Officer on January 4, 2010 (JA 236), January 11, 2010 (JA 238-241), and January 12, 2010 (JA 237). None of these communications mentioned the statute of limitations on collection.

On January 15, 2010, Pilla wrote to the Settlement Officer on behalf of taxpayer. (JA 242.) He stated that the small joint liability for 2001 had been paid in full. (JA 242.) He then laid out an argument that the remaining years were "uncollectible by reason of the expiration of the collection statute of limitations." (JA 242.) By his calculations, the limitations periods had expired on October 10, 2009, with respect to the 1987 through 1991 tax years, and on September 26, 2009, with respect to the 1986 tax year. (JA 244.)

As Pilla acknowledged in the letter (JA 244), a request for a CDP hearing suspends the running of this statute. *See* I.R.C. § 6330(e). But, he argued, taxpayer's request had been untimely:

> The Letter 1058 issued to my client for the periods in question is dated February 11, 2009. My client had until March 13, 2009, in which to mail his CDP request. He mailed his Form 12153 by overnight mail, United States Post Office, on March 14, 2009. Thus, it was mailed outside the thirty-day window in which to be treated as a CDP request. . . . only a timely filed CDP request tolls the CSED.

> See code section 6330(e)(1) and Rev. Reg. sections 301.6330-1(b)(1) and (c)(1).

As evidence, Pilla attached taxpayer's copies of the postmarked envelopes from March 13, 2009, and March 14, 2009, and his receipts from those mailings. (*See* JA 206-208.) The March 13 receipt bears the handwritten notation "2001"; the March 14 envelope bears the handwritten notation "1986, 1987, 1988, 1989, 1990, 1991." (*Id.*)[3]

Reviewing this letter, the settlement officer noted that while the notice of intent to levy was generated on February 11, 2009, it was not mailed until February 13, 2009. (JA 222.) Thus, even assuming taxpayer did not mail the request until March 14, 2009, she concluded the request was timely: "The number of days from the mailing on 2/13/2009 to the postmarked dated 03/14/2009 is 29 days. The request is timely." (JA 223.) In a telephone conference with Pilla held on January 22, 2010, the settlement officer explained her conclusion. She also found that it was too late for taxpayer to challenge the timeliness of

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[3] There is no indication whether the notations were made contemporaneously with the mailing of the letters. (JA 60.) If the 30-day period runs from the date of mailing, however, as we argue in Part B of the Argument, *infra*, it does not matter whether taxpayer mailed his hearing request on March 13 or March 14.

his own request: He could have alerted Appeals to the supposed fact that his request was untimely as soon as he was contacted by letter of June 5, 2009, but did not do so until January, 2010. (JA 223.)

In this conference, and in his other communications with the IRS, Pilla raised no other issues. In particular he did not pursue the issues, raised by taxpayer on his Forms 12153, whether penalties should be abated, whether the levy would cause taxpayer hardship, and whether an installment agreement would be appropriate.

The settlement officer requested an opinion from IRS Counsel regarding the timeliness of the CDP request and the expiration date of the collection statute. (JA 223-224.) After she received that opinion, the settlement officer followed up extensively with counsel and the IRS insolvency unit. (JA 223-226.) On April 21, 2011, she called Pilla to inform him that IRS counsel agreed with her initial assessment: the CDP request was timely and the statute of limitations therefore remained open. (JA 227.) She asked Pilla if taxpayer wanted to pursue any collection alternatives, and he said he would get back to her by April 29, 2011. (JA 227.) Not having heard from him, on May 3, 2011,

the settlement officer prepared the closing documents for the hearing. (JA 227.)

d. The notice of determination

The notice of determination after a CDP hearing, issued on May 6, 2011, concludes that "the proposed levy action is appropriate." (JA 249.) The attached memorandum states that "Appeals has obtained verification from the IRS office collecting the tax that the requirements of any applicable law, regulation or administrative procedure with respect to the proposed levy . . . have been met." (JA 251.)

The only issues raised by taxpayer in the hearing were the timeliness of the CDP request and the expiration date of the statute of limitations on collection. (JA 251.) As to the timeliness of the CDP request, IRS Appeals reported that IRS Counsel had "concluded that the 30 day period for filing a timely Collection Due Process (CDP) hearing request runs from the date the CDP notice was mailed." (JA 252.) Because the notice was mailed on February 13, 2009,

she concluded that the request was due by March 15, 2009,[4] and thus the request was timely regardless of whether it was postmarked March 13 or March 14. (JA 252.) As to the statute of limitations on collection, the notice concludes that, but for the suspension caused by the CDP request, the expiration date would have been July 21, 2009. (JA 253.)

3. The Tax Court opinion

Taxpayer petitioned the Tax Court for review of this determination. (JA 6.) Ordinarily the Tax Court reviews CDP determinations on the administrative record. *Robinette v. Commissioner*, 439 F.3d. 455, 462 (8th Cir. 2006). Where the underlying liability is at issue, however, the Tax Court conducts a trial de novo, as in its deficiency proceedings. *See Sego v. Commissioner*, 114 T.C. 604, 609 (2000); *Goza v. Commissioner*, 114 T.C. 176, 180 (2000). Because of "uncertainty in our precedents as to whether a de novo standard of review applies where (as here) the controversy concerns a

[4] In fact, because March 15, 2009, was a Sunday, the deadline was extended to Monday, March 16, 2009. I.R.C. § 7503. Because timely mailing is timely filing under the Internal Revenue Code, I.R.C. § 7502(a), the settlement officer's mistake is immaterial.

challenge to the 10-year collection period of limitations" (JA 146-147), the Tax Court conducted a trial in this case. The court ultimately found, however, that it "would reach the same result regardless of which standard . . . applied." (JA 147.)

The Tax Court accepted the view, shared by both parties, that the corrected Form 12153 submitted by taxpayer in April 2009 related back to the original Form 12153 mailed by him in March 2009. (JA 145, 153.) Accordingly, court found that the "focus of the parties' dispute is whether [taxpayer] filed the 1986 CDP Form" — *i.e.*, Ex. 18-J — "within the 30-day period specified in section 6330(a)(3)(B)." (JA 148.) Because taxpayer insisted that his Form was mailed on March 14, 2009, the court reasoned, the question could be reduced to "whether March 14 was within 30 days of the levy notice." (JA 148.) If the date of the levy notice was the date it was mailed, February 13, 2009, then taxpayer's request was timely; if the date of the notice was the date printed on the notice, February 11, 2009, it was untimely. (JA 148.) This reasoning, which follows the reasoning of IRS Appeals, permitted the Tax Court to

avoid making a finding of fact regarding whether taxpayer mailed the notice on March 13, 2009, or March 14, 2009.

The court observed that numerous prior cases had recited the rule that "the 30-day period in which a taxpayer may timely request an Appeals Office hearing begins on the day after the date of mailing" of a levy notice under section 6330(a). (JA 148, citing *Newsome v. Commissioner*, T.C. Memo. 2007-111, *Lopez v. Commissioner*, T.C. Memo. 2001-228, and *Andre v. Commissioner*, 127 T.C. 68, 71 (2006) (holding that premature CDP requests are not effective).) But, the court noted, no prior case "addressed a situation where the date appearing on a levy notice does not match the mailing date." (JA 148.)

In considering the same problem with respect to other notices, the court observed, it had since its inception as the Board of Tax Appeals relied upon the actual date of mailing when an earlier date was printed on the notice. (JA 148 (citing, *inter alia*, *United Tel. Co. v. Commissioner*, 1 B.T.A. 450 (1925) (notice dated September 20, but mailed September 22, 1924).)) The court gave particular weight (JA 148-149) to the recent case *Bongam v. Commissioner*, 146 T.C. 52,

58 (2016), in which the notice of deficiency issued after a CDP hearing had been mailed to the wrong address, returned to the IRS, and then — without reopening the envelope or redating the notice — remailed to the correct address. The Tax Court held that the date of remailing began the running of taxpayer's time to petition the Tax Court under I.R.C. § 6330(d)(1). *Id.* at 59. In further support of this position, the Tax Court observed, it would make judicial review available to a larger number of taxpayers, whereas the upside-down position advocated by taxpayer here would make taxpayers' administrative hearings immune from judicial review. (JA 149.)

The Tax Court rejected (JA 154 n.9) taxpayer's reliance on *Jones v. Commissioner*, T.C. Memo. 1984-171, explaining that in *Jones*, unlike in this case, the date printed on the notice was *later* than the mailing date, and that the Tax Court in *Jones* had expressly disclaimed any intent "to shorten the period . . . when the date stamped on the notice is earlier than the date of delivery to the postal authorities." The Tax Court also rejected taxpayer's attempt to construe various regulations and instructions that refer to "the date *of* the CDP Notice" as references to "the date *on* the CDP Notice." (JA 149.)

Having concluded that taxpayer's Form 12153 was timely if mailed within 30 days of the date the notice of intent to levy was mailed, the Tax Court proceeded to find that the settlement officer had not abused her discretion in finding that the notice of intent to levy was mailed on February 13, 2009. (JA 150-151.) Moreover, the court noted, even if the Postal Service had not collected the letter until Saturday, February 14, 2009, that fact would be immaterial, as taxpayer's Form 12153 was timely with respect to both dates. (JA 154 n.12.)

The Tax Court rejected taxpayer's argument that a notice of intent to levy bearing a date that does not match the mailing date violates the statutory requirement that, in that notice, the Commissioner inform the taxpayer "in simple and nontechnical terms" of, inter alia, his "right . . . to request a hearing during the 30-day period under paragraph (2)." (JA 151.) To begin with, the court noted, nothing in the statute indicated *any* Congressional intent to sanction the Commissioner for failure to comply with this instruction, least of all the conclusion that administrative levy action cannot be sustained in the face of such a minor discrepancy. (JA 151-152.) The court noted that, going back

many years, it and its predecessors had had occasion to consider notices stamped with dates that did not match their mail dates, and that it had never concluded that such a discrepancy invalidated the notice. (JA 151, citing *S. Ca. Loan Ass'n v. Commissioner*, 4 B.T.A. 223 (1926); *United Tel. Co.*, 1 B.T.A. 450 (notice dated September 22, mailed September 24, 1924); *Hurst, Anthony & Watkins v. Commissioner*, 1 B.T.A. 26 (1924) (no date stamped on notice).)

The Tax Court also (JA 152) rejected taxpayer's argument that, even if the notice of intent to levy was valid, it was an abuse of discretion to proceed with the administrative collection action given the mismatched dates, and an Internal Revenue Manual (IRM) provision stating that the dates should match. The court noted, however, that the "IRM lacks the force of law and does not create rights for taxpayers," and, moreover, that no authority had been identified holding that the verification requirement of I.R.C. § 6330(c)(1) required verification that the IRS had complied with all IRM provisions. (JA 152.)

Finally, the Tax Court rejected taxpayer's equitable estoppel argument. (JA 152-153.) Taxpayer argued that the IRS had "misled

him" by concealing the date of mailing, and that he had "suffered prejudice as a result," because he had been granted a CDP hearing he did not really want, with the concomitant suspension of the collection statute. (JA 152.) The Tax Court rejected both prongs of this argument. The court found that the IRS had not concealed the date of mailing because the "date on the levy notice and the date imprinted on the envelope were visible for all to see." (JA 152.) It also found that taxpayer's "testimony that he actually sought an 'Equivalent Hearing' was implausible for at least four reasons:

> (1) he did not check the box for "Equivalent Hearing" despite two opportunities to do so;
>
> (2) the IRS during the pendency of an "equivalent hearing" could begin immediate collection action, which was the last thing [taxpayer] wanted;
>
> (3) any relief afforded by the IRS in an "equivalent hearing" would be purely discretionary and not subject to judicial review; and
>
> (4) the CDP hearing that he requested would entitle him to judicial review and defer IRS collection action indefinitely, thus achieving the goals he expressed in his hearing request.

In accord with this opinion, the Tax Court entered a decision sustaining the proposed administrative levy. (JA 155.)

SUMMARY OF ARGUMENT

This Tax Court collection-due-process (CDP) proceeding presents a single issue: whether taxpayer's request for a CDP hearing was timely filed. The issue is presented, however, with an unusual twist. It was the Commissioner who treated the CDP request as timely filed, and who argues that that treatment is correct, while it is the taxpayer who argues that his own request was *not* timely filed and thus should not have been granted. If taxpayer is correct, then the statute of limitations on collection, which is suspended during CDP hearings and appeals therein, has expired, and the undisputed taxes, penalties, and interest — dating from as early as 1986 and amounting to well over half a million dollars — are not collectible.

Under section 6330(a)(2) of the Internal Revenue Code, the Commissioner must, "not less than 30 days before the first levy," give a taxpayer notice that he intends to levy to collect an unpaid tax. By statute, the notice may be given in person, left at the taxpayer's home, or sent by certified mail, return receipt requested. I.R.C. § 6330(a)(2). The notice is to include "the right of the person to request a hearing during the 30-day period under paragraph (2)." I.R.C. § 6330(a)(3)(B).

The notice in this case was mailed to taxpayer, return receipt requested, on Friday, February 13, 2009. Taxpayer mailed his request for a CDP hearing no later than March 14, 2009. Under the Internal Revenue Code, timely mailing is timely filing. Taxpayer's CDP request thus was timely filed within 30 days of the notice of intent to levy.

Taxpayer argues, however, that the statutory 30-day period either began running before the notice was mailed, or that it should be shortened from 30 days to 28, because the date printed on the notice was February 11, 2009, two days before it was mailed. (An IRS revenue officer had prepared the notice on that day, intending to personally deliver it to taxpayer's home, but had been deterred by a dog. (JA 177.)) As the Tax Court pointed out, these arguments, if accepted, generally would disadvantage taxpayers because, as a rule, taxpayers request CDP hearings only if they want CDP hearings.

Taxpayer's arguments are inconsistent with the law. The plain language of the statute allows taxpayers 30 days from the date of mailing to request a CDP hearing. Taxpayer attempts to use Treasury Regulations to circumvent the statutory language, but the regulations refer to the "date *of* the notice," rather than the "date *on* the notice."

That phrase, which is at most ambiguous, should not be interpreted to contravene the statute or to grant the IRS authority to shorten the statutory 30-day period by backdating a notice. Taxpayer's reliance on other, less authoritative administrative documents is similarly misplaced.

Taxpayer's appeal to equity to shorten his own deadline is misconceived. The Commissioner was not equitably estopped by the misdated notice from finding taxpayer's CDP request timely, not least because, as the Tax Court found, taxpayer was not credible when he testified that he relied on the February 11, 2009, date printed on the notice for the purpose of filing a CDP request when it was too late for that request to be effective. Moreover, as the Supreme Court has long held, a taxpayer who makes a request that causes the Commissioner to forebear from executing an administrative levy until after the statute of limitations on collection otherwise would have expired cannot then be heard to complain that the Commissioner granted his request. *R.H. Stearns v. Commissioner*, 291 U.S. 54 (1934).

Finally, there was no error in the Commissioner's determination to proceed with the levy despite the fact that the date printed on the

notice did not match the date the notice was mailed. Although this discrepancy did not follow the best administrative practices, it did not violate any law or regulation, and did not prevent taxpayer from receiving the notice with plenty of time to file a timely request for a CDP hearing (which he did). The Commissioner did not abuse his discretion in concluding that, at least in this case, this minor departure from the Internal Revenue Manual is no reason for the Government to abandon collection of taxpayer's large and undisputed debt.

ARGUMENT

As the Tax Court concluded, the Commissioner's determination to proceed with the proposed administrative levy was not an abuse of discretion

Standard of review

The Courts of Appeals generally review the determinations of the Tax Court on the same standard as the judgments of a district court. I.R.C. § 7482(a)(1). "In a CDP case in which the merits of the underlying tax liability are not at issue, this court reviews the determinations made by the Office of Appeals for an abuse of discretion." *Byers v. Commissioner*, 740 F.3d 668, 675 (D.C. Cir. 2014). *See also Tucker v. Commissioner*, 676 F.3d 1129, 1135-37 (D.C. Cir. 2012); H. Conf. Rept. 105-599, at 266 (1998) ("Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion.").

Taxpayer's principal claim, that the tax liabilities at issue are uncollectible because the statute of limitations on collection has expired, does not concern "the merits of the underlying tax liability," and therefore is subject to abuse-of-discretion review. *See* Proper Standard of Review for Collection Due Process Determinations, IRS Notice CC-

2014-002 (May 5, 2014). CDP determinations reviewed for abuse of discretion generally are reviewed on the administrative record. *Robinette v. Commissioner*, 439 F.3d. 455, 462 (8th Cir. 2006). That said, in this case the Commissioner did not object to a trial de novo in the Tax Court.

The Tax Court concluded (JA 146-147) that it would have reached the same result on either standard. As we demonstrate below, that is correct. As a matter of law, on the undisputed facts of this case, the 30-day period began to run when the notice of intent to levy was mailed on February 13, 2009. Equity will not *shorten* that statutory period. And it was no abuse of discretion for the IRS to proceed with the levy, notwithstanding the misdated notice, when taxpayer received actual notice in time to request the hearing, and when the suspension of the running of the statute of limitations on collection corresponded to a suspension of administrative collection action.

A. Introduction

1. Collection due process (CDP) hearings, in general

Under § 6301, the Secretary "shall collect the taxes imposed by the internal revenue laws." To that end, within 60 days of making an

assessment, the Secretary must notify the taxpayer of the assessment and demand payment.[5] I.R.C. § 6303. When a taxpayer neglects or refuses to pay a tax after assessment, notice and demand, the amount due becomes "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." I.R.C. § 6321. The statutory lien is not self-executing, however, and the IRS must take affirmative action to enforce the collection of delinquent taxes. For example, the IRS may collect the tax by levy under § 6331(a), after first giving the taxpayer 30 days' notice of intent to do so, *see* § 6331(d)(1) and (2).

In 1998, in order to provide taxpayers additional procedural protection in connection with tax collection activity by means of liens and levies, Congress enacted § 6330, which generally affords taxpayers the right to a hearing to review the propriety of collection activity. RRA 1998 § 3401, 112 Stat. 685, 746. *See generally Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621, 624-625 (6th Cir. 2005).

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[5] Assessment, notice and demand here took place during one of taxpayer's bankruptcies. These actions are not barred by the automatic stay. 11 U.S.C. § 362(b)(9).

Under § 6330(a), the Commissioner must notify a taxpayer of his right to request a collection-due-process (CDP) hearing before a levy is made.[6] Following a timely request — the central issue in this proceeding — the taxpayer is entitled to a hearing before the IRS Office of Appeals. I.R.C. § 6330(b)(1), (2); Treas. Reg. § 301.6330-1(b), (d) (26 C.F.R.). *See generally Tucker*, 676 F.3d at 1131.

CDP hearings are informal and nonadversarial. They are often conducted by telephone or correspondence, and they are not required to be transcribed or recorded. *Tucker*, 676 F.3d at 1135; *Murphy v. Commissioner*, 469 F.3d 27, 30 (1st Cir. 2006); *Living Care Alternatives*, 411 F.3d at 624; Treas. Reg. § 301.6330-1(d)(2), Q&A D6.

At the hearing, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy," including challenges to the appropriateness of collection activities and offers of collection alternatives (*e.g.*, posting a bond, substitution of other assets, an installment agreement or an offer-in-compromise). I.R.C. § 6330(c)(2)(A); Treas. Reg. § 301.6330-1(e)(3), Q&A E6. In addition, if

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[6] A CDP hearing is also offered upon the filing of a notice of lien. I.R.C. §§ 6320, 6323. Because only a proposed levy is at issue here, we discuss only the levy provisions.

a taxpayer has not previously had the opportunity to dispute a tax, he may dispute it in the CDP hearing. I.R.C. §§ 6320(c), 6330(c)(2)(B).

After the hearing, the IRS Office of Appeals issues a "notice of determination" determining whether the "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." I.R.C. § 6330(c)(3)(C); *see* Treas. Reg. §§ 301.6330-1(e)(3) Q&A E8, 301.6330-1(f)(1). If an adverse notice of determination is issued, § 6330(d)(1) allows the taxpayer to seek review of the notice of determination in the Tax Court within 30 days thereafter.

2. The 30-day period under I.R.C. § 6330(a)

As mentioned above, the Commissioner must notify a taxpayer of his right to request a collection-due-process (CDP) hearing before a levy is made. I.R.C. § 6330(a)(1). The time and method for delivering the notice are prescribed by the statute, which permits notice to be given in any of three ways:

> **(2) Time and method for notice.**—The notice required under paragraph (1) shall be—
>
> **(A)** given in person;
>
> **(B)** left at the dwelling or usual place of business of such person; or

> **(C)** sent by certified or registered mail, return receipt requested, to such person's last known address;
>
> not less than 30 days before the first levy with respect to the amount of the unpaid tax for the taxable period.

I.R.C. § 6330(a)(2). *Compare* I.R.C. § 6331(d)(2) (describing the same 30-day period). Under I.R.C. § 6330(a)(3)(B), this notice is required to "include in simple and nontechnical terms . . . the right of the person to request a hearing during the 30-day period under paragraph (2)."

A timely request for a hearing has two consequences. First, it entitles the requestor to a CDP hearing: "If a 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." I.R.C. § 6330(b)(1). Second, it suspends both administrative collection action *and* the running of the statute of limitations on collection:

> if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment) . . . shall be suspended for the period during which such hearing, and appeals therein, are pending.

I.R.C. § 6330(e)(1). A timely CDP request thus affects two different deadlines: it *satisfies* the 30-day deadline to request a CDP hearing

under I.R.C. § 6330(a)(2) and (a)(3)(B) (a deadline that runs against the taxpayer, for the benefit of the Commissioner) and, at the same time, *suspends* the running of the 10-year statute of limitations on collection under I.R.C. § 6502 (a deadline that runs against the Commissioner, for the benefit of the taxpayer).

3. Equivalent hearings

If the request for a hearing is not timely filed within this 30-day period, the Commissioner has the power to conduct "equivalent hearings." Congress contemplated that such hearings would be made available to taxpayers: indeed, the Conference Committee Report states that "[t]he Secretary must provide a hearing equivalent to the hearing if later requested by the taxpayer." *See* H. Conf. Rept. 105-599, at 266 (1998), 1998-3 C.B. 1020. The comment reflects Congress's understanding that informal hearings about collection action, though not required by Congress, were within the authority of IRS Appeals prior to the 1998 Act. *See Tucker v. Commissioner*, 135 T.C. 114, 137 (2010) (discussing the pre-existing collection appeals program), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012). The 1998 Act might best be understood as codifying this practice and, with respect to timely-requested

hearings, providing for Tax Court review of the administrative determination — and thus, via I.R.C. § 7482, for review by the Courts of Appeals.

Consistent with the understanding expressed by the Conference Committee, the IRS now provides for "equivalent hearings" by regulation. Treas. Reg. § 301.6330-1(i). Under the regulations, an equivalent hearing "generally will follow Appeals procedures for a CDP hearing." *Id.* Equivalent hearings end, with the issuance not of a Notice of Determination, but of a Decision Letter. *Id.* *Cf.* Treas. Reg. § 301.6330-1(i)(2) Q&A-I5 ("The Decision Letter will generally contain the same information as a Notice of Determination.").

The grant to the Tax Court of jurisdiction to review CDP hearings does not extend to equivalent hearings. I.R.C. § 6330(d)(1); Treas. Reg. § 301.6330-1(i)(2) Q&A-I6. Because Congress intended for the IRS to conduct equivalent hearings in response to late-filed requests, the IRS's decision to conduct an equivalent hearing does not waive the statutory deadline for requesting a CDP hearing. *Moorhous v. Commissioner*, 116 T.C. 263, 270 (2001); *Kennedy v. Commissioner*, 116 T.C. 255 (2001). That said, the Tax Court will construe an administrative hearing styled

as an "equivalent hearing" as a CDP hearing, and a result conveyed in a "decision letter" as a notice of determination, if the hearing was timely requested. *Craig v. Commissioner*, 119 T.C. 252 (2002) (finding that the taxpayer's perfected request for a CDP hearing related back to the timely, but imperfect, request). In *Craig* the Tax Court presumed that the taxpayer sought a CDP hearing even though he expressly stated that he did not want to suspend the running of the statute of limitations on collection. 119 T.C. at 255-56.

Taxpayer here seeks to upend that presumption: he argues (Br. 37) that, notwithstanding the objective evidence of his CDP request, he never wanted a CDP hearing, because to him the continued running of the statute of limitations on collection was more valuable than judicial review and the suspension of collection activity. In practical terms, because the IRS stopped collection activity when it received taxpayer's request and treated it as timely filed, the result he argues for is the most valuable combination of all: a cessation of administrative collection action *without* a corresponding suspension of the statute of limitations on collection.

The Tax Court correctly concluded that taxpayer may not obtain this mismatched set of benefits. As we show in Part B, under the plain language of the statute and the facts of this case, the 30-day period within which a taxpayer may request a CDP hearing began to run when the notice was mailed, and taxpayer's request thus was timely. Regulations and other administrative documents upon which taxpayer relies are not to the contrary. Moreover, as we demonstrate in Part C, a taxpayer who has filed a CDP request may not invoke a sort of "reverse equitable tolling" argument to *shorten* his own deadline. Finally, as we explain in Part D, the Secretary did not abuse his discretion in concluding that the proposed levy should proceed, notwithstanding the fact that the notice of intent to levy was dated February 11, 2009, but not mailed until February 13, 2009.

B. Taxpayer's CDP request was filed within the 30-day period created by the Code

1. By statute, the 30-day period for filing a CDP request runs from the date notice is transmitted pursuant to I.R.C. § 6330(a)(2)

As noted above, paragraph (2) of Section 6330(a) of the Code requires the Commissioner to provide notice of intent to levy "not less than 30 days before the first levy with respect to the amount of the

unpaid tax for the taxable period," and allows the Commissioner to deliver this notice by any of three different methods: the notice may be (A) "given in person"; (B) left at the taxpayer's home or place of business"; or (C) "sent by certified or registered mail, return receipt requested, to such person's last known address." I.R.C. § 6330(a)(2). The next paragraph of the statute, paragraph (3), refers to "the right of the person to request a hearing during the 30-day period under paragraph (2)." I.R.C. § 6330(a)(3)(B). This reference thus describes the 30-day period that begins with the delivery of notice by one of the methods enumerated in paragraph (2).

Of these methods, only one was accomplished here. To be sure, the IRS Settlement Officer who prepared the notice of intent to levy here at issue, as well as a similar notice limited to the 2001 tax year and addressed to taxpayer's wife, intended to give these notices to taxpayer and his wife in person or to leave them at their home: on Wednesday, February 11, 2009, he prepared the notices and took them to taxpayer's home for that purpose, but a dog prevented him from going down the driveway.

And so, on Friday, February 13, 2009, after he had returned to his office, the Settlement Officer sent the notices by certified mail, return receipt requested, to taxpayer's last known address (and on Tuesday, February 17, 2009, taxpayer's wife signed for them). (JA 54-56, 59.) When the notices were sent by certified mail, notice was transmitted under the terms of I.R.C. § 6330(a)(2), and the 30-day period began to run.

Because the statutory 30-day period began to run on Friday, February 13, 2009, when the notices were mailed, taxpayer and his wife had 31 days, until Monday, March 16, 2009, to file their CDP requests. *See* I.R.C. § 7503 (when a deadline falls on a Sunday, performance on a Monday is considered timely). Under the Code, timely mailing is timely filing, I.R.C. § 7502(a), but both requests would have been timely even without this rule: the IRS received both requests on Monday, March 16. (JA 59.) Both were signed by taxpayer on March 13, 2009. (JA 212, 214.) One was postmarked March 13, 2009, and the other was postmarked March 14, 2009. (JA 59.) Regardless of which request was in which envelope, both were timely filed within the statutory 30-day

period that began running on February 13, 2009 (as extended by I.R.C. § 7503).

2. A misdated notice does not shorten the statutory 30-day period under any of the authorities relied upon by taxpayer

In his brief, taxpayer declines to consider the plain language of I.R.C. § 6330(a)(2). Instead, he relies on a variety of administrative documents that, he argues, override the plain language of the statute and permit the IRS to shorten the 30-day period provided by Congress within which a taxpayer may request a CDP hearing. At bottom, as the Tax Court held, none of the administrative documents he relies on can override the statute to shorten the statutory period in this manner.

a. The regulations

Taxpayer relies (Br. 17) on the regulations concerning notice of intent to levy, especially Treas Reg. § 301.6330-1(b)(1) ("entitlement to a CDP hearing"), which states that the "taxpayer must request the CDP hearing within the 30-day period commencing on the day after the date of the CDP notice," and (c)(1) ("requesting a CDP hearing"), which provides that "the CDP hearing must be requested during the 30-day period that commences the day after the date of the CDP notice."

Taxpayer argues (Br. 18) that in these statements the phrase "date *of* the CDP notice" must refer to the date *printed on* the CDP notice, rather than the date the notice was *issued*.

Taxpayer misreads the regulations. The regulations themselves equate the phrase "date of the CDP notice" with the date that notice is issued, not the date printed on the notice. Question B2 asks whether the taxpayer is "entitled to a CDP hearing when the IRS, more than 30 days *after issuance* of a CDP notice under section 6330" issues an additional levy notice concerning the same tax. Treas. Reg. § 301.6330-1(b)(2) (emphasis added). If the IRS generates and prints a notice, but for some reason — an encounter with a dog, for example — the IRS agent does not actually give the notice to the taxpayer, leave it for the taxpayer, or mail it to the taxpayer, it cannot be said that the notice has been "issued." The "date of the CDP notice," as that phrase is used in the regulation, therefore refers to the date the notice is given to the taxpayer, left for the taxpayer, or mailed to the taxpayer in accord with I.R.C. § 6330(a)(2).

Taxpayer also conflates (Br. 19) the regulations governing the mailing of a *notice of determination* issued *after* a CDP hearing (in

Treas. Reg. § 301.6330-1(e)(3) Q&A E8) with the regulations pertinent here, those governing the *notice of intent to levy* that *initiate* a CDP proceeding, Treas. Reg. § 301.6330-1(a)(1), which echo the statute. The regulations are quite distinct, however, because the statute governing the making of determinations, I.R.C. § 6330(d)(1), unlike the statute here at issue, does not specify the means by which determinations will be communicated to taxpayers: It provides only that a taxpayer "may, within 30 days of a determination under this section, petition the Tax Court for review of such determination." It is the regulation relied upon by taxpayer, Treas. Reg. § 301.6330-1(e)(3) Q&A E8, that specifies how this determination will be communicated to taxpayers.

In any event, taxpayer's reading of even this inapplicable regulation is erroneous. Under the regulation, the taxpayer "will be sent a dated Notice of Determination by certified or registered mail," and the notice "will advise the taxpayer of the taxpayer's right to seek judicial review within 30 days of the date of the Notice of Determination." Treas. Reg. § 301.6330-1(e)(3) Q&A E8(i). Taxpayer asserts (Br. 22) that, under this regulation, the phrase "dated notice" must mean that the date *printed* on the "dated Notice of Determination"

starts the running of the 30-day period within which the taxpayer may petition the Tax Court, even if the Notice of Determination is "sent . . . by certified or registered mail" on a different date. But again, the Service cannot be said to have "*sent* a dated Notice of Determination," Treas. Reg. § 301.6330-1(e)(3) Q&A E8(i), on a date when the notice had not yet departed the agency's offices. For these reasons, the Tax Court has held that the date printed on a Notice of Determination cannot shorten the 30-day period that begins to run when the notice is properly mailed. *Bongam v. Commissioner*, 146 T.C. 52, 58 (2016).

Taxpayer attempts to fortify his erroneous readings of the regulations by invoking the doctrines of *Chevron* deference and *Auer* deference. (Br. 14, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); Br. 20-21, citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997).) Nothing about these doctrines, however, permits the Court to analyze the regulations without first reading the text of I.R.C. § 6330(a)(2), as taxpayer advocates (Br. 13-14). As explained above, under the statute, the 30-day period unambiguously begins at the happening of the first of the three events listed in I.R.C. § 6330(a)(2). Nor will these doctrines support taxpayer's

desire to read even an ambiguous regulation (and, as we have already shown, the regulations at issue are *not* ambiguous) to contradict the statute.

b. The instructions to the Form 12153

Taxpayer also attempts to leverage the instructions included with the notice of intent to levy into a requirement that the printed date controls. He argues (Br. 16) that any "simple and nontechnical" description of the deadline, *see* I.R.C. § 6330(a)(3), must take as the starting point the date printed on the letter.

We disagree. In our view, any "simple and nontechnical" description of a deadline presumes that the deadline operates like every other deadline — that is, that there is a penalty for filing late, but no penalty for filing early. Consistent with this straightforward understanding of deadlines, the IRS instructions are designed to help taxpayers file their CDP requests on time. For example, the instructions do not refer to the rule that a deadline falling on a weekend or holiday is extended to the next business day, I.R.C. § 7503. Failure to mention that rule might cause a taxpayer to file early, but (because it

only extends and does not shorten deadlines) the omission cannot cause him to file late.

Taxpayer places special weight on the statement in the notice that the hearing must be requested "within 30 days from the date of this letter." (Br. 21, citing JA 173.) Here, as in the regulation, the preposition *of* is, at most, ambiguous. As we explained above, and as the Tax Court held, under the statute the date *of* the notice does not necessarily mean the date *printed on* the notice.

Other publications included with the notice only increase the ambiguity. As taxpayer points out (Br. 20), IRS Publication 594, The IRS Collection Process (Rev. 7-2007), included with the notice of intent to levy (JA 57-58), states that "You may request a CDP hearing with the Office of Appeals by sending a request for a CDP hearing to the address shown on your notice. You must file your request within 30 days of the date *on* your notice." (JA 193, emphasis added.)[7] But also included with the notice of intent to levy was the more specific Collection

[7] Subsequent versions of IRS Publication 594 have been corrected. *See* Publication 594 (Rev. 4-2012) at 6 ("You can request a Collection Due Process hearing within 30 days from the date *of* your Notice of Intent to Levy (emphasis added); Publication 594 (Rev. 3-2017) at 6 (same), https://www.irs.gov/pub/irs-pdf/p594.pdf.

Appeals Rights flyer (JA 57-58, 198), which correctly explains that "The IRS can't levy or seize your property within 30 days from the date [the levy notice] is mailed, given to you, or left at your home or office. During that 30-day period, you may request a hearing with Appeals." (JA 198.) We submit that arguably ambiguous instructions published by an administrative agency cannot override the plain language of a statute, especially when to allow such an override would empower the agency to *shorten* the time allowed by Congress for a taxpayer to request a CDP hearing.

c. The Internal Revenue Manual

Taxpayer also relies (Br. 22) on the Internal Revenue Manual, which states: "Caution: The date on the L1058 must be the date it is given to, left for, or mailed (return receipt requested) to the taxpayer." IRM 5.11.1.2.2.2 (4). While this directive no doubt reflects best practices, "[i]t is well-settled . . . that the provisions of the [Internal Revenue] manual are directory rather than mandatory, are not codified regulations, and clearly do not have the force and effect of law." *Marks v. Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991); *Anonymous v. Commissioner*, 145 T.C. 246, 257 (2015).

Taxpayer objects (Br. 48) that the issue in the Tax Court's *Anonymous* case has no relevance here. The same cannot be said of this Court's own decision in *Marks* (relied upon by the Tax Court in *Anonymous*) which, like this case, concerns the sufficiency of a notice sent in compliance with the statute but, again like the notice here at issue, not pursuant to the best practices outlined in the manual. 947 F.3d at 986. The taxpayer in *Marks*, like taxpayer here, tried to bootstrap the manual's directions into law by arguing that failure to follow those directions invalidated the notice, but this Court rejected that argument. *Id.* The argument should be rejected here as well.

d. The TIGTA report

Finally, taxpayer invokes (Br. 21, 23) a 2006 report from TIGTA (the Treasury Inspector General for Tax Administration) which noted, without disapproval, the IRS's practice of postdating notices of intent to levy, by mailing the notices "prior to the date on the letter to ensure the taxpayer receives it with the full 30 calendar days in which to appeal." TIGTA, *The Office of Appeals Should Continue to Strengthen and Reinforce Procedures for Collection Due Process Cases*, at 6, Ref. No. 2006-10-123 (Sept. 20, 2006). That practice, TIGTA noted, was in

tension with the IRS Appeals Office's practice of calculating the 30-day period strictly according to the statute, with the result that a taxpayer following the instructions in the letter might find that his CDP request, filed within 30 days of the date printed on the notice, was adjudged tardy by IRS Appeals. *Id.*

The concerns raised by the TIGTA report are diametrically opposed to those raised by taxpayer here: TIGTA was concerned that some taxpayers seeking a CDP hearing might lose that opportunity because they were misled by a post-dated notice that was ineffective to *extend* the statutory 30-day period. Here, in contrast, taxpayer is seeking to nullify his own objectively manifested request for a CDP hearing by relying on a misdated notice to *shorten* the statutory 30-day period.

Regardless whether a postdated notice might, under certain circumstances, extend the statutory 30-day period, as the Tax Court has sometimes suggested (*see* JA 154 n.9), there is no reason to believe that a notice bearing a printed date prior to the date on which it was mailed or otherwise delivered can *shorten* that statutory period, because a

notice that has not left the agency's offices is not "notice" in any plausible sense of the word.

C. Taxpayer may not rely on a kind of "reverse equitable tolling" to shorten his own deadline

Under the doctrine of equitable tolling, certain deadlines may be extended for equitable reasons. *E.g.*, *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Taxpayer here does not invoke equitable tolling per se, but instead appears to invent a backwards version of that doctrine, what might be termed "reverse equitable tolling." He argues that his own deadline for filing a request for a CDP hearing should be *shortened* for equitable reasons. We have been unable to locate any authority that authorizes or even contemplates such a result.

Taxpayer's novel estoppel theory should be rejected for two reasons. First, taxpayer cannot satisfy the requirements of equitable estoppel (even assuming such a claim can lie against the Government). And second, because whatever his subjective intent, taxpayer objectively requested a CDP hearing, and cannot now be heard to complain that the Commissioner granted his request.

1. The Tax Court did not commit clear error in finding that the elements of equitable estoppel were not established

As the Tax Court found (JA 152-153), the doctrine of equitable estoppel will not support taxpayer's bid to shorten his own deadline. The Supreme Court repeatedly has admonished that "equitable estoppel will not lie against the Government as it lies against private litigants." *OPM v. Richmond*, 496 U.S. 414, 419 (1990). Even assuming principles of equitable estoppel may be applied against the government in these circumstances, taxpayer's argument fails. *See Keating v. F.E.R.C.*, 569 F.3d 427, 434 (D.C. Cir. 2009) (agency not estopped from lifting stay of deadlines).

"A party attempting to apply equitable estoppel against the government must show that '(1) there was a definite representation to the party claiming estoppel, (2) the party relied on its adversary's conduct in such a manner as to change his position for the worse, (3) the party's reliance was reasonable[,] and (4) the government engaged in affirmative misconduct.'" *Id.* (quoting *Morris Commc'ns Inc. v. FCC*, 566 F.3d 184, 191-2 (D.C. Cir. 2009)). In addition, a "case for estoppel against the government must be compelling, and will certainly include

. . . a showing of an injustice . . . and lack of undue damage to the public interest." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988) (internal quotations omitted). Taxpayer cannot meet this standard.

a. Representation. To begin with, taxpayer cannot show a "definite representation" by the Commissioner, *see Keating*, 569 F.3d at 191, because, as the Tax Court found, both the "date on the levy notice and the date imprinted on the envelope were visible for all to see." (JA 152.) The mismatched dates were not concealed by the Commissioner, but as the Tax Court found "would have been apparent" to taxpayer if the envelope had not been thrown away. (JA 152.) That it was taxpayer's wife, and not taxpayer himself, who threw away the envelope (*see* Br. 55) is of no significance: taxpayer's wife's action cannot be attributed to the IRS. Taxpayer relies (Br. 56) on two Pennsylvania state cases that disregard postmarks, but he provides no reason the Tax Court should have turned to Pennsylvania law instead of its own foundational precedents holding that notice is effective even though no notice date is provided to the taxpayer. *S. Ca. Loan Ass'n v. Commissioner*, 4 B.T.A. 223, 226 (1926) (Commissioner not required

inform taxpayer of the date of mailing); *Hurst, Anthony & Watkins*, 1 B.T.A. 26, 27 (1924) (Commissioner not estopped by absence of date on the notice). Taxpayer's assertion (Br. 57) that even if he had noticed the discrepancy, he would have been helpless to act is obviously false: had he wanted to ensure his CDP request was timely, he could have mailed it within 30 days of the February 11, 2009, that is, on or before March 13, 2009; had he wanted to ensure it was untimely, he could have waited to mail his request until March 17, 2009.

b. Reliance. Taxpayer also cannot show that he relied on the date on the letter to his detriment. He argues that he should have been able to rely on the date printed on the letter (Br. 58), implying (but not stating) that he relied on that date to file his CDP request late, so as to obtain only an equivalent hearing, and so the statute of limitations on collection would continue to run. The Tax Court found taxpayer's testimony on this point not credible. (JA 152-153.) The credibility of a witness is a matter for the trier of fact, which "has the primary responsibility of interpreting the demeanor, credibility, and reliability of the witnesses' testimony." *Albright v. United States*, 732 F.2d 181, 186-87 (D.C. Cir. 1984). "It is not for the court of appeals to look over

the district court's shoulder to determine whether the testimony was articulate and persuasive." *Id.* at 186. Taxpayer argues both that his intent to file timely is irrelevant (Br. 26-27) and that the Tax Court erred in finding his intent (Br. 30). He does not, however, argue that the Tax Court's credibility determination was erroneous. The Tax Court's finding that taxpayer did not rely on the date on the levy notice intentionally to file an *un*timely request for a CDP hearing therefore should be affirmed.

In addition to finding that taxpayer's testimony was not credible, the Tax Court observed (JA 152-153) that it was contradicted by the Form 12153 submitted by him in several ways. First, taxpayer failed to check the box on the Form 12153 to indicate that he would like an equivalent hearing (JA 212) — this despite the repeated instructions that a taxpayer seeking an equivalent hearing must check this box. (JA 202 ("you must check line 6 (Equivalent Hearing) to request an equivalent hearing"), JA 204 ("You must check the Equivalent Hearing box on line 6 of the form to request an equivalent hearing"); JA 199 ("To request an equivalent hearing, you must check the Equivalent Hearing box on line 6 of Form 12153").) In addition, taxpayer stated, on his

Form 12153, that one reason he was requesting a hearing was because "levy action will cause a hardship." (JA 212.) A CDP hearing would address taxpayer's stated concern about the levy, because a CDP hearing stays any proposed levy, I.R.C. § 6330(e)(1), but an equivalent hearing does not, Treas. Reg. § 301.6330-1(i)(2) Q&A-I4.

Taxpayer's trial testimony also was inconsistent with the statement, in his letter of April 2, 2009, that he had filled out the Form 12153 "in a hurry at the last minute." (JA 215.) If taxpayer had intended to request only an equivalent hearing, he was not filling out the form "at the last minute" at all; the deadline to request an equivalent hearing was still 11 months away. *See* Treas. Reg. § 301.6330-1(i)(2) Q&A-I7. And if what taxpayer really wanted was to allow the statute of limitations on collection continue to run, as he now argues (Br. 30), he faced no deadline at all: in the absence of any action, the period of limitations on collection would have continued to run.

c. Misconduct. Taxpayer makes much of the revenue officer's failure to reprint the notice of intent to levy before mailing it to him. (Br. 58-59.) To be sure, the officer's failure to update the date on the notice was not the best practice. But neither was it anywhere near the

sort of egregious misconduct required to support estoppel against the government. The failure to reprint the notice was no "injustice." *ATC Petroleum*, 860 F.2d at 1111.

d. Prejudice. Finally, taxpayer cannot invoke equitable estoppel here because he was not prejudiced by the Commissioner's decision to treat his CDP request as timely filed. It is beyond dispute that the taxpayer received actual notice of the Commissioner's intent to levy; that he received that notice by February 17, 2009, with ample time to petition for a CDP hearing; and that he in fact mailed his request within the 30-day period allotted by statute. Taxpayer argues (Br. 38) that he nevertheless was prejudiced by the mis-dated notice, because the error subverted his supposed plan to request only an equivalent hearing, thus allowing the statute of limitations to expire. But, once taxpayer realized that the Commissioner had credited his manifest request for a CDP hearing, rather than intuiting his contrary subjective intent, he could have obtained an equivalent hearing, and started the statute running again, by withdrawing his request for a CDP hearing. Treas. Reg. § 301.6330-1(g)(1) & (g)(2) Q&AG-1. At all events, the suspension of the statute in the interval between the request for a CDP

hearing and the end of that hearing cannot be said to have prejudiced taxpayer, as administrative collection action was also suspended for the same period. I.R.C. § 6330(e)(1).

The revenue officer's departure from best practices could have been prejudicial to taxpayer only if he had been attempting, in some sort of elaborate shell game built of two Forms 12153 (both signed on March 13, 2009), and two envelopes (mailed from different post offices on March 13 and March 14, 2009), to trick the IRS into staying administrative collection action with respect to his half-million dollar liability *without* permitting a corresponding suspension of the statute of limitations on collection. But taxpayer has never asserted such a devious intent, and if he had, his case for prejudice would be secured at the cost of his argument for equitable estoppel. One must come to equity with clean hands. Taxpayer could not be heard to complain that a bureaucratic misstep foiled his own elaborate trap.

2. Taxpayer cannot retroactively retract a request the IRS has honored

Moreover, regardless of his subjective intent, taxpayer objectively requested a CDP hearing, and cannot now be heard to complain that the IRS granted his request. The Supreme Court addressed a similar

fact pattern in the case *R.H. Stearns Co. of Boston, Mass. v. United States*, 291 U.S. 54 (1934). That case, like this one, began when the IRS informed the taxpayer of its intent to levy to collect an unpaid tax. *Id.* at 57, 59. In *R.H. Stearns*, the unpaid tax was for the Company's 1917 tax year; the taxpayer was notified of the Commissioner's intent to levy in August 1923. *Id.* The statute of limitations on collection was then set to expire in April 1924, because the Company had previously executed (and the Commissioner had accepted) a waiver that extended the expiration date of the collection statute. *Id.* at 57. In February 1923, the Company had executed a second such waiver, but the Commissioner did not accept this second waiver until 1930. *Id.*

Meanwhile, in August 1923, when R.H. Stearns learned of the Commissioner's intent to levy to collect its unpaid 1917 tax, the Company responded by seeking a refund for its 1918 through 1921 tax years, and asked the Commissioner to apply that refund to the unpaid 1917 tax liability. *Id.* at 57. The Commissioner acceded to the request by forbearing to collect. *Id.* at 57-58. In 1924, when the audit of the later tax years was complete, the Commissioner performed the offset. *Id.* at 58. In 1930, when it learned of the belated acceptance of the

second waiver of the statute of limitations, the Company sued for a refund, arguing that without acceptance, the waiver was ineffective to extend the collection statute, and thus the offset should have been barred by the expiration of that statute. *Id.* at 58-59.

A unanimous Court rejected this argument. Assuming arguendo that acceptance was necessary to make the second waiver effective, the Court nevertheless held that the offset was proper on the ground that, in requesting the offset, the Company had made "a positive request, which till revoked upon reasonable notice had the effect of an estoppel." *Id.* at 59. In August 1923, before the company made this request, the Court found, "collection would have been enforced unless the taxpayer had done something to postpone the hour of payment." *Id.* The Commissioner forebore to levy only because taxpayer filed its request. *Id.*

Under the circumstances, the Court held, the "applicable principle" was the "fundamental" one, "more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *Id.* at 61-62. Of course, R.H. Stearns had committed no

"wrong" by requesting the offset, just as taxpayer here committed no wrong by requesting a CDP hearing. Nevertheless, a "suit may not be built on an omission induced by him who sues." *Id.* at 62. The request for an offset, the Court reasoned, "in substance . . . was this: Please do not collect the tax for 1917, until you have completed the audit for the years 1918 to 1921 inclusive, and if there has been overassessment for those years, set it off as a credit." *Id.* at 60. Because the Commissioner in *R.H. Stearns* had done no more than forebear to levy in response to a request from the taxpayer, the taxpayer could not fault the Commissioner for granting his request.

The same reasoning applies here. Just as the Commissioner stood ready to levy on R.H. Stearns in August 1923, and "collection would have been enforced unless the taxpayer had done something to postpone the hour of payment," *id.* at 59, so too the Commissioner here stood ready to levy on taxpayer in March 2009. And just as the Commissioner forebore to levy on R.H. Stearns in response to the Company's request for an offset, so too the Commissioner here forebore to levy on taxpayer in response to his request for a CDP hearing. Having induced the Commissioner to suspend collection activity at his

request, taxpayer here, like the taxpayer in *R.H. Stearns*, cannot complain that his request was granted.

D. The Settlement Officer did not abuse her discretion in determining that the Commissioner should proceed with the proposed administrative collection action

Taxpayer also argues (Br. 39-50) that, even if his CDP request was timely, the settlement officer abused her discretion by sustaining the proposed levy. As part of CDP hearings, the IRS appeals officer conducting the hearing is required to "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." I.R.C. § 6330(c)(1).

But no law requires the IRS to cease administrative collection efforts whenever it discovers a bureaucratic misstep that, as we have already shown, did not prevent the taxpayer from receiving actual notice in time to seek a hearing. Rather, the decision whether to proceed with a proposed levy is to "take into consideration" three factors, including not only the required verification relied upon by taxpayer, I.R.C. § 6330(c)(1), (c)(3)(A), but also any issues raised concerning collection alternatives, I.R.C. § 6330(c)(2)(A), (c)(3)(B), and "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." I.R.C. § 6330(c)(3)(C). On that standard, and in the absence of any other argument from taxpayer, the misdated notice in this case was no reason not to proceed with the proposed administrative levy.

Similarly, neither the settlement officer nor the Tax Court was constrained to find, as taxpayer now argues (Br. 51-53), that the discrepancy between the date printed on the notice of intent to levy and the date it was actually mailed invalidated the notice altogether. The cases taxpayer relies upon are inapposite: both concerned notices of determination, not a notice of intent to levy, and — since CDP hearings continue until the determination is issued — effectively held that the hearings were still underway. *LG Kendrick, LLC v. Commissioner*, 146 T.C. 17, 29 (2016), *aff'd*, 684 Fed. Appx. 744 (10th Cir. 2017); *Smith v. Commissioner*, 124 T.C. 36, 44 (2005) (notice of determination issued in violation of the automatic stay). Neither case supports taxpayer's contention that, because the notice was printed on February 11, 2009, and mailed on February 13, 2009 — a discrepancy that did not prevent

him from receiving actual notice or from seeking a hearing in a timely fashion — his substantial self-reported tax debts should be eliminated.

CONCLUSION

The decision of the Tax Court should be affirmed, and the proposed administrative levy sustained.

Respectfully submitted,

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Attorney for the Commissioner

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I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on January 16, 2018. Counsel for the appellant was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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