

UNITED STATES TAX COURT

BRIAN H. MCLANE

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

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Docket No. 020317-13 L

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**MEMORANDUM OF LAW OF AMICUS CURIAE UDC DAVID A.  
CLARKE SCHOOL OF LAW TAX CLINIC IN SUPPORT OF THE  
PETITIONER**

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**MEMORANDUM OF LAW OF AMICUS CURIAE UDC DAVID A. CLARKE SCHOOL OF LAW TAX CLINIC IN SUPPORT OF THE PETITIONER**

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**INTEREST OF THE AMICUS<sup>1</sup>**

The University of the District of Columbia David A. Clarke School of Law (UDC DCSL) Tax Clinic (“the Clinic”) is an academic legal clinic that extends *pro bono* representation primarily to low income taxpayers in the Washington, DC metro area.

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<sup>1</sup> No person or entity other than the UDC David A. Clarke School of Law has made any monetary contribution toward the preparation and submission of this brief. Further, this brief was not written, in whole or in part, by the counsel for any party in this matter.

The Clinic was founded in late 2005 by Professor Jacqueline Lainez Flanagan to assist and represent low income taxpayers in active federal tax controversy cases, including matters involving petitions before the U.S. Tax Court.

As part of a public land grant institution, the Clinic is vested in promoting the public interest in their work, which includes taxpayer advocacy, education and representation. The Clinic has an interest in litigation of concern to taxpayers, particularly litigation with potential national significance in the area of taxpayer rights and procedural efficiency.

The Clinic has identified the present case as having such significance. Specifically, the issues before the Court in this case afford the Court an opportunity to clarify the congressional grant of jurisdiction to allow the Court to order overpayments in section 6330(c)(2(B))<sup>2</sup> proceedings.

Carlton M. Smith, of counsel to the Clinic, previously served as Director of the Cardozo Tax Clinic in his capacity as Clinical Associate Professor of Law at the Benjamin N. Cardozo School of Law from 2003 until 2013. He is currently retired but continues his public service as pro bono counsel in tax controversy litigation.

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<sup>2</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code.

## **SUMMARY OF FACTS**

In his original petition, filed on September 3, 2013, Petitioner challenged Respondent's Notice of Determination sustaining a proposed levy to collect amounts owed for tax year 2006 and tax year 2008. Specifically, Petitioner contested the determination of the Internal Revenue Service Appeals office regarding tax year 2008, for which Petitioner maintained that he was entitled to certain business deductions and a net operating loss carryover from 2007. During and after the trial of this case, Respondent accepted petitioner's substantiations of deductions for the tax year 2008, which ultimately resulted in petitioner's tax liability being less than the amount reported on his income tax return for 2008.

From the outset of this case, Petitioner contended, among other things, that Respondent failed to properly mail to Petitioner a Notice of Deficiency for his 2008 taxable year, which would have provided Petitioner with notice of the amount owed and an opportunity to petition the Tax Court for a redetermination of the deficiency. Contrastingly, Respondent maintains that it properly issued the Notice of Deficiency on August 7, 2012. The parties do agree, however, regardless of whether the Notice of Deficiency was properly mailed, Petitioner never received such notice and, therefore, did not have the opportunity to file a petition for redetermination of the deficiency Respondent purportedly assessed.

Petitioner paid the amount showing due on his 2008 income tax return (\$2,548) by way of an installment plan. The payments were made beginning in the latter half of 2009, with the last payment being made in September 2012. Being that Respondent has accepted certain business deductions petitioner claimed for the 2008 taxable year, it is now evident that Petitioner has paid more tax than was owed for the 2008 taxable year.

### **SUMMARY OF ARGUMENT**

The issue presented in this case is whether the Tax Court has jurisdiction to determine an overpayment in a collection review proceeding initiated pursuant to section 6330(d)(1). Although this Court's decision in Greene-Thapedi holds that the Tax Court does not have overpayment jurisdiction in collection review proceedings, this finding is contrary to the remedial purpose which Congress intended section 6330 to serve. Section 6330 was drafted with the intent to broaden the jurisdiction of the Tax Court, whose mandate under this statute is to ensure that the Commissioner collects the correct amount of tax. Absent any language in section 6330 limiting the Court's ability to order a credit or refund of an overpayment, this Court's decision to refrain from determining an overpayment frustrates its congressionally conferred jurisdiction. Furthermore, where it becomes clear through the collection review proceeding that a taxpayer has overpaid his tax

liability, the Court's failure to remedy the overpayment leaves a major issue in the controversy before the Court unaddressed.

Even if this Court should decide that Greene-Thapedi stands as the relevant law related to its overpayment jurisdiction in section 6330 proceedings, its decision should not impair this Court's authority to determine an overpayment where a taxpayer is entitled, pursuant to section 6330(c)(2)(B), to contest the existence or amount of the underlying tax liability. Section 6330(c)(2)(B) permits a taxpayer to challenge the existence or amount of the underlying tax liability only if the taxpayer did not receive a notice of deficiency or otherwise have a prior opportunity to contest that liability. Congress' decision to afford in a collection review proceeding permission for a taxpayer who did not receive a notice of deficiency to challenge the underlying liability was, without a doubt, to ameliorate the harshness of a valid deficiency assessment by giving the taxpayer a chance to bring (through the collection review proceeding) a challenge to the underlying liability in tax. Being that this opportunity to raise a liability challenge is intended to protect taxpayers whose claims would otherwise be disregarded, this Court should consider such a liability challenge in the collection review proceeding in the same way it would decide a redetermination of a deficiency in a standard deficiency case.

Of course, where a taxpayer receives a notice of deficiency and petitions this Court for a redetermination of the deficiency, the Court clearly has jurisdiction under Section 6512(b) to determine an overpayment and order that such overpayment be refunded. The result should be no different if the taxpayer has missed the opportunity to contest a notice of deficiency because, through no fault of his own, the notice was never received. Where the taxpayer is entitled to challenge the existence or amount of his underlying tax liability as part of the section 6330 proceeding, this Court may need to consider whether the taxpayer has any unpaid balance, which in turn leads to the possibility of finding that the taxpayer has paid more tax than was owed. This Court should therefore exercise its entire deficiency jurisdiction powers where section 6330(c)(2)(B) applies so that it may make a correct and complete determination as to both the underlying tax liability and the proposed collection action.

This Court's decision to refrain from exercising overpayment jurisdiction in a section 6330 proceeding results in undesirable consequences for taxpayers and the courts alike. For some taxpayers, the only recourse is to pursue relief in a District Court or the Court of Federal Claims, which requires that taxpayer expend time and resources to justify his claim to the money that it is evident he overpaid. The taxpayer may find that the expected refund is too small in relation to the costs he will entail to bring his case before the District Court or Court of Federal Claims.

And even if a taxpayer decides to pursue relief in another court, he may soon find that his claim is barred by the principle of res judicata. The interests of judicial economy are better served if this Court, the forum in which the case was initiated, can address all issues related to the collection action, including the possibility that the taxpayer has paid more than was owed.

For other taxpayers, such as Petitioner in this matter, the situation may be even worse. If this Court should uphold the rule that 6512(b)(1) and section 6512(b)(3) do not apply to allow the Tax Court in a collection review proceeding to determine an overpayment, then a taxpayer such as Petitioner will never be entitled to a refund of the money that it is evident he overpaid. Moreover, a taxpayer who has been intricately involved in the section 6330 proceeding will most likely find that, by the time this Court renders a decision in the collection review proceeding, his refund claim would either be time-barred by the period of limitations contained in section 6511, or severely limited or eliminated by the look-back rules of section 6511(b). As a result, the taxpayer can no longer file the necessary timely predicate refund claim required under section 7422 and then bring a refund suit in the other courts. This seems an inexplicably harsh punishment to be placed on a taxpayer who, through no fault of his own, never received a notice of deficiency.

Here, Petitioner’s challenge to his underlying tax liability, initiated pursuant to section 6330(c)(2)(B), should be akin to a Tax Court suit to which the taxpayer would have been entitled had he received the notice of deficiency and timely petitioned the Tax Court for a redetermination of the deficiency. In such a Tax Court suit, even though Petitioner had not filed any actual administrative refund claim, he would be entitled to an overpayment determination from this Court under section 6512(b)(3)(A) with respect to the amount of taxes that he actually paid after the date of the notice of deficiency, and under section 6512(b)(3)(B) in the appropriate look-back period as if an administrative refund claim had been filed on the date Respondent issued the notice of deficiency. The rule in Greene-Thapedi eliminates part of the relief to which the taxpayer would be entitled had he received the notice of deficiency and timely petitioned the Tax Court. It is hard to conceive that Congress intended this result for a person who failed to receive a notice of deficiency through no fault of his own.

## **ARGUMENT**

### **I. The Recommended Holding.**

At page 11 of the Tax Court’s opinion in Greene-Thapedi v. Commissioner, Judge Thornton explained, “. . . we do not believe we should assume, without explicit statutory authority, jurisdiction either to determine an overpayment or to order a refund or credit of taxes paid in a section 6330 collection proceeding.”

Greene-Thapedi v. Commissioner, 126 T.C. 1, 11 (2006). Amicus takes exception to this quoted language and does not believe that the Commissioner can unilaterally deprive the Court of jurisdiction in a section 6330 proceeding by merely stating that he no longer intends to proceed with collection. The holding in Greene-Thapedi is contrary to the corrective purpose which section 6330 is intended to serve.

Instead, Amicus' position is that upon the issuance of a valid notice of determination and a timely petition to the Tax Court for review of such notice, the jurisdictional requirements of section 6330(d)(1) are met and this Court is authorized to exercise its jurisdiction "with respect to such matter" as is covered by the final determination in a requested CDP hearing before the Appeals office.

Vigon v. Commissioner, 149 T.C. No. 4, 12 (2017). If the taxpayer is entitled to contest the underlying tax liability under section 6330(c)(2)(B) either because he did not receive a notice of deficiency or otherwise did not have an opportunity to contest the deficiency, then the issue of the underlying tax liability is additionally part of the "matter" to be decided by this Court (Id.), and its jurisdiction cannot be revoked until the Court has decided the entire controversy. Dorl v. Commissioner, 57 T.C. 720, 722 (1972), aff'd, 507 F.2d 406 (2d Cir. 1974).

Amicus recognizes that it is calling for the overruling of the Greene-Thapedi decision, should this court not be able to distinguish the present matter, and that

this Court may be reluctant to accept the invitation to do so. However, amicus emphasizes that the holding in Greene-Thapedi has never been appealed, nor has any appellate court ever ruled on the issue of whether the Tax Court may exercise overpayment jurisdiction in a collection review proceeding where the taxpayer is entitled to contest the underlying liability in tax pursuant to section 6330(c)(2)(B).

**II. The Greene-Thapedi Decision is Inconsistent With the Remedial Purpose That the Legislature Intended Section 6330 to Serve Because it Leaves an Essential Issue in a Collection Review Proceeding Unaddressed.**

Section 6330 generally provides that the Commissioner cannot proceed with collection by levy until the person has been given notice and the opportunity for an administrative review of the matter (in the form of an IRS Appeals office hearing). See Davis v. Commissioner, 115 T.C. 35, 37 (2000); Goza v. Commissioner, 114 T.C. 176, 179 (2000). A review of the legislative history supports the conclusion that section 6330 is “remedial legislation,” designed primarily to broaden the Tax Court’s jurisdiction and afford due process to taxpayers facing the possibility of a levy of their property. Greene-Thapedi 126 T.C. at 15 (Vazquez, J., dissenting). In Katz v. Commissioner, this Court observed, “Congress enacted secs. 6320 (pertaining to liens) and 6330 (pertaining to levies) to provide new protections for taxpayers with regard to collection matters.” Katz v. Commissioner, 115 T.C. 329, 333 n.8 (2000). Furthermore, the Senate Report accompanying the Internal Revenue Service Restructuring and Reform Act of 1998, which gave rise to section

6320 and section 6330, refers to the Senate Finance Committee's intent that section 6330 would establish "formal procedures designed to insure due process where the IRS seeks to collect taxes by levy". S. Rept. 105-174, at 67 (1998), 1998-3 C.B. 537, 603. Therefore, as a general matter, Congress intended that the procedural protections set forth in section 6330 would "increase fairness to taxpayers." Id.

Section 6330 further provides that if a taxpayer is dissatisfied with an administrative review of the levy action, that person may seek a judicial review of the administrative determination. See sec. 6330(d)(1). The Court's statutory charge under section 6330 is to ensure that the Commissioner collects the "correct amount of tax . . . by observing all applicable laws and administrative procedures."

Montgomery v. Commissioner, 122 T.C. 1, 10 (2004). In reviewing an administrative determination to make sure that the correct amount of tax is collected, the Court should interpret section 6330 broadly and liberally in order to effectuate its purposes. See Washington v. Commissioner, 120 T.C. 137, 155-156, 158 (2003) (emphasizing the Court's obligation to liberally construe the remedial provisions of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub. L. 105-206, 112 Stat. 685). In certain instances, the Court's review of an administrative determination may lead to a finding that the taxpayer has paid more than was owed. In such cases, the congressional intent behind the enactment of section 6330 would be frustrated if the Commissioner could declare

the collection matter moot and unilaterally deprive the Tax Court of jurisdiction after directing the taxpayer to the Tax Court by issuing the notice of determination. Greene-Thapedi, 126 T.C. at 16-17 (Vasquez, J., dissenting).

Moreover, if this Court refrains from reaching a decision regarding the taxpayer's overpayment, it would be dismissing the case while leaving an essential question relating to the matter before it undecided. This results in one of several unfortunate outcomes: 1) assuming that the period of limitations for seeking a claim for credit or refund has not expired, and that the taxpayer has filed the necessary timely predicate refund claim required under section 7422, the taxpayer must expend the additional time and resources to resolve the overpayment issue in yet another round of litigation before a U.S. District Court or the U.S. Court of Federal Claims (Greene-Thapedi, 126 T.C. at 14 (Colvin, J., concurring)); 2) even if the taxpayer has made a timely claim for credit or refund and proceeds to commence a refund suit in the U.S. District Court or the U.S. Court of Federal Claims, the doctrine of res judicata may bar the refund action, especially in a case like the present controversy which involves a challenge to the underlying tax liability (See Commissioner v. Sunnen, 333 U.S. 591, 598, 68 S. Ct. 715, 719-20 (1948); Peter A. Lowy, Thoughts on Practicalities Of the CDP Process, 107 Tax Notes 783 (May 9, 2005)); or 3) because section 6330(e)(1) does not provide for the suspension of the period of limitations for seeking a claim for credit or refund

pursuant to section 6511, it is very likely that after the time has elapsed in which the taxpayer has been involved in the section 6330 proceeding, the taxpayer's refund claim would either be time-barred by the period of limitations contained in section 6511, or severely limited or eliminated by the look-back rules of section 6511(b) (See Greene-Thapedi, 126 T.C. at 20 n.4 (Vasquez, J., dissenting)).

Petitioner's circumstances would result in the third outcome detailed above. Petitioner, through no fault of his own, did not receive a notice of deficiency. He thus never had the opportunity to petition the Tax Court for a redetermination of the deficiency and, even though he did not file an administrative refund claim, receive the overpayment determination to which he would be entitled under 6512(b)(3)(A) or 6512(b)(3)(B). After several years of being involved in the present section 6330 proceeding, Petitioner's opportunity to make a timely predicate refund claim has lapsed and, under the current state of the law, he will never be entitled to a refund of the overpayment it is evident he made. The decision in Greene-Thapedi eliminates the very relief—i.e., an overpayment determination—to which Petitioner would be entitled had he received the Notice of Deficiency and timely petitioned the Tax Court. This Court's failure to determine an overpayment in the present collection review proceeding would do away with fairness to the taxpayer, contrary to Congress's intent, and will instead cause "taxpayer frustration and waste judicial resources." Greene-Thapedi, 126 T.C. at

14 (Colvin, J., concurring). It will also amount to straying from the Tax Court's mandate under section 6330, which is to ensure that the Commissioner collects only the correct amount of tax. Montgomery, 122 T.C. at 10.

**III. Greene-Thapedi Does Not Impair This Court's Jurisdiction to Determine an Overpayment Where, Pursuant to Section 6330(c)(2)(B), a Taxpayer is Entitled to Challenge the Existence or Amount of the Underlying Tax Liability.**

**A. This Case is Properly Before the Court Because All Requirements to Vest This Court With Jurisdiction Under Section 6330 Have Been Met.**

The Tax Court's jurisdiction under section 6330 is contingent on the IRS Appeals office's issuance of a valid notice of determination and the taxpayer's timely petition for review. Goza v. Commissioner, 114 T.C. 176, 182 (2000). Additionally, a taxpayer may only file a petition for review with the Tax Court where the administrative determination concerns a tax over which the Court generally has jurisdiction. Moore v. Commissioner, 114 T.C. 171, 175 (2000). In the instant case, Respondent issued a valid notice of determination to Petitioner on July 30, 2013 and Petitioner challenged Respondent's determination by filing a timely petition with this Court on September 3, 2013. The administrative determination in this case concerns petitioner's income tax, over which this Court generally has jurisdiction. All requirements to vest this court with jurisdiction over the subject matter of the tax year at issue have been satisfied.

Once a petitioner properly invokes the jurisdiction of the Court, jurisdiction lies with the Court and remains unimpaired until the Court has reached its conclusion as to the entire controversy. Naftel v. Commissioner, 85 T.C. 527, 529-30 (1985) (citing Dorl v. Commissioner, 57 T.C. 720, 722 (1972), aff'd, 507 F.2d 406 (2d Cir. 1974)). Moreover, the prevailing approach to a federal court's subject-matter jurisdiction is that "subject-matter jurisdiction is determined at the time it is invoked." Charlotte's Office Boutique, Inc. v. Commissioner, 425 F.3d 1203, 1208 (9th Cir. 2005), aff'g, 121 T.C. 89 (2003). For example, in a deficiency case, the Commissioner's concession of a deficiency does not deprive the Tax Court of jurisdiction over the subject matter of that year. LTV Corp. v. Commissioner, 64 T.C. 589, 591 (1975). Rather, it is the determination of the deficiency that is essential to vest this Court with jurisdiction. Charlotte's Office Boutique, Inc. v. Commissioner, 121 T.C. 89, 103 (2003), aff'd, 425 F.3d 1203 (9th Cir. 2005).

Thus, even when a taxpayer has made a showing that casts doubt on the validity of the determination rendered in a notice of deficiency, the notice itself is generally not rendered void, but its issuance remains sufficient to vest the Court with jurisdiction. Suarez v. Commissioner, 58 T.C. 792, 814 (1972). Indeed, were this not true, then the "absurd result" would be that in every deficiency case in which the Court determined that no deficiency existed, the Court's jurisdiction would be lost. Hannan v. Commissioner, 52 T.C. 787, 791 (1969).

In a section 6330 collection review proceeding, it is the Commissioner's issuance of a notice of determination that directs the taxpayer to the Tax Court. The congressional intent behind the enactment of this law—to afford taxpayers due process and increase fairness—is frustrated if the Commissioner can thereafter unilaterally deprive the Tax Court of jurisdiction by merely stating that he no longer intends to proceed with collection. See Charlotte's Office Boutique, Inc. v. Commissioner, 425 F.3d 1203, 1213 (9th Cir. 2005), aff'g, 121 T.C. 89 (2003).

In the instant case, although Respondent has conceded to petitioner's substantiations of deductions for the tax year at issue, Respondent's concession should have no bearing on this court's jurisdiction because there remains a controversy between the parties which this Court must address. See LTV Corp. v. Commissioner, 64 T.C. 589 (1975). Petitioner believes that he has made an overpayment of his income tax and is entitled to a refund of this amount. Respondent argues that, even if there is admittedly now an overpayment, the Tax Court lacks jurisdiction to decide the overpayment in a collection review proceeding. It follows that there remains a controversy which this Court should address, its jurisdiction having been properly invoked pursuant to 6330(d)(1).

**B. The “Determination” Which the Tax Court has Jurisdiction to Review Under Section 6330(d) is not Limited to a Collection Notice and Instead Extends to Every Issue Properly Within the Collection Due Process Hearing.**

Section 6330(c)(3) sets forth the determination of an Appeals officer that the Tax Court has jurisdiction to review under section 6330(d). The determination is to 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.” Section 6330(c)(3). The verification referred to in Section 6330(c)(3)(A) is that the requirements of any applicable law or administrative procedure have been met. Furthermore, the issues raised in 6330(c)(2)(B) include any relevant issue with regard to the Commissioner's collection activities, including spousal defenses to collection, challenges to the appropriateness of the Commissioner's intended collection activities, and possible alternative means of collection. Sego v. Commissioner, 114 T.C. 604, 609 (2000). The components of subparagraph (A), (B), and (C) together comprise the circumstances that the Appeals officer is to take into consideration when making its determination, and thus, when a taxpayer subsequently challenges the determination in the Tax Court under section 6330(d)(1), this Court acquires jurisdiction over all issues that Congress allowed to

be included in “such matter,” including the components of the subparagraphs iterated above. Vigon, 149 T.C. No. 4, at 16-17.

Where a taxpayer has not received a notice of deficiency or has not had the opportunity to litigate the underlying tax liability, then section 6330(c)(2)(B) applies and the issue of the underlying tax liability is properly within the matter of the Collection Due Process hearing. Sec. 6330(c)(2)(B). Upon the issuance of a determination considering the underlying tax liability, the taxpayer may choose to appeal the determination to the Tax Court. Sec. 6330(d)(1). In such a case, the Tax Court similarly obtains jurisdiction of a liability challenge and does not lose its jurisdiction over this challenge if the IRS releases a lien and ceases collection.

Vigon, 149 T.C. No. 4, at 17.

**C. This Case Can be Distinguished From Greene-Thapedi Because it Presents a Challenge Under Section 6330(c)(2)(B) to the Underlying Deficiency in Tax After the Taxpayer Did Not Receive a Notice of Deficiency.**

Where a taxpayer receives a notice of deficiency issued pursuant to section 6212(a), the taxpayer is entitled, under section 6213(a), to file a petition with the Tax Court for redetermination of the deficiency. In such a case, the Tax Court is authorized to re-determine the correct amount of tax owed, even if the amount re-determined is greater than the amount of the deficiency. Sec. 6214. Alternatively, the Court may determine that the taxpayer made an overpayment of the amount of tax owed and hence is entitled to a refund for such overpayment. Sec. 6512(b). The

statutory provision authorizing the Court to determine an overpayment is section 6512(b)(1), which explicitly authorizes the Tax Court to determine an overpayment in a deficiency proceeding. The plain language of section 6512(b)(1) gives the Court jurisdiction to determine the existence of a deficiency or an overpayment, provided that one of the requirements of section 6512(b)(3)(A), (B), or (C) is met. Research Corp. v. Commissioner, 138 T.C. 192, 202 (2012).

In the present case, while Respondent maintains it mailed a Notice of Deficiency to Petitioner on August 7, 2012, Petitioner never received this notice of deficiency and therefore did not have an opportunity to petition the Tax Court for a redetermination of the deficiency. Had Petitioner received a notice of deficiency and filed a Tax Court petition for redetermination of such deficiency, the court would have clearly had jurisdiction under Section 6512(b)(1) to find an overpayment. Additionally, because the requirements of section 6512(b)(3) have been met in Petitioner's case, Petitioner would have been entitled to a refund of his overpayment had he had the opportunity to contest the notice of deficiency.

Where a taxpayer petitions the Tax Court for review of a notice of determination in which the taxpayer contested the underlying liability in tax, the Court takes jurisdiction over the entire underlying tax liability and reviews that issue de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). A taxpayer may challenge the underlying tax liability during a CDP hearing if he or she did not

receive a statutory notice of deficiency for such liability or did not otherwise have the opportunity to dispute such liability. Sec. 6330(c)(2)(B); see also Krishnan v. Commissioner, T.C. Memo 2016-83 (2016). In a review of the existence or amount of a taxpayer's underlying tax liability, the Court should "decide that challenge in the same manner as [it] would redetermine a deficiency pursuant to section 6214." Washington v. Commissioner, 120 T.C. 114, 126 (2003) (Halpern, J., concurring). Hence the reference in section 6330(c)(2)(B) to a "notice of deficiency," coupled with a petitioner's ability to challenge an underlying deficiency in tax, sweeps in the entire deficiency jurisdiction powers of the Tax Court into a section 6330 proceeding when the notice of deficiency was not received.

The Court in Greene-Thapedi recognized the possibility of this circumstance in a footnote appended to its majority opinion. In footnote 19, the Court explained that it might consider whether a taxpayer had paid more than what was owed in collection cases where the underlying liability was properly at issue pursuant to section 6330(c)(2)(B). Greene-Thapedi, 126 T.C. at 11 n. 19. In such a case, the Court explained, reaching a correct and complete determination of whether the proposed collection action should proceed may require that the Court determine whether the amount of the underlying tax liability should be lowered. Id. And such a consideration raises the likelihood of finding an overpayment, as has arisen in the present matter.

This case is distinguishable from Greene-Thapedi because in Greene-Thapedi, by contrast, the taxpayer received the notice of deficiency and had a prior Tax Court deficiency case involving it. Furthermore, in Greene-Thapedi, the taxpayer's matter before the Appeals office in Collection Due Process could not involve the underlying liability in tax under 6330(c)(2)(B) but was only about interest and late-payment penalties later assessed in an allegedly excessive amount. Here, as discussed above, petitioner did not receive a notice of deficiency and therefore was entitled to contest as part of his Collection Due Process hearing the existence or amount of his underlying tax liability pursuant to section 6330(c)(2)(B). Petitioner's subsequent appeal to this court for a review of the notice of determination concerning the underlying tax liability vests this Court with jurisdiction over the entire underlying tax liability. As a result, the Court may exercise its deficiency jurisdiction powers to determine whether the amount of the underlying tax liability should be lowered and perhaps an overpayment be found.

**IV. An Explicit Statement of Overpayment Jurisdiction is Not Necessary for This Court to Exercise its Authority to Determine That a Taxpayer Has Paid More Tax Than Was Owed.**

**A. Historically, the Tax Court's Predecessor, the Board of Tax Appeals, Assumed Overpayment Jurisdiction Pursuant to the Language of The Revenue Act of 1924.**

The Board of Tax Appeals, this Court's predecessor, was created by section 900 of the Revenue Act of 1924, which gave taxpayers the right to appeal to the

Board if the Commissioner determined any assessment should be made. Although the issue of the Board's jurisdiction at its initiation was somewhat indefinite and not clearly defined, the Board assumed, and later affirmed, that it had overpayment jurisdiction pursuant to the language of the Revenue Act of 1924. See Revenue Revision, 1925, Hearings before the Committee on Ways and Means House of Representatives (1925 Hearings), 69th Cong. iii-iv (1925) at 922-923 (statement of Charles D. Hamel).

For example, in Barry v. Commissioner, the IRS determined that the taxpayer had overpaid his taxes for a tax year prior to the year for which it determined a deficiency. Barry v. Commissioner, 1 B.T.A. 156, 156 (1924). The IRS credited the overpayment of tax against the additional amount due for the year in which it assessed a deficiency, and then proposed to assess the deficiency remaining. Id. at 157. As a defense, the taxpayer claimed that he was entitled to certain depreciation deductions for the prior tax year in which the overpayment was found. Id. While the Commissioner argued that the Tax Court should not be able to consider the taxpayer's depreciation claims because any consideration of such would amount to deciding whether the taxpayer was entitled to a refund, the Board rejected this argument. Id. at 158. In doing so, the Board stated, "We think it was clearly the intention of Congress in creating the Board that, on appeals by taxpayers, we should consider every question necessary to a correct and complete

determination of any deficiency which the Commissioner proposes to assess.” Id. The Board later affirmed that it had overpayment jurisdiction in a series of cases following Barry. See generally Hickory Spinning Co. v. Commissioner, 1 B.T.A. 409 (1925); Walker-Crim Co. v. Commissioner, 1 B.T.A. 599 (1925)., Maritime Sec. Co. v. Commissioner, 2 B.T.A. 188 (1925).

Congress ultimately placed some limits on the Board’s overpayment jurisdiction in the Revenue Act of 1926. See Revenue Act of 1926, 69 P.L. 20, 44 Stat. 9, 69 Cong. Ch. 27. Section 274(g) of this Act revoked the overpayment jurisdiction that the Board determined it had in Barry v. Commissioner. The Act limited the Board from exercising jurisdiction to determine an overpayment for a year as to which no deficiency had been found by the Commissioner, and to apply that overpayment against the deficiency. But the revocation was limited to the Board’s finding that it had jurisdiction to determine an overpayment for a year as to which no deficiency had been found by the Commissioner. The language of section 274(g) therefore addressed the court’s limited authority to determine an overpayment for “other taxable years,” besides the year for which the Commissioner determined a deficiency. Section 274(g) did not, however, prevent the Board from determining an overpayment for the tax year in question (i.e., the tax year for which the deficiency was assessed). Quite to the contrary, Congress

confirmed and clarified the Board's jurisdiction and authority to decide an overpayment in section 284(e) of the same Act.

Thus, in 1924, the Board decided that it had overpayment jurisdiction and continued to exercise this authority until Congress enacted certain limits pursuant to the Revenue Act of 1926. This Court should similarly assume that it has overpayment jurisdiction in collection review proceedings and exercise such authority unless and until Congress explicitly excludes or limits that jurisdiction.

**B. The Tax Court Exercises Overpayment Jurisdiction in Proceedings Brought Pursuant to Section 6015 Absent an Explicit Grant of Such Authority in the Statute.**

The majority opinion in Greene-Thapedi references section 6404 and this Court's authority to find an overpayment in interest abatement cases pursuant to section 6404(h)(2)(B), which states that rules like those in section 6512(b) are to apply in interest abatement cases. Greene-Thapedi, 126 T.C. at 12. The Greene-Thapedi majority concludes that the reference to section 6512(b) in section 6404(h)(2)(B) is an infrequent instance of Congress acting to extend the Court's overpayment jurisdiction within circumscribed limits. Id. at 13. Absent such an express statutory provision, the majority contends, this Court should not assume overpayment jurisdiction. Id.

However, it is important to note that this Court exercises overpayment jurisdiction in cases brought under section 6015(g) absent an explicit grant to the

Tax Court of such authority in innocent spouse cases. Ordlock v. Commissioner, 126 T.C. 47, 55-56 (2006). Furthermore, there is no explicit language granting *to the Tax Court* the authority to order a credit or refund in a case brought under section 6015. Instead, section 6015(g) provides only that: (1) overpayment determinations are not allowed under subsection (c); and (2) refunds should be allowed under section 6015(g)(1), notwithstanding any other provisions of the Code, save for the limitations in section 6511 and section 6512(b). Sec. 6015(g).

The above language from section 6015(g) is an implicit statement that Congress thought that 6512(b) could apply in innocent spouse cases, even though Congress never explicitly says it does in such cases. An explicit statement of overpayment jurisdiction is therefore not necessary for this Court to exercise its authority to determine an overpayment. Hence, just as the reference to section 6512(b) in section 6404 and the language pertaining to refunds and credits in section 6015 indirectly authorize the Tax Court to find an overpayment in an interest abatement or innocent spouse case, the reference to the notice of deficiency in section 6330(c)(2)(B) implicitly sweeps in the entire deficiency jurisdiction powers of the Tax Court into a collection review proceeding when the notice of deficiency was not received.

Additionally, Congress, in section 6330(c)(2)(A)(i), allows “spousal defenses” to be the subject matter of a collection due process hearing. This Court

has already concluded that “spousal defenses” incorporate the argument that no joint return was ever filed or that, even if a joint return was filed, relief is available under section 6015. Downing v. Commissioner, T.C. Memo. 2007-291 (deciding no joint return issue as part of its CDP appeal opinion); Magee v. Commissioner, T.C. Memo. 2005-263 (same). Applying Greene-Thapedi to its logical conclusions, the Tax Court would hold that if suit were brought under 6015(e), the Court would have overpayment jurisdiction as limited by 6512(b), but if suit were brought pursuant to section 6330(d), the Tax Court could not determine any overpayment because of a “spousal defense” relying on section 6015 relief. Sec. 6330(c)(2)(A)(i). This demonstrates just another instance where the Tax Court would afford less relief under section 6330(d) cases than it would under 6015(e) or deficiency cases addressing overpayments under section 6015(b) or (f).

It is unlikely that Congress intended these disparate jurisdictional results for the Tax Court with respect to section 6015(g) overpayment relief. In Porter v. Commissioner, 130 T.C. 115 (2008), the Tax Court believed that harmonizing procedures under 6015(e) suits raising 6015(f) relief with collection due process and deficiency suits involving 6015(f) relief required that there be a trial *de novo* in all three kinds of suits. The Court observed,

[I]n a deficiency case we hold a trial *de novo* relating to a taxpayer's affirmative defense that he or she is entitled to innocent spouse relief under section 6015(f). Adoption of respondent's position [to review only an administrative record in a suit for (f) relief under section 6015(e)] would

cause us to apply different procedures in our determinations in cases under section 6015. See Ewing v. Commissioner, 122 T.C. at 42. We believe that cases in which the taxpayer seeks relief under section 6015(f) should receive similar treatment and, thus, the same scope of review. Porter, 130 T.C. at 124-125.

For similar reasons—i.e., uniform treatment of identical issues—it seems Congress would want overpayment jurisdiction to apply to Tax Court suits under 6330(d), whether those suits involved the standard deficiency issues, such as the present case, or "spousal defenses" raised under section 6330(c)(2)(A)(i).

Furthermore, in Wright v. Commissioner, the taxpayer brought suit in the Tax Court under section 6330(d)(1). Wright v. Commissioner, 571 F.3d 215 (2d Cir. 2009). During the taxpayer's Collection Due Process hearing, the taxpayer argued that he had been overcharged and made an overpayment of interest. Id. at 218. While the Tax Court conceded that suit brought under section 6404 could give rise to overpayment jurisdiction, it held that it lacked such jurisdiction where the case was initiated as a section 6330 proceeding. Id. at 219. The taxpayer appealed the Tax Court's decision to the Court of Appeals for the Second Circuit, arguing that the Tax Court erred in declining to exercise jurisdiction over his request for an abatement of interest and order a refund of any resulting overpayment.

The Second Circuit ultimately held that the Tax Court could find an overpayment, even though the case was not technically styled as a 6404(h) interest abatement proceeding. Id. at 220. In reaching its decision, the Tax Court treated the

Collection Due Process Notice of Determination as effectively a notice of determination not to allow interest abatement. Id. While the facts in Wright may be distinguishable on several grounds, the case serves as an example of at least one appellate court's dissatisfaction with a narrow interpretation of the powers of this Court in reviewing the IRS Appeals office's Collection Due Process Notice of Determination.

As explained above, the Tax Court has authority to determine an overpayment in section 6404 interest abatement proceedings, as well as to provide for refunds regarding 6015 relief. See secs. 6404(h)(2)(B); 6015(g). Allowing these defenses to be raised in a section 6330 proceeding without the Court's ability to determine an overpayment leads to an unjust result for those taxpayers who choose to litigate their section 6015 and section 6404 claims as part of the section 6330 proceeding. Greene-Thapedi, 126 T.C. at 26 (Vasquez, J., dissenting). These taxpayers could otherwise have obtained a refund had they made claims for section 6015 relief or interest abatement in a proceeding other than that initiated pursuant to section 6330. This is contrary to the principle which holds that identical issues brought before a single tribunal should lead to similar results. Corson v. Commissioner, 114 T.C. 354, 364 (2000).

**C. Although the Language of Section 6330 Does Not Explicitly Grant the Tax Court Jurisdiction to Determine an Overpayment in a Collection Review Proceeding, This Court's Jurisdiction to Find**

**an Overpayment Under Section 6512(b)(1) Is Not Limited to Deficiency Proceedings.**

The plain language of section 6512(b)(1) authorizes the Court to determine the existence of a deficiency or an overpayment in all cases other than small tax proceedings brought under section 7463, so long as the requirements of section 6512(b)(3)(A), (B), or (C) are met. See sec. 6512(b)(1). It is unquestionable here that this case was not brought under section 7463, and as explained below, the requirements of section 6512(b)(3) have been met. Thus, if the Court agrees with the Petitioner that there is not a deficiency but an overpayment in his 2008 income tax, the Tax Court "shall have jurisdiction to determine the amount of such overpayment". Id.

Section 6512(b)(3) provides that "[n]o such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid" within one of three specified time periods. Borenstein v. Commissioner, 149 T.C. No. 10, 1 (2017). The first of the time periods is found in Subparagraph (A), which refers to the tax paid "after the mailing of the notice of deficiency." Sec. 6512(b)(3)(A). The second is described in Subparagraph (B) and refers to tax paid "within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment." Sec.

6512(b)(3)(B). In sum, section 6512(b)(3)(B) incorporates the look-back provisions from section 6511(b)(2), and directs the Tax Court to determine the applicable period by inquiring into the timeliness of a hypothetical claim for refund filed on the date of the mailing of the notice of deficiency. Peck v. Commissioner, T.C. Summary Opinion 2016-45, 9 (2016). To this end, section 6512(b)(3)(B) directs the Tax Court's attention to section 6511(b)(2), which in turn instructs the court to apply either a three-year or a two-year look-back period. Commissioner v. Lundy, 516 U.S. 235, 251 (1996).

In the present case, if this Court should find that it has jurisdiction under section 6330(d) to apply 6512(b)(3)'s overpayment limitations, this will require that the Court actually determine whether a notice of deficiency was properly issued to Petitioner (whether or not received). Furthermore, to apply section 6512(b)(3)'s overpayment limitations, this Court will either need to determine: a) whether Petitioner filed a refund claim (formal or informal) that might implicate this Court's jurisdiction under section 6512(b)(3)C); or b) whether Respondent properly issued a notice of deficiency to the Petitioner (whether or not received), which would implicate its jurisdiction under section 6512(b)(3)(A) and (B). Since it appears that no such refund claim has been filed, the proper jurisdictional limits are at 6512(b)(3)(A) and (B). The application of section 6512(b)(3)'s overpayment limitations are jurisdictional issues, and this Court has an independent duty to

determine its jurisdiction. See generally Commissioner v. Lundy, 516 U.S. 235 (1996). It therefore cannot omit to make this finding on whether the notice of deficiency was in fact sent because it is a necessary predicate to applying the jurisdictional limits of section 6512(b)(3)(A) and 6512(b)(3)(B). Id.

Assuming that this Court finds that the notice of deficiency was in fact properly sent, then, although Petitioner did not make a formal claim for refund before the filing of his petition requesting a judicial review of the notice of determination, this Court may determine that there has been an overpayment because section 6512(b)(3)(A) and (B) have been satisfied. Furthermore, section 6512(b)(3)(A) allows a refund of the portion of tax that was paid after the mailing of the notice of deficiency. Here, Respondent alleges that it mailed a notice of deficiency in August 2012. Petitioner continued to make payments toward his 2008 income tax liability through September 2012. Thus, a portion of petitioner's income tax was paid after the mailing of the notice of deficiency.

Additionally, Petitioner's hypothetical refund claim is deemed to have been filed on the date of the mailing of the notice of deficiency, August 7, 2012. Petitioner's timely return for tax year 2008 was filed on October 9, 2009. The requirements of section 6512(b)(3)(B) have therefore been satisfied because the hypothetical refund claim was filed within three years from the time the return was

filed, and Petitioner is entitled to a refund of the tax paid within the three-year lookback period.

## **CONCLUSION**

Accordingly, the Clinic urges the Court to hold that the Court has jurisdiction to determine an overpayment in the present matter because, although the case is before the Court as a section 6330 collection review proceeding, there remains an issue as to the underlying liability in tax. The Petitioner in this case did not receive a notice of deficiency, through no fault of his own, and therefore did not have a previous opportunity to contest before this Court the amount of the deficiency. In these circumstances, the Court should treat Petitioner's challenge to his underlying tax liability, initiated pursuant to section 6330(c)(2)(B), akin to a Tax Court suit to which the taxpayer would have been entitled had he received the notice of deficiency and timely petitioned the Tax Court for a redetermination of the deficiency. Since this Court has explicit jurisdiction to determine an overpayment in a standard deficiency case, it should exercise similar powers in a collection review proceeding where the underlying liability in tax is at issue because doing so is necessary to make a correct and complete determination as to whether the proposed collection action should proceed.

Respectfully Submitted,

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Dated: April 27, 2018

## **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing paper was served on counsel for Respondent, by mailing the same on April \_\_, 2018, in a postage-paid envelope addressed to her at Nancy Gilmore, Esq., at IRS Counsel's Office, 31 Hopkins Plaza, Suite 1320, Baltimore, Maryland 21201.

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Jacqueline Lainez Flanagan  
Director of U.D.C. Low-Income Taxpayer Clinic

## **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing paper was served on Petitioner, by mailing the same on April \_\_, 2018, in a postage-paid envelope addressed to him at 8722 Eddington Road, Baltimore, Maryland 21234.

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Jacqueline Lainez Flanagan  
Director of U.D.C. Low-Income Taxpayer Clinic