UNITED STATES TAX COURT

ALAN M. BERKUN,	)	
	)	
Petitioner,	)	
v.	)	Docket No. 18437-15L
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	Filed Electronically
	)	
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION TO VACATE ORDER OF DISMISSAL FOR LACK OF JURISDICTION

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ARGUMENT

In the order of dismissal in this case, the Court held (1) that the notice of intention to levy ("NOIL") was mailed to the petitioner on November 3, 2014, at his last known address and (2) that petitioner filed a Form 12153 requesting a Collection Due Process ("CDP") hearing with the IRS Office of Appeals on February 20, 2015. Without deciding the question of whether or not the taxpayer had received the NOIL within the 30-day period after November 3, 2014, the Court observed:

> Generally, a levy notice properly sent to the taxpayer's last known address by certified or registered mail is sufficient to start the 30-day

> period within which an Appeals hearing may be requested, and actual receipt of such levy notice is not a prerequisite to the validity of that notice. See sec. 301.6330-1(a)(3), Q&A-A9, Proced. & Admin. Regs.; see also Mannella v. Commissioner, 132 T.C. 196, 199-200 (2009), rev'd on other grounds, 631 F.3d 115 (3d Cir. 2011).
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> . . . .
>
> The record further establishes that petitioner's hearing request in response to the levy notice was not timely. See sec. 6330(a)(3)(B); sec. 301.6330-1(b)(1), Proced. & Admin. Regs. That being so, respondent properly afforded petitioner an equivalent hearing. See sec. 301.6330-1(c)(2), Q&A-C7, Proced. & Admin. Regs.; sec. 301.6330-1(i), Proced. & Admin. Regs. It follows that this case must be dismissed for lack of jurisdiction on the ground that no notice of determination under section 6330 has been issued to petitioner with respect to the underlying liability. See Wilson v. Commissioner, 137 T.C. 47; Moorhous v. Commissioner, 116 T.C. 263.

The parties had largely limited their jurisdictional arguments to whether the NOIL was mailed to the last known address. However, the parties failed to discuss an alternate argument for this Court to find that it has jurisdiction in this case. The omitted argument, now being made in the motion to vacate, is that even if the NOIL was mailed to petitioner's last known address and so was valid for some purposes, if petitioner actually received the NOIL more than 30 days after it was mailed, and petitioner, within 30 days after actual receipt, then requested a CDP hearing, then any hearing given based thereon was a CDP hearing, not an equivalent hearing. Therefore, any decision letter issued after such hearing must be deemed a

notice of determination giving rise to Tax Court jurisdiction. See Craig v. Commissioner, 119 T.C. 252 (2002).

As will be discussed in detail below, the language and structure of section 6330[1] and the legislative history thereof support this alternative argument. Moreover, neither Reg. § 301.6330-1(a)(3), Q&A-A9, nor Mannella v. Commissioner, 132 T.C. 196 (2009), rev'd in part and remanded 631 F.3d 114 (3d Cir. 2011) – neither of which were cited in the parties' filings on the motion to dismiss – address or contradict this argument. It is also questionable whether Reg. § 301.6330-1(b)(1) addresses this argument. But, to the extent that the Court disagrees and believes that the cited regulation sections do address and go against this alternative argument, then the regulations are invalid either under the deferential review standards set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), or, since the regulations primarily have the effect of limiting this Court's jurisdiction, under a non-deferential review standard.

Although the CDP provisions have been in existence for almost 18 years, as far as petitioner can determine, surprisingly, the argument presented herein appears to be one of first impression in any court.

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code, and all references to Reg. sections are to the Procedural and Administrative Regulations at 26 C.F.R.

I. The Statutory Language, Structure, and Legislative History of Collection Due Process Indicates That, Where a Notice of Intention to Levy that Was Mailed to the Last Known Address is Not Received in the 30-day Period, a Collection Due Process Hearing Must Be Held If Requested Within 30 Days After the Notice's Actual Receipt.

The CDP provisions of §§ 6320 and 6330, were created by § 3401(a) and (b), respectively, of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 ("the 1998 Act"). The House Bill (H.R. 2767 (105th Cong.)) that eventually became the 1998 Act contained no provisions analogous to CDP. See H.R. Rep. (Conf.) 105-599 at 264, 1998-3 C.B. 747, 1018. Rather, on May 4, 1998, the Senate Finance Committee amended H.R. 2767 on the Senate floor to add the precursor of the CDP provisions. The text of the Finance Committee amendment can be found at 144 Cong. Rec. S4147 et seq., and the text of § 3401(a) and (b) as originally passed by the Senate begins at page S4163. The Finance Committee also issued a report that is considered the legislative history of the Senate amendment, S. Rep. 105-174, 1998-3 C.B. 537.

Petitioner's argument in this memorandum begins with the Senate language.

As the Court is aware, for notices of deficiency under § 6212(a), there is only limited statutory guidance on how they must be issued. Section 6212(a) instructs that the Secretary is "authorized to send notices of . . .

deficiency [relating to income, estate, gift, or certain excise taxes] to the taxpayer by certified mail or registered mail." Then, § 6212(b)(1) provides "that notice of deficiency [relating to such taxes] . . ., if mailed to the taxpayer at his last known address, shall be sufficient . . . ." "Congress did not create a mandatory address to which a notice of deficiency must be mailed, but rather provided the Commissioner a 'safe harbor' address to which he could send the notice." McKay v. Commissioner, 89 T.C. 1063, 1068 (1987), aff'd, 886 F.2d 1237 (9th Cir. 1989). This Court long ago held that a notice of deficiency is valid to commence a Tax Court case, even if it is not mailed to the taxpayer's last known address, when it got into the hands of the taxpayer in time for the taxpayer to file a timely Tax Court petition without prejudicial delay. Mulvania v. Commissioner, 81 T.C. 65 (1983) (taxpayer's children brought him the notice in plenty of time for him to timely file).

In drafting its version of the 1998 Act, the Senate Finance Committee was more concerned about the issue of actual notice to the taxpayer and opportunity to contest notices. Therefore, in both the proposed § 6320 and the proposed § 6330, the Finance Committee wrote a paragraph at subsection (a)(2) providing:

> (2) Time and method for notice.--The notice required under paragraph (1) shall be--

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address . . . .

This language applied both to the new notice of federal tax lien filing ("NFTL") and the new notice of intention to levy ("NOIL"). The language was more specific and demanding than § 6212 (concerning notices of deficiency) as to how the two CDP notices should be issued. Thus, the facts presented in Mulvania would not support a similarly-valid NFTL or NOIL if mailed to the wrong address, yet received "in time".

Neither in its proposed legislation nor in its report thereon did the Finance Committee mention what it expected to happen if, somehow, a taxpayer still did not actually receive an important notice in the CDP process. See S. Rep. 105-174 at 67-69, 1998-3 C.B.at 603-605 (nowhere containing the word "receive" or any variation thereof)

Controversially, the Senate amendment also proposed allowing taxpayers at CDP hearings to make "challenges to the underlying tax liability as to existence or amount", without regard to whether the taxpayers had been previously issued a valid notice of deficiency with respect to such taxes. Proposed §§ 6320(c) and 6330(c)(2)(A).

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

First, in the manner of the methods for issuing NFTLs and NOILs, Congress made a change for NOILs that added the requirement that, if the NOIL was mailed, it should be mail "return receipt requested". Section 6330(a)(2). A similar change was not made to section 6320(a)(2) concerning NFTLs.

Second, after lobbying by the White House, the Conference Committee cut back on the possibility of unlimited challenges to the existence or amount of underlying tax liability by enacting a new section 6330(c)(2)(B) providing challenges to the underlying liability only "if the person did not receive any statutory notice of deficiency for such tax liability or otherwise have an opportunity to dispute such tax liability." (Emphasis added.) With regard to the word "receive" in the statute, the Conference Committee report, in its section on the NFTL and again in its section on the NOIL, wrote: "[T]he validity of the tax liability can be challenged only if the taxpayer did not actually receive the statutory notice of deficiency or has not otherwise had the opportunity to dispute the liability." H.R. Rep. (Conf.) 105-599 at 265, 1998-3 C.B. 747, 1019 (Emphasis added). Thus, the

Conference Committee indicated that, for purposes of CDP hearings, it was concerned with actual receipt of notices of deficiency, not merely constructive receipt by mailing of notices of deficiency to a taxpayer's last known address. While the mere mailing of a notice of deficiency to the taxpayer's last known address would allow the assessment based on the notice to be valid, nonreceipt of such notice would give rise during the CDP hearing to the taxpayer's right to challenge the deficiency set forth in the notice.

Clearly, the new § 6330(c)(2)(B) was intimately related to the concern expressed by the Finance Committee to make more stringent procedures for getting the new NFTLs and NOILs to be actually received by taxpayers. One of the reasons Congress went to such lengths to impose special delivery requirements for NFTLs and NOILs (beyond those for notices of deficiency) stemmed from the reason for the creation of the §§ 6320 and 6330 remedy of allowing a contest to the validity of the underlying tax when the taxpayers had not previously had the actual opportunity to a prepayment contest. Congress knew that many taxpayers sent notices of deficiency at their last known addresses did not actually receive the notices of deficiency in time to contest the liabilities set forth therein in Tax Court, and so those taxpayers (before CDP) had lost all prepayment opportunity to contest the proposed

(and now assessed) deficiencies in court. The creation of the remedy allowing a merits contest in the CDP hearing was bound up with the delivery problems with notices of deficiency that Congress sought to address with the NFTL and NOIL delivery procedures. If actual receipt was not assured with respect to notices of deficiency, Congress sought greater likelihood of actual receipt of NFTLs and NOILs, so as to afford taxpayers a final prepayment hearing that could eventually get into Tax Court and include a prepayment judicial contest of the merits of the tax liability.

This Court has for some time interpreted that word "receive" in § 6330(c)(2)(B) to involve a situation where a notice of deficiency is actually received, regardless of whether the notice was mailed to the taxpayer's last known address. See Tatum v. Commissioner, T.C. Memo. 2003- 115 (taxpayers may challenge underlying liability in CDP hearing because taxpayers did not receive notice of deficiency mailed to last known address, since postal service only attempted delivery once and taxpayers credibly testified that they were not avoiding delivery). By contrast, where a notice of deficiency was mailed to a taxpayer's last known address, and the taxpayer deliberately or carelessly refused to retrieve his or her mail, the Court has found that the taxpayer actually received the notice of deficiency for purposes of § 6330(c)(2)(B). Sego v. Commissioner, 114 T.C. 604, 610-

612 (2000); Onynago v. Commissioner, 142 T.C. 425 (2014), aff'd 2016 U.S. App. LEXIS 5358 (D.C. Cir. 2016). In a third situation, though, where it is shown during a CDP hearing that the IRS never mailed a notice of deficiency to the last known address and the taxpayer otherwise did not receive it in sufficient time to petition the Tax Court, the remedy is not to allow the taxpayer to challenge the underlying liability during a CDP hearing under § 6330(c)(2)(B), but to invalidate the notice of deficiency and the assessment based thereon. Hoyle v. Commissioner, 131 T.C. 197 (2008). Thus, in interpreting the word "receive" in § 6330(c)(2)(B), this Court has recognized that a notice mailed to a last known address can have some legal consequences (e.g., permitting assessment based thereon), but when the notice is not timely received, it does not preclude another opportunity for a prepayment hearing thereon.

The Conference Committee's insertion of a requirement to send NOILs with a return receipt requested form needs some consideration at this point. Why was that requirement added, and why only for NOILs, but not for NFTLs?

A little reflection indicates that adding a requirement that the IRS include a return receipt with either a mailed NOIL or NFTL would do nothing to increase the odds that a taxpayer actually received either the

NOIL or NFTL. All that requirement would do – if the receipt came back promptly, signed by the taxpayer – is to eliminate any future argument by the taxpayer that the NOIL or NFTL was not actually received within the 30-day period to request a CDP hearing. But, adding such a requirement shows the Conference Committee's even greater concern with actual receipt.

Why, then, was Congress more concerned with actual receipt of the NOIL than the NFTL, since the Conference Committee's amendment adding the return receipt form only applies to NOILs? Congress was concerned that, in a CDP hearing, the IRS Office of Appeals employee try to impose a collection action that was "no more intrusive than necessary". § 6330(c)(3)(C). While Congress certainly thought that the filing of a public notice of federal tax lien was an important event that the taxpayer should be allowed to try to subsequently undo by a CDP hearing, conversely, Congress insisted that a CDP hearing precede any actual levy. There can be no more intrusive collection activity than a levy – an involuntary taking of a taxpayer's property. Since a levy is more intrusive than a tax lien filing, Congress was willing to force the IRS to spend a few more dollars on each NOIL to include a return receipt request that could confirm timely receipt by the taxpayer.

But what consequences, then, did Congress think would ensue in any

of these three common following situations, where a CDP hearing was not requested within 30 days after an NOIL was mailed to the taxpayer at his or her last known address?

(a) Where the return receipt came back signed by the taxpayer shortly after the NOIL was mailed – indicating that the taxpayer actually received the NOIL within ample time to request a CDP hearing within 30 days after the date of the notice.

(b) Where the return receipt came back signed for by someone other than the taxpayer – indicating that the taxpayer may or may not have actually received the NOIL, depending on the signer's actions.

(c) Where the return receipt never came back – which could happen either if the taxpayer did not actually receive the NOIL or actually received the NOIL, but just declined to sign and mail back the requested return receipt.

Unfortunately, Congress did not explicitly address the consequences in these situations in the statute. But, the Conference Committee tried to address at least some of these situations in its Committee report. Even though the passage below repeats one sentence previously quoted, to understand the context of the key second paragraph quoted below, the entire relevant portion of the Conference Committee report describing the holding

of CDP hearings after NOILs is as follows:

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

H.R. Rep. (Conf.) 105-599 at 265-266, 1998-3 C.B. at 1019-1020 (Emphasis added).[2]

In the first sentence of the second paragraph quoted above, Congress addressed situation (c) – the case where no return receipt is received by the IRS. The sentence reads: "If a return receipt is not returned, the Secretary may proceed to levy on the taxpayer's property or rights to property." Although not stated in that sentence, implicit in it is that it is addressing a

[2] Note that there is no similar second paragraph in the discussion of NFTLs in the Committee report – doubtless because there was no return receipt requirement for mailing of an NFTL.

situation where the NOIL was mailed to the taxpayer's last known address, yet the taxpayer did not request a CDP hearing within 30 days after the date of the notice and no return receipt was received by the IRS within the 30 days.[3] The Committee report sentence suggests an NOIL mailed to the last known address, whether or not received, is "valid" for purposes of beginning levy, if no CDP hearing is requested in the 30-day period after the date shown on the NOIL. But, the sentence does not go on to specify what other consequences ensue from such a "valid" NOIL when it is not received within the 30-day period.

The Committee report did not include a sentence addressing situation (a) – where a return receipt signed by the taxpayer came back to the IRS shortly after the NOIL was mailed – since it is too obvious to discuss in the report what should happen in that case: Since, by signing the return receipt and mailing it back to the IRS, the taxpayer admitted that he or she actually received the NOIL in time to request a CDP hearing within 30 days after the

[3] In fact, the Committee report perhaps overstates how soon the IRS may begin levying. The consequence of § 7502 is that it permits a taxpayer to mail a timely CDP hearing request to the IRS as late as the 30th day after the mailing of the NOIL. If the CDP hearing request is mailed on the 30th day, the IRS will not receive the hearing request until one or more days after the 30th day. Since the IRS is not allowed to begin levying after receipt of the request, the IRS would be wise not to begin levying until a short period after the 30-day period expires, just to avoid levying before a taxpayer's timely hearing request arrives in the mail.

NOIL was mailed, if the taxpayer did not so request in the 30-day period, levying may start.

The second and third sentences of the second paragraph in the above Conference Committee report quotation are: "The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice." These sentences are the origin of the so-called "equivalent hearing" in CDP, discussed in detail at Reg. § 301.6330-1(i). These sentences are also clearly addressed to an NOIL that is properly mailed to the taxpayer's last known address, since only a properly-mailed NOIL can give rise even to an equivalent hearing.

The last sentence of the second paragraph in the above Conference Committee report quotation, though, is the most important to the argument presented in the motion to vacate. This last sentence addresses situations (b) and (c), above, but only as to a taxpayer who did not actually receive the NOIL within the 30-day period after the NOIL was mailed (or, perhaps, within sufficient time to file a CDP hearing request within that period). The sentence reads: "<u>If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be</u>

suspended and a hearing provided to the taxpayer." (Emphasis added.) This sentence needs some unpacking to be understood.

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

Second, although, the sentence begins with the phrase, "[i]f the taxpayer did not receive the required notice [of intention to levy]", there can be little doubt that Congress also intended the phrase to encompass the situation of a taxpayer who did not actually receive the NOIL within the 30-day period in which the taxpayer could request a CDP hearing, but who received a copy later. The latter part of the sentence assumes that levying against the taxpayer has begun and also implicitly assumes that a taxpayer could request a hearing after not receiving the NOIL in the 30-day period after its mailing. In a situation where levying has begun and the taxpayer has never received an NOIL, how would the taxpayer know what was contained within the NOIL or the address shown in the NOIL to which the taxpayer must submit his or her Form 12153 hearing request?

When levying has begun and the taxpayer wants a CDP hearing, although not having ever yet received the NOIL, the taxpayer will, in the

usual case, call up the IRS and ask why the IRS is levying. The IRS employee on the phone will respond that the taxpayer failed to timely request a hearing after an NOIL was issued, so the IRS began levying. The taxpayer will then demand to see the NOIL and will be sent a photocopy. The taxpayer will then request a CDP hearing by filing the request at the address shown in the notice. So, in this common situation, the taxpayer actually, eventually, receives the NOIL, but just not within the period in which the taxpayer would ordinarily file a timely CDP hearing request – i.e., 30 days after the date that the notice was mailed by certified mail. Congress could not have intended the sentence in the Committee report to apply only to people who never, ever received a copy of the NOIL. How would such people ever know to what address they should submit their belated hearing request if they never, ever received a copy of the NOIL?[4]

Therefore, Congress no doubt meant the opening phrase of the sentence also to cover a situation where the "taxpayer did not receive the required notice [of intention to levy]" either (1) within 30 days after it was originally mailed or (2) within sufficient time in which the taxpayer could

[4] Of course, a taxpayer could guess or be told that an NOIL was issued, say, by the Automated Collection Service of the IRS ("ACS"). On the East Coast, an experienced tax controversy attorney has no doubt seen the address in Bensalem, Pennsylvania that ACS uses for Forms 12153 and, without ever seeing the NOIL, that attorney might guess rightly as to where to send the Form 12153 seeking a hearing.

file a file a Form 12153 within 30 days after the NOIL was originally mailed. Petitioner does not ask the Court to resolve which of the two time periods is the more appropriate, since in the instant case, petitioner would be covered by this sentence if either time period applied. The facts in this case show that petitioner neither received nor even heard about the NOIL that was mailed to his last known address on November 3, 2014, until January 21, 2015, when Revenue Officer Steven Crimmins handed a copy of the NOIL to petitioner in a meeting at petitioner's mother's home. Thus, petitioner did not receive the NOIL either (1) within 30 days after it was originally mailed or (2) within sufficient time in which petitioner could file a file a Form 12153 within 30 days after it was originally mailed.

The next question is: What consequences did Congress intended for a person covered by the initial phrase of the sentence? Again, the whole sentence reads: "If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer." Let's focus on the words after the comma – the consequences: "[C]ollection shall be suspended" and "a hearing [shall be] provided to the taxpayer."

What do we know already? We know that for collection to be "suspended", the NOIL must have been mailed to the taxpayer at the

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

Next, what kind of a hearing should be given to a person covered by this last sentence? Obviously, a real CDP hearing, not an equivalent hearing. Why? Because the two immediately preceding sentences in the Committee report state: "The Secretary must provide a hearing equivalent to

the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice." That is, there is no suspension of levying during an equivalent hearing. Yet the very next sentence of the paragraph states that "collection shall be suspended and a hearing provided to the taxpayer" in the case of nonreceipt of an NOIL where a hearing is provided.

Finally, how long does a taxpayer have to request a CDP hearing after initially not receiving the NOIL during the 30-day period after it was mailed (or within sufficient time in which the taxpayer could file a file a Form 12153 within 30 days after the NOIL was originally mailed)? If one assumes that the Congress did not intend that a person have forever to request a CDP hearing in this case, but should be put under some time pressure or otherwise be afforded an equivalent hearing, then it seems logical that, in a circumstance when the taxpayer does not receive the NOIL either (1) within 30 days after the date of the NOIL was originally mailed or (2) within sufficient time in which the taxpayer could request a CDP hearing within 30 days after the NOIL was originally mailed, if the taxpayer later wants a CDP hearing, he or she should make a request for a CDP hearing either (1) up to 30 days after actually receiving the NOIL or (2) up to 30

days after learning of the issuance of the NOIL (even if it has not yet been received). Again, there is no need in this case for the Court to decide which of the two options is the last day to file for a CDP hearing in these circumstances, since the petitioner in this case neither received nor learned of the mailing of the NOIL before January 21, 2015, and the IRS received physical possession of his CDP hearing request 30 days thereafter. (There is also no need to decide in this case whether or how the § 7502 timely-mailing-is-timely-filing rules would extend the filing period, since petitioner's CDP hearing request was actually received by the IRS within either potential 30-day period. He is not relying on the § 7502 rules.)

In summary, perhaps a better way of expressing the final sentence of the paragraph in the Committee report is to clarify it to read as follows: "If the taxpayer did not receive the required [NOIL that was mailed to his or her last known address either (1) within 30 days after the date of the NOIL was originally mailed or (2) within sufficient time in which the taxpayer could request a CDP hearing within 30 days after the NOIL was originally mailed] … and requests a [CDP] hearing after collection activity has begun [based on the NOIL], then collection shall be suspended and a [CDP] hearing [shall be] provided to the taxpayer [if the taxpayer makes a request for a hearing either (1) up to 30 days after actually receiving the NOIL or (2) up to 30

days after learning of the issuance of the NOIL]." Perhaps because such a sentence was such a mouthful, the drafters of the Committee report unwisely over-shortened the sentence. But, it is pretty clear that the longer sentence more precisely states what they were trying to say.

The reading of the Committee report described herein is entirely consistent with the thrust of CDP – that taxpayers get a prepayment hearing whose resolution can be appealed to a court, even when a taxpayer did not receive an important notice in the assessment and collection process – i.e., either a notice of deficiency or an NOIL. Indeed, any other reading of the statute would be internally inconsistent: Why should Congress care so much about actual receipt of a notice of deficiency, such that where a notice of deficiency was not actually received, the underlying tax liability may be considered in a CDP hearing, but Congress not be concerned about actual receipt of an NOIL? The odd consequence of the Court's prior ruling in this case is that, if the underlying liability in dispute was a deficiency, and the taxpayer wanted to challenge the underlying deficiency in a CDP hearing because the taxpayer did not receive the notice of deficiency, the taxpayer would be denied the right to do so if the taxpayer did not also receive the NOIL. It is hard to imagine a Congress that would want such a result.

Moreover, the word "receive" in § 6330(c)(2)(B) and the Committee report words "actually receive" and "receive" in the passage quoted above should all be given the same meaning, since they were written by the same Congress. Thus, this Court's precedents under § 6330(c)(2)(B) about what it means to "receive" a notice of deficiency mailed to a taxpayer's last known address should also apply to the Committee report language concerning what it means to "receive" an NOIL (one that is also mailed to a taxpayer's last known address).

While there is no Tax Court or other court opinion that has discussed the argument presented in the accompanying motion and this memorandum, there is, however, precedent for treating an NOIL that was mailed to a taxpayer's last known address, but not received by the taxpayer, as not fully valid for all purposes. The Court's recent opinion in Yasgur v. Commissioner, T.C. Memo. 2016-77 (Apr. 25, 2016), is instructive:

In Yasgur, the Tax Court determined that the taxpayers had timely requested a CDP hearing with respect to an NFTL. In that hearing, the taxpayers wanted to challenge the amount of the tax liability that they had self-reported on their joint return. They argued that they "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability," within the meaning of §

6330(c)(2)(B). Reg. § 301.6330-1(e)(3), A-E7 provides, in part: "If the taxpayer previously received a CDP Notice under section 6330 with respect to the same tax and tax period and did not request a CDP hearing with respect to that earlier CDP Notice, the taxpayer had a prior opportunity to dispute the existence or amount of the underlying tax liability." (Emphasis added.) (Note how receipt of the NOIL or lack thereof can change the consequences of this regulation section.) In Yasgur, the IRS argued that it had previously mailed NOILs to the taxpayers concerning the same taxes at their last known address, and that neither taxpayer had filed a Form 12153 with respect to the NOILs within 30 days after the NOILs were mailed, so they were both barred in the NFTL hearing from challenging the underlying liability because they had "received" the NOILs and thus had a previous opportunity to contest that liability at Appeals.

In Yasgur, the Court agreed that the wife had "received" the NOIL, within the meaning of the regulation, so was barred from contesting the underlying liability in the NFTL CDP hearing. She picked up the NOILs at the Post Office. But, the couple had been living apart, only using the wife's address as their last known address. The wife usually forwarded mail from the IRS to the husband, but in this case, the Court believed the husband that she did not do it with respect to the NOIL during the 30-day period, so, the

Court ruled, he could challenge the underlying liability in the NFTL CDP hearing. The Court distinguished this case from cases where a taxpayer deliberately avoided receipt of a notice of deficiency (which presents a parallel issue). The husband here did not deliberately try to avoid receipt of the NOIL.

Yasgur is instructive in this case for several reasons:

First, in Yasgur, in order to decide whether the husband had a prior opportunity to challenge the underlying liability, the Court held that it needed to determine whether, in fact, the husband received the NOIL, was aware of the NOIL, or deliberately refused to receive the NOIL. The Court's determination of "receipt" was required under the regulations – i.e., the regulations essentially treat an otherwise valid NOIL mailed to the last known address as invalid for purposes of § 6330(c)(2)(B) if it was not actually or constructively "received". Thus, the validity of the NOIL for cutting off the underlying liability CDP hearing right depended on actual or certain constructive receipt of the NOIL. What petitioner is arguing in the instant case is that, even if the NOIL may have been sent to petitioner at his last known address (a holding that petitioner still disputes), because he did not actually or constructively receive the NOIL until more than 30 days after it was mailed, his right to a CDP hearing was similarly not cut off. In

essence, the Court in Yasgur found a situation for which the unreceived NOIL would be valid for some purposes (affording a CDP hearing and beginning levying when no hearing was requested within 30 days of the mailing of the NOIL), but not valid for other purposes (cutting off the right to challenge underlying liability in the later NFTL CDP hearing).

Second, the Court in Yasgur created an inquiry into the receipt of an NOIL, even though the statute never contained words mentioning the significance of receipt of an NOIL. (The statute only mentions a situation where the taxpayer "did not receive a notice of deficiency".) Thus, petitioner is only asking the Court to make a similar inquiry into whether or when an NOIL was received for purposes of applying the CDP statute in his case. The Court need not have a regulation specifically discussing receipt of NOILs to make this inquiry.

Third, in its inquiry in Yasgur, the Court, to decide the issue of receipt of an NOIL, applied case law on what it means to receive a notice of deficiency for purposes of § 6330(c)(2)(B), including whether the taxpayer deliberately refused to receive that notice. Petitioner is requesting that this Court also use the same notice of deficiency receipt case law in deciding in the instant case whether or when he "received" an NOIL, since, logically,

"receive" as used in the Conference Committee report concerning NOILs should be read in pari materia with "receive" as used in § 6330(c)(2)(B).

Finally, the facts of Yasgur are strikingly similar to the facts of the instant case. In both cases, two people both arguably had the same last known address (the Yasgurs had the same last known address and petitioner and Ms. Thomas arguably had the same last known address), yet they were living apart at the time the NOIL was mailed to that last known address and their relationships were, at the time, no longer intimate. The Court in Yasgur believed the taxpayer who did not live at that address that the NOIL that was picked up by the other taxpayer was not forwarded to the taxpayer. The Court wrote: "We believe that Mrs. Yasgur plausibly could have believed that the levy notices concerned matters that Mr. Yasgur was already addressing with the Holtsville office and therefore misjudged their significance and the importance of notifying Mr. Yasgur of them." Yasgur, supra, at *16.[5] Petitioner requests the same kind of ruling here – that he did

[5] In Yasgur, the Court also wrote (id. at p. *18):

> Mr. Yasgur's circumstances are more akin to those of taxpayers who are not residing at their "last known address" when a notice is sent. See, e.g., Kuykendall v. Commissioner, 129 T.C. 77, 81-82 (2007); Smith v. Commissioner, T.C. Memo. 2008-229. Such taxpayers have not received a notice within the meaning of section 6330(c)(2)(B) or section 301.6320-1(e)(3), Q&A-E7, Proced. & Admin. Regs., nor have they deliberated refused receipt.

not receive the NOIL for purposes of the CDP provisions, since Ms. Thomas plausibly (in light of her behavior at the time of selling off his assets for her own benefit) neither forwarded the NOIL to him nor told him about the NOIL, and petitioner did not negligently or intentionally refuse to receive the NOIL when it was mailed.

II. Regulation § 301.6330-1(a)(3)Q&A-A9 and (b)(1) Do Not Address the Question of Whether a Taxpayer Should Be Denied a CDP Hearing in the Circumstance Where a Notice of Intention to Levy is Properly Mailed to the Taxpayer's Last Known Address, but the Taxpayer Does Not Actually Receive it During the 30-day Period and the Taxpayer Later Requests a CDP Hearing Within 30 Days of Actual Receipt.

This Part of the memorandum discusses whether two regulations cited by the Court in its order actually address the situation presented in this case, if the Court is correct that on November 3, 2014, the NOIL was mailed to petitioner at his last known address.

By way of introduction, to date, the Court and respondent have focused on the mailing of the NOIL to the proper address and on the filing of a CDP hearing request during the 30-day period after the mailing of an NOIL to the correct address; however, as will be seen below, nothing in the statute or the regulations specifically addresses the situation of a taxpayer who receives the properly-addressed NOIL after the 30-day period and

makes a CDP hearing request within 30 days of receipt of the NOIL. Those facts exist in this case.

This circumstance deserves attention – other than by citing to the regulations that fail to discuss it and other than by trying to make an analogy to deficiency proceedings – because deficiency proceedings focus on proper mailing (necessary to the assessment process). In contrast, CDP levy cases focus on receipt and do so in large part because of the occasional failure of deficiency proceedings to give taxpayers the real opportunity for a pre-enforced-collection contest to their liabilities – one that can be taken to court.

The statute and regulations make clear what the outcome should be if the Service mails an NOIL to the correct address and the taxpayer promptly receives the notice and timely requests a hearing: The taxpayer receives a CDP hearing. The statute and regulations also make clear what the outcome should be if the Service mails an NOIL to the correct address and the taxpayer promptly receives the notice, but fails to make a timely CDP hearing request: The taxpayer does not receive a CDP hearing. In this latter case, the taxpayer may receive an equivalent hearing, based on the regulations that interpret the legislative history of this provision. See Reg. § 301.6330-1(i).

In both of these situations, the taxpayer receives the NOIL timely and has the opportunity to request a hearing. However, neither of these situations presents itself in this case. Here, the Court has held that respondent has mailed the NOIL to the correct address, but petitioner did not receive it for more than two months. So, petitioner did not have the opportunity to make a CDP hearing request within 30 days after the mailing.

Although neither party cited or discussed it in the papers filed in connection with the motion to dismiss in this case, this Court's order of dismissal cited Reg. § 301.6330-1(a)(3), Q&A-A9 as support for the following sentence in the order: "Generally, a levy notice properly sent to the taxpayer's last known address by certified or registered mail is sufficient to start the 30-day period within which an Appeals hearing may be requested, and actual receipt of such levy notice is not a prerequisite to the validity of that notice."

Petitioner takes no issue with this sentence from the order, but does question the particular purposes for which the NOIL is valid. As has been demonstrated above, Congress intended that an NOIL mailed to the taxpayer's last known address, but that was not received until more than 30 days after mailing, be "valid" (1) for purposes of allowing the IRS to commence levying if a taxpayer does not file a CDP hearing request within

the 30-day period after the date of mailing, (2) for getting a CDP hearing if, despite lack of timely receipt, a taxpayer still manages somehow to request a CDP hearing during the 30-day period after the NOIL was mailed, and (3) under petitioner's reading of the Conference Committee report, for getting a CDP hearing that the taxpayer requests after first receiving a copy of the NOIL beyond the 30-day period.

But, just because an NOIL that is not timely received is valid for some purposes does not mean that it is valid for all purposes. For example, as shown by the Yasgur case, such an NOIL is not valid for purposes of cutting off a right to contest the underlying liability in a subsequent NFTL hearing. Petitioner submits that an NOIL that is not timely received also is not valid to cut off the right to a CDP hearing that is requested after it is actually received.

The situation presented here is similar to the situation concerning a notice of deficiency under section 6212, which is "valid" if sent to the last known address for two purposes: (1) for starting the 90-day period to file in the Tax Court, and (2) for assessing the deficiency if no petition is filed in the period. But, if the notice of deficiency was not received by the taxpayer in time to allow the filing of a timely Tax Court petition, the notice of deficiency is not valid to cut off the right to challenge the underlying

liability in a CDP hearing. The phrase "did not receive" in § 6330(c)(2)(B) addresses a properly-mailed notice of deficiency and is discussed in the Conference Committee report (with the phrase "did not actually receive") in the paragraph immediately preceding the paragraph in the report that talks of the consequences of when a taxpayer "did not receive" an NOIL. The words "receive" in both sentences should be read in pari materia.

The Congressional goal was to provide taxpayers a real opportunity to contest their tax issues before Appeals and before the Tax Court and not merely an opportunity to do so only when acting within 30 days of a properly-mailed NOIL. The opportunity to timely request the CDP hearing after the receipt of the NOIL – rather than just within 30 days of its proper mailing – does not cut off the right of the Service to levy and move forward with collection once the 30-day period passes. The opportunity to timely request a CDP hearing after receipt of the NOIL merely gives the taxpayer the chance to contest the proposed collection action when the taxpayer actually receives the notice. This can cause disruption in the collection plans of the Service and cause it to step back to a point that it thought it had passed. In this way, it operates similarly to the step back regarding assessment where the Service makes a valid assessment following the proper mailing of a notice of deficiency and default in filing a Tax Court petition,

but, where the taxpayer, in the CDP context, may cause the reexamination of the amount of the assessment because the taxpayer did not receive the properly-sent notice of deficiency.

The interpretation offered here places the ability to contest the assessment proposed in the notice of deficiency and to contest the collection action proposed in the NOIL on the same footing based on actual receipt of the respective notices. Without this interpretation, taxpayers would possess the right to contest their assessments at a later point if they did not actually receive the underlying notices of deficiency, but would not possess the right to contest in court the collection actions on their assessments at a later point based on actual receipt. In both cases, an inconvenience is caused for the Service, but Congress considered that inconvenience warranted in order to provide taxpayers with actual opportunities to contest the proposed actions all the way to court after actual receipt, rather than just to foreclose their ability to contest through to court based on statutory presumptions. In both cases, the statute of limitations on collection is suspended, which also places both actions on the same footing.

So, now let's turn to the exact language of the regulation on which the Court relied in its order. Reg. §301.6330-1(a)(3)Q&A-A9 states as follows:

> Q-A9. What are the consequences if the taxpayer does not receive or accept the notification which was properly left at the taxpayer's

> dwelling or usual place of business, or properly sent by certified or registered mail, return receipt requested, to the taxpayer's last known address?
>
> A-A9. Notification properly sent to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business is sufficient to start the 30-day period within which the taxpayer may request a CDP hearing. See paragraph (c) of this section for when a request for a CDP hearing must be filed. Actual receipt is not a prerequisite to the validity of the CDP Notice.

Arguably, the above question and answer only address validity for purposes of getting a CDP hearing if, despite lack of timely receipt, a taxpayer still manages somehow to request a CDP hearing during the 30-day period after the NOIL was mailed. The regulation simply does not state anything (positive or negative) (1) about validity of the unreceived NOIL for purposes of levying or (2) about the possibility, discussed in the Conference Committee report, of getting a CDP hearing that the taxpayer requests after first receiving a copy of the NOIL beyond the 30-day period.

It appears that A-9 is inspired by the sentence from the report reading: "If a return receipt is not returned, the Secretary may proceed to levy on the taxpayer's property or rights to property." But, ironically, that sentence only deals with validity for purposes of allowing the IRS to commence levying if a taxpayer does not file a CDP hearing request within the 30-day period after the date of mailing.

In its order of dismissal in this case, it appears that the Court has read more into A-9 than it actually covers. The language in the regulation is distinguishable because it does not address validity for purposes of whether a taxpayer who does not receive the NOIL (one that was addressed to the taxpayer at his or her last known address) until after the 30-day period may or may not also get a CDP hearing in an additional 30-day period beginning either on the date of actual receipt or the date of first awareness of the NOIL's issuance.

The Court may well next ask whether another provision of the regulations is inspired by the sentence of the Conference Committee report that reads: "If the taxpayer did not receive the required notice and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer." (Emphasis added.) It is clear that the regulation drafters had this sentence in mind when they drafted the immediately-following Q&A-A10. Reg. §301.6330-1(a)(3)Q&A-A10 states as follows:

> Q-A10. What if the taxpayer does not receive the CDP Notice because the IRS did not send that notice by certified or registered mail to the taxpayer's last known address, or failed to leave it at the dwelling or usual place of business of the taxpayer, and the taxpayer fails to request a CDP hearing with Appeals within the 30-day period commencing the day after the date of the CDP Notice?
>
> A-A10. When the IRS determines that it failed properly to provide a

> taxpayer with a CDP Notice, it will promptly provide the taxpayer with a substitute CDP Notice and provide the taxpayer with an opportunity to request a CDP hearing. Substitute CDP Notices are discussed in Q&A-B3 of paragraph (b)(2) and Q&A-C8 of paragraph (c)(2) of this section. [(emphasis added)]

A-10 of the regulation clearly garbles the intent of Congress in the quoted sentence from the Conference Committee report by providing that the NOIL needs to be reissued in the case of nonreceipt only if the NOIL was not sent to the last known address (which would make it invalid ab initio). There is no such limitation in the language of the Conference Committee report to nonreceipt of invalid notices. As was demonstrated in Part I of this memorandum, any fair reading of the quoted Conference Committee report sentence shows that Congress was concerned with nonreceipt of valid notices. The regulation in essence modifies the sentence in the Conference Committee report to read: "If the taxpayer did not receive the required notice [because it was not mailed to the taxpayer's last known address] . . . , then . . . a hearing [shall be] provided to the taxpayer [after a new NOIL is issued to the taxpayer's last known address]." Note the ellipses in this modification of the Committee report sentence: The IRS has taken out both the phrases "and requests a hearing after collection activity has begun" and "collection shall be suspended and". Those phrases would be inconvenient, since if A-10 were to admit that valid levying had been

done under the NOIL, and only that the levying should be "suspended", then the NOIL would have to have been issued to the taxpayer's last known address.

As it is, now, A-10 simply reflects a tautology – i.e., if a notice is invalid because not sent to a taxpayer's last known address, then the taxpayer should be afforded a hearing only after the IRS mails a replacement valid notice to the taxpayer's last known address.

Petitioner submits that Congress had far more in mind in drafting the Conference Committee report sentence than addressing invalid notices. There was no need to spill any ink on the consequences of nonreceipt because of invalid notices, since, obviously, such notices could never give rise to valid levies or CDP hearings.

The other regulation relied on by this Court in its order is, arguably, similarly inapt. In its order, the Court relied on Reg. § 301.6330-1(b)(1) for its holding that "petitioner's hearing request in response to the levy notice was not timely". Reg. § 301.6330-1(b)(1) provides: "In general. A taxpayer is entitled to one CDP hearing with respect to the unpaid tax and tax periods covered by the pre-levy or post-levy CDP Notice provided to the taxpayer. The taxpayer must request the CDP hearing within the 30-day period commencing on the day after the date of the CDP Notice." The

second sentence from the cited section is what this Court relied on. These two sentences are essentially a summary of §§ 6330(a)(2), (a)(3)(B), and (b)(1). The requirement in the regulation that the taxpayer request a CDP hearing "within the 30-day period commencing on the day after the date of the CDP Notice" is merely a clarification and combination of some of the rules of §§ 6330(a)(2) and (a)(3)(B). Petitioner takes no issue with this regulation. However, it is a regulation designed for the ordinary case, where a taxpayer receives the properly-addressed NOIL either within the 30-day period or within sufficient time in which the taxpayer could request a CDP hearing within 30 days after the NOIL was originally mailed. The regulation does not purport to address the situation of where the taxpayer does not receive such notice during the period – i.e., the situation covered in the sentence in the Conference Committee report and partially addressed by Reg. §301.6330-1(a)(3)Q&A-A9 .

III. If this Court Holds that Regulation §§ 301.6330-1(a)(3)Q&A-A9 and (b)(1) Dictate that a Taxpayer Should Be Denied a CDP Hearing in the Circumstance Where a Notice of Intention to Levy is Properly Mailed to the Taxpayer's Last Known Address, but the Taxpayer Does Not Actually Receive it During the 30-day Period, then Such Regulation Provisions Are Invalid.

In Part II of this memorandum, petitioner has tried to persuade this Court that it misread the import of the regulations that it cited in its order and that those regulations do not require the result the Court came to in its

order of dismissal. However, if the Court disagrees with petitioner about Part II, then petitioner contends that the regulations should be ignored as invalid for purposes of the situation presented in this case.

Before explaining why the regulations, if so interpreted, would be invalid, a knotty issue of the standard of review of the validity of such regulations must be raised.

In Mayo Foundation v. United States, 562 U.S. 44 (2011), the Supreme Court clarified that general authority tax regulations, like those involved in this case, are normally reviewed under the deferential standards set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron Step One, a regulation is invalid if Congress has already spoken unambiguously on the matter. If Congress has not so spoken, then Chevron Step Two permits an agency, in its regulations, to choose among reasonable interpretations of the statute, but not choose unreasonable interpretations.

In City of Arlington v. FCC, 133 S. Ct. 1863 (2013), the Supreme Court clarified that Chevron deference was also required as to regulations wherein an agency determines its jurisdiction.

But, it is also well-settled that an agency gets no deference to regulations that it adopts that effectively limit a court's jurisdiction. See

Harris v. Commissioner, 32 T.C. 1216, 1217 (1959) ("[O]ne litigant cannot write into the law limitations on the jurisdiction of the Court as to the other party by his own regulations."). See also Bongam v. Commissioner, 146 T.C. No. 4 (Feb. 11, 2016) at p. *8 n.2 (casting doubt on whether the Court need give any deference to Reg. § 301.6330-1(e)(3), Q&A-E8, which states: "Taxpayers will be sent a dated Notice of Determination by certified or registered mail."; notice of determination held valid, even though sent by regular mail, when received by taxpayer and he petitioned within 30 days after mailing under § 6330(d)(1)).

While the regulations relied on by the Court in its order of dismissal in this case – Reg. §§ 301.6330-1(a)(3)Q&A-A9 and (b)(1) – purport to deal only with filings in the IRS Office of Appeals, and not the Tax Court, an argument could be made that these regulations primarily impact whether this Court may review the IRS Office of Appeals hearings. The principal (though not sole) purpose of the regulations appears to be to distinguish between two kinds of hearings that differ as to whether they are subject to judicial review – CDP hearings and equivalent hearings. A regulation that would effectively make hearing requests filed fall more into the category of equivalent hearings than CDP hearings – as these regulations do – effectively limits this Court's jurisdiction. As a result, the regulations under

dispute deserve no deference because their primary effect is to limit judicial review, not to reduce the number of hearings heard at Appeals.

But, even if the regulations were accorded Chevron deference by this Court, the regulations would be invalid. Petitioner concedes that there is an ambiguity in the statute as to how to deal with an NOIL that is mailed to a taxpayer's last known address, but where the taxpayer does not receive the NOIL before the normal 30-day period to request a CDP hearing has expired. Thus, the regulations are not invalid at Chevron Step One. But, as shown in Part I of this memorandum, the structure of CDP and its legislative history indicate that the interpretation of the regulations that might deny petitioner a CDP hearing on these facts would be an unreasonable interpretation of the statute. Thus, the regulations would fail Chevron Step Two.

IV. The Holding in Mannella v. Commissioner Should Not Impact This Case.

In addition to citing Reg. § 301.6330-1(a)(3)Q&A-A9 as support, this Court cited part of its opinion in Mannella v. Commissioner, 132 T.C. 196, 199-200 (2009), as support for its statement that, "[g]enerally, a levy notice properly sent to the taxpayer's last known address by certified or registered mail is sufficient to start the 30-day period within which an Appeals hearing may be requested, and actual receipt of such levy notice is not a prerequisite

to the validity of that notice." This Court, in its order, acknowledged the peripheral nature of Mannella's support for this statement by prefixing the citation with "see also". However, Mannella really has nothing to do with the situation presented in this case or the proper outcome herein.

Mannella apparently presented the sad situation of an abused spouse, where the husband denied his wife access to some or all of the mail coming into the house. The Service mailed the couple an NOIL regarding their joint income tax liabilities for a number of years. The NOIL was mailed to their last known address and was signed for by the husband. He was now (after their divorce) prepared to testify to the Court that he had withheld the NOIL and any knowledge thereof from his wife. Mrs. Manella eventually became aware of the NOIL and filed a Form 8857, but she filed it more than 2 years after the NOIL was originally mailed.

The liability for the first taxable year was a deficiency; for all later taxable years, the liabilities were underpayments of taxes shown on the returns. Therefore, for Mrs. Mannella to obtain relief from the liability for the first taxable year under § 6015, before the Court could consider relief under subsection (f), it had to determine whether she could obtain relief under subsections (b) and (c). Both subsections (b) and (c) provide that relief under them may only be elected within 2 years from the

commencement of collection activities. In a motion for summary judgment, the IRS argued that the NOIL constituted the first collection activity. Mrs. Mannella countered that the NOIL should not constitute the first collection activity, since she did not receive it until many years later. The Court's opinion on this point reads, in relevant part, as follows:

> The notice of intent to levy must be given in person, left at the person's dwelling or usual place of business, or sent by certified or registered mail to the person's last known address. Secs. 6330(a)(2), 6331(d)(2); secs. 301.6330-1(a), 301.6331-2(a)(1), Proced. & Admin. Regs. If the notice is properly sent to the taxpayer's last known address or left at the taxpayer's dwelling or usual place of business, it is sufficient to start the 30-day period within which an Appeals hearing may be requested. Sec. 301.6330-1(a)(3), A-A9, Proced. & Admin. Regs. Actual receipt of the notice of intent to levy is not required for the notice to be valid for purposes of starting the 30-day period. Id.
>
> We see no reason the notice of intent to levy, including information about her right to section 6015 relief, mailed to petitioner at her last known address but not received by her should start the 30-day period to request an Appeals hearing but not start the 2-year period to request relief under section 6015(b) or (c). Nothing in section 6015 or the corresponding regulations requires that petitioner actually receive the notice of intent to levy for the 2-year period to begin. We conclude that her actual receipt of the notice of intent to levy is not required for the 2-year period in which to request relief under section 6015(b) or (c) to begin.

132 T.C. at 200. The balance of the opinion deals with subsection (f) relief, which the Court awarded for all years on the ground that a regulation providing a similar 2-year period for requesting relief under subsection (f) was invalid. The IRS appealed the grant of relief under subsection (f). Mrs.

Mannella did not cross-appeal the denial to her of relief under subsections (b) and (c). In Mannella v. Commissioner, 631 F.3d 115 (3d Cir. 2011), the Third Circuit revered the Tax Court and upheld the validity of the regulation, but had no occasion to consider the ruling concerning the effect of nonreceipt of the NOIL on the commencement of the 2-year period under subsections (b) and (c).

Mannella is a ruling by this Court that an NOIL that is not received is still valid to cut off the right to § 6015 (b) or (c) relief, if an election for such relief is not filed within 2 years after the NOIL was mailed. Mannella simply assumes that Reg. § 301.6330-1(a)(3)Q&A-A9 dictates that an NOIL is "valid" to start the 30-day period to request a CDP hearing, even if the NOIL is not received, and Mannella extrapolates that assumption to a wholly different context, innocent spouse relief. There was no discussion in the opinion of the CDP Conference Committee report sentence that casts doubt on the extent of what the CDP regulation was addressed to. That is not surprising, since Mrs. Mannella was pro se for the time period in which she was responding to the IRS motion for summary judgment on which the court ruled. It is beyond doubt that she would never have known to bring to this Court's attention legislative history from the CDP provisions in her innocent spouse case.

The holding of Mannella is merely that an NOIL mailed to the last known address commences the 2-year period in which to elect innocent spouse relief under § 6015(b) and (c). That holding has apparently not been cited again in any other published Tax Court opinion. And, it should be limited in its impact to the innocent spouse area – a wholly different statutory scheme from CDP. It should have no impact on deciding the issues presented in the accompanying motion in this case.

CONCLUSION

Even if the NOIL mailed to petitioner on November 3, 2014, was mailed to his last known address, because petitioner did not receive or become aware of the NOIL until January 21, 2015, and because he requested a CDP hearing within 30 days of January 21, 2015, the hearing that the IRS Office of Appeals gave him should be considered a CDP hearing. As a result, the decision letter issued after such hearing should be treated as a notice of determination that can establish jurisdiction in this Court.

Respectfully submitted,

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