



# United States Tax Court

Washington, DC 20217

ORGANIC CANNABIS FOUNDATION,  
LLC,

Petitioner

v.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent

Docket No. 381-22L.

## ORDER

On February 25, 2022, respondent filed a Motion to Dismiss for Lack of Jurisdiction and to Strike part of the Petition that relates to 2018. On July 27, 2022, petitioner filed an Opposition to respondent's Motion, and on October 31, 2022, respondent filed a Response to the Opposition.

Respondent maintains that the Court does not have jurisdiction in this collection due process (CDP) proceeding over 2018 because he did not make a determination with respect to that year. He asserts that petitioner did not timely request a CDP hearing for 2018 and the Notice of Determination issued to petitioner covered only 2010 and 2011. Petitioner asserts that the Notice of Determination covered 2018. It further argues that it timely requested a CDP hearing for 2018 or the request should be treated as timely under the doctrine of equitable tolling.

### *Background*

The following background is derived from the pleadings, the parties' motion papers, and exhibits attached thereto and is stated solely for purposes of ruling on respondent's Motion.

On April 16, 2019, respondent issued a Notice of Federal Tax Lien (NFTL) for 2010 and 2011, and petitioner timely requested a CDP hearing. On March 16, 2021, respondent issued a NFTL for 2018.<sup>1</sup> The NFTL stated that a CDP hearing must be

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<sup>1</sup> All further references to NFTL are to the one issued for 2018. Unless otherwise indicated, all section references are to the Internal Revenue Code, title 26, U.S.C., in effect for the years at issue, and all regulatory references are to the Code of Federal Regulations, Title 26 (Treas. Reg.)

**Served 11/14/22**

requested by April 22, 2021. The NFTL was delivered to petitioner on March 23, 2021. The IRS sent a copy to petitioner's power of attorney (POA) by letter dated March 25, 2021, and the POA received it on March 29, 2021.

On March 5, 2021, an IRS revenue officer prepared and executed Form 668-Y, Notice of Federal Tax Lien, the document that is filed by local and state recording offices. The NFTL was filed by the Sonoma County Recorder on March 15, 2021 (Sonoma filing), and by the California Secretary of State on April 7, 2021 (California filing). Petitioner's account transcript shows two entries for the NFTL, March 16 and 18, 2021.

On April 23, 2021, petitioner submitted a CDP hearing request with the Internal Revenue Service (IRS) Independent Office of Appeals (Appeals). The case history indicates that the Appeals Officer (AO) assigned to 2018 determined that the request was received on April 23, 2021, was late based on the April 22, 2021, deadline, and would be treated as a request for an equivalent hearing. The case history also indicates that the AO advised the POA that petitioner would not have the right to petition the Tax Court from the decision from an equivalent hearing. The equivalent hearing was transferred to the AO assigned to 2010 and 2011 so that there may be combined consideration of the three years. The conference was on September 17, 2021, and included discussion of 2010, 2011, and 2018 according to paragraph 11 of petitioner's Objection.

On December 13, 2021, respondent issued a Notice of Determination with a header that identified the tax periods at issue as 2010, 2011, and 2018. Specifically with respect to 2018, it states: "Due Process – EH Levy – 2018". EH is a commonly used acronym for "equivalent hearing". IRM 8.22.4-3. An equivalent hearing is available to a taxpayer that does not timely request a CDP hearing. Treas. Reg. § 301.6320-1(c)(2) Q&A-C7, (i)(1).

The body of the Notice does not refer to any year. It states:

We reviewed the completed or proposed collection actions for the tax periods above. This letter is your Notice of Determination, as required by law. We attached a summary of our determination. The attached determination summary shows the matters we considered at your Appeals hearing and our conclusions.

If you want to dispute this determination in court, you must file a petition with the United States Tax Court within 30 days from the date of this letter.

An Attachment was included as part of the Notice of Determination, which includes the AO's summary and recommendations and issues raised by petitioner. The Attachment refers only to 2010 and 2011. A table at the beginning of the Attachment lists the tax periods 2010 and 2011 as at issue. The remainder of the

Attachment refers only to issues relating to 2010 and 2011. No part of the Attachment indicates that the AO considered or made a determination for 2018.

The Petition was filed on January 11, 2022, challenging the collection actions for 2010, 2011, and 2018. On February 17, 2022, Respondent issued a Decision Letter on Equivalent Hearing, for 2018.

### *Discussion*

Section 6320(a)(2) requires the Secretary to provide written notice to the taxpayer of the filing of an NFTL not more than 5 business days after the day of the filing of the NFTL (5-day notice period). The notice must also include notice of the taxpayer's right to request an administrative hearing during the 30-day period beginning on the day after 5-day notice period. § 6320(a)(3)(B). The Treasury regulations explain the 30-day period for requesting a CDP hearing: the CDP hearing must be requested during the 30-day period that commences the day after the end of the 5-business-day period within which the IRS is required to provide the taxpayer with notice of the NFTL (30-day period). Treas. Reg. § 301.6320-1(b)(1), (c)(1), (c)(2) Q&A-C3.

Section 6320(b) gives the taxpayer the right to a hearing by Appeals. The conduct and scope of the hearing are governed by section 6330. § 6320(c). Where a taxpayer requests a CDP hearing, the hearing is held by Appeals and Appeals must make a determination. § 6320(c), § 6330(c)(3). The taxpayer may seek judicial review by the Court within 30 days of the determination, and the Court shall have jurisdiction with respect to such matter. § 6330(d)(1).

The regulations provide that Appeals will determine the timeliness of any hearing request. Treas. Reg. § 301.6320-1(e)(1). The regulations explain that when a taxpayer does not request a CDP hearing within the 30-day period, it foregoes the right to a CDP hearing with respect to the unpaid tax and tax period shown in the NFTL. *Id.* para. (c)(2) Q&A-C7. No statutory provision provides for an alternative type of hearing where a taxpayer submits a hearing request after the 30-day period. However, the regulations provide that a taxpayer who does not timely request a CDP hearing may request and receive an equivalent hearing by Appeals. The regulations state that for a late request, the taxpayer will be notified of the untimeliness of the request and offered an equivalent hearing without needing to submit an additional request. *Id.* For equivalent hearings, Appeals generally will follow the procedures for a CDP hearing and will consider the same issues as a CDP hearing. *Id.* para. (i)(1), (2) Q&A-I2. The regulations set a period to request an equivalent hearing. *Id.* Q&A-I7. After the equivalent hearing, Appeals will issue a Decision Letter and will not issue a Notice of Determination. *Id.* para. (i)(1). The Decision Letter will generally contain the same information as a Notice of Determination. *Id.* para. (i)(2) Q&A-I5. The regulations provide that section 6320 does not authorize a taxpayer to appeal the decision of Appeals from an equivalent hearing. *Id.* Q&A-I6.

The regulations further provide that collection action is not required to be suspended during the pendency of an equivalent hearing, and the decision to take collection action during that time will be made on a case-by-case basis. *Id.* Q&A-I4.

### 1. *Jurisdiction Over 2018 Collection Action*

The Court's jurisdiction under section 6330(d) depends on the issuance of a valid Notice of Determination and a timely filed petition. *Offiler v. Commissioner*, 114 T.C. 492, 498 (2000); *see also Wilson v. Commissioner*, 131 T.C. 47, 50 (2008); *Andre v. Commissioner*, 127 T.C. 68, 69-70 (2006); *Lunsford v. Commissioner*, 117 T.C. 159, 161 (2001). The Court has predicated its jurisdiction on a timely request for a CDP hearing. Where the taxpayer did not timely request a CDP hearing, Appeals would make no determination, and without a determination for this Court to review, there is no basis for jurisdiction under section 6330(d). *See Offiler*, 114 T.C. at 497-98; *see also Ramey v. Commissioner*, 156 T.C. 1, 11 (2021). If Appeals does not make a determination with respect to a particular taxable period, the absence of a determination is grounds for dismissal of the Petition regarding that tax period. *See LG Kendrick, LLC*, 146 T.C. 17, 31 (2016).

A taxpayer may not appeal to this Court from a decision by Appeals in an equivalent hearing.<sup>2</sup> *Moorhous v. Commissioner*, 116 T.C. 263, 269-270 (2001); *Kennedy*, 116 T.C. 255, 261-263 (2001); *see also Orum v. Commissioner*, 123 T.C. 1, 11 (2004); Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I6, 301.6330-1(i)(2) Q&A-I6. A decision letter issued after an equivalent hearing is not considered a determination and is insufficient to invoke the Court's jurisdiction. *See, e.g., Ramey*, 156 T.C. at 11; *Moorhous*, 116 T.C. at 269-70; *Kennedy*, 116 T.C. at 262-263.

### 2. *Notice of Determination*

A Notice of Determination must specify the tax period, liability, and collection action to which it relates or provide sufficient information so the taxpayer can reasonably conclude that Appeals made a determination and cannot reasonably be deceived. *LG Kendrick, LLC*, 146 T.C. at 31. Generally, we examine the face of the Notice to assess its validity for jurisdictional purposes. *Lunsford*, 117 T.C. at 161-164. Where the Notice of Determination is facially valid (*i.e.*, it clearly states that there was a determination), the Court will assert jurisdiction and will not look behind the Notice. *Id.* It has asserted jurisdiction even where the Notice was erroneously issued because the CDP hearing request was late and the taxpayer actually received an equivalent hearing. *Kim v. Commissioner*, T.C. Memo. 2005-96

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<sup>2</sup> Petitioner argues that that the CDP hearing covered 2018 because no separate equivalent hearing was held, and thus, the Notice of Determination must cover 2018. Petitioner's basic premise is incorrect. Appeals is authorized to hold hearings for different tax periods at the same time and may combine an equivalent hearing with a CDP hearing. Treas. Reg. § 301.6320-1(d)(1), (2) Q&A-D2, D3, (i)(1). Accordingly, consideration of 2010, 2011, and 2018 in one hearing does not convert an equivalent hearing into a CDP hearing.

(the Court held that the Notice of Determination clearly contained a determination and was facially valid even though the CDP hearing request was late); *see also Shirley v. Commissioner*, T.C. Memo. 2014-10. Where the Notice of Determination is internally inconsistent and, thus, not clear on its face, the Court will look behind it to determine whether the CDP hearing was timely requested, and if the request was late, the Court has held that there was no determination, the Notice of Determination was invalid, and it lacked jurisdiction. *Wilson*, 131 T.C. at 50.<sup>3</sup>

Petitioner argues that the Notice of Determination on its face embodies a determination and is valid for 2018 citing the header's reference to 2018. It further argues that the Court should not look behind the Notice to assess its validity. Respondent disagrees, arguing that the face of the Notice clearly establishes the opposite, there was no determination for 2018. Alternatively, he argues that there are inconsistencies in the Notice and that we should look behind it. If the Court were to do so, respondent argues that the Court will find that the CDP hearing request was late and, thus, there was no determination for 2018.

We cannot say that the Notice of Determination clearly states that there was a determination for 2018, and thus we disagree with petitioner. The header indicates that petitioner received an equivalent hearing and the Attachment, which is part of the Notice of Determination, refers only to 2010 and 2011.<sup>4</sup> Thus, the face of the Notice of Determination tends to support respondent's position that there were determinations only for 2010 and 2011 and no determination for 2018, or at best, the Notice is internally inconsistent,<sup>5</sup> which would cause us to look behind the Notice to determine whether petitioner's CDP hearing request was timely.

### *3. Timeliness of CDP Hearing Request*

We have jurisdiction to determine whether petitioner's CDP hearing request was timely. *See Ramey*, 156 T.C. at 11-12. If we determine that Appeals erred in concluding the request was late, we have jurisdiction to correct the error. *Id.*

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<sup>3</sup> In *Wilson*, we examined a document that was labeled a Notice of Determination but contained internally inconsistent with respect to whether it embodied a determination. The Court treated the attached Appeals case memorandum as part of the Notice. The Court treated the Notice of Determination as a Decision Letter because the taxpayer's CDP hearing request was late and he actually received an equivalent hearing. Thus, the Court decided that it did not have jurisdiction to review the purported Notice of Determination.

<sup>4</sup> Petitioner argues that the Decision Letter was issued in conjunction with respondent's Motion merely to bolster his case. We have not considered the Decision Letter in determining whether the Notice of Determination embodied a determination for 2018.

<sup>5</sup> The body of the NFTL explains that a determination was made and informs petitioner of its right to petition the Court. It does not differentiate between the CDP years (2010 and 2011) and 2018 but refers to the Attachment for an explanation of the determination.

The Sonoma filing occurred on March 15, 2021. Thus, notice was timely within 5 business days, March 16, 2021. Respondent has established that petitioner received the NFTL. The time for filing a CDP hearing request was April 22, 2021, 5 business days plus 30 days from March 16, 2021. Petitioner's CDP hearing request filed April 23, 2021, was late.

Petitioner asserts that the hearing request was timely if counting of the 30-day period starts on (1) the date of the California filing or (2) the date that a copy of the NFTL was mailed to the POA. Neither date is of consequence to the timeliness of the CDP hearing request. When NFTL filings occur in multiple locations, only the first filing entitles the taxpayer to a CDP hearing and the taxpayer must timely request a hearing on the basis of the date of the first filing. Treas. Reg. § 301.6320-1(b)(1), (b)(2) Q&A-B1, (c)(3). Thus, the timeliness of the CDP hearing request is measured only from the date of the Sonoma filing and the California filing date is irrelevant. The date that a copy of the NFTL was sent to the POA is also immaterial. Section 6320(a)(2)'s notice requirement is met by mailing the NFTL to petitioner's last known address by certified or registered mail. The date a copy is mailed to the POA does not determine timeliness of the hearing request.

Petitioner also argues that there were multiple inconsistencies with the dates involved here including the dates of: Form 668-Y was prepared and executed, March 5, 2021, the actual Sonoma filing, March 15, 2021, the NFTL, March 16, 2021, and the two entries in the account transcripts for the NFTL, March 16 and 18, 2021. It challenges IRS records as imprecise and seems to suggest, without any evidence, that the NFTL may not have been issued on March 16, 2021.<sup>6</sup> Respondent explains these purported inconsistencies are because the IRS is generally unable to obtain the date that the NFTL filing actually occurs in local and state recording offices before the end of the 5 business day notice period due to limitations of the recording offices' systems, stating only a few recording offices provide electronic notification of filing. Accordingly, IRS policy is to issue a NFTL based on an estimate date of filing to ensure compliance with the 5-business-day notice requirement. *See* I.R.M. 5.12.6.3.6(4) (Jan. 19, 2018). Further, the duplicate entries are explained by the fact that the liens were filed in two locations.

Having found that petitioner's CDP hearing request for 2018 was late, we turn to petitioner's alternative argument that the 30-day period for requesting a CDP hearing is subject to equitable tolling.<sup>7</sup> In the absence of equitable tolling,

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<sup>6</sup> As further evidence of the IRS's inaccurate recordkeeping, petitioner points to a delay in forwarding the 2010 and 2011 CDP hearing requests to Appeals and erroneous levies for 2010 and 2011 when the CDP hearing request was pending.

<sup>7</sup> The Court need not address petitioner's argument that an erroneously issued Notice of Determination is a basis to invoke our jurisdiction. To be erroneously issued, the Notice would have to be facially valid as in *Kim* and *Shirley*. However, we note that even if we were to find that the Notice was facially valid, embodied a determination for 2018, and thus invoked our jurisdiction, respondent

petitioner's CDP hearing request was late, there was no determination, and we would not have jurisdiction over 2018.

#### 4. *Equitable Tolling*

Our caselaw tells us that we must determine whether the document issued by Appeals should have been a Notice of Determination. *Craig v. Commissioner*, 119 T.C. 252, 259 (2002); *see also Wilson*, 131 T.C. at 50. Where Appeals erroneously concludes that a CDP hearing request was late, the Court has jurisdiction to determine that the request was timely and to review the determination irrespective of the label that Appeals used on the document notifying the taxpayer of its determination. *Craig*, 119 T.C. at 259 (taxpayer received a purported Decision Letter). Accordingly, we must determine whether the 30-day period for submitting a CDP hearing request is subject to equitable tolling. If it is subject to tolling, the Court would have jurisdiction to review 2018 as it would have jurisdiction to correct Appeals' determination that the request was late.

Petitioner argues that the 30-day period for a CDP hearing request is subject to equitable tolling under the principles set forth in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1497 (2022). In *Boechler*, the Supreme Court held that the 30-day period to file a petition with the Court for review of a CDP determination in section 6330(d)(1) is a nonjurisdictional deadline subject to equitable tolling. Respondent argues that *Boechler* does not apply. *Boechler* did not expressly address the 30-day period for requesting a CDP hearing. However, the Court believes that the concepts discussed therein may equally apply to the 30-day period for submitting a CDP hearing request. Accordingly, we will provide petitioner with an opportunity to respond to the arguments raised by respondent in his Response with respect to whether the doctrine of equitable tolling should apply to administrative hearing requests, including the statutory provisions creating a taxpayer's right to a hearing summarized below, the Treasury regulations that establish equivalent hearings, and caselaw that has construed the 30-day period as a fixed deadline.

The 30-day period is contained in section 6320(a)(3), "Information Included with Notice" and states that "The notice required ... shall include in simple and nontechnical terms— ... (B) the right of the person to request a hearing during the 30-day period" beginning on the day after the 5-business day notice period. Section 6320(b), entitled "Right to Fair Hearing" contains the taxpayer's right to a fair hearing and refers to the 30-day period in section (a)(3)(B). Section 6320(b)(1) states "If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by ... [Appeals]." Section 6320(c) cross-references parts of section 6330 for the conduct of the hearing

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would seemingly be entitled to summary adjudication because petitioner's hearing request was late (in the absence of equitable tolling). *See Kim*, T.C. Memo. 2005-96 (asserting jurisdiction over a facially valid but erroneously issued Notice of Determination but granting respondent summary judgment on the ground that the CDP hearing request was late).

including section 6330(c), which requires Appeals to make a determination. Section 6330(c) begins with “In the case of any hearing conducted under this section –”.

We have previously described the 30-day period in section 6330(b) during which a taxpayer may request a CDP hearing as jurisdictional, *Wilson*, 131 T.C. at 50, and have stated that where a taxpayer fails to timely request a CDP hearing, respondent is under no obligation to provide a CDP hearing or issue a determination. *See, e.g., Andre*, 127 T.C. 68; *Moorhous*, 116 T.C. 263; *Kennedy*, 116 T.C. 255. We have also stated that section 6330 does not authorize the Commissioner to waive the 30-day period for requesting a CDP hearing, *Kennedy*, 116 T.C. at 262, and the conduct of an equivalent hearing does not waive the 30-day period for requesting a CDP hearing. *Id., see also Moorhous*, 116 T.C. at 270.

As discussed above, the equivalent hearing was not established by statute, but in the regulations apparently on the basis of statements in the legislative history of the IRS Restructuring and Reform Act of 1998, which enacted sections 6320 and 6330. *See H.R. Conf. Rep. No. 105-599 at 266; see also Craig*, 119 T.C. at 258. The Court has stated that the decision to grant a taxpayer an equivalent hearing “simply reflects respondent’s good faith effort to further a fundamental policy underlying section 6330; *i.e.*, to provide a taxpayer with a final opportunity for administrative review before proceeding with enforced collection.” *Moorhous*, 116 T.C. at 270.

Upon due consideration, it is

ORDERED that respondent’s Motion to Dismiss for Lack of Jurisdiction as to 2018, filed February 25, 2022, is held in abeyance. It is further

ORDERED that petitioner is directed on or before January 10, 2023, to file with the Court a memorandum regarding the application of *Boechler* to the facts of this case and to address whether “determination” includes the result of an equivalent hearing when the doctrine of equitable tolling would have required respondent to apply the CDP hearing procedures for a timely administrative hearing request. It is further

ORDERED that respondent is directed on or before February 1, 2023, to file with the Court a reply to petitioner’s memorandum.

**(Signed) Joseph Robert Goeke**  
**Judge**