No. 24-416

In the Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JENNIFER ZUCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a proceeding under 26 U.S.C. 6330 for a pre-deprivation determination about a levy proposed by the Internal Revenue Service to collect unpaid taxes becomes moot when there is no longer a live dispute over the proposed levy that gave rise to the proceeding.

RELATED PROCEEDINGS

United States Tax Court:

Zuch v. *Commissioner*, No. 25125-14 (Apr. 6, 2022)

United States Court of Appeals (3d Cir.):

Zuch v. *Commissioner*, No. 22-2244 (June 26, 2024)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Internal Revenue, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 97 F.4th 81. The decisions of the United States Tax Court (App., *infra*, 40a-43a, 50a-60a) and the Internal Revenue Service Independent Office of Appeals (App., *infra*, 44a-49a, 61a-67a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2024. A petition for rehearing was denied on June 26, 2024 (App., *infra*, 68a-69a). On September 12, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

October 11, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this petition. App., *infra*, 76a-84a.

STATEMENT

A. Legal Background

1. When a taxpayer who is "liable to pay any tax neglects or refuses to pay," the Internal Revenue Service (IRS) may (with certain exceptions) "collect such tax" by "levy[ing] upon" the taxpayer's property. 26 U.S.C. 6331(a). Before 1998, the Internal Revenue Code authorized the IRS to levy upon taxpayer property without any prior opportunity for a hearing or other pre-collection process, so long as there were adequate post-deprivation procedures. See *Phillips* v. *Commissioner*, 283 U.S. 589, 595 (1931). In 1998, however, Congress established various procedures that the IRS generally must follow before levying. See Taxpayer Bill of Rights 3, Pub. L. No. 105-206, Tit. III, § 3401(b), 112 Stat. 747-749 (codified at 26 U.S.C. 6330).

Under those procedures, a taxpayer whose property the IRS seeks to take by levy generally must be notified at least 30 days before the levy of the right to request a hearing before the IRS Independent Office of Appeals (Appeals Office). 26 U.S.C. 6330(a) and (b). A taxpayer's request for such a hearing—sometimes called a "collection due process hearing[]," App., *infra*, 2a—generally suspends "the levy actions which are the subject of the requested hearing" as well as the running of specified limitations periods. 26 U.S.C. 6330(e)(1).

At the hearing itself, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed

levy," including "challenges to the appropriateness of collection actions" and "offers of collection alternatives." 26 U.S.C. 6330(c)(2)(A)(ii) and (iii). The taxpayer may also challenge "the existence or amount of the underlying tax liability" if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. 6330(c)(2)(B).

The Appeals Office then issues a "determination" to sustain or reject the proposed levy. 26 U.S.C. 6330(c)(3). The taxpayer may petition the United States Tax Court "for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. 6330(d)(1). The Tax Court's decision, in turn, is subject to review by a federal court of appeals. 26 U.S.C. 7482(a)(1).

2. When a taxpayer overpays her taxes for a particular year, the IRS "may credit the amount of such overpayment" against the taxpayer's existing tax "liability" instead of refunding that amount to the taxpayer. 26 U.S.C. 6402(a). That credit is known as an "offset." App., *infra*, 42a. A taxpayer may challenge the credit through the traditional mechanism for disputing the collection of a federal tax: a post-deprivation refund suit. See 26 U.S.C. 7422(a). To bring a refund suit, a taxpayer must first request a refund from the IRS. 26 U.S.C. 6511, 7422(a). If the refund is denied, the taxpayer may sue to recover the disputed amount in federal district court or the Court of Federal Claims. 26 U.S.C. 7422(a); 28 U.S.C. 1346(a)(1), 1491(a)(1).

B. Factual And Procedural Background

1. Respondent and Patrick Gennardo were married from 1993 to 2014. C.A. App. 273-274. In 2010 and 2011, respondent and Gennardo paid $50,000 in estimated tax

to the IRS for tax year 2010. App., *infra*, 8a. One payment was a check for $20,000 that listed both respondent and Gennardo as account holders. C.A. App. 314. The other was a check for $30,000 that listed only Gennardo as an account holder. *Id.* at 315.

In September 2012, respondent and Gennardo filed separate (and late) federal income-tax returns for tax year 2010. App., *infra*, 7a; see C.A. App. 316-381. Respondent's return showed a small overpayment and made no mention of the estimated payments. C.A. App. 317. In contrast, Gennardo's return showed a liability of $385,393 and claimed $10,000 of the estimated payments. *Id.* at 331. The IRS applied the full $50,000 in estimated payments toward Gennardo's 2010 tax liability. App., *infra*, 8a; see C.A. App. 473. Gennardo applied for, and ultimately obtained, a compromise settlement that resolved his share of joint tax liabilities for tax years 2007, 2008, and 2009, as well as his separate liabilities for tax years 2010 and 2011, based in part on those payments. C.A. App. 277-278, 311, 460, 466, 468.

Meanwhile, respondent realized that her 2010 return had omitted her income from a retirement distribution. C.A. App. 279, 477. In November 2012, respondent filed an amended return showing additional tax due of $27,682, claiming the full $50,000 in estimated payments, and requesting a refund of the remainder. *Id.* at 475. Because the IRS had already allocated the $50,000 to Gennardo, the IRS declined to apply the estimated payments to respondent's account. *Id.* at 280. Instead, the IRS assessed the additional tax due of $27,682 as reported on her amended return, along with a late-filing penalty of $7020. *Id.* at 305.

2. In 2013, the IRS sent respondent a notice and demand for payment of her balance due. C.A. App. 280.

After she failed to pay, the IRS sent her a notice of intent to levy on her property to collect her unpaid taxes. App., *infra*, 70a-75a. Respondent requested a pre-levy hearing before the Appeals Office under Section 6330. C.A. App. 567. She contended that the IRS should have applied the full $50,000 in estimated payments to her account, making her underlying tax liability $0. *Ibid.*; see App., *infra*, 10a.

In 2014, after a hearing, the Appeals Office issued a determination sustaining the proposed levy, explaining that the estimated payments could not be applied to respondent's account because they had already been applied to Gennardo's account. App., *infra*, 61a-67a. Respondent petitioned for review, and the Tax Court remanded to the Appeals Office in 2016 for clarification of several issues. C.A. App. 16; App., *infra*, 50a-60a. On remand, the Appeals Office reaffirmed its prior determination to sustain the proposed levy, explaining in a 2017 supplemental notice of determination that the estimated payments had been properly allocated to Gennardo. App., *infra*, 44a-49a. The case returned to the Tax Court. *Id.* at 12a.

While respondent's pre-levy proceedings were pending before the Appeals Office and the Tax Court, respondent overpaid her taxes for tax year 2013 and subsequent tax years. App., *infra*, 12a-13a. The IRS exercised its authority under Section 6402(a) to credit her overpayments in those years against her 2010 tax liability. *Ibid.* By April 15, 2019, those offsets had reduced respondent's 2010 balance due to $0. *Id.* at 13a.

In March 2020, the IRS moved to dismiss as moot the pre-levy proceeding before the Tax Court, explaining that because "the underlying liability" had been paid, the IRS "no longer intend[ed] to pursue the proposed

[levy]." App., *infra*, 42a; see C.A. Doc. 5-4, at 445-458 (July 21, 2022). In April 2022, the Tax Court granted the motion and dismissed respondent's Section 6330 case seeking review of the proposed levy. App., *infra*, 40a-43a. The court explained that "[b]ecause there is no unpaid liability for the determination year upon which a levy could be based, and [the IRS] is no longer pursuing the proposed [levy], this case is moot." *Id.* at 43a.

3. The court of appeals vacated the Tax Court's order of dismissal and remanded for the Tax Court to determine whether respondent was entitled to the estimated tax payments that the IRS had allocated to Gennardo. App., *infra*, 1a-39a.

While acknowledging that "the Tax Court need not hear a moot case," App., *infra*, 16a, the court of appeals held that the proceedings before the Tax Court were "not moot," *id.* at 2a. In a part of its opinion joined by only two members of the panel, the court of appeals concluded that the Tax Court has jurisdiction to review respondent's "'underlying tax liability,'" *id.* at 26a (citation omitted), even if "the levy is no longer being enforced or the tax is satisfied," *id.* at 27a; see *id.* at 25a-39a. In so concluding, the court of appeals acknowledged that it was "part[ing] ways * * * with the Fourth and D.C. Circuits," which have held that a Section 6330 proceeding is moot when the IRS no longer seeks to levy on a person's property. *Id.* at 27a (citing *McLane* v. *Commissioner*, 24 F.4th 316 (4th Cir.), cert. denied, 143 S. Ct. 408 (2022), and *Willson* v. *Commissioner*, 805 F.3d 316 (D.C. Cir. 2015)). The court of appeals took the view that even though the IRS no longer sought to take respondent's property by levy, the Tax Court still had jurisdiction to "declare that she had a right to the estimated payments." *Id.* at 37a.

In a part of the court of appeals' opinion joined by all three members of the panel, the court concluded that the Tax Court also retained jurisdiction to review whether the IRS had validly exercised its authority under Section 6402 to use respondent's overpayments to offset her 2010 tax liability. App., *infra*, 19a-25a. The court acknowledged that "[i]t may be that Congress has not *explicitly* granted the Tax Court such power" to review offset decisions. *Id.* at 20a. But the court of appeals viewed such power as "*implicit*" in Section 6402. *Id.* at 20a; see *id.* at 20a-21a. The court itself then went on to consider the merits of the offset issue, concluding that "the IRS's setoffs were invalid and without legal effect." *Id.* at 25a. The court further concluded that because respondent's "tax obligation was not properly set off," "she can challenge the IRS's application of the estimated payments." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

When respondent failed to pay the taxes she owed for a particular tax year, the IRS notified her that it intended to levy on her property to satisfy her tax liability. Respondent invoked her right to challenge the proposed levy in a pre-deprivation hearing under 26 U.S.C. 6330, and the hearing officer sustained the proposed levy. But while the Section 6330 proceeding was pending, respondent overpaid her taxes in other tax years, and the IRS exercised its statutory authority to credit those overpayments against her outstanding liability—reducing her balance due to $0 and eliminating the need to levy on her property. The IRS therefore abandoned its proposed levy, and the Tax Court dismissed the Section 6330 proceeding as moot.

The court of appeals disagreed, holding that the Section 6330 proceeding is not moot. The court of appeals

concluded that the Tax Court has jurisdiction under Section 6330 to consider respondent's challenge to her tax liability, even though there is no longer a live dispute over the proposed levy that prompted the Section 6330 proceeding in the first place. And the court of appeals concluded that the Tax Court also has jurisdiction to review the IRS's use of respondent's overpayments to offset her liability, even though Congress has not "explicitly granted the Tax Court such power" in a Section 6330 proceeding. App., *infra*, 20a (emphasis omitted).

The court of appeals' decision has no basis in the statute Congress enacted. It conflicts with the decisions of other circuits, as the court itself acknowledged. And absent this Court's review, the decision below could be used to transform the nature of a Section 6330 proceeding—expanding the Tax Court's jurisdiction far beyond the pre-levy proceeding that Congress contemplated. For all of those reasons, the petition for a writ of certiorari should be granted.

A. The Court Of Appeals' Decision Is Wrong

The court of appeals held that a pre-levy proceeding under Section 6330 is not moot even when there is no longer a live dispute over the proposed levy that gave rise to the proceeding. App., *infra*, 16a-39a. That holding is incorrect.

1. A pre-levy proceeding under Section 6330 is moot when there is no longer a live dispute over the proposed levy that gave rise to the proceeding

Congress enacted Section 6330 to provide a mechanism for pre-deprivation review of an IRS levy to collect unpaid taxes. See p. 2, *supra*. Under that provision, a taxpayer is entitled to notice and an opportunity for a hearing before the IRS proceeds with a proposed levy

on her property. 26 U.S.C. 6330(a) and (b). And if a hearing officer "determin[es]" that the proposed levy may go forward, 26 U.S.C. 6330(c)(3), the taxpayer may petition the Tax Court for review of that "determination," 26 U.S.C. 6330(d)(1).

When the IRS declares that it no longer needs or intends to take the taxpayer's property by levy, a pre-levy proceeding under Section 6330 becomes moot. After all, the point of the proceeding is to "determin[e]" whether the IRS may proceed with the proposed levy. 26 U.S.C. 6330(c)(3) and (d)(1). When the IRS declares that it no longer has any basis for a levy, the issue that prompted the proceeding is no longer "'live'": The IRS has ceased to have any "legally cognizable interest" in a determination sustaining the proposed levy, and the taxpayer has ceased to have any "legally cognizable interest" in a determination rejecting the proposed levy. *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (citation and some internal quotation marks omitted).

Here, the IRS initially pursued a levy to collect respondent's balance due for tax year 2010, prompting respondent to request a pre-levy proceeding under Section 6330. C.A. App. 563, 567. But when respondent overpaid her taxes in subsequent tax years, the IRS exercised its statutory authority to credit those overpayments against her 2010 tax liability—thereby reducing her balance due to $0 and eliminating the previous need to take her property by levy. App., *infra*, 12a-13a. The IRS thus informed the Tax Court that it "no longer intend[ed] to pursue the proposed [levy]," *id.* at 42a, and the Tax Court correctly deemed the Section 6330 proceeding "moot," *id.* at 43a.

2. The court of appeals erred in holding that a Section 6330 proceeding may go on without a live dispute over the proposed levy

The court of appeals recognized that "the Tax Court need not hear a moot case." App., *infra*, 16a. The court of appeals also acknowledged that the IRS had "withdr[awn] its levy" on respondent's property. *Id.* at 25a. The court nevertheless concluded that the Section 6330 proceeding in this case is "not moot." *Id.* at 16a (capitalization omitted). That was error.

a. The Tax Court lacks jurisdiction to consider "the underlying tax liability" when there is no live dispute over the proposed levy

The court of appeals reasoned that the Section 6330 proceeding is not moot because respondent still disputes whether the IRS "erroneously allocated" the estimated payments to Gennardo. App., *infra*, 19a. But Section 6330 empowers the Tax Court to review only the Appeals Office's determination to sustain or reject the proposed levy. 26 U.S.C. 6330(d)(1). When there is no longer a live dispute over whether the proposed levy may proceed, the pre-levy proceeding "is moot notwithstanding the existence of other live controversies between the taxpayer and the IRS that do *not* fall within the tax court's jurisdiction" under Section 6330. *Willson* v. *Commissioner*, 805 F.3d 316, 320 (D.C. Cir. 2015).

The court of appeals took the view that Section 6330 *does* grant the Tax Court jurisdiction to decide whether the IRS properly allocated the estimated payments to Gennardo. App., *infra*, 25a-39a. The court cited Section 6330(c)(2)(B), which allows a taxpayer to "raise at [a Section 6330] hearing the existence or amount of the underlying tax liability" if the taxpayer "did not receive any statutory notice of deficiency for such tax liability

or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. 6330(c)(2)(B); see App., *infra*, 26a. But a taxpayer may challenge the existence or amount of her underlying tax liability under Section 6330(c)(2)(B)—and may raise "any relevant issue relating to the unpaid tax," 26 U.S.C. 6330(c)(2)(A)—"*only* in the context of determining whether" the proposed levy may "proceed," *McLane* v. *Commissioner*, 24 F.4th 316, 319 (4th Cir.) (citation omitted), cert. denied, 143 S. Ct. 408 (2022). When the "proposed levy is moot," a taxpayer "has no independent basis to challenge the existence or amount of her underlying tax liability in [a Section 6330] proceeding," *Greene-Thapedi* v. *Commissioner*, 126 T.C. 1, 8 (2006)—just as she could not have used Section 6330 to seek those findings if no levy had been proposed in the first place.

That conclusion follows from the statutory text, which refers to "the existence or amount of the *underlying* tax liability," 26 U.S.C. 6330(c)(2)(B) (emphasis added)—*i.e.*, the tax liability "underlying" the proposed levy. That language presupposes the existence of a proposed levy, for there is otherwise nothing relevant to Section 6330 with respect to which the tax liability is "underlying." *Ibid.* Section 6330(c)(2)(B) thus allows a taxpayer to challenge the existence or amount of her tax liability "only in connection with her challenge to the proposed [levy]." *Greene-Thapedi*, 126 T.C. at 8. Here, because the IRS no longer wishes (nor has any need) to pursue the proposed levy, the court of appeals erred in concluding that the Tax Court has jurisdiction to consider respondent's challenge to "the underlying tax liability." 26 U.S.C. 6330(c)(2)(B).

b. The Tax Court lacks jurisdiction to review offsets in a Section 6330 proceeding

The court of appeals also reasoned that the Section 6330 proceeding is "not moot because the IRS's setoffs were invalid." App., *infra*, 19a (capitalization omitted). But "[t]he Tax Court is a court of limited jurisdiction." *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) (per curiam). And nothing in Section 6330 grants the Tax Court jurisdiction to review the IRS's exercise of authority under Section 6402(a) to credit a taxpayer's overpayments against her tax liability. See 26 U.S.C. 6330(c) and (d).

The court of appeals did not suggest otherwise. Instead, the court pointed to Section 6402(a) itself, which authorizes the IRS to "credit the amount of [an] overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment." 26 U.S.C. 6402(a); see App., *infra*, 20a-21a. The court of appeals reasoned that even if Section 6402(a) does "not *explicitly* grant[]" the Tax Court jurisdiction to review the IRS's crediting of overpayments against a taxpayer's liability, that provision should be read to contain "an *implicit* grant" of such power. App., *infra*, 20a. As a court of limited jurisdiction, however, the Tax Court possesses only the jurisdiction that Congress has "expressly authorized." *Willson*, 805 F.3d at 320 (citation omitted). And because Congress has not expressly authorized the Tax Court to review offsets in a Section 6330 proceeding, the court of appeals erred in concluding that the Tax Court had such jurisdiction.[1]

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[1] In reaching out to decide the issue that it mistakenly found to be within the Tax Court's jurisdiction, the court of appeals also erred in concluding that the offsets against respondent's tax liability were

Moreover, even if the Tax Court had jurisdiction to review offsets in a Section 6330 proceeding, the court of appeals still erred in concluding that this Section 6330 proceeding is not moot. The court of appeals assumed that if the Tax Court had jurisdiction to review the IRS's use of respondent's overpayments to offset her tax liability, and if those offsets were invalid, the Tax Court would then have jurisdiction to consider respondent's challenge to "the IRS's application of the estimated payments." App., *infra*, 19a. But the Tax Court would have jurisdiction under Section 6330 to consider such a challenge only in connection with a live dispute over a proposed levy. See pp. 10-11, *supra*. And a court cannot manufacture such a dispute merely by deeming the offsets invalid. After all, the IRS has no basis for pursuing a levy so long as the overpayments that respondent made remain "in the government's pocket." App., *infra*, 25a. And not even the court of appeals suggested that the Tax Court would be able to order the IRS to refund those overpayments.[2] Cf. *Greene-Thapedi*, 126 T.C. at 8

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invalid. App., *infra*, 22a-25a. The court took the view that the offsets violated the common-law rule that "a creditor cannot set off a disputed debt with an undisputed one." *Id.* at 22a. But that rule has no application under Section 6402(a), which authorizes the IRS to "credit the amount of [an] overpayment * * * against any liability," undisputed or not. 26 U.S.C. 6402(a). The court also believed that the offsets violated "Article III mootness principles." App., *infra*, 25a. But no such principles limit the IRS's exercise of its authority under Section 6402(a).

[2] Although the court of appeals declined to "reach any conclusion about whether the Tax Court has overpayment or refund jurisdiction in a context like this," App., *infra*, 34a n.38, the court of appeals did suggest that the Tax Court could "declare that [respondent] had a right to the estimated payments," *id.* at 37a. But Congress has expressly barred "any court of the United States" from issuing declaratory relief "with respect to Federal taxes." 28 U.S.C. 2201(a).

(holding that the Tax Court lacks "jurisdiction" under Section 6330 to "order a refund or credit of taxes paid"). Thus, even if the offsets were invalid, the Section 6330 proceeding in this case would still be moot.

None of this is to say that taxpayers may not challenge the IRS's allocation of estimated payments or its use of overpayments to offset their liability. Taxpayers may do so through a *post*-deprivation suit for a refund—the traditional mechanism for disputing the assessment or collection of a federal tax. See 26 U.S.C. 7422(a); 28 U.S.C. 1346(a)(1), 1491(a)(1). The proceeding at issue here, however, is a pre-deprivation proceeding for challenging a particular method of collection: a proposed levy. Because the IRS no longer seeks to deprive respondent of any property by levy, the pre-deprivation proceeding in this case is moot.

B. The Question Presented Warrants This Court's Review

1. As the court of appeals acknowledged, its decision in this case "part[s] ways * * * with the Fourth and D.C. Circuits." App., *infra*, 27a.

In an opinion by Judge Henderson, joined by then-Judge Kavanaugh and Judge Pillard, the D.C. Circuit in *Willson* held that a Section 6330 proceeding is "'moot'" when "[t]he IRS no longer seeks to levy on [the taxpayer's] property." 805 F.3d at 321 (citation omitted). The IRS in that case had "abandoned its levy" after determining that the taxpayer had no "'underlying tax liability.'" *Id.* at 320-321. The D.C. Circuit explained that the absence of a pending levy was "the very relief [that the taxpayer] ostensibly sought when he requested a [Section 6330] hearing to challenge the proposed levy in

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The only relief that Section 6330 authorizes is rejection of a proposed levy. See *Willson*, 805 F.3d at 321.

the first place." *Id.* at 321. And the D.C. Circuit concluded that because the taxpayer had "received all the relief that section 6330 authorize[d] the tax court to grant him," "'there was no appropriate course of action for the Tax Court to take but to dismiss [his case] as moot.'" *Ibid.* (brackets and citation omitted); see *Byers* v. *Commissioner*, 740 F.3d 668, 679 (D.C. Cir.) (similarly concluding that the IRS's decision to abandon its pursuit of a proposed levy meant that the Section 6330 proceeding that the taxpayer had requested was "moot"), cert. denied, 574 U.S. 872 (2014).

In *McLane*, the Fourth Circuit reached the same conclusion, holding that a Section 6330 proceeding is "moot" when the IRS has "already conceded that a taxpayer has no tax liability" and the taxpayer "no longer faces" a levy. 24 F.4th at 319. The taxpayer in that case had argued that even though the IRS had abandoned its levy, "the phrase 'underlying tax liability' * * * confer[red] jurisdiction on the Tax Court to determine that he [had] overpaid [his taxes in a particular year] and order a refund." *Id.* at 318. The Fourth Circuit rejected that contention, explaining that "the phrase 'underlying tax liability'" must be read in "'the specific context in which that language is used.'" *Id.* at 319 (citation omitted). Viewing that context as "the IRS's attempt to collect via lien or levy," the Fourth Circuit concluded that "the 'taxpayer was permitted to challenge the amount of his underlying liability in the [Section 6330] hearing . . . *only* in the context of determining whether the collection action could proceed.'" *Ibid.* (citation omitted). And because the taxpayer "no longer face[d] such an action," *ibid.*, the Fourth Circuit affirmed the Tax Court's decision to dismiss the taxpayer's case, see *id.* at 318-319.

The court of appeals in this case correctly recognized that its decision conflicts with *Willson* and *McLane*. App., *infra*, 27a. Unlike the D.C. and Fourth Circuits, the court of appeals in this case held that a Section 6330 proceeding is "not moot" even though the IRS no longer seeks to levy on the taxpayer's property. *Id.* at 16a (capitalization omitted); see *id.* at 16a-39a. Contrary to the Fourth Circuit's decision in *McLane*, the court of appeals in this case also held that a taxpayer may continue to challenge her "underlying tax liability" under Section 6330(c)(2)(B) even after the IRS has abandoned its levy. *Id.* at 27a; see *ibid.* (declining to read "'underlying tax liability'" as "narrowly" as the Fourth Circuit). This Court's review is warranted to resolve the conflict between the decision below and the decisions of the D.C. and Fourth Circuits.

2. The decision below also conflicts with the decisions of other circuits recognizing that the Tax Court possesses only that jurisdiction "expressly authorized by Congress." *Willson*, 805 F.3d at 320 (D.C. Cir.) (citation omitted); see *Borenstein* v. *Commissioner*, 919 F.3d 746, 749 (2d Cir. 2019); *McLane*, 24 F.4th at 318 (4th Cir.); *Sanders* v. *Commissioner*, 813 F.2d 859, 861 (7th Cir. 1987); see also *Brown* v. *Commissioner*, 58 F.4th 1064, 1067 (9th Cir. 2023) (recognizing that the Tax Court "has only the jurisdiction specifically granted by statute and lacks the authority to expand upon that statutory grant"). Despite acknowledging that principle, App., *infra*, 14a, the decision below departed from it in concluding that the Tax Court had "*implicit*" jurisdiction "to review setoffs" and in rejecting the need to point to any "*explicit*[]" grant of such authority, *id.* at 20a.

3. Finally, the decision below threatens significant practical consequences. There are tens of thousands of

Section 6330 proceedings each year. See Treasury Inspector Gen. for Tax Admin., U.S. Dep't of the Treasury, Report No. 2023-10-038, *Review of the IRS Independent Office of Appeals Collection Due Process Program* 7 (July 21, 2023), perma.cc/DVL7-9HA8 (reporting 28,349 closed Section 6330 cases in 2023). Absent this Court's review, the decision below could be invoked to convert many of those proceedings from a limited opportunity for pre-deprivation review into a more general forum for considering challenges to tax liability—expanding the Tax Court's jurisdiction under Section 6330 far beyond what Congress contemplated. See App., *infra*, 28a. Review of the court of appeals' decision transforming the nature of Section 6330 proceedings, and departing from Congress's intent and the decisions of other circuits, is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2244

JENNIFER ZUCH, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

Argued: Apr. 26, 2023
Filed: Mar. 22, 2024

On Appeal from the United States Tax Court
(IRS 1:14-25125)
Tax Court Judge: Honorable Lewis R. Carluzzo

Before: JORDAN, KRAUSE, and BIBAS*, *Circuit Judges*

OPINION OF THE COURT[1]

JORDAN, *Circuit Judge*.

When Congress grants taxpayers the right to challenge what the Internal Revenue Service says is owed to the government, Congress's will prevails. The IRS cannot say that such a right exists only under the cir-

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* We requested briefing on certain issues from Audrey Patten, Esquire, of the Harvard Law Tax Litigation Clinic, whom we appointed as Amicus Curiae. We are grateful for the thoughtful insights provided by Ms. Patten and the Clinic.

[1] Judge Bibas joins the opinion in full except for Section II.C.3.

cumstances it prescribes. That ought to go without saying, but this case requires us to say it.

The IRS sent Jennifer Zuch a notice informing her that it intended to levy on her property to collect unpaid tax. She challenged the levy, arguing that she had prepaid the tax. The IRS Independent Office of Appeals (the "IRS Office of Appeals") sustained the levy, and Zuch petitioned the United States Tax Court for review of that decision. While the issue was being litigated in that Court over several years, the IRS withheld tax refunds owed to Zuch and applied them to what it said was her unpaid balance, satisfying it in full. When, according to the IRS's accounting, there was no more tax to be paid, the IRS filed a motion to dismiss the Tax Court proceeding for mootness, and the Court granted the motion.

Because Zuch's claim is not moot, we will vacate the dismissal and remand this matter to the Tax Court to determine whether Zuch's petition is meritorious.

I. BACKGROUND

A. Overview of Tax Court Proceedings

Some understanding of tax procedure is essential to the consideration of this case, so we begin with a brief summary of the two basic pathways by which taxpayers can dispute what they owe the government before the IRS collects: deficiency proceedings and collection due process hearings.[2] After addressing a key question related to these pathways—the distinction between

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[2] If a taxpayer wishes to dispute what he owes *after* the IRS collects, he must file a refund action in a federal district court or the Court of Federal Claims. 26 U.S.C. § 7422.

unpaid tax and tax liability—we turn to the factual and procedural background that led to this appeal.

1. Deficiency Proceedings

When the IRS decides that a taxpayer owes more than the amount reported on her tax return, it mails the taxpayer a "notice of . . . deficiency."[3] 26 U.S.C. § 6212(a).[4] The taxpayer may challenge the IRS's tax determination before collection by filing a petition in the Tax Court within ninety days after the mailing of the notice of deficiency. § 6213(a). Such a petition commences a "deficiency proceeding[]." *Cooper v. Comm'r*, 718 F.3d 216, 223 (3d Cir. 2013). Deficiency proceedings are "[t]he Tax Court's principal basis for jurisdiction[.]" *Sunoco Inc. v. Comm'r*, 663 F.3d 181, 187 (3d Cir. 2011). In a deficiency proceeding, the Tax Court has jurisdiction to determine the correct amount of tax owed, § 6214(a), and to order that any overpayments be refunded to a taxpayer, § 6512(b)(1). The Tax Court's final order in a deficiency proceeding is subject to review by an Article III court. § 7482(a)(1).

2. Collection Due Process Proceedings

If a taxpayer does not pay the amount the IRS says is due, the IRS can levy—that is, seize and sell—a tax-

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[3] A notice of deficiency is a "jurisdictional prerequisite" to litigate the merits of the IRS's deficiency determination in the Tax Court. *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976). We have called the notice of deficiency the taxpayer's "ticket to the Tax Court[.]" *Robinson v. United States*, 920 F.2d 1157, 1158 (3d Cir. 1990) (internal quotation marks omitted).

[4] Unless otherwise indicated, all section references in the remainder of this opinion are to the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 1 *et seq.*

payer's property to satisfy the tax liability. § 6331(a). But, before it does so, it must provide the taxpayer notice and an opportunity for a hearing to contest the levy. § 6330(a)(1). After the IRS sends notice to the taxpayer of its intent to levy, the taxpayer has thirty days to request a hearing. § 6330(a)(3)(B). That hearing, known as a Collection Due Process ("CDP") hearing, is "an administrative proceeding before an appeals officer with the [IRS Office of Appeals] in which a taxpayer may raise 'any relevant issue relating to the unpaid tax or the proposed levy.'" *United States v. Weiss*, 52 F.4th 546, 548 (3d Cir. 2022) (quoting § 6330(c)(2)(A)). Under § 6330(c)(2)(B), the taxpayer

> may also raise at the [CDP] hearing challenges to the existence or amount of [his or her] underlying tax liability for any tax period if [he or she] did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

This scheme makes good sense in light of potential due process concerns. "[S]ome form of hearing is required before an individual is finally deprived of a property interest[,]" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and a taxpayer who cannot challenge a levy before seizure and sale may wrongfully lose property without notice or the opportunity to be heard, *see* § 6330(c)(2)(A). Similarly, and particularly relevant here, a taxpayer who cannot challenge her underlying liability before collection may wrongfully lose money without notice or a hearing. § 6330(c)(2)(B); *see generally* S. Rep. No. 105-174, at 67 (1998) ("[T]he IRS should afford taxpayers adequate notice of collection activity

and a meaningful hearing before the IRS deprives them of their property.").

So, to recap: If the taxpayer could have commenced a deficiency proceeding before the CDP hearing, the hearing provides a forum to challenge the unpaid tax and proposed levy only. But if the taxpayer had no opportunity to commence a deficiency proceeding, the CDP hearing provides a forum to challenge the unpaid tax, the proposed levy, and the underlying tax liability.

Once the IRS Office of Appeals makes a determination on the taxpayer's challenges, the taxpayer has thirty days to petition the Tax Court to review any issues that were properly raised at the CDP hearing. § 6330(d)(1). Again, the Tax Court's final order is subject to review by an Article III court. § 7482(a)(1).

3. Unpaid Tax Versus Tax Liability

Section 6330(c)(2)(B) of the Internal Revenue Code raises an important question: What is the difference between unpaid tax and tax liability? There must be some distinction, or else the language in § 6330(c)(2)(B) allowing a challenge to liability would be superfluous.[5] Congress confined the right to raise a liability challenge to taxpayers who did not have a previous opportunity to do so, while at the same time granting all taxpayers in a CDP hearing the ability to raise issues relating to the unpaid tax or proposed levy. Hence, it is evident that Congress intended to grant to qualifying taxpayers

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[5] Section 6330(c)(2)(A) authorizes a taxpayer to raise "any relevant issue relating to the unpaid tax or the proposed levy," while § 6330(c)(2)(B) grants qualifying taxpayers an opportunity to raise "challenges to the existence or amount of the underlying tax liability."

some right in addition to the rights given to all taxpayers in a CDP hearing. *See infra* section II.C.3. On that basis, "unpaid tax" cannot be synonymous with "tax liability." *See also United States v. Yung*, 37 F.4th 70, 79 (3d Cir. 2022) ("Normally, where Congress uses different words, we read those words to have different meanings.").

There is indeed a distinction: West's Tax Law Dictionary defines "tax liability" as the "[t]otal amount of tax owed to the I.R.S. *after* the allowance of any proper credits." *Tax Liability*, *West's Tax Law Dictionary* § T830 (emphasis added). And it defines credit as "an allowance against the tax itself [including] [i]ncome tax withheld on wages, *prepaid estimated taxes*, [etc.]" *Credit*, *West's Tax Law Dictionary* § C4530 (emphasis added). Tax liability is therefore the net amount owed to the IRS: If you owe $20 to the IRS and have prepaid that $20, your tax liability—at least on these simple facts—is $0. Understanding "tax liability" in this way accords with the plain meaning of "liability." To say, "I have no liability" is to say, in effect, "I owe nothing." A "challenge" to liability under § 6330(c)(2)(B) means the taxpayer disputes what the IRS says he owes.

In contrast, "issue[s] relating to the unpaid tax" under § 6330(c)(2)(A) do not directly concern the amount and existence of the liability. Instead, such issues concern the IRS's proposed collection activity, as illustrated by the three examples Congress provides in the statute: "(i) appropriate spousal defenses [for a spouse who filed a joint tax return]; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives." § 6330(c)(2)(A). In each case, the focus is not on the liability itself, but is rather on the

method the IRS will use to collect what it says is due to the government. *See* Treas. Reg. § 301.6330-1(e)(3), Q&A (E)(3) (2006) ("When a taxpayer asserts a spousal defense, the taxpayer is not disputing the amount or existence of the liability itself[.]").

Strictly speaking, then, unpaid tax means something different than tax liability. For example, assuming that the IRS has assessed $20 in taxes, your unpaid tax is just that: the $20 the IRS says you owe. But further proceedings can change that number. If a deficiency proceeding or a challenge under § 6330(c)(2)(B) in a CDP hearing establishes that the IRS should have credited $5 toward the $20 balance, your liability is $15, and, once fixed by those further proceedings, that sum also becomes your unpaid tax.

B. Factual Background[6]

Zuch and Patrick Gennardo[7] were married from 1993 to 2014. On September 12, 2012, they filed separate, untimely tax returns for the 2010 tax year, each electing married-filing-separately status.[8] Zuch's tax return

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[6] Unless otherwise noted, the facts are undisputed. They are taken primarily from the stipulated factual record submitted to the Tax Court.

[7] Gennardo is not a party in this proceeding.

[8] A taxpayer must elect one of several filing statuses when submitting an individual income tax return. *See* IRS, *1040 (and 1040-SR): Instructions* 13 (2023), https://www.irs.gov/pub/irs-pdf/i1040gi.pdf [https://perma.cc/X76A-GVKC]. Unmarried taxpayers who do not have a qualifying dependent must elect "Single" status. *Id.* Unmarried taxpayers who have a qualifying dependent may elect "Head of Household" status. *Id.* at 14-15. Married taxpayers have the option to elect either "Married Filing Jointly" or "Married Filing Separately" status. *Id.* at 13-14. Unmarried persons whose

showed adjusted gross income of $74,493 and an overpayment of tax of $731.[9] Gennardo's tax return showed adjusted gross income of $1,077,213 and tax due of $385,393. On that same day, Gennardo filed an offer-in-compromise to settle his tax debts for the 2007 to 2011 tax years.[10]

All of this had been preceded in 2010 and 2011 by two prepayments of the couple's estimated tax liability for 2010. More specifically, in June of 2010, the couple submitted an estimated tax payment of $20,000 to the IRS for the 2010 tax year.[11] Gennardo then, in January of 2011, sent an estimated tax payment of $30,000 for the 2010 tax year.[12] When they made the payments, Zuch and Gennardo did not specify how they wanted to have the IRS allocate those payments to their respective tax liabilities, and Zuch's late-filed 2010 tax return did not mention the estimated payments. After processing Gennardo's return, the IRS sent him a notice, in October of 2012, that showed it had applied the full $50,000 in estimated payments to offset the tax due on his individual 2010 return.

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spouse died during the previous two tax years and who have a qualifying dependent may elect "Qualifying Surviving Spouse" status. *Id.* at 15.

[9] The IRS applied that overpayment to the couple's 2008 unpaid tax liability.

[10] An offer-in-compromise allows a taxpayer to settle tax debts for less than the total amount of the outstanding liability. § 7122(a).

[11] The check was drawn from a bank account that listed both Zuch's and Gennardo's names. The accompanying Form 1040-ES also listed both of their names.

[12] The check Gennardo used to make the payment listed only his name. The cover letter accompanying the check, however, listed both Zuch's and Gennardo's names.

Later, in November of 2012, Zuch filed an amended 2010 tax return to report additional income of $71,000 from a retirement account distribution, causing additional tax due of $27,682. On that return, she claimed the benefit of the same $50,000 in estimated payments and requested a refund of $21,918. The IRS assessed Zuch the additional tax she reported, but it did not refund or otherwise credit her for the $50,000 in estimated payments that she claimed. It also allegedly sent her a notice and demand for payment of her additional tax due, but she disputes ever having been sent such a notice.[13]

Soon after, in March of 2013, Gennardo filed an amended tax return for the 2010 tax year. He included a statement that he was amending his return in part to notify the IRS that there were estimated payments of $50,000 that should be allocated to Zuch,[14] apparently showing his approval of Zuch's previously filed amended

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[13] Before the Tax Court, the IRS and Zuch jointly stipulated that the IRS had sent her a notice of tax due and demand for payment. In her briefing, Zuch now asserts that the IRS never notified her. A notice of tax due and demand for payment is not to be confused with a notice of deficiency; the IRS uses the former to notify the taxpayer of an unpaid tax and to demand payment, *Notice CP14*, Taxpayer Advoc. Serv. (updated July 11, 2023), https://www.taxpayeradvocate.irs.gov/notices/notice-cp14/[https://perma.cc/H92Z-M9QM], while the IRS uses the latter to notify a taxpayer that it is proposing to increase the total amount of tax due for a particular tax year, *90 Day Notice of Deficiency*, Taxpayer Advoc. Serv. (updated Dec. 6, 2023), https://www.taxpayeradvocate.irs.gov/notices/exam-90-day-notice-of-deficiency/ [https://perma.cc/VZX2-84JZ]. It is undisputed that Zuch never received a notice of deficiency.

[14] Gennardo did not mention on his tax return that the IRS had already allocated the $50,000 in estimated payments to him or that he had an offer-in-compromise pending.

return in which she claimed the benefit of the estimated payments.[15] But the IRS did not adjust the allocation of the $50,000 from Gennardo to Zuch. In June of 2013, Gennardo submitted an amended offer-in-compromise to increase the amount of his offer, which the IRS accepted the next month. Despite his earlier direction that the estimated payments should be allocated to Zuch, the IRS gave him a document showing it had credited the $50,000 in estimated payments to his outstanding tax liability.

C. Procedural Background

1. Zuch's CDP Hearing

On August 31, 2013, the IRS sent Zuch a "Final Notice of Intent to Levy and Notice of your Right to a Hearing." (App. at 563.) That notice informed her that the IRS intended to levy on her property for failing to pay her remaining 2010 tax liability of approximately $36,000 and that she had thirty days to appeal the levy by requesting a CDP hearing with the IRS Office of Appeals. Zuch timely requested a CDP hearing, and because she did not receive a notice of deficiency or "otherwise have an opportunity to dispute [her] tax liability," she exercised her right to challenge "the existence or amount of the underlying tax liability" in the CDP proceedings. § 6330(c)(2)(B). Specifically, Zuch alleged that the $50,000 of estimated tax payments credited to Gennardo should have been credited to her, making her underlying tax liability $0.[16] Prior to the hear-

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[15] Zuch's and Gennardo's amended tax returns were prepared by the same tax preparer.

[16] Zuch also requested that the IRS abate any underpayment penalties against her because she was going through a divorce with Gen-

ing, Zuch's counsel submitted a signed declaration from Gennardo directing the IRS to apply the $50,000 to Zuch's personal tax liability.[17]

The CDP hearing was held via telephone on July 29, 2014. During the hearing, an IRS officer told Zuch's counsel that he did not believe that the IRS could credit any of the estimated payments to Zuch's liability because they had already been credited to Gennardo's account, which had been subject to an offer-in-compromise. On September 25, 2014, the IRS Office of Appeals sent Zuch a Notice of Determination sustaining the IRS's proposed levy and stating it was "not in a position" to move credits from Gennardo's account to hers. (App. at 294.) That notice also informed Zuch that she had thirty days to dispute the IRS's determination by filing a petition with the Tax Court.

2. Zuch's Tax Court Proceedings

Zuch did petition the Tax Court for relief. She asked the Court to conduct a de novo review of her underlying tax liability and conclude that the $50,000 in estimated tax payments should be applied to her individual account. The IRS moved for summary judgment, which the Tax Court denied in December 2016. It made three observations at that time. First, it stated that the initial $20,000 estimated payment appeared to be a joint estimated tax payment and that it was unclear why the IRS had applied the payment to Mr. Gennardo's

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nardo and collection would create an undue hardship for her. The IRS denied that request.

[17] The IRS notes in its briefing that the declaration was signed in March 2014, nearly eight months after Gennardo had received credit for the estimated payments pursuant to his amended offer-in-compromise.

tax liabilities. Second, the Court explained that it was "unclear whether the [later] $30,000 payment was a separate payment or a joint payment." (App. at 264.) And third, it noted that the "circumstances surrounding Mr. Gennardo's [offer-in-compromise were] not clear[,]" including whether that offer-in-compromise satisfied Zuch and Gennardo's joint tax liabilities for any years they filed a joint tax return and, if so, whether Zuch was involved in the offer-in-compromise process. (App. at 264.)

The Tax Court then granted the IRS's unopposed motion to remand the case to the IRS Office of Appeals. In June 2017, the IRS issued a Supplemental Notice of Determination, confirming its prior determination to sustain the levy and stating that it received no new information that would compel it to change its prior decision. The case returned to the Tax Court and was initially set for trial. Instead, the parties agreed to forgo trial and proceed on a stipulated factual record.[18]

3. Credit Setoffs

Throughout the several years Zuch was arguing with the IRS about her 2010 tax liability, including in the CDP hearing and in the Tax Court, the IRS was taking tax refunds that Zuch was owed in later tax years and applying them to what it calculated to be her 2010 tax liability. It did this six times—once each in 2013, 2014,

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[18] Tax Court Rule 122(a) provides, "Any case not requiring a trial for the submission of evidence (as, for example, where sufficient facts have been admitted [or] stipulated . . .) may be submitted . . . by motion of the parties filed with the Court."

2015, and 2019, and twice in 2016.[19] On April 15, 2019, the IRS used a refund to set off the remainder of Zuch's 2010 unpaid tax, reducing the balance due to $0.

With no remaining unpaid tax on which to execute a levy, the IRS moved to dismiss the Tax Court proceeding as moot. Zuch opposed the motion, but the Tax Court granted it and dismissed the petition. In a short order, the Court held that the case was moot. Without acknowledging § 6330(c)(2)'s distinction between unpaid tax and underlying tax liability, the Court found there was no longer a live controversy because there was "no unpaid liability . . . upon which a levy could be based" and the IRS was "no longer pursuing the proposed collection action[.]" (App. at 7-8.) It also explained that the Tax Court was not the proper forum to determine whether Zuch had overpaid because it lacked "jurisdiction to determine an overpayment or to order a refund or credit of tax paid in a [CDP] proceeding[.]" (App. at 7.)

Zuch timely appealed the Tax Court's order.

II. DISCUSSION[20]

The dispute comes down to this: whether, in the midst of litigation over a contested tax liability, the IRS

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[19] In its briefing and at oral argument, the IRS alleged that Zuch should have received notice of the setoffs. But it provided no evidentiary support that notice was sent to her.

[20] The Tax Court had jurisdiction under §§ 6330(d)(1) and 7442. We have jurisdiction pursuant to § 7482(a)(1). We exercise "de novo review over the Tax Court's findings of law, including its construction and application of the Internal Revenue Code." *DeNaples v. Comm'r*, 674 F.3d 172, 176 (3d Cir. 2012). We review factual findings for clear error. *Id.*

is free to deprive the Tax Court of jurisdiction by the expedient of taking the taxpayer's tax refunds and applying them to that liability. The answer is no. The IRS's arrogation to itself of the power to eliminate predeprivation judicial review of liability by seizing a taxpayer's money to cover a disputed debt is not supported by relevant statute, common law (incorporated into statute), or mootness principles.

A. The Tax Court Originally Had Jurisdiction to Hear Zuch's Claim.

The Tax Court is a tribunal of limited jurisdiction. *Sunoco*, 663 F.3d at 187. Being organized under Article I of the Constitution, it possesses only the power "expressly conferred by Congress." *Id.* Congress has granted the Tax Court jurisdiction to review decisions made by the IRS Office of Appeals in CDP hearings. § 6330(d)(1). Specifically, the Tax Court is to consider "any relevant issue [raised by the taxpayer] relating to the unpaid tax or the proposed levy[.]" § 6330(c)(2)(A). If the taxpayer "did not receive any statutory notice of deficiency for [his or her] tax liability or did not otherwise have an opportunity to dispute such tax liability[,]" the Court must, in addition, consider any challenge "to the existence or amount of the underlying tax liability[.]" § 6330(c)(2)(B).

Zuch fell into the latter category, disputing her 2010 tax liability at the CDP hearing by arguing that the $50,000 provided by her and Gennardo as estimated tax payments should have been applied to satisfy her tax liability instead of Gennardo's. Because Zuch had neither received a notice of deficiency nor had an opportunity to contest the allocation of the tax payments prior

to her CDP hearing,[21] the IRS was required to consider her challenge. The IRS did so, finding that the $50,000 could not be credited to Zuch and sustaining the levy. Accordingly, the Tax Court had jurisdiction to review that determination, including whether the estimated payments were allocated correctly.[22]

B. The Tax Court Applies Article III Case or Controversy Principles to Determine Mootness.

"Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies.'" *Chafin v. Chafin*, 568 U.S. 165, 171 (2013). As an Article I tribunal, however, the Tax Court "is not fully constrained by Article III's case or controversy limitation." *Baranowicz v. Comm'r*, 432 F.3d 972, 975 (9th Cir. 2005). Nevertheless, the Tax Court wisely applies that constraint to itself, *Battat v. Comm'r*, 148 T.C. 32, 46 (2017) ("The case or controversy requirement under Article III presumptively applies in the Tax Court."), and, of course, is free to do so for prudential reasons, *cf. Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996) ("As a court established under Article I of the U.S. Constitution, the Court of Veterans Appeals . . . has decided, based on the same prudential considerations behind the 'case or controversy' requirement, . . . that it would re-

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[21] Zuch did not receive a notice of deficiency because the amount of tax due that she reported, without taking any payments into account, is not in dispute. *See supra* note 13.

[22] The IRS does not dispute that the Tax Court originally had jurisdiction to review the proper allocation of the estimated tax payments. (Supp. Br. at 15 ("If Zuch's tax liability for 2010 had not been fully satisfied by the credit offsets, we agree that the case would not be moot and that the Tax Court could review the proper allocation of the estimated tax payments.").)

frain from deciding cases that do not present an actual case or controversy."). Zuch and the IRS agree that the Tax Court need not hear a moot case. Accordingly, for purposes of this matter, we discuss and apply Article III mootness principles to determine whether Zuch's claim is moot.

Article III permits federal courts to "entertain actions only if [those actions] present live disputes, ones in which both sides have a personal stake." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020). That "case or controversy" requirement remains "through all stages of federal judicial proceedings, trial and appellate." *Chafin*, 568 U.S. at 172 (internal quotation marks omitted). Thus, a case becomes moot, and a federal court is deprived of jurisdiction to hear that case, when there is no longer a live case or controversy between the litigants. *Id.* "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (internal quotation marks omitted). Therefore, a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (cleaned up). A defendant faces a "heavy burden" when trying to persuade a court that there is no longer a live controversy. *Hartnett*, 963 F.3d at 305-06 (internal quotation marks omitted).

C. Zuch's Claim Is Not Moot.

The parties dispute whether Zuch's claim falls under § 6330(c)(2)(A) or § 6330(c)(2)(B). We therefore first address how Zuch's claim should be characterized, before turning to the question of mootness.

1. The Characterization of Zuch's Claim.

In the Notice of Determination that Zuch received, the IRS listed her challenge to the allocation of the estimated payments under the heading "Challenges to the Liability." (App. at 298.) Now, however, it argues that a challenge to the allocation of estimated tax payments is not a challenge to the "underlying liability," which involves § 6330(c)(2)(B), but is rather a challenge "relating to the unpaid tax" under § 6330(c)(2)(A).[23] *See supra* section I.A.3. It says that Zuch's claim should be understood not as involving the net amount she owes to the IRS, but rather the amount of tax she self-reported on her amended return, separate from any payments she reported or paid to satisfy that tax. Thus, the IRS asserts that once there is no levy and no unpaid tax, the challenge to the proper allocation of the payments is extinguished because Zuch's underlying tax liability, as the IRS defines it, is not disputed.

This is, to be frank, nothing but self-serving word play. The IRS says an "underlying tax liability" must be understood by looking only at the "total tax" line on a return, while turning a blind eye to estimated tax payments listed on the very same return. But Zuch's "tax liability" did not exist in a vacuum, separate from pay-

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[23] *See also* I.R.S. Notice CC-2014-002 (May 5, 2014), 2014 WL 2003048 (explaining the IRS's view that a challenge to whether the IRS properly applied a payment is a challenge to the unpaid tax under § 6330(c)(2)(A), subject to abuse-of-discretion review, rather than a challenge to the underlying tax liability under § 6330(c)(2)(B), subject to de novo review).

ments she made on that liability.[24] She would only have an underlying liability if the tax was unpaid after she filed her amended return.

Perhaps because its meaning is clear, the term "underlying tax liability" is not defined by statute, nor is there any reference to its meaning in the relevant legislative history. *Montgomery v. Comm'r*, 122 T.C. 1, 7 (2004). Yet, the Tax Court has been inconsistent in treating challenges to the IRS's application of payments and credits toward tax as, in some instances, falling under § 6330(c)(2)(A), and in others as under § 6330(c)(2)(B). *Compare Landry v. Comm'r*, 116 T.C. 60, 62 (2001) ("[T]he validity of the underlying tax liability, i.e., the amount unpaid *after application of credits* to which petitioner is entitled, is properly at issue[.]" (emphasis added)), *Boyd v. Comm'r*, 117 T.C. 127, 131 (2001) (same), *and Dysle v. Comm'r*, T.C.M. (RIA) 2004-285, at 3 (same), *with Melasky v. Comm'r*, 151 T.C. 89, 92 (2018) ("A question about whether the IRS properly

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[24] Even the *Greene-Thapedi* court, *see infra* section II.C.3, acknowledged that the Tax Court may need to consider tax payments in reviewing a challenge to the underlying tax liability:

> We do not mean to suggest that this Court is foreclosed from considering whether the taxpayer has paid more than was owed, where such a determination is necessary for a correct and complete determination of whether the proposed collection action should proceed. Conceivably, there could be a collection action review proceeding where . . . the proposed collection action is not moot and where pursuant to sec. 6330(c)(2)(B), the taxpayer is entitled to challenge "the existence or amount of the underlying tax liability." In such a case, the validity of the proposed collection action might depend upon whether the taxpayer has any unpaid balance, which might implicate the question of whether the taxpayer has paid more than was owed.

Greene-Thapedi v. Comm'r, 126 T.C. 1, 11 n.19 (2006).

credited a payment is not a challenge to a tax liability; i.e., the amount of tax imposed by the Code for a particular year. It is instead a question of whether the liability remains unpaid." (emphases omitted)).

The inconsistency is puzzling since it seems obvious that a taxpayer's "challenge[] to the existence or amount of the underlying tax liability" involves whether and how much the taxpayer has paid on that liability. § 6330(c)(2)(B). A dispute over whether the IRS appropriately credited a taxpayer's account with estimated tax payments is, at bottom, a dispute over the taxpayer's underlying tax liability. The point is one of plain English. Therefore, Zuch's argument that her estimated tax payments were erroneously allocated to her ex-husband is a challenge to her underlying tax liability under § 6330(c)(2)(B).

Nonetheless, even if the IRS is correct that Zuch's claim is properly characterized as a challenge to unpaid tax under § 6330(c)(2)(A), the IRS still loses.

2. Zuch's Claim Is Not Moot Because the IRS's Setoffs Were Invalid.

Because, as explained below, the Tax Court retains jurisdiction to review setoffs, and the IRS cannot satisfy a tax dispute by means of unlawful credit setoffs, Zuch's tax obligation was not properly set off, and she can challenge the IRS's application of the estimated payments.[25]

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[25] As noted previously, the IRS does not dispute that the Tax Court had jurisdiction to hear Zuch's claim regarding the estimated tax payments at issue prior to the IRS's credit setoffs, *see supra* note 22, albeit under § 6330(c)(2)(A).

a) The Tax Court has jurisdiction to review setoffs.

Under § 6402(a) of the Internal Revenue Code, the IRS normally must refund to taxpayers any tax payments in excess of their liability for that taxable year. But § 6402(a) allows the IRS to apply any refund amount as a setoff against a taxpayer's unpaid tax debts, thus lowering or eliminating the amount of the refund.

The IRS contends that, in § 6512(b)(4), Congress affirmatively stripped the Tax Court of its jurisdiction to review setoffs. That provision says the "Tax Court shall have no jurisdiction *under this subsection* to restrain or review any credit or reduction made by the Secretary under section 6402." § 6512(b)(4) (emphasis added). But, by its terms, subsection 6512(b) is limited to describing the Tax Court's overpayment and refund jurisdiction in a deficiency proceeding. *See supra* Section I.A.1. It does not refer to CDP proceedings, so that jurisdiction stripping provision is plainly inapplicable. It does not affect Zuch's case.[26]

The IRS also asserts that Congress did not affirmatively grant the Tax Court the power to review setoffs in a CDP case. It may be that Congress has not *explicitly* granted the Tax Court such power, but an *implicit* grant allows the Court to review setoffs in any event.

As the Tax Court has recognized, "[s]ection 6402(a) contains a statutory counterpart" to the common law

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[26] In its opening brief and at oral argument, the IRS argued that § 6402(g) also barred judicial review of tax setoffs under § 6402 "in the Tax Court or anywhere else." (Answering Br. at 22; Oral Arg. Trans. at 85-87.) It retreated from that position in its supplemental briefing.

right of offset. *Boyd v. Comm'r*, 124 T.C. 296, 300 (2005). And the common law of setoffs "calls for judicial review of the merits of the claim being invoked as an offset of a government debt." *Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1365 (Fed. Cir. 2020). For example, the Federal Circuit has "emphasized that the Debt Collection Act [of 1982, Pub. L. No. 97-365, 96 Stat. 1749,[27]] was intended to supplement, and not displace, the government's pre-existing offset rights under the common law." *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1566 (Fed. Cir. 1993). "Congress understood that to trigger the [Debt Collection Act's] offset provision, a pre-existing, valid debt must first be owed to the United States." *Agility*, 969 F.3d at 1364. Accordingly, the court reasoned that the Act "cannot be reasonably interpreted as shielding from judicial review the United States' determination that a pre-[existing] debt is owed." *Id.*

Because § 6402 carries forward the common law of setoffs, and because that section says nothing about disallowing Tax Court offset review (as Congress has expressly and specifically stated elsewhere in the Tax Code), it follows that the Court has the power to review setoffs in a CDP proceeding to determine whether there was a pre-existing, valid debt that was owed to the IRS.

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[27] Akin to § 6402(a), the Debt Collection Act provides, in relevant part, that the government may collect an outstanding debt owed to the United States "by [means of] administrative offset," 31 U.S.C. § 3716(a), which means to "withhold[] funds payable by the United States . . . to . . . a person to satisfy" a debt that the person owes the government, *id.* § 3701(a)(1).

b) The IRS setoffs violated setoff common law and Article III mootness principles and are thus invalid.

The "right of setoff (also called 'offset') allows [parties] that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995) (quoting *Studley v. Boylston Nat'l Bank of Bos.*, 229 U.S. 523, 528 (1913)). The right to apply mutual debts to offset each other does not apply when the debts are disputed. Accordingly, a creditor cannot set off a disputed debt with an undisputed one. That is a matter of black letter law. *Setoff*, *Black's Law Dictionary* (11th ed. 2019) ("Set off is a mode of defence by which the defendant *acknowledges the justice of the plaintiff's demand*, but sets up a demand of his own against the plaintiff, to counterbalance it either in whole or in part." (emphasis added) (quoting Oliver L. Barbour, *A Treatise on the Law of Set Off* 3 (1841))); 15 *Williston on Contracts* § 44:34 (West 2023) (explaining that "mutual debts do not extinguish one another . . . either automatically or by an election or other action by one party; rather, the agreement of the parties or judicial action is required"). As the Seventh Circuit has noted:

> Courts regularly require the payment of undisputed debts while the parties litigate their genuine disputes. This reflects the limits of the common law right of set-off between debts. Setoffs are permitted only when the debts are "mutual", and debts arising at different times out of different circumstances are not mutual.

Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co., 840 F.2d 546, 551 (7th Cir. 1988) (internal citation omitted) (Easterbrook, J.).

To the extent that the IRS's argument is that § 6402(a) rescinds the common law governing setoffs, the answer is no, it does not. Nowhere in the text is there any indication of that, and even the IRS did not seem to think it so until the middle of this appeal. It explained in its initial brief that § 6402(a) "is a tax-specific codification of the common-law right of setoff[.]" (Answering Br. at 21.) Perhaps, as a result of being pressed on that issue at oral argument, the IRS now professes a different view—that "setoffs authorized by § 6402(a) do not need to follow any common-law principles regarding setoffs[.]" (Supp. Br. at 13.) The change in position may be convenient but it is ill-considered and unpersuasive.

A "longstanding [rule] is . . . that statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."[28] *United States v. Texas*, 507 U.S. 529, 534 (1993) (cleaned up). And to "abrogate a common-

[28] Although it is not essential to our holding, nothing in the legislative history of § 6402(a) suggests that its purpose was to overrule the common law. Section 252 of the Revenue Act of 1918 appears to be the earliest forerunner of the setoff provision that is now in § 6402(a), and only a single sentence, buried in a House Ways and Means Committee Report for that old act, suggests the purpose for the provision: "It is believed that this provision will materially assist in the settlement of transactions between the taxpayer and the Government." H.R. Rep. No. 65-767, at 15 (1918). If anything, allowing the government to set off disputed debts hinders, rather than assists, settlements, as this case demonstrates.

law principle, the statute must speak directly to the question addressed by the common law." *Id.* (internal quotation marks omitted). Section 6402(a) does not do that.

Although § 6402(a) allows the IRS to credit overpayments to "any liability" of the taxpayer, reading that provision to allow a disputed debt to be set off has the infirmity of presupposing that the taxpayer in fact has some liability. In other words, the reading that the IRS pushes is an exercise in pure bootstrapping. Zuch alleges that she does not have any liability, and it does nothing to advance the analysis of this case for the IRS to simply declare that she does and then say it is accordingly allowed to effect a setoff. The law is exactly to the contrary. The whole point of Congress's authorization of CDP hearings is to give taxpayers "protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor." S. Rep. No. 105-174, at 67. Allowing offsets such as the ones here would be an affront to the entire purpose of CDP hearings. We instead "take it as given that Congress has legislated with an expectation that the [common law] principle[s] [of setoff] will apply[.]"[29] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (cleaned up).

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[29] Treas. Reg. § 301.6330-1(g)(2), Q&A (G)(3) (2006) provides that the IRS may offset overpayments against the unpaid tax in a CDP proceeding during the pendency of the CDP hearing and appeals process. To the extent that regulation provides that the IRS can take an undisputed debt (i.e., an overpayment of taxes, giving rise to an obligation by the government to provide a refund) and apply it against a disputed one (like the alleged tax liability here), such an interpretation of the statute is untenable. Nothing in the plain text of § 6402(a) allows for such a meaning.

Beyond violating the common law and the clear legislative intent to preserve taxpayer rights in CDP hearings, the setoffs here violate Article III mootness principles. "One scenario in which we are reluctant to declare a case moot is when the defendant argues mootness because of some action it took unilaterally after the litigation began." *Hartnett*, 963 F.3d at 306; *see also Vigon v. Comm'r*, 149 T.C. 97, 104 n.3 (2017) (the IRS "may not unilaterally oust the Tax Court from jurisdiction—neither in a deficiency case nor in a CDP case" (internal quotation marks omitted)). That is what we are faced with here. It is well established that "a defendant's voluntary *cessation* of a challenged practice does not deprive [us] of [our] power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted) (emphasis added). It is no stretch to likewise conclude that, as a general matter, and when an avenue of relief remains, a defendant cannot unilaterally *complete* a challenged practice to moot a case either.

In short, because the IRS's setoffs were invalid and without legal effect, Zuch's claims are not moot, although Zuch's money is, at least for the time being, in the government's pocket.

3. Zuch's Claim Is Also Live Under § 6330(c)(2)(B) Because the Tax Court Retained Jurisdiction to Review Her Liability.

If we view Zuch's claim as a challenge to liability under § 6330(c)(2)(B), we reach the same conclusion. Zuch's underlying tax liability was very much in dispute when the IRS withdrew its levy because it had already taken her money without her consent, and it remained a

live issue based on (1) a plain reading of the statute, (2) properly read (and non-erroneous) Tax Court precedent, (3) the Tax Court's independent jurisdiction over liability, (4) the Tax Court's ability to declare Zuch's rights, and (5) the potential preclusive effect of such a declaration. We address each issue in turn.[30]

a) Nothing in the plain text of § 6330 suggests a taxpayer's challenge to tax liability under § 6330(c)(2)(B) can be rendered moot by the unilateral action of the IRS.

Section 6330 allows a taxpayer to raise two categories of issues at a CDP hearing. First, § 6330(c)(2)(A) permits a taxpayer to raise "any relevant issue relating to the unpaid tax or the proposed levy[.]" Issues under that provision, accordingly, must relate to a tax that is currently unpaid or a levy that is still being proposed. But § 6330(c)(2)(B), the provision under which Zuch brought her challenge, permits a taxpayer to "*also* raise at the hearing challenges to the existence or amount of the underlying tax liability . . . if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." (emphasis added). Zuch meets those prerequisites, as the IRS has admitted. Unlike challenges under § 6330(c)(2)(A), the rights provided under § 6330(c)(2)(B) are not restricted by any requirement that they relate to an unpaid tax or proposed levy. Consequently, there is nothing in § 6330(c)(2)(B) to suggest that a taxpayer's right to challenge the existence or amount of her underlying tax becomes moot

[30] This discussion is only applicable to taxpayers who did not receive a notice of deficiency or otherwise have a previous opportunity to challenge their underlying tax liability.

once the levy is no longer being enforced or the tax is satisfied.

We part ways here with the Fourth and D.C. Circuits. The Fourth Circuit has held that the phrase "underlying tax liability" in § 6330(c)(2)(B) must be read in the "specific context [of] the IRS's attempt to collect via lien or levy." *McLane v. Comm'r*, 24 F.4th 316, 319 (4th Cir. 2022) (internal quotation marks omitted). With that limitation in mind, it reasoned that the Tax Court does not have jurisdiction "over independent overpayment claims when the collection action no longer exists." *Id.* Similarly, the D.C. Circuit reasoned that "all the relief that section 6330 authorizes the tax court to grant" is relief from levy and that, consequently, there is "no appropriate course of action for the Tax Court to take but to dismiss [a case] as moot" when the IRS withdraws its proposed levy. *Willson v. Comm'r*, 805 F.3d 316, 321 (D.C. Cir. 2015) (internal quotation marks omitted).[31]

While it is true that the "plainness or ambiguity of statutory language is determined by reference to . . . the specific context in which that language is used, and the broader context of the statute as a whole[,]" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), we do not read "underlying tax liability" so narrowly. Section 6330 is not directed toward helping the IRS collect taxes

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[31] In addition to *McLane* and *Willson*, the IRS also relies on *Ruesch v. Commissioner*, 805 F. App'x 12, 14 (2d Cir. 2020), to argue that a taxpayer can challenge her underlying tax liability only when the IRS is actively seeking to levy. But in *Ruesch*, the issue before us was never in play. The Tax Court there held that it lacked jurisdiction over the dispute because the IRS had not issued the taxpayer a valid notice of determination, not because of its interpretation of § 6330(c)(2)(B). *Id.*

via lien or levy. On the contrary, by its terms it provides taxpayers a forum to *challenge* a lien or levy and accounts for different circumstances in which that need may arise—including the circumstance in which the taxpayer had no opportunity to challenge her underlying liability.

As the Tax Court has explained, the broader purpose of § 6330 in the overall statutory scheme is rather straightforward—to "collect the *correct* amount of tax." *Montgomery*, 122 T.C. at 10 (emphasis added) ("In view of the statutory scheme as a whole, we think the substantive and procedural protections contained in sections 6320 and 6330 reflect congressional intent that the Commissioner should collect the correct amount of tax, and do so by observing all applicable laws and administrative procedures."); *see also* S. Rep. No. 105-174, at 67 ("[F]ollowing procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers."). Allowing a taxpayer to challenge her underlying tax liability in a context like the present case, even after the IRS ceases collection, not only comports with the text of § 6330 but supports that objective. It also comports with fundamental notions of due process, as the taxpayer in that scenario necessarily has an independent right to challenge her tax liability in a CDP hearing.[32] *See supra* section I.A.2.

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[32] If the IRS could impose liability without sending a notice of deficiency, and could both offset the purported liability so as to cease collection and moot any CDP challenge based on its cessation, that taxpayer would be denied *any* pre-deprivation opportunity to contest what the IRS says she owes. Because that taxpayer may not be able to initiate a deficiency proceeding or carry forward her CDP action, she also could be denied *any* Article III forum in which to

After the IRS Office of Appeals considers the taxpayer's challenges at the CDP hearing and issues its determinations as to the levy and the taxpayer's liability, the Tax Court obtains jurisdiction to review those determinations. § 6330(d)(1) ("The person may . . . petition the Tax Court for review of such determination (and the Tax Court *shall have jurisdiction* with respect to such matter)." (emphasis added)). Accordingly, the Tax Court's "jurisdiction is not limited to the notice of [the proposed collection action] that triggered th[e] collection proceeding but rather comprehends all the issues that Congress allowed to be included in 'such matter.'" *Vigon*, 149 T.C. at 107. "[S]uch matter" includes a challenge to what the IRS asserts to be the underlying tax liability.[33] *Id.*

In short, there is nothing in the plain text of § 6330 that suggests a taxpayer's challenge to the tax liability at issue in an action under § 6330(c)(2)(B) can be rendered moot by the unilateral action of the IRS.

b) Greene-Thapedi*'s reasoning was faulty.*

Nevertheless, the Tax Court here held otherwise. It dismissed Zuch's case as moot "[b]ecause there [was] no unpaid liability for the determination year upon which a levy could be based, and [the IRS was] no longer pursuing the proposed collection action[.]" (App. at 7-

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contest her liability. This is true before collection, and it may also be true as a general matter. Here, for example, it is not clear whether Zuch would be able to challenge her tax liability at all (outside of a live CDP proceeding) because her post-collection claim might be time-barred. *See infra* note 41.

[33] When "the validity of the underlying tax liability is properly at issue, the Court will review the matter on a de novo basis." *Sego v. Comm'r*, 114 T.C. 604, 610 (2000).

8.) That dismissal followed the reasoning of an earlier case called *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006), with facts very similar to the case before us now. There, the IRS notified a taxpayer that it intended to levy on her property to collect a disputed tax liability. *Id.* at 2-3. The taxpayer then challenged the tax liability in a CDP hearing. *Id.* at 3. The IRS Office of Appeals sustained the levy, and the taxpayer petitioned the Tax Court for review. *Id.* After she filed her petition, the IRS used the taxpayer's overpayment in a later year to fully satisfy the disputed tax liability. *Id.* at 4. The Tax Court then dismissed the taxpayer's proceeding as moot, holding that "whatever right petitioner may have to challenge the existence and amount of her underlying tax liability in this proceeding arises only in connection with her challenge to the proposed collection action." *Id.* at 8. And if "the proposed levy is moot," then the taxpayer "has no independent basis to challenge the existence or amount of her underlying tax liability" in her proceeding at the Tax Court.[34] *Id.*

To arrive at that conclusion, the *Greene-Thapedi* Court relied on two inapposite and non-precedential Tax Court cases, *Chocallo v. Commissioner*, T.C.M. (RIA) 2004-152, and *Gerakios v. Commissioner*, T.C.M. (RIA) 2004-203.[35] *See id.* at 7-8. In both of those cases, the taxpayer was not asserting any ongoing challenge to the

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[34] The Tax Court also denied a refund to the taxpayer because "section 6330 does not expressly give [the Tax Court] jurisdiction to determine an overpayment or to order a refund or credit of taxes paid." *Greene-Thapedi*, 126 T.C. at 8.

[35] The Tax Court issues memorandum opinions, like *Chocallo* and *Gerakios*, which are considered non-binding precedent. *See Dunaway v. Comm'r*, 124 T.C. 80, 87 (2005) ("[M]emorandum opinions of this Court are not regarded as binding precedent.").

tax liability underlying the CDP proceeding when the Tax Court declared the matter moot. In *Chocallo*, the IRS discovered during the CDP hearing that it had incorrectly assessed the taxpayer's liability and so it refunded the amount already collected. *Chocallo* at 2. At that point, the IRS moved to dismiss the case as moot. *Id.* The taxpayer then filed a "Supplemental Motion for Sanctions, Contempt and For Other Relief[,]" requesting that the IRS employees who handled her case be criminally prosecuted and claiming damages for alleged wrongs committed by IRS employees. *Id.* Thus, the taxpayer was seeking damages; she was no longer contesting the underlying tax liability that gave rise to the suit. In *Gerakios*, the taxpayer voluntarily paid his tax liabilities after a CDP hearing. *Gerakios* at 1. He "did not dispute his underlying liabilities." *Id.* at 1 n.1. He paid the tax because the tax lien was hindering his ability to refinance his home. *Id.* at 1. He sought review in the Tax Court claiming only that IRS "employees mistreated him [and] violated his civil rights, and that his credit rating was adversely affected by the filing of the lien." *Id.* Since neither case involved a taxpayer who was then challenging an underlying tax liability, as is the case here and was in *Greene-Thapedi*, the *Greene-Thapedi* court's reliance on *Chocallo* and *Gerakios* was misplaced.

The Tax Court's own precedent since *Greene-Thapedi* suggests that the case was wrongly decided. In *Vigon v. Commissioner*, decided in 2017, the Tax Court held that the IRS cannot unilaterally moot a case by withdrawing its proposed collection activity if the Tax Court has already "obtained jurisdiction of a liability challenge when the petition was filed." 149 T.C. at 107. That's because the "liability issue may remain

even after the collection issues have been resolved or become moot." *Id.* at 105. To be sure, a footnote in *Vigon* distinguished it from *Greene-Thapedi* because *Greene-Thapedi* "involved a liability that had been satisfied" and "not merely abated," as in *Vigon*. *Id.* at 105 n.4. But there is nothing in § 6330 to suggest that distinction. Once the Tax Court has jurisdiction to resolve a disputed tax liability, it does not lose that jurisdiction simply because the IRS decides to satisfy the asserted liability with the taxpayer's own funds.

Indeed, even the IRS used to recognize that. In a notice to its attorneys in 2003, it explained that "[a] motion to dismiss for mootness is inappropriate if petitioner is disputing the existence or amount of the liability . . . . *Even if the liability has been paid*, petitioner may still dispute the liability[.]" I.R.S. Notice CC-2003-016 (May 29, 2003), 2003 WL 24016801 (emphasis added).[36] That is the correct view, and the IRS

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[36] The IRS "Chief Counsel is appointed by the President of the United States" and is the "chief legal advisor to the IRS Commissioner on all matters pertaining to the interpretation, administration and enforcement of the Internal Revenue Laws[.]" *Office of Chief Counsel At-a-Glance*, IRS, https://www.irs.gov/about-irs/office-of-chief-counsel-at-aglance [https://perma.cc/63NC-KGG9]. Chief Counsel Notices "are directives [to IRS attorneys and staff] that provide interim guidance, furnish temporary procedures, describe changes in litigating positions, or announce administrative information." *Chief Counsel (CC) Notices*, IRS, https://www.irs.gov/chief-counsel-notices [https://perma.cc/S68G-5MA8].

The IRS updated its position with another notice in 2005, stating, "[a] motion to dismiss on ground of mootness . . . should be filed if the tax liability has been paid fully and the taxpayer raises no other relevant issues." I.R.S. Notice CC-2005-008 (May 19, 2005), 2005 WL 1259554. Zuch's claim that the estimated tax payments were

should have stuck with it. *Greene-Thapedi*'s holding that a taxpayer may only challenge her underlying tax liability if there remains an unpaid tax or a proposed levy is erroneous.[37]

c) The Tax Court need not have repayment or refund jurisdiction for there to be a live dispute.

In *Greene-Thapedi*, the Tax Court said that, once a levy was removed and the tax was paid, it could not provide any other relief to the taxpayer because "section 6330 does not expressly give [the] Court jurisdiction to determine an overpayment or to order a refund or credit of taxes paid." 126 T.C. at 8. It reasoned that full payment rendered any conclusion it might make as to liability "at best, . . . an advisory opinion." *Id.* at 13.

A leading tax-procedure treatise, noting that "[m]any scholars and practitioners believe that *Greene-Thapedi* reached an incorrect conclusion[,]" explains how the Tax Court got it wrong:

> [A] [t]axpayer's full payment of the previously unpaid tax liability should not render the entire case "moot" if the Tax Court otherwise has jurisdiction over the underlying liability. Full payment does not neces-

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applied incorrectly is certainly a relevant issue to whether the Tax Court CDP proceeding should remain open.

[37] In a footnote in *Ahmed v. Commissioner*, 64 F.4th 477, 487 n.10 (3d Cir. 2023), we stated that a petitioner's lien-withdrawal request was moot because the IRS had already released its liens once the taxpayer remitted a deposit to the IRS. But the taxpayer in *Ahmed* never challenged his underlying tax liability in the CDP hearing, so that case has no bearing here.

> sarily resolve the dispute as the Tax Court held. The question of whether a dispute remains is separate from the question of whether the Tax Court can grant a refund. Even if granting a refund is barred, the Tax Court could still determine the correct liability as part of its CDP determination.

Michael I. Saltzman & Leslie Book, *IRS Practice & Procedure* ¶ 14B.16[4][a] (West 2023).

We agree. Notwithstanding any overpayment or refund jurisdiction, a live dispute as to underlying liability does not become moot based upon payment of the "unpaid" tax. Section 6330 grants the Tax Court jurisdiction to review a CDP determination regarding a taxpayer's properly raised challenge to the existence or amount of her underlying tax liability, full stop. That jurisdiction does not change until the dispute is resolved. *See Naftel v. Comm'r*, 85 T.C. 527, 530 (1985) ("[G]enerally, once a petitioner invokes the jurisdiction of the Court, jurisdiction lies with the Court and remains unimpaired until the Court has decided the controversy."). Therefore, overpayment or refund jurisdiction is not essential to having a live controversy.[38]

d) A Tax Court determination of Zuch's right to the estimated payments would not be an impermissible declaratory judgment.

Despite all of the foregoing, the IRS argues that a Tax Court determination of the proper allocation of the tax payments in a CDP hearing would be an improper

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[38] Accordingly, we need not, and do not, reach any conclusion about whether the Tax Court has overpayment or refund jurisdiction in a context like this.

declaratory judgment. (Supp. Br. at 15 ("Nothing in the Code or Section 6330 authorizes the Tax Court to issue advisory opinions or declaratory judgments in CDP cases.").) The Declaratory Judgment Act allows any United States court to render a declaratory judgment when there is a case or controversy, "except with respect to Federal taxes[.]"[39] 28 U.S.C. § 2201(a). If that were all that one knew of the Act, the IRS's argument would be more persuasive. But, although the Act is broadly worded, courts have traditionally construed it to be coterminous with the Tax Anti-Injunction Act, and that undermines the agency's position.[40]

The Tax Anti-Injunction Act generally provides that there can be "no suit for the purpose of restraining the assessment or collection of any tax[.]" § 7421(a). But it also provides an exception for a request under § 6330(e)(1) to enjoin a levy via a CDP hearing and any appeals. *Id.* (prohibiting suits to restrain assessment or collection of a tax "[e]xcept as provided in section[] . . . 6330(e)(1)," among others). Consequently, the Tax Anti-Injunction Act is not violated when a levy is stayed during the pendency of a CDP hearing. Furthermore, because the Tax Anti-Injunction Act and the Declaratory Judgment Act are coterminous, the phrase "'with respect to Federal taxes' [in the Declaratory Judgment Act] means 'with respect to the assessment or collection of taxes.'" *Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011).

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[39] The Declaratory Judgment Act carves out some tax exceptions that are not relevant here.

[40] *See Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 56 (D.D.C. 2014) (collecting cases from the Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits).

Thus, when a court has the power to enjoin a levy under the Tax Anti-Injunction Act, it also has the power to declare the rights of the parties in that proceeding without violating the Declaratory Judgment Act. As the D.C. Circuit has explained,

> a functional concern exists with construing the [Declaratory Judgment Act]'s exception to bar relief otherwise allowed under the [Tax Anti-Injunction Act]. The court would have jurisdiction to enjoin the parties appearing before it, but not to declare their rights. This defies common sense, however, "since an injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes."

Id. at 730 (quoting *Wyoming Trucking Ass'n, Inc. v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996)); *see also Tomlinson v. Smith*, 128 F.2d 808, 811 (7th Cir. 1942) ("[T]he jurisdiction of the court to issue a restraining order is . . . determinative of its jurisdiction to declare the rights of the parties relative thereto. It is unreasonable to think that a court with authority to issue a restraining order is without power to declare the rights of the parties in connection therewith.").

Because the Declaratory Judgment Act does not bar the Tax Court from declaring the rights to estimated payments at issue in a CDP hearing, there is a live case and controversy, and a Tax Court determination of Zuch's tax liability would not be an improper declaratory judgment.

e) The IRS has not met its burden to show that no relief would be available to Zuch if the Tax Court declared she had a right to the estimated payments.

To show mootness, the IRS must prove that Zuch could have no relief whatsoever if the Tax Court were to declare that she had a right to the estimated payments. Given what we have already said here, to carry its heavy burden, the IRS must prove that a declaration by the Tax Court of Zuch's rights in her CDP case would not have preclusive effect on a future refund claim. In a supplemental brief, the IRS has taken the position that such a determination would not have any preclusive effect, but it cites no relevant authority to support that proposition. And, indeed, the IRS Office of Chief Counsel has at least twice issued notices indicating the opposite. *See* I.R.S. Notice CC-2006-005 (Nov. 21, 2005), 2005 WL 3272051 ("A judicial determination in a CDP case of a taxpayer's underlying tax liability for a taxable year (which may be less than the taxpayer's payments for that year) may be subject to estoppel principles in a subsequent refund action[.]"); I.R.S. Notice CC-2009-010 (Feb. 13, 2009), 2009 WL 497736 ("A judicial determination of the amount of the underlying tax liability in a CDP case may, however, estop both parties from contesting the amount of that same liability in a subsequent refund action[.]").[41] Accordingly, the IRS

[41] At argument, the IRS asserted that any refund claim Zuch had is barred by the statute of limitations in § 6511. But in its supplemental brief, the IRS now says that it "has determined that she may still be able to file a refund suit in the district court or Court of Federal Claims." (Supp. Br. at 3.) It explains that Zuch did not receive the required two-year notice of disallowance that would have triggered the two-year limitations period for filing a refund

has not met its heavy burden to show that Zuch would have no relief whatsoever if the Tax Court were to declare she has a right to the estimated tax payments. And, of course, an agency of the United States, having received a court order declaring a citizen's rights, is expected to either appeal it or abide by it.[42]

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suit under § 6532(a)(1). Because of the Tucker Act, however, it is unclear whether a court will hear Zuch's refund claim. That Act bars any suit against the United States "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The Court of Federal Claims has longstanding precedent that § 6532 preempts the Tucker Act's general statute of limitations. *Detroit Tr. Co. v. United States*, 130 F. Supp. 815, 818 (Ct. Cl. 1955). And the IRS has repeatedly opined that the Tucker Act does not apply to tax refund claims. Rev. Rul. 56-381, 1956-2 C.B. 953; I.R.S. CCA 201044006 (Nov. 5, 2010), 2010 WL 4384169; I.R.S. Notice CC-2012-012 (Jun. 1, 2012), 2012 WL 2029785; I.R.S. IRM 34.5.2.2(5) (Apr. 22, 2021), https://www.irs.gov/irm/part34/irm_34-005-002 [https://perma.cc/46FG-E3TE]. If that were true, Zuch may not be barred from filing a refund claim because the two-year limitations period under § 6532 has not been triggered. But three district courts have held that the six-year limitations period is the outer limit for any claims against the government. *See Breland v. United States*, No. 10-cv-00007, 2011 WL 4345300, at *6-7 (N.D.N.Y Sept. 15, 2011); *Wagenet v. United States*, No. 8-cv-00142, 2009 WL 4895363, at *3 (C.D. Cal. Sept. 14, 2009); *Finkelstein v. United States*, 943 F. Supp. 425, 432 (D.N.J. 1996). Under that view, Zuch's refund suit would be time-barred because six years have passed since her right accrued to file a refund claim. We do not reach any conclusion today concerning the viability of a refund claim. She may have a viable claim, and that is enough for today's purposes.

[42] If enforcement were needed, requiring a taxpayer to go to a different court to enforce a right judicially determined in the Tax Court is consistent with historical practice. In fact, for over sixty years, the Tax Court had jurisdiction to determine a taxpayer's overpayment in a deficiency proceeding but did not have authority to order

III. CONCLUSION

For the foregoing reasons, we will vacate the Tax Court's order of dismissal and remand for that tribunal to determine whether Zuch is entitled to receive credit for any amount of the estimated tax payments at issue.

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a refund consistent with that determination. *See Greene-Thapedi*, 126 T.C. at 9 (explaining that the Tax Court had overpayment, but no refund, jurisdiction from 1926 until the enactment of § 6512(b) in 1988).

APPENDIX B

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 25125-14L

JENNIFER ZUCH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed: Apr. 6, 2022

ORDER OF DISMISSAL

This section 6330(d)[1] case is before the Court on respondent's motion to dismiss on grounds of mootness, filed March 6, 2020. Petitioner's objection to respondent's motion was filed on April 13, 2020.

In a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated September 25, 2014 (notice), respondent determined that a levy is an appropriate collection action with respect to petitioner's then outstanding 2010 Federal income tax liability (underlying liability). The submissions of the parties show their agreement to the events, summarized below.

[1] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended.

On September 12, 2012, petitioner filed her 2010 Federal income tax return as a married person filing a separate return. On the return, petitioner reported adjusted gross income of $74,493, tax due of $7,736, and withheld Federal tax of $8,607. The return showed a $731 overpayment, which respondent applied to the 2008 joint tax liability of petitioner and her former spouse, Patrick Gennardo.

Petitioner submitted an amended 2010 Federal income tax return (amended return), filed November 14, 2012. On the amended return, as relevant, petitioner reported a $71,000 increase in adjusted gross income, additional tax due of $27,682, estimated tax payments of $50,000, and a $21,918 overpayment. Respondent assessed the additional tax due of $27,682 reported on the amended return. Respondent further assessed an addition to tax under section 6651(a)(1) for failure to file a timely return of $7,020.50.

By letter dated August 31, 2013, petitioner was advised that respondent intended to levy (proposed collection action) in order to collect the underlying liability. That letter also advised petitioner of her right to challenge that proposed collection action by requesting an administrative hearing, which she did. *See* sec. 6330(a) and (b). Respondent received petitioner's timely administrative hearing request, dated September 27, 2013, in which petitioner alleged that the $50,000 of estimated tax payments should be credited to her 2010 income tax account and further requested that any penalty should be abated for reasonable cause. Respondent's settlement officer considered and rejected petitioner's requests, and because petitioner did not request a collec-

tion alternative during the administrative hearing, the notice was issued and this case ensued.

The petition in this case raises issues related exclusively to the amount of the underlying liability, including petitioner's entitlement to the abatement of penalties. According to petitioner, (1) the underlying liability would be eliminated if the estimated tax payments were properly credited to petitioner's income tax account, and (2) she is entitled to the refund of the overpayment shown on her amended return. After the petition in this case was filed, on April 15, 2019, respondent credited petitioner's income tax account with a $14,883.19 offset arising from her income tax account for 2018, which resulted in the satisfaction of the underlying liability. The payment of the underlying liability, in turn, resulted in the motion here under consideration.

Relying upon *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006), and pointing out that the underlying liability has now been paid, respondent argues that the case is moot because respondent no longer intends to pursue the proposed collection action. Petitioner objects to respondent's motion. According to petitioner, "because * * * [respondent] did not issue a valid notice of deficiency [with respect to the 2010 assessment] * * * [r]espondent's assessment is void". Petitioner further contends that section 6330(c)(2)(B) obligates the Court to determine the existence or amount of the underlying liability and that she is due a refund for an overpayment for 2010. That being so, petitioner argues the case is not moot because the parties disagree over the amount of the overpayment of petitioner's 2010 Federal income tax liability.

Petitioner is concerned that unless the underlying is determined in this proceeding, she will be forced to pursue any refund to which she might be entitled through traditional Federal income tax refund procedures, including if necessary, initiating a case in a different Federal court. Petitioner's concerns, although well-founded, are insufficient to defeat respondent's motion. Because we do not have jurisdiction to determine an overpayment or to order a refund or credit of tax paid in a section 6330 proceeding, this is not the proper forum to determine whether, and the extent to which, if any, the underlying liability has been overpaid. *See Greene-Thapedi v. Commissioner*, 26 T.C. at 11. Although we have concerns about the merits of petitioner's position on the point, *see* secs. 6201(1), 6665(b), under the circumstances we need not address the validity of the assessment as petitioner requests us to do.

Because there is no unpaid liability for the determination year upon which a levy could be based, and respondent is no longer pursuing the proposed collection action, this case is moot. *See McClane v. Commissioner*, 24 F.4th 316 (4th Cir. 2022) *aff'g* T.C. Memo. 2018-149; *see also Greene-Thapedi v. Commissioner*, 26 T.C. 1.

Premises considered, it is

ORDERED that respondent's motion to dismiss on grounds of mootness, filed March 6, 2020, is granted. It is further

ORDERED that this case is dismissed as moot.

(Signed) Lewis R. Carluzzo
Chief Special Trial Judge

APPENDIX C

Internal Revenue Service
Appeals Office
One Newark Center
15th Floor
Newark, NJ 07102

Date: [June 12, 2017]

JENNIFER ZUCH
[REDACTED]
ENGLEWOOD NJ
07631-1929

Department of the Treasury

Person to Contact:

Mario C Tevis
Employee ID Number:
[REDACTED]
Tel: 973-468-3252
Fax: 855-275-5379

Refer Reply to:

AP:CL:NWK:MCT

Tax Type/Form Number:

Income Tax / 1040

In Re:

Collection Due Process Appeal

Tax Court

Tax Period(s) Ended:

12/2010

SUPPLEMENTAL NOTICE OF DETERMINATION CONCERNING COLLECTION ACTION(S) UNDER SECTION 6320 and/or 6330

Dear Ms. Zuch:

The determination summarized below and described in detail in the attachment supplements the Notice of Determination dated September 25, 2014. This supple-

ment is being issued pursuant to the order of the Tax Court dated December 29, 2016 remanding the case to this appeals office. A copy of this supplement is also being sent to Tom Deamus Attorney, IRS, Area Counsel, Newark, NJ.

If you have any questions, please contact the person whose name and telephone number are shown above.

Summary of Determination

Review of your tax payment transfer request and your request for penalty abetment are both denied. Appeals received no new information that would compel us to consider either of your two requests.

Therefore, our determination is that the proposed levy action balances the need for efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. The action taken by Compliance is being sustained by Appeals.

Sincerely,

/s/ DARRYL LEE
Darryl K Lee
Appeals Team Manager

cc: Newark, NJ Area Counsel

Attachment to Supplemental Notice of Determination		
Type of Tax	**Tax Period**	**CDP Notice Date**
1040	12/31/2010	08/31/2013

Summary and Recommendation

The taxpayer filed a timely CDP request, received by Compliance on 09/27/2013, in response the issuance of a final notice of intent to levy dated on 08/31/2013. A Notice of Determination was issued by Appeals on 09/25/2014, sustaining the action taken by Compliance.

The case went to Tax Court and was remanded back to Appeals on an order dated 12/29/2016. No new information was presented to Appeals by the taxpayer. The original decision to sustain the levy action taken by Compliance is being upheld by Appeals.

Brief Background

A telephonic conference was held with your POA on 07/29/2014. During that call, your request to have $50,000.00 in credits moved from your husband's account to your account was denied. On 09/25/2014, you were issued Letter 3193 (Notice of Determination) by Appeals. Your POA petitioned Tax Court on your behalf. The case was reviewed by the court and remanded back to Appeals in an order dated 12/29/2016. The court ordered that Appeals address several issues that needed clarification (in the court's opinion) regarding the aforementioned credits.

Several calls between Appeals, IRS Area Counsel, and the POA took place between February and May of 2017 with the final call taking place on 05/26/2017. All calls,

except for the last call were made in an attempt to secure additional information in order for us to reconsider the disposition of the payments at issue, but nothing new was ever supplied to Appeals.

On 05/26/2017, it was determined that Appeals was not in a position to change our original determination to sustain Compliance's issuance of their final notice of intent to levy and that we would not move any credits to your account from your husband's account.

Legal and Procedural Requirements

I, Mario C Tevis, verified the requirements of any applicable law or administrative procedure were met. IRS records confirmed the proper issuance of the notice and demand, Notice of Intent to Levy and/or Notice of Federal Tax Lien (NFTL) filing, and notice of a right to a Collection Due Process (CDP) hearing.

An assessment was properly made for each tax and period listed on the CDP notice.

Notice and demand for payment was mailed to your last known address.

There was a balance due when the Notice of Intent to Levy was issued or when the NFTL filing was requested.

I had no prior involvement with respect to the specific tax periods either in Appeals or Compliance.

I reviewed the Collection file, IRS records and information you provided. My review confirmed that the IRS followed all legal and procedural requirements, and the actions taken or proposed were appropriate under the circumstances.

Issues relating to the unpaid liability

In an order from Tax Court dated December 29, 2016, the court remanded your case back to Appeals. The Tax Court questioned three (3) items:

1. The legal basis for which the $20,000.00 payment was applied to the account of the Gennardo's.

Appeals reviewed that the $20,000.00 payment in question was received as a joint 1040 ES payment (applied on 06/19/2010). It was applied to your husband's account, as he was the primary taxpayer on the joint account.

Appeals reviewed that you and your husband then filed separate income tax (1040) returns for the tax year ended 12/31/2010. Your initial tax liability was fully satisfied with your withholdings, which subsequently generated a refund to you.

The $20,000.00 1040 ES payment in question was never an issue until an amended 1040X was filed and an additional assessment was made. That assessment was made on 02/11/2013 in the amount of $27,682.00 (plus P&I).

2. Whether the payment of $30,000.00 was a separate or joint payment.

The $30,000.00 payment was made by bank check, dated 12/14/2010 and had only Mr. Gennardo's name on it. It was applied accordingly, to him.

3. The circumstances surrounding Gennardo's Offer in Compromise.

Mr. Gennardo has an accepted Offer in Compromise (OIC). In accordance with the terms of any OIC filed

at that time, Section 8 of OIC Form 656 (Rev. 5-2012), paragraph (d), states "The IRS will keep any monies it has collected prior to this offer and any payments that I make relating to this offer that I did not designate as a deposit". It should be known that his OIC was filed on 09/18/2012 and accepted on 07/17/2013.

It should also be known that your denial for penalty abatement was never raised by the court and that our initial determination to deny your request for abatement still stands.

Balancing efficient tax collection with concern regarding intrusiveness

Review of your tax payment transfer request and your request for penalty abetment are both denied. Appeals received no new information that would compel us to consider either of your two requests.

Therefore, our determination is that the proposed levy action balances the need for efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. The action taken by Compliance is being sustained by Appeals.

APPENDIX D

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 25125-14L

JENNIFER ZUCH, PETITIONER(S)

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed: Dec. 12, 2016

ORDER

This collection review case is before the Court on respondent's Motion for Summary Judgment filed on April 29, 2015, pursuant to Rule 121.[1] Respondent contends that the Court should affirm the determination of the Internal Revenue Service Office of Appeals sustaining a proposed levy to collect petitioner's unpaid Federal income tax for 2010. Petitioner objects to the motion for summary judgment.

A. Background

The record establishes and/or the parties do not dispute the following facts.

[1] Rule references are to the Tax Court Rules of Practice and Procedure and section references are to the Internal Revenue Code, as amended.

1. Estimated Payments

Petitioner resided in New Jersey when the petition in this case was timely filed. Petitioner was married to Patrick J. Gennardo during the year in issue. Petitioner and Mr. Gennardo elected married filing joint filing status for their Federal income tax returns for 2007, 2008, and 2009.[2]

Petitioner and Mr. Gennardo mailed to the Internal Revenue Service (IRS or respondent) a 2010 Form 1040-ES, Estimated Payment, with a $20,000 personal check payable to U.S. Treasury dated June 15, 2010. The Form 1040-ES listed both Mr. Gennardo's and petitioner's names and social security numbers, and the check listed both of their names on the account. On June 19, 2010, the IRS applied the $20,000 payment to petitioner's and Mr. Gennardo's married filing joint account for 2010.

On January 10, 2011, Mr. Gennardo sent a letter via Federal Express to the attention of Ms. L. Washington at the IRS office in Paramus, New Jersey. The subject of the letter was "Re: Patrick J. Gennardo and Jennifer Zuch" and Mr. Gennardo wrote "Enclosed please find the payments we discussed in December". Included with the letter was a $30,000 bank check payable to the U.S. Treasury dated December 14, 2010, which was drawn from petitioner's and Mr. Gennardo's joint Citibank bank account. On the bank check in the space for "remitter" only Mr. Gennardo' s name was listed. On January 11, 2011, the IRS applied the $30,000 payment

[2] Copies of IRS account transcripts reflect that as of July 23, 2012, petitioner and Mr. Gennardo had outstanding liabilities and penalties for 2007, 2008, and 2009.

to petitioner's and Mr. Gennardo's married filing joint account for 2010.

2. Tax Returns

a. Original Tax Returns

Petitioner and Mr. Gennardo each filed a Federal income tax return electing married filing separate status for 2010.

Petitioner submitted a delinquent 2010 Form 1040, U.S. Individual Income Tax Return, dated September 12, 2012, and filed October 29, 2012.[3] On this return petitioner reported $7,736 in tax due, federal tax withheld of $8,067, and $0 in estimated tax payments.

Mr. Gennardo also submitted a delinquent 2010 Form 1040 on September 12, 2012, which was filed on October 29, 2012. On this return Mr. Gennardo reported $10,000 in estimated tax payments. Mr. Gennardo's return reflected a balance due and he did not remit payment.

At some point after Mr. Gennardo filed his 2010 Form 1040 the IRS applied the $50,000 in estimated payments to his account as a married filing separate taxpayer.[4]

b. Amended Tax Returns

Petitioner filed a 2010 Form 1040X, Amended U.S. Individual Income Tax Return, dated November 14, 2012. Petitioner's power of attorney (POA) Lawrence Brody hand-delivered a copy of her 2010 Form 1040X to IRS Revenue Officer (RO) Robyn Scherzer on Novem-

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[3] Petitioner did not request an extension of time to file her 2010 Federal income tax return.

[4] It is unclear from the record as to exactly when the two payments were applied to Mr. Gennardo's account.

ber 14, 2012. On her amended return petitioner reported additional income of $71,000 from a retirement distribution and claimed an additional $50,000 in estimated tax payments, reporting additional tax due of $27,683 and requesting a refund of $22,649.

Along with petitioner's 2010 Form 1040X, Mr. Brody also hand-delivered to RO Scherzer a copy of a 2010 Form 1040X for Mr. Gennardo, signed and dated November 10, 2012. Mr. Gennardo reported $0 in estimated tax payments on this 2010 Form 1040X.

Respondent did not apply the $50,000 in estimated payments to petitioner's account and assessed additional tax due of $27,682 based on her amended return on February 11, 2013.

Mr. Gennardo submitted another 2010 Form 1040X dated March 13, 2013. Mr. Gennardo reported $0 in estimated tax payments on this amended return, an adjustment from the $10,000 in estimated payments originally reported. Mr. Gennardo attached to this amended return a "statement 1" which asserted his reasons for amending his 2010 return including: (1) "to show $10,000 payment on original tax return not paid" and (2) "there were estimated payments of $50,000 allocated to the spouse Jennifer Zuch".[5] The IRS received Mr. Gennardo's amended return prior to May 2013.

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[5] It does not appear that Mr. Gennardo's 2010 Form 1040X provided to Ms. Scherzer on November 14, 2012 (2012 version), was filed with the IRS. The Form 1040X filed by Mr. Gennardo in 2013 (as filed version) differs in several ways from the 2012 version. Relevant to the case before the Court, in the 2012 version Mr. Gennardo did not list the $10,000 in estimated payments as originally claimed on his 2010 Form 1040 and he did not include a statement 1.

Both versions of Mr. Gennardo's Form 1040X and petitioner's Form 1040X were prepared by the same certified public accountant Steven Moses.

3. Mr. Gennardo' s Offer in Compromise

On September 18, 2012, 6 days after filing his original 2010 Federal income tax return, Mr. Gennardo submitted to the IRS an offer-in-compromise (OIC) relating to his 2010 tax liability. The IRS accepted Mr. Gennardo's OIC on July 17, 2013, and applied the $50,000 in estimated payments to Mr. Gennardo's outstanding 2010 tax liability as part of the agreement.[6]

4. Petitioner's CDP Hearing

On August 31, 2013, the IRS issued to petitioner a Final Notice of Intent to Levy and Notice of Your Right to a Hearing, informing her of the intent to collect the assessed balance of $31,802 for 2010 as well as a late payment penalty of $1,496 and interest. On September 27, 2013, petitioner's POA Frank Agostino timely submitted on petitioner's behalf a Form 12153, Request for a Collection Due Process or Equivalent Hearing, and a cover letter. Petitioner asserted in her Form 12153 and the attached letter that the $50,000 in estimated payments for 2010 should have been applied to her tax due for 2010 and requested abatement of the late payment penalty for reasonable cause. Petitioner attached to the Form 12153 a copy of the IRS account transcript for the 2010

[6] The documents submitted by Mr. Gennardo for the Offer in Compromise were not made part of the record. At the hearing on the motion for summary judgment respondent asserted that Mr. Gennardo's OIC was for "his tax liability for 2010 and other years".

married filing joint showing the $50,000 in estimated payments and her 2010 Form 1040X.

Petitioner's case was assigned to Settlement Officer (SO) Mario Tevis in the Newark, New Jersey Office. SO Tevis and Mr. Brody had a telephone conversation on March 10, 2014, during which Mr. Brody informed SO Tevis that petitioner's husband Mr. Gennardo supportted petitioner's position regarding application of the estimated payments. On March 17, 2014, Mr. Brody emailed to SO Tevis a declaration from Mr. Gennardo signed under penalty of perjury and dated March 12, 2014. Mr. Gennardo asserted in this declaration that the $50,000 in estimated tax payments for 2010 were intended to be joint estimated payments and he directed that these payments be applied to petitioner's unpaid tax.

On July 29, 2014, SO Tevis and Mr. Brody conducted a telephonic collection due process (CDP) hearing. SO Tevis informed Mr. Brody that he believed that the IRS could not credit any of the $50,000 in estimated payments to petitioner's account because it had already been applied to Mr. Gennardo's account, which was subject to an OIC. During this telephone conference SO Thompson also denied petitioner's request for abatement of penalties.

After the telephone conference Mr. Brody sent to SO Thompson a letter dated July 29, 2014, via email, fax, and first class mail. In his letter Mr. Brody argued again that the $50,000 in estimated payments should be credited to petitioner's 2010 account pursuant to her agreement with Mr. Gennardo, and for this reason any penalties for late payment should be abated. Mr. Brody also stated that a penalty for late filing should be

abated due to reasonable cause because petitioner "was under extreme emotional distress due to her husband moving out of the marital home to live with his boyfriend" and petitioner and Mr. Gennardo were "currently in divorce proceedings."

On September 25, 2014, SO Thompson sent a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code, sustaining the Final Notice of Intent to Levy (Notice of Determination).

5. Motion for Summary Judgment

On October 22, 2014, petitioner timely filed a petition commencing this case. Petitioner asserts in her petition that respondent should have allocated the $50,000 in estimated tax payments to her 2010 unpaid tax because of her agreement with Mr. Gennardo and requested a refund of any overpayment. Petitioner also requested abatement of penalties.

On April 29, 2015, respondent filed the Motion for Summary Judgment presently before the Court. Respondent filed the Declaration of Mario C. Tevis in Support of Respondent's Motion for Summary Judgment. On June 25, 2015, petitioner filed a Notice of Objection to Motion for Summary Judgment, a Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment, and a Declaration of Lawrence M. Brody in Support of Notice of Objection to Motion for Summary Judgment. Petitioner's attorney Mr. Brody included with his declaration as Exhibit C a copy of the Declaration of Patrick Gennardo, signed and dated June 24, 2015. On July 14, 2015, petitioner filed a Motion for Leave to File Out of Time Declaration of Jeffrey Dir-

mann in Support for Notice of Objection, which the Court granted.

The Court held a hearing on respondent's Motion at the New York, New York trial session on October 31, 2016.

B. Discussion

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party. Sundstrand Corp., 98 T.C. at 520. Respondent, as the moving party, bears the burden of proving that no genuine dispute or issue exists as to any material fact and that respondent is entitled to judgment as a matter of law. FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. 527, 529 (1985). However, where the moving party properly makes and supports a motion for summary judgment, the taxpayer "may not rest upon the mere allegations or denials of such party's pleading" but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); see also Naftel v. Commissioner, 85 T.C. at 529.

Section 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer liable for taxes who fails to pay those taxes within 10 days after a notice and demand for payment is made. The taxpayer who receives the notice can request a collection due process (CDP) hearing with an appeals officer. Sec. 6330(b). The taxpayer can raise at the hearing "any relevant issue relating to the unpaid tax or proposed levy" including challenges to the appropriateness of the collection action and an offer of a collection alternative. Sec. 6330(c)(2)(A). If a CDP hearing is requested, the hearing is to be conducted by the IRS Office of Appeals, and, at the hearing, the officer conducting the conference must verify that the requirements of any applicable law or administrative procedure have been met. Sec. 6330(b)(1), (c)(1).

This Court has jurisdiction under section 6330 to review the Commissioner's administrative determinations. Sec. 6330(d); see Iannone v. Commissioner, 122 T.C. 287,290 (2004). Where the underlying tax liability is at properly at issue we review the determination de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000). Where the underlying tax liability is not at issue we review the determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 182 (2000). We need not and do not decide which standard to apply in the context of the motion for summary judgment.[7] We conclude at

[7] See Freije v. Commissioner, 125 T.C. 14, 23, 26-27 (2005) (applying abuse of discretion standard where taxpayer in CDP case challenged IRS' failure to credit overpayments). Compare Landry v. Commissioner, 116 T.C. 60, 62 (2001) (applying de novo standard where taxpayer challenged application of overpayment credits, reasoning that "the validity of the underlying tax liability, i.e., the amount unpaid after application of credits to which peti-

this juncture that respondent has not established that no genuine dispute exists as to material facts. We do however make some observations based on the current status of the record.

First, it would appear that the $20,000 estimated payment, accompanied with the Form 1040-ES listing both petitioner's and Mr. Gennardo's names and social security numbers, was a joint estimated tax payment. We do not fully understand the factual or legal basis upon which respondent applied the payment to Mr. Gennardo's tax liabilities which was ultimately credited as part of the OIC.

Second, the status of the $30,000 estimated payment is even less clear. Respondent asserts that the payment was intended to be a separate payment, pointing to the fact that only Mr. Gennardo's name was written on the check. Petitioner asserts that the payment was intended to be a joint payment, pointing to the fact that it was made from the joint checking account she shared with Mr. Gennardo, Mr. Gennardo's declaration that it was intended to be an estimated payment, and Mr. Gennardo's letter to the IRS that accompanied the payment with the subject line "Re: Patrick J. Gennardo and Jennifer Zuch". We do not have further context regarding this letter to Ms. Washington, such as her interactions

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tioner is entitled, [was] properly at issue"), with Kovacevich v. Commissioner, T.C. Memo. 2009-160, 98 T.C.M. (CCH) 1, 4 & n.10 (applying abuse of discretion standard where taxpayer challenged application of tax payments, reasoning that "questions about whether a particular check was properly credited to a particular taxpayer's account for a particular tax year are not challenges to his underlying tax liability"), and Orian v. Commissioner, T.C. Memo. 2010-234, 100 T.C.M. (CCH) 356, 359 (same).

or conversation with Mr. Gennardo. Nor do we know why only Mr. Gennardo' s name was written on the check. It is also not clear from the record as to when petitioner and Mr. Gennardo decided to file their 2010 Form 1040s separately. Thus, it is unclear whether the $30,000 payment was a separate payment or a joint payment.

Third, circumstances surrounding Mr. Gennardo's OIC are not clear. Issues that may be relevant include whether the OIC included petitioner's and Mr. Gennardo's joint tax liabilities for 2007, 2008, and 2009 or any other joint liability tax year? Further, if the OIC involved any joint tax liability year was petitioner involved in the process?

For these reasons we find that respondent has not met his burden of proving that no genuine dispute exists as to this material fact. See FPL Group, Inc. v. Commissioner, 115 T.C. at 559; Bond v. Commissioner, 100 T.C. at 36; Naftel v. Commissioner, 85 T.C. at 529. Thus, we will deny respondent's motion for summary judgment. See Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. at 520.

Upon due consideration and for cause, it is

ORDERED that respondent's Motion For Summary Judgment, filed April 29, 2015, is denied.

(Signed) Peter J. Panuthos
Special Trial Judge

Dated: Washington, D.C.
December 12, 2016

APPENDIX E

Department of the Treasury
Internal Revenue Service
Appeals Office
1 Newark Center
Newark, NJ 07102

JENNIFER ZUCH
[REDACTED]
ENGLEWOOD NJ
07631-1929

Date: [Sep. 25, 2014]

Person to Contact:
M. Tevis
Employee ID Number:
[REDACTED]
Telephone: 973-468-3252
Fax: 855-275-5379

Re:
Collection Due Process Hearing
(Tax Court)

Taxpayer ID number:
[REDACTED]

Tax Period(s) Ended:
12/2010

CERTIFIED MAIL

NOTICE OF DETERMINATION
Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code

Dear Ms. Zuch:

We reviewed the completed or proposed collection actions for the tax period(s) shown above. This letter is your Notice of Determination, as required by law. We attached a summary of our determination below. The attached summary shows, in detail, 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 a 30-day period beginning the day after the date of this letter. To obtain a petition form and the rules for filing a petition, write to:

Clerk, United States Tax Court
400 Second Street NW
Washington, DC 20217

You can also visit the Tax Court website at **www.ustaxcourt.gov.**

The United States Tax Court also has a simplified procedure for an appeal of a collection action if the total unpaid tax (including interest and penalties) for all periods doesn't exceed $50,000. You can obtain information about this simplified procedure by writing to the Tax Court or visiting their website as shown above.

The law limits the time for filing your petition to the 30-day period mentioned above. The courts cannot consider your case if you file late. If you file an appeal in an incorrect court (e.g., United States District Court), you won't be able to refile in the United States Tax Court if the period for filing a petition expired.

If you don't petition the court within the period provided by law, we'll return your case to the originating IRS office for action consistent with the determination summarized below and described on the attached pages. If you have questions, please contact the person at the telephone number shown above.

Summary of Determination

Appeals reviewed both your tax payment transfer request and your request for penalty abatement. Ap-

peals has determined that we cannot transfer any payments made to husband's account to your account. Appeals has also determined that you do not qualify for penalty abatement (reasonable cause).

Therefore, our determination is that the proposed levy action balances the need for efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. Compliance's decision to issue the Final Notice of intent to Levy is being sustained by Appeals

Thank you for your cooperation.

Sincerely,

/s/ DARRYL LEE
Darryl Lee
Appeals Teams Manager

Enclosure:
Attachment

cc: Mr. Brody

Attachment

JENNIFER ZUCH
[REDACTED]

Type of Tax(es)	Tax Period(s)	Date of CDP Notice	Type of hearing	Date used to determine timeliness
1040	201012	08/31/2013	6330	09/27/2013

SUMMARY AND RECOMMENDATION

The taxpayer filed a CDP request in response the issuance of a final notice and demand for payment by Compliance. The notice was issued out on 08/31/2013. A timely CDP request was received by Compliance on 09/27/2013. Appeals has determined to sustain the action (levy) taken by Compliance.

BRIEF BACKGROUND

Appeals issued letter 3855 to you on 11/20/2013. Letter 3855 requested that you provide Appeals with Form 433-A. Letter 3855 also set up for a phone conference to be held on 01/07/2014. You were given 14 days, from the date of Letter 3855 to provide Form 433-A. Form 433-A was provided and a face to face conference was requested in the Newark Appeals office.

On 03/10/2014, S/O Tevis reviewed your case arid spoke with your POA (Mr. Brody). During that conversation, it was determined that a face to face conference was not necessary.

A telephonic conference was held on 07/29/2014 between S/O Tevis and POA Brody. Your request to have the

payment credits moved from your husband's account to your account was denied. Your request for penalty abatement was also denied. It was agreed that you did not want a collection alternative (i.e. installment agreement, OIC) and that a Notice of Determination would be issued.

LEGAL AND ADMINISTRATIVE REVIEW

I, Mario Tevis, verified the requirements of any applicable law or administrative procedure were met. IRS records confirmed the proper issuance of the notice and demand, Notice of Intent to Levy and/or Notice of Federal Tax Lien (NFTL) filing, and notice of a right to a Collection Due Process (CDP) hearing.

An assessment was properly made for each tax and period listed on the CDP notice.

Notice and demand for payment was mailed to your last known address.

There was a balance due when the Notice of Intent to Levy was issued or when the NFTL filing was requested.

I had no prior involvement with respect to the specific tax periods either in Appeals or Compliance.

I reviewed the Collection file, IRS records and information you provided. My review confirmed that the IRS followed all legal and procedural requirements and the actions taken or proposed were appropriate under the circumstances.

ISSUES YOU RAISED

Collection Alternatives Requested

You offered no alternatives to collection.

Challenges to the Liability

You disagree with your liability because you felt that you should be given credit for the tax payments made to your husband's account. You also felt that you should be granted penalty abatement.

Appeals reviewed that you filed an original 1040 and then an amended 1040 for the 12/31/2010 tax year. The original 1040 showed that you were entitled to a refund. The subsequent (amended) return was filed with a tax balance due.

You requested that the payments made on your husband's account be transferred to your account. Appeals is not in a position to move credits from your husband's account to your account. Your request is being denied.

Appeals is also not in a position to grant your penalty abatement request because you have not demonstrated "reasonable cause" for abatement. You claim that you were under duress from your divorce. Appeals does not agree that you should be granted penalty abatement based upon the aforementioned reasoning.

You raised no other issues.

BALANCING ANALYSIS

Appeals reviewed both your tax payment transfer request and your request for penalty abatement. Appeals has determined that we cannot transfer any payments made to husband's account to your account. Appeals has also determined that you do not qualify for penalty abatement (reasonable cause).

Therefore, our determination is that the proposed levy action balances the need for efficient collection of taxes

with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. Compliance's decision to issue the Final Notice of Intent to Levy is being sustained by Appeals.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2244

JENNIFER ZUCH, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

Filed: June 26, 2024

On Appeal from the United States Tax Court
(IRS 1:14-25125)
Tax Court Judge: Honorable Lewis R. Carluzzo

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and CHUNG, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted

for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

/s/ Kent. A. Jordan
Circuit Judge

DATE: June 26, 2024

PDB/cc: All Counsel of Record

APPENDIX G

Department of the Treasury
Internal Revenue Service

ACS SUPPORT—STOP 5050
PO BOX 219236
KANSAS CITY, MO 64121-9236

7161761792843794547 8

Date:
AUG. 31, 2013

Taxpayer Identification Number:
[REDACTED] Y 05

Case Reference Number:

9302972875

Caller ID: 526847

Contact Telephone Number:

TOLL FREE: 1-800-829-7650

BEST TIME TO CALL:

MON - FRI 8:00 AM TO 8:00 PM LOCAL

ASISTENCIA EN ESPANOL 1-800-829-7650

JENNIFER ZUCH
[REDACTED]
ENGELWOOD NJ 07631-1929084

CALL IMMEDIATELY TO PREVENT PROPERTY LOSS
FINAL NOTICE OF INTENT TO LEVY AND NOTICE OF YOUR RIGHT TO A HEARING

WHY WE ARE SENDING YOU THIS LETTER

We've written to you before asking you to contact us about your overdue taxes. You haven't responded or paid the amounts you owe. We encourage you to call us immediately at the telephone number listed above to discuss your options for paying these amounts. If you act promptly, we can resolve this matter without taking and selling your property to collect what you owe.

We are authorized to collect overdue taxes by taking, which is called levying, property or rights to property and selling them if necessary. Property includes bank accounts, wages, real estate commissions, business assets, cars, and other income and assets.

WHAT YOU SHOULD DO

This is your notice as required under Internal Revenue Code section 6320 and 6331, that we intend to levy on your property or your rights to property 30 days after the date of this letter unless you take one of these actions:

- Pay the full amount you owe shown on the back of this letter. When doing so,
  - Please make your check or money order payable to the United States Treasury;
  - Write your social security number and the tax year or employment identification number and the tax period on your payment; and <u>enclose a copy of this letter with your payment</u>.

- Make payment arrangements, such as an installment agreement that allows you to pay off your debt over time.
- Appeal the intended levy on your property by requesting a Collection Due Process hearing within 30 days from the date of this letter.

WHAT TO DO IF YOU DISAGREE

If you've paid already or think we haven't credited a payment to your account, please send us proof of that payment. You may also appeal our intended actions as described above.

Even if you request a hearing, please note that we can still file a Notice of Federal Tax Lien at any time to protect the government's interest. A lien is a public notice that tells your creditors that the government has a right to your current assets and any assets you acquire after we file the lien.

We've enclosed two publications that explain how we collect past due taxes and your collection appeal rights, as required under Internal Revenue Code sections 6330 and 6331. In addition, we've enclosed a form that you can use to request a Collection Due Process hearing.

We look forward to hearing from you immediately, and hope to assist you in fulfilling your responsibility as a taxpayer.

Enclosures: Copy of letter, Form 12153, Publication 594, Publication 1660, Envelope

[REDACTED]

[REDACTED] 03 Automated Collection System

EXHIBIT 16-J

Pay By Date: 09-26-2013

Account Summary JENNIFER ZUCH [redacted]

Type of Tax	Period Ending	Assessed Balance	Accrued Interest	Late Payment Penalty	Total
.040	12-31-2010	$ 31,801.50	$ 2,798.10	$ 1,495.87	$ 36,095.47

Total Amount Due $ 36,095.47

Type of Tax	Period Ending	Name of Return

Department of the Treasury
Internal Revenue Service

Date:
Aug. 31, 2013

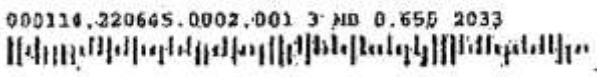
ACS SUPPORT—STOP 5050
PO BOX 219236
KANSAS CITY, MO 64121-9236

[REDACTED]

7161 7617 9284 3794 5478

Contact Telephone Number:
TOLL FREE: 1-800-829-7650
BEST TIME TO CALL:
MON - FRI 8:00 AM TO 8:00 PM
LOCAL
ASISTENCIA EN ESPANOL
1-800-829-7650

000114.220665.0002.001 3 MB 0.655 2033



JENNIFER ZUCH
[REDACTED]
ENGELWOOD NJ 07631-1929084

Return this cover sheet in the envelope provided so our address appears in the window.

FOLD HERE and return with your reply FOLD HERE and return with your reply

---

Automated Collections System
LT11

ACS Case Reference Number:
9302972875

MFT/TXPD: 30 / 201012

Amount Enclosed: $_____

Internal Revenue Service
ACS SUPPORT—STOP 5050
PO BOX 219236
KANSAS CITY, MO 64121-9236

(Certified Letter—Coversheet)(6-2013)

APPENDIX H

1. 26 U.S.C. 6330 provides:

Notice and opportunity for hearing before levy

(a) Requirement of notice before levy

(1) In general

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

(2) Time and method for notice

The notice required under paragraph (1) shall be—

(A) given in person;

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

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice

The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth—

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing

(1) In general

If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Independent Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing

In the case of any hearing conducted under this section—

(1) Requirement of investigation

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

(2) Issues at hearing

(A) In general

The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

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

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

(B) Underlying liability

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

(3) Basis for the determination

The determination by an appeals officer under this subsection shall take into consideration—

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

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

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

(4) Certain issues precluded

An issue may not be raised at the hearing if—

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

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

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

(C) a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63.

This paragraph shall not apply to any issue with respect to which subsection (d)(3)(B) applies.

(d) Proceeding after hearing

(1) Petition for review by Tax Court

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

(2) Suspension of running of period for filing petition in title 11 cases

In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1) with respect to a determination under this section, the running of the period prescribed by such subsection for filing such a petition with respect to such determination shall be suspended for the period during which the person is so prohibited from filing such a petition, and for 30 days thereafter.

(3) Jurisdiction retained at IRS Independent Office of Appeals

The Internal Revenue Service Independent Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

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

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

(e) Suspension of collections and statute of limitations

(1) In general

Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin

any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal

Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) Exceptions

If—

(1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy,

(2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund,

(3) the Secretary has served a disqualified employment tax levy, or

(4) the Secretary has served a Federal contractor levy,

this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

(g) Frivolous requests for hearing, etc.

Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets

the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review.

(h) Definitions related to exceptions

For purposes of subsection (f)—

(1) Disqualified employment tax levy

A disqualified employment tax levy is any levy in connection with the collection of employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a hearing under this section with respect to unpaid employment taxes arising in the most recent 2-year period before the beginning of the taxable period with respect to which the levy is served. For purposes of the preceding sentence, the term "employment taxes" means any taxes under chapter 21, 22, 23, or 24.

(2) Federal contractor levy

A Federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor.

2. 26 U.S.C. 6402(a) provides:

Authority to make credits or refunds

(a) General rule

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal

revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f), refund any balance to such person.