

Tax Court Jurisdiction and Code Sec. 6330 Challenges: A Need for Clarification

By *Brian Isaacson and Karen Phu*

Brian Isaacson and Karen Phu examine when a taxpayer can appeal a Code Sec. 6330 collection action in the Tax Court.

Introduction

An IRS notice of intent to levy is subject to statutory requirements as described in Code Sec. 6330 and, in some cases, judicial review by the Tax Court, as granted by Code Sec. 6330. However, precisely when the court has jurisdiction to review a Code Sec. 6330 collection actions has been the subject of much judicial debate and dissent. Because government taking of private property is a harsh and severe remedy, Congress has specified the rights that a taxpayer must be afforded before such a levy can take effect.¹ First, a taxpayer must receive a notice of intent to levy from the IRS.² Second, the taxpayer must have the opportunity to appeal to their underlying tax liability in an administrative hearing with the IRS Appeals Office.³ If a taxpayer has been deprived of either these rights, the taxpayer can bring a case in the Tax Court to appeal the collection action and dispute their underlying tax liability.⁴

The Tax Court has struggled to determine when they have jurisdiction to review in Code Sec. 6330 collection actions, and more specifically, when they have jurisdiction to determine a taxpayer's "underlying tax liability." In two extensive Tax Court opinions, *Montgomery* and *Greene-Thapedi*,⁵ the Tax Court has debated this issue at great length. While it appeared the court had decided to grant broad jurisdiction to review Code Sec. 6330 collection actions in

Montgomery, the court came back two years later and appeared to greatly restrict the holding of the *Montgomery* decision in *Greene-Thapedi*. In spite of extensive discussion by the court in these two cases, the issue of when the Tax Court has jurisdiction to review Code Sec. 6330 collection actions remains ripe for appeal. In addition, dozens of cases in the Tax Court have inconsistently applied the rule first established in *Montgomery*. However, the most resounding message of the *Montgomery* and *Greene-Thapedi* cases, and what these two opinions have in common, is a call to Congress to clarify when a taxpayer has a basis to appeal Code Sec. 6330 collection actions in the Tax Court.

Montgomery: An Expansion of the Tax Court's Authority

A divided court in *Montgomery* held that "Code Sec. 6330(c)(2)(B) permits petitioners to challenge the existence or amount of the tax liability reported on their original tax return because they have not received a notice of deficiency for 2000 and they have not otherwise had an opportunity to dispute their tax liability in question."⁶ Of the 12 judges who signed on to the majority opinion, eight either wrote or signed on to separate concurring opinions, while three others dissented.⁷

In *Montgomery*, the taxpayers filed a tax return for the year 2000, which they were unable to pay.⁸ In 2002, upon receipt of a "Notice of Levy" and "Notice of Your Right to a Hearing" from the Commissioner with regard to their unpaid taxes for 2000, the taxpayers asserted to the Appeals Office that they intended

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to file an amended return showing that they were actually entitled to a refund.⁹ About two months after the taxpayer made this assertion,¹⁰ before any such amendment was filed, the Appeals Office issued the taxpayers a “Notice of Determination Concerning Collection Action(s) Under §6230 and/or §6330.”¹¹ Soon after, the taxpayers filed an amended return reflecting that they were due a refund, and subsequently filed a “Petition for Lien or Levy Action Under §6320 and/or §6330” in order to challenge the amount of their underlying tax liability.¹² The IRS responded that the taxpayers were barred from challenging the existence of the amount of their underlying tax liability because the tax liability in question was “self-assessed” by the taxpayers pursuant to Code Sec. 6201(a)(1).¹³ The taxpayer filed suit in the Tax Court to appeal the denial of their Code Sec. 6330 hearing to challenge their underlying tax liability.

The taxpayers argued that the IRS failed to follow the minimally mandated procedures required under Code Sec. 6330 because the taxpayers never received a meaningful opportunity to dispute their underlying tax liability.¹⁴ The taxpayers believed that since they were deprived of this opportunity, the tax court had jurisdiction to review their underlying tax liability.¹⁵ This argument relied heavily upon Senate hearing transcripts, which reflected Congress’s intention behind Code Sec. 6330 to restore the IRS’s mission of “collecting the proper amount of tax revenue at the least amount of cost, serve the public by continually improving the quality of our products and services, and performing in a manner warranting the highest degree of public confidence in our integrity, efficiency, and fairness.”¹⁶

In response, **the IRS argued that Code Sec. 6330 only Tax Court to review a taxpayer’s underlying tax liability when the tax liability was asserted by the commissioner** <<AUTHOR: PLEASE CLARIFY THIS SENTENCE>> (and not when the amount is assessed by the taxpayers themselves), stating that “[i]t is nonsensical to permit taxpayers whose tax liabilities are self-determined to contest under Code Sec. 6330 the liabilities they computed, voluntarily reported and declared to be correct under penalty of perjury.”¹⁷ The IRS further claimed that Code Sec. 6330 should be construed in favor of the IRS because it constituted a waiver of sovereign immunity.¹⁸ The Tax Court rejected both of these arguments, responding to the notion that the Tax Court did not have jurisdiction to review the tax liability in this case because it was assessed by the tax-payer by stating that:

§6330(c)(2)(B) extends the substantive and procedural protections of §6320 and §6330 to taxpayers who may have erred (in the Government’s favor) in preparing and filing their tax returns. Given the complexity of the Federal income tax laws, such taxpayer errors may well be common. We conclude that §6330(c)(2)(B) is fairly read as providing a remedy to such taxpayers.¹⁹

The Tax Court also rejected the IRS’s claim that Code Sec. 6330 should be construed in favor of the government, explaining that, “[c]onsidering the plain language of the statute, we find respondent’s reliance on principles of sovereign immunity equally unavailing.”²⁰

The majority of the Tax Court ultimately sided with the taxpayer, and found that Respondent’s assertion that the taxpayer was precluded from bringing a Code Sec. 6330 challenge to their underlying tax liability when that liability is self-assessed to be too limiting.²¹ The court explained that “if Congress had intended to preclude taxpayers from challenging in a collection review proceeding taxes that were assessed pursuant to Code Sec. 6201(a)(1), the statute would have been drafted to clearly so provide.”²² The court further explained that the plain language of Code Sec. 6330 actually provides taxpayers with a much broader opportunity for remedy in the Tax Court than the Respondent’s interpretation of the statute.²³ The reasoning behind the court’s decision was based on the Congressional intent behind the statute. As the court stated:

Those sections were enacted to provide taxpayers, who have been notified that the Commissioner has filed a lien or intends to collect unpaid taxes by levy, with a final opportunity to raise a spousal defense, offer an alternative means of collection, and/or challenges the appropriateness of the proposed collection action. Moreover, as pertinent herein, Congress provided taxpayers who are confronted with a lien or proposed levy, but who have not had an opportunity to challenge the existence or amount of tax liability in question, with the opportunity to do so. In view of the statutory scheme as a whole, we think the substantive and procedural protections contained in §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.²⁴

In *Montgomery*, the court found that Congress enacted Code Sec. 6330 with the intention to collect the *cor-*

rect amount of tax from taxpayers, granting taxpayers a broader opportunity to seek judicial review in the Tax Court to determine their underlying tax liabilities when the IRS has commenced a lien or levy proceeding against them to collect unpaid taxes, when notice or opportunity to dispute their tax liability has not been proper. The majority's opinion in this case expanded the Tax Court's jurisdiction in order to accomplish Congress's ultimate intention behind Code Sec. 6330 of accuracy in tax collection.

Other Perspectives on *Montgomery*

Several judges wrote concurrences to express their varying reasons for supporting the holding that petitioners can challenge their underlying tax liability when they have not received a notice of deficiency or otherwise have an opportunity to dispute their tax liability. Most interesting among these concurrences are Judge Laro and Judge Gale's opinions, particularly in light of the *Greene-Thapedi* case decided later and discussed below. Judge Laro wrote separately to emphasize points underlying the majority's opinion. As he explains, behind Congress's intent to collect the correct amount of taxes, as the majority found, is ultimately the goal to "increase fairness to taxpayers" by allowing measures to ensure that taxpayers are not wrongfully deprived of their property.²⁵ Judge Laro argues that taxpayers should be granted the opportunity to dispute their entire underlying tax liability in Code Sec. 6330 cases brought to the Tax Court because this corresponds with Congress's intent to ensure that taxpayer are treated fairly. In addition, Judge Laro also highlights that "Congress obviously knew how to use the word 'deficiency' and presumably would have used that word in relevant term had it intended the reading advocated by respondent."²⁶ This suggests that if Congress had intended to limit the Tax Court's jurisdiction, they could have and would have done so with adding some additional language.

Judge Gale's concurrence also offers insight into the Congressional intent behind Code Sec. 6330. His opinion emphasized that the legislative history

shows that Congress did not want to limit judicial review of self-assessed tax liability Code Sec. 6330 challenges.²⁷ In addition, Judge Gale suggests that the lack limiting language in the statutes can be interpreted as a grant of jurisdiction in these matters to the Tax Court.²⁸ Judge Wells also highlighted in his concurrence that petitioners may challenge "the entire amount of tax, penalties, and interest."²⁹ All of

these opinions, including the majority's opinion, appear to support a reading of Code Sec. 6330 which grants the Tax Court broader authority to review taxpayers' underlying tax liability.³⁰

Several judges offered more limiting readings of Code Sec. 6330. Judge Goeke concurred that the Tax Court was limited to reviewing a taxpayer's underlying tax liability only insofar as it is related to the proposed collection action and that the Tax Court does not have the authority to issue a refund in the case where a taxpayer has shown that they overpaid their taxes.³¹ Judges Chiechi, Gerber and Halpern offer even more restrictive views on the court's authority in their dissenting opinions. Judge Chiechi stated in her concurring in part and dissenting in part opinion that the taxpayer should only be allowed to challenge their underlying tax liability as specified in the final notice (of the IRS's intent to levy), based on administrative regulations on the topic.³² Judge Gerber went further to opine that Code Sec. 6330 limited the jurisdiction of the Tax Court to hear challenges to a taxpayer's underlying tax liability when this liability is determined by the IRS—not when the taxpayer self-assess their liability.³³ While Judge Gerber does believe that Congress wanted to give taxpayers certain rights when enacting Code Sec. 6330 where the IRS initiates a collection proceeding against the taxpayer, he believes that Congress's intent was only to guarantee these rights when the IRS has proposed the changes to the taxpayer's liability, leading to deficiency.³⁴ When a taxpayer determines his own tax liability and is subsequently deficient in paying that amount, Judge Gerber's opinion suggests that he ought to not be able to seek review in Tax Court.³⁵ The most narrow interpretation of Code Sec. 6330 is offered in Judge Halpern's lengthy dissenting opinion.³⁶ Judge Halpern's review of legislative history demonstrates his belief that Congress intended

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to provide taxpayers remedy to Code Sec. 6330 actions in the Tax Court only when the tax liability is determined by the IRS.³⁷ His reasoning, however, is different from Judge Gerber's. Instead, Judge Halpern believes that Code Sec. 6330 was created with the intent of granting the Tax Court jurisdiction only in the case where the IRS assess a taxpayer's liability, where the taxpayer is deprived of an opportunity to appeal *because* they did not receive a notice of deficiency, and that tax has not been paid.³⁸ These dissenting opinions propose a much more restrictive interpretation of Code Sec. 6330 than the majority's, and these positions appear to become more persuasive when the court re-examines the issue in two years later in *Greene-Thapedi*.

***Greene-Thapedi*: A Shift in the Tax Court's Opinion**

The Tax Court put a cap to *Montgomery*'s expansion to their Code Sec. 6330 jurisdiction in the *Greene-Thapedi* case, limiting taxpayer's opportunity to seek a judicial remedy when a refund claim arises out of a Code Sec. 6330 action.³⁹ In *Greene-Thapedi*, the taxpayer did not receive notice of a 1997 IRS assessed a deficiency against her 1992 tax liability.⁴⁰ Upon receipt of a notice of intent to levy, petitioner requested a Collection Due Process Hearing. After a series of correspondence and telephone calls, the IRS Appeals Office sustained the levy against the taxpayer. The taxpayer filed suit in the Tax Court for a Code Sec. 6330 review of this collection action because she felt that she was denied a meaningful hearing as required by Code Sec. 6330, and petitioned to dispute her tax liability.⁴¹ In a pretrial motion, the Tax Court determined that the taxpayer had received a meaningful opportunity for a hearing.⁴² However, in the process of litigation, it was revealed that in assessing the taxpayer's overpayment of her 1999 tax liability was used to offset her 1992 deficiency, thus resulting in full payment of her 1992 liability and thus essentially nullifying the levy upon which the taxpayer's suit was initially predicated.⁴³ The taxpayer filed a refund suit for her 1999 returns in the District Court, but the District Court stayed the proceedings until the Tax Court resolved the question of the taxpayer's 1992 liability.⁴⁴ The taxpayer then filed an amended petition to her case in the Tax Court, challenging her underlying tax liability for the 1992 deficiency.⁴⁵ In the end, the Tax Court held that it:

lack[s] the jurisdiction to determine the taxpayer's 1992 overpayment or to offer a refund or credit of her 1992 taxes, and because the proposed collection action for 1992 is now moot, no factual issue remains which would affect the disposition of the case before us. For us to undertake to resolve issues that would not affect the disposition of this case would, at best, amount to rendering an advisory opinion. This we decline to do.⁴⁶

Because the District Court deferred to the Tax Court to determine the taxpayer's underlying tax liability for 1992, and because Tax Court found that they did not have the jurisdiction to do so since the disputed outstanding liability had been collected from the taxpayer's overpayment in 1999, the taxpayer is left essentially with no remedy in this situation.

The court's reasoning in the *Greene-Thapedi* case for limiting their jurisdiction seems to contrast the policy reasons established in *Montgomery*. The court in *Greene-Thapedi* begins their discussion by stating that:

The tax court is a court of limited jurisdiction; we may exercise jurisdiction only to the extent expressly authorized by Congress. Our jurisdiction in this case is predicated upon §6330(d)(1)(A), which gives the Tax Court jurisdiction 'with respect to such matter' as is covered by the final determination in a requested hearing before the Appeals Office. 'Thus, our jurisdiction is defined by the scope of the determination' that the Appeals officer is required to make.⁴⁷

This tone is remarkably different from where the court left off in their holding in *Montgomery*, which stated:

In view of the statutory scheme as a whole, we think the substantive and procedural protections contained in §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.⁴⁸

Whereas in *Montgomery*, where the majority determined that the legislative intent authorized the Tax Court to determine a taxpayer's underlying tax liability in Code Sec. 6330 proceedings, extending the court's jurisdiction to take all applicable administrative procedures in order to accomplish that underlying goal, the Tax Court in *Greene-Thapedi*

limits that authority when a taxpayer's original Code Sec. 6330 claim becomes moot.⁴⁹ Ultimately, the court returns to legislative intent to justify this limitation on their jurisdiction, relying heavily on a lack of an explicit grant of such authority by Congress, though no such explicit grant was deemed necessary in *Montgomery*. The majority stated that:

In sum, given that explicit statutory authority was required before this Court acquired jurisdiction to determine overpayments in deficiency cases, and given that additional explicit statutory authority was required before this Court acquired, decades later, jurisdiction to enforce such an overpayment, and given that Congress later clarified legislatively that this overpayment jurisdiction did not extend to reviewing credits under §6402 (such as the credit of petitioner's 1999 overpayment against her 1992 tax liability), we do not believe we should assume, without explicit statutory authority, jurisdiction either to determine an overpayment or to order a refund or credit of taxes paid in a §6330 collection proceeding.⁵⁰

Because Code Sec. 6330 did not explicitly authorize the Tax Court authority in this type of case, and because the legislative history does not clearly indicate an intention from congress to grant the Tax Court authority in this type of case, the court found that they lacked the jurisdiction to determine the taxpayer's underlying tax liability when dispute is about an overpayment or to get a refund or credit of taxes issued.⁵¹

Confusion, Problems and Inconsistencies Created by *Greene-Thapedi*

In direct contrast to their concurring opinions in *Montgomery*, Judges Laro and Gale signed onto this majority opinion in *Greene-Thapedi*. Judge Laro had previously written a concurring opinion in *Montgomery* to emphasize the lack of limiting language in Code Sec. 6330 suggests that the Tax Court's jurisdiction ought not to be foreclosed.⁵² In the instant case, Judge Laro now sides with the majority opinion, whose reasoning seems inconsistent with Judge Laro's prior opinion.

Judge Gale had previously stated in a discussion of the legislative intent behind Code Sec. 6330 in *Montgomery* that "[t]hese aspects of the legislative

history, rather than offering any support for respondent's position, give rise to a negative inference concerning Congress's intention to foreclose review of self-assessed liabilities in Code Sec. 6330."⁵³ Judge Gale perceived that the lack of discussion of limiting the Tax Court's jurisdiction to review self-assessed tax liabilities in the legislative history and the statute itself gave rise to an inference *against* limiting their jurisdiction. In other words, the fact that the jurisdiction of the Tax Court was never implicitly or explicitly limited leaves the door open for the tax court to read the jurisdictional grant of Code Sec. 6330 more broadly. This interpretation conflicts with the majority opinion in *Greene-Thapedi* that Judge Gale signed onto, which seems suggests that an explicit grant of jurisdiction is required before the Tax Court may review a case, and that the lack of discussion in the legislative history and the statute itself gives rise to an inference *for* limiting the Tax Court's jurisdiction.⁵⁴ The conflicting opinions between Judge Laro and Judge Gale's positions in *Montgomery* (which were also signed onto by a number of other judges⁵⁵) and their positions in *Greene-Thapedi* suggest that there is confusion within the Tax Court itself on how to properly apply Code Sec. 6330.

The problem created by *Greene-Thapedi* is highlighted by Judge Colvin's concurring opinion in the case which points out the inherent unfairness to the taxpayer in limiting the Tax Court's jurisdiction to review certain Code Sec. 6330 cases:

The majority holds that petitioner properly invoked the Court's jurisdiction under §6330 by filing a timely petition challenging respondent's notice of determination regarding the proposed collection of her tax liability for 1992. The majority also holds that action was rendered moot because petitioner overpaid her Federal income tax for 1999, and the Commissioner offset that overpayment by the amount of her unpaid 1992 tax liability.

Typically, in these situations, a taxpayer's only remedy may be to fully pay the tax, file a refund claim, and if unsuccessful, institute a tax refund suit in the Federal District Court or the Court of Federal Claims. As a result, taxpayer protections provided in §6320 and §6330, that is, the right to administrative and judicial review of the Commissioner's collection actions, can quickly evaporate simply because the taxpayer overpaid his or her taxes for another year.

The combination of the Commissioner's authority to offset an overpayment and the mootness doctrine may cause taxpayer frustration and waste judicial resources. The dismissal of a proceeding brought in this court under §6320 or §6330 due to the offset of an overpayment may convince taxpayers that their efforts during the administrative and judicial process were wasted. Taxpayers may draw little solace from the fact that they can reinstate their challenge to the Commissioner's collection action by filing a refund suit in another court.⁵⁶

A seemingly absurd result can occur in this set of circumstances, requiring taxpayers to seek remedy from a single tax dispute by filing two different suits in two different forums, and in some instances still be left without remedy. This result seems not only to be unfair to the taxpayer, but also to be an inefficient use of judicial resources, and seems unlikely to be the result that Congress intended when they enacted Code Sec. 6330.

Judge Vasquez's lengthy dissenting opinion offers a very poignant criticism of the majority's holding in the *Greene-Thapedi* case, and the illogical consequence that their opinion can cause:

I do not believe that the Commissioner can unilaterally deprive the Court of jurisdiction in §6330 cases by merely stating that he no longer intends to proceed with collection. The congressional intent behind the enactment of §6330 is frustrated if the Commissioner can unilaterally deprive the Tax Court of jurisdiction after directing the taxpayer to the Tax Court by issuing the notice of determination.⁵⁷

Judge Vasquez disagreed with the holding of the majority, instead believing that the Tax Court's jurisdiction to decide overpayment does exist in Code Sec. 6330 cases. To substantiate this belief, Judge Vasquez relies upon the history of the Tax Court and on legislative history.⁵⁸ In contrast the history of the Tax Court provided by the Majority, Judge Vasquez's dissent offers a history of the Tax Court which shows that its predecessor, the Board of Tax Appeals, had routinely held that they had jurisdiction to hear cases involving overpayment.⁵⁹ The dissent also explains that the legislative history suggests that the Tax Court does have jurisdiction in this case, making an argument

similar to the one made by the majority in *Montgomery*.⁶⁰ Judge Vasquez explains that:

... the legislative history does not provide any specific expression of Congressional intent to bar taxpayers, such as petitioner, from raising overpayment claim [...] Without a clear jurisdictional prohibition or inability, it would be most unjust to prohibit taxpayers from claiming an overpayment of tax in this forum and require them to seek it in another.

Instead of finding a limit to jurisdiction of the Tax Court in Code Sec. 6330 challenges, Judge Vasquez interprets Code Sec. 6330 to inherently grant the Tax Court jurisdiction in cases like *Greene-Thapedi*, where an overpayment is raised in an issue as a part of dispute about the taxpayer's underlying tax liability:

The §6330 determination includes the issue of an overpayment if it is raised as a relevant issue or if there is a challenge to the underlying tax liability. §6330 (c)(2)(A) and (B), (3). Accordingly, I believe we have jurisdiction to enter a decision that petitioner had an overpayment in tax for the year at issue. §6330(d)

It would be illogical to conclude that the Commissioner has collected too much money, but we could not enter a decision that the taxpayer has overpaid his/her tax. The majority's interpretation of the statute conflicts with the remedial purpose of §6330.⁶¹

When a taxpayer brings a Code Sec. 6330 challenge to their underlying tax liability, the Tax Court may determine that the tax liability of a taxpayer is actually less than the amount attempting to be collected upon by the IRS. In instances like in the *Greene-Thapedi* case, where the Commissioner managed collected such amounts from the taxpayer after Code Sec. 6330 challenge was initiated, Judge Vasquez believes that the Tax Court has the authority to determine in such circumstances that the IRS has collected an overpayment of taxes from the taxpayer, justifying a refund.⁶² The view advanced by Judge Vasquez in his dissent appears to offer taxpayers a more equitable remedy than the view advanced by the majority, and better upholds the precedent established by the Majority.

More Cases, More Inconsistencies

Narrowing the Jurisdiction of the Tax Court in Code Sec. 6330 Challenges

Taxpayers are generally barred from Code Sec. 6330 challenges in the Tax Court if they have received notice of their deficiency prior to levy proceedings and if they have already had an opportunity to dispute their underlying tax liability. Some courts have read this to disallow Code Sec. 6330 challenges in a very broad range of cases.⁶³ In addition to taxpayers being barred from challenging their tax liability after being given the opportunity to dispute their claims directly with the IRS Appeals Office, having had the opportunity to file suit for a refund in United States District Court or the United States Court of Federal Claims may also bar challenges.⁶⁴ The Tax Court has also held that failing to object to the IRS's proof of claim in a bankruptcy proceeding also bars taxpayers from bringing a Code Sec. 6330(c)(2)(B) challenge to their underlying tax liability⁶⁵:

When the IRS submits a proof of claim for unpaid federal tax liabilities in a taxpayer's bankruptcy proceeding, the taxpayer and trustee may object to the IRS's proof of claim [...] We think that, when the procedure described provides the taxpayer the opportunity to object to the IRS's proof of claim for an unpaid federal tax liability, the taxpayer is afforded an opportunity to dispute the tax liability as contemplated by Congress in Code Sec. 6330(c)(2)(B).⁶⁶

Thus, so long as taxpayer has some sort of opportunity to dispute their underlying tax liability, whether it be with the IRS Appeals Office, the United States District Court, the United States Court of Federal Claims or Bankruptcy Court, even if the proceeding is not for the purposes of determining a taxpayer's federal tax liability, a taxpayer may be barred from seeking remedy in the Tax Court to challenges to their tax liability.

Furthermore, a taxpayer may be barred from raising a Code Sec. 6330(c)(2)(B) challenge to their tax liability if they receive a notice of deficiency and file a petition in response, but neglect to challenge their tax liability in the petition.⁶⁷ If a petition is filed in response to a notice of deficiency, the petition must

challenge the underlying tax liability at that instance if the petitioner intends to challenge it at all.⁶⁸

The Tax Court in *Banis*⁶⁹ determined that the application of *Montgomery* was limited only to cases where the accuracy of the taxpayer's federal tax liability was at dispute. In *Banis*, like in *Montgomery*, the taxpayers did not have an opportunity to dispute their tax liability before they received a notice of levy from the IRS.⁷⁰ "Unlike the taxpayer in *Montgomery*, however, petitioner is not disputing the accuracy of his self-determined tax liability.⁷¹ Rather, he alleges that the liability has been paid by the trustee."⁷² Instead of disputing the accuracy of their self-reported tax return, the taxpayer in *Banis* tried to raise challenge to the levy in the Tax Court by showing that their trustee in bankruptcy was responsible for the payment, not the taxpayers personally. Thus, the court held that the taxpayer in *Banis* was not entitled to challenge his tax liability under Code Sec. 6330(c)(2)(B), limiting the scope of *Montgomery* only to disputes where the accuracy of a taxpayer's tax return is at issue.

Boarding the Jurisdiction of the Tax Court in Code Sec. 6330 Challenges

Though some opinions issued by the Tax Court have narrowed the application of the basic holding in *Montgomery*, many have affirmed its basic holding that taxpayers have a right to dispute their underlying tax liability when they have been received a notice of deficiency or other opportunity to dispute tax liability.⁷³ In a few instances,⁷⁴ the court has construed Code Sec. 6330 more broadly than in *Montgomery*.

In *Perkins*,⁷⁵ for example, the court broadened the application of *Montgomery* by allowing taxpayers to make a Code Sec. 6330(c)(2)(B) even when they had made an Appeals Request to the Appeals Office and had a Collection Due Process Hearing. In *Perkins*, the IRS sent the taxpayer a letter notifying them that significant portion of their claimed losses were disallowed. The taxpayer appealed this disallowance with an Appeals Request, to which the IRS responded with a Notice of Intent to Levy (without having sent a Notice of Deficiency).⁷⁶ Taxpayers filed for a Request for a Collection Due Process Hearing to dispute their underlying tax liability and the levy.⁷⁷ The IRS treated this request as a claim for abatement and denied it, advising taxpayers that they could pursue the matter further by filing suit in the U.S. District Court or the U.S. Court of Federal Claims.⁷⁸ Subsequent to the Taxpayer's Appeals request was denied and request for Hearing, the IRS offered petitioners an opportunity

to schedule a Code Sec. 6330 hearing, which the taxpayers attended.⁷⁹ However, during this hearing, the taxpayer was not allowed to challenge the underlying tax liability, and the IRS decided to proceed with the proposed levy.⁸⁰

The court in *Perkins* held that the taxpayer did not have an opportunity to dispute his tax liability, and that they ought to be given the chance to make a Code Sec. 6330 challenge.⁸¹ Because the taxpayer's Appeals Request only concerned the tax liability arising from the IRS's disallowance of petitioner's claimed losses, the court found that this was not an opportunity for the taxpayer to dispute his underlying tax liability.⁸² In addition, because the taxpayer was denied a Collection Due Process hearing and not allowed to dispute his underlying tax liability in his Code Sec. 6330 hearing, the court found that he had not had any opportunity to dispute his underlying tax liability.⁸³ This holding is in direct contrast to *Farley*, *Kendricks* and *Whitinger*, according to which it would appear that taxpayer in this case has already had multiple opportunities to dispute their underlying tax liability and thus would have been denied a challenge in the Tax Court.

Conclusion

What Really Is the Congressional Intent Behind Code Sec. 6330?

In a statement by Jennifer Long, an IRS collection agent invited to testify in a Senate hearing regarding conditions existing within the agency as found in *Practices and Procedures of the Internal Revenue Service: Hearings Before the Committee on Finance Unites States Senate*,⁸⁴ Ms. Long expressed concern that the focus of the IRS had changed from one of collecting the proper amount of tax to "increasing the office collection or division collection statistics."⁸⁵ One means by which the IRS accomplished this, according to her testimony, was by "not permitting valid changes in a tax return that would favor the taxpayer."⁸⁶ Page 122 of the Senate hearing transcript contains the following statement by Ms. Long:

Until Congress grants clear statutory authority granting the Tax Court jurisdiction to address the problems created in *Greene-Thapedi*, some taxpayers trying to contest their underlying tax liability may be left completely without remedy, ...

The IRS mission statement of the IRS Examination Division states, "Examination supports the mission of the service by encouraging the correct reporting by taxpayers of income." Yet, in reality, when valid changes could be made by the IRS on a taxpayer's return that favored a taxpayer, we are instructed not to make those changes.

The Senators conducting the hearings expressed views that are contrary to the position taken by the Commissioner in the instant case. In his opening statement, Senator William V. Roth, chairman of the Senate Finance Committee charged with IRS oversight, stated

that the purpose of the Senate hearing on IRS restructuring and reform, was to "help the IRS get back to its mission statement."⁸⁷ Page 4 of Senator Roth's opening statement provides as follows:

What we seek to do is help the IRS get back to its mission statement. That statement reads, "the purposes of the IRS is to collect the *proper amount of tax revenue* at the least cost, serve the public by continually improving the quality of our products and services, and performing in a manner warranting the highest degree of public confidence in our integrity, efficiency, and fairness." [Emphasis added].

Throughout the Senate hearing transcript on IRS Restructuring and Reform, concern was voiced by Congressmen, practitioners, IRS personnel and taxpayers that the goal of the IRS had strayed from collecting the "proper amount of tax" owed by the taxpayer. Nowhere in the Senate hearing transcript is there any language which would limit the definition of the "proper amount of tax" to amounts asserted by the IRS which exceed the tax reported by the taxpayer on their original return. On page 232 of the Senate hearing transcript, Senator Bryan of the Senate Finance Committee states as follows:

We need to change the structure so that, indeed, the perception as well as the reality is that people can get a fair break if they have an

honest difference of opinion with the revenue agent about whether or not *additional revenue is owed* based upon an interpretation of the Code or an honest dispute between the revenue agent and the taxpayer.

Senator Moseley-Braun commented:

I believe that the Chairman and the members of this committee are trying to find common ground between a fair and honest effort to support the service on the one hand so that it can collect taxes where due, but then to make certain that the controls and the checks and the balances are there so that the service does not overbear, does not mistreat, and does not treat unfairly with any, any taxpayer of any sort.⁸⁸

Thus both the legislative history and the subsequent case law support the court's opinion in *Montgomery* regarding the propriety of the IRS (and now the court) giving consideration to a taxpayer's actual underlying tax liability.

A Call to Action for Congress to Define Code Sec. 6330 Jurisdiction in the Tax Court

The Tax Court first broadened the jurisdiction granted to them by Code Sec. 6330 to determine a taxpayer's underlying tax liability in *Montgomery*, then came back to limit their jurisdiction in instances where there is a refund in dispute in *Greene-Thapedi*, leaving some taxpayers without remedy. In subsequent cases, the court applied Code Sec. 6330 with varying breadth, leaving the interpretation of Code Sec. 6330 inconsistent and unpredictable. The confusion in the Tax Court about how to interpret Code Sec. 6330 in the Tax Court between shows the necessity of Congressional clarification in regards to when the Tax Court does or does not have jurisdiction to hear Code Sec. 6330 challenges. On one hand, in *Montgomery*, the majority states that "we are not aware of any specific expression of congressional intent in the legislative history that would bar persons, such as petitioners, from raising a valid challenge to the existence or amount of tax previously reported due on a tax return."⁸⁹ This lack of explicit limitation was used to grant jurisdiction in *Montgomery*. It seems that by the time the Tax Court heard the *Greene-Thapedi* case, they had realized that this interpretation could seem to allow the Tax Court to assume limitless jurisdiction,

and then came back in that case to state that "Congress believed that absent this legislative change [to explicitly grant authority,] the Tax Court lacked authority to order the refund of any overpayment."⁹⁰

The Tax Court seems to recognize the inconsistency of their opinion, and the inherent unfairness to the taxpayer in their *Greene-Thapedi* decision in their lengthy and detailed explanation of why their hands are tied from determining the taxpayer's underlying tax liability.⁹¹ However, they ultimately conclude that "we do not believe we should assume, without explicit statutory authority, jurisdiction either to determine an overpayment or to refund a credit of taxes paid in a Code Sec. 6330 collection proceeding."⁹² This statement is a call to Congress to grant the Tax Court authority to rectify the inherent injustice of their holding in *Greene-Thapedi*. Until Congress grants clear statutory authority granting the Tax Court jurisdiction to address the problems created in *Greene-Thapedi*, some taxpayers trying to contest their underlying tax liability may be left completely without remedy, in direct conflict with the IRS's mission "to collect the proper amount of tax revenue at the least cost, serve the public by continually improving the quality of our products and services, and performing in a manner warranting the highest degree of public confidence in our integrity, efficiency, and fairness."⁹³

Another Possible Solution

In his dissenting opinion in *Greene-Thapedi*, Judge Vasquez offers an alternate argument which may be persuasive in invoking the jurisdiction of the Tax Court in Code Sec. 6330 collection cases brought by the Tax Payer where the IRS has managed to collect the disputed outstanding tax liability. Judge Vasquez argues that recent case law in the Ninth Circuit suggests that once Code Sec. 6330 jurisdiction in the Tax Court is invoked, the Tax Court retains jurisdiction in the matter until the dispute is resolved. As he explains:

Once a taxpayer invokes the jurisdiction of the Court, jurisdiction lies with the court and remains unimpaired until the Court has decided the controversy. *Naftel v. Commissioner*, 85 T.C. 527, 529-530 (1985); *Dorl v. Commissioner*, 57 T.C. 720, 722 (1972), affd. 607 F.2d 406 (2d Cir. 1974).

The U.S. Court of Appeals for the Ninth Circuit recently addressed mootness in the context of §7436 (employment classification) cases. *Charlotte's Office Botigue, Inc. v. Commissioner*, 425 F.3d

1203 (9th Cir. 2005), affg 121 T.C. 89 (2003). The commissioner argued that there was no actual case or controversy that a certain individual was an employee of the taxpayer, and accordingly this deprived the Tax Court of jurisdiction. *Id.* at 1206, 1207. In affirming that the Tax Court had jurisdiction, the court noted: “the commissioner’s approach is contrary to the prevalent approach to subject-matter jurisdiction and the few cases ... [that have] considered the Tax Court’s jurisdiction. ... as a general matter a federal

court’s subject-matter jurisdiction is determined at the time invoked” *Id.* at 1208.⁹⁴

The view advocated by Judge Vasquez here and by the Ninth Circuit Court of Appeals could potentially eliminate the problem created by the “mootness doctrine” arising out of *Greene-Thapedi* if jurisdiction in the Tax Court is indeed “determined at the time invoked” and carried through to address all issues arising out of the initial controversy.

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¹ According to Code Sec. 6330(a)(1), “[n]o 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.” This notification must also be accompanied with information for the taxpayer about their right to request an administrative hearing by the IRS Office of Appeals to dispute the collection action. Code Sec. 6330(b)(1). At this hearing, a taxpayer may raise “any relevant issue relating to the unpaid tax or the proposed levy.” Code Sec. 6330(c)(2)(A). More importantly “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.” Code Sec. 6330(c)(2)(B).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *N. Montgomery*, 122 TC 1, Dec. 55,501 (2004), and *L. Greene-Thapedi*, 126 TC 1, Dec. 56,401 (2006).

⁶ *Montgomery*, 122 TC at 9.

⁷ Judge Chiechi only concurred to the part of the majority opinion that would allow petitioners to challenge the tax liability specified in their final notice, and dissented to the holding and rationale of the majority. *Montgomery*, 122 TC, at 20.

⁸ *Id.*, at 2.

⁹ *Id.*

¹⁰ The taxpayer was criticized in Judge Marvel’s concurrence for the length of time between when they announced an amended return would be made and when it was actually filed. See *Montgomery*, 122 TC, at 17. Council for the taxpayer, who had been recently retained, was unable to gather all of the information necessary to accurately file an amended return immediately after they announced they would make an amended return. This information was eventually compiled and an amended return filed within after approximately two months.

¹¹ *Id.*, at 3.

¹² *Id.*, at 4. The taxpayers were represented by the Brian Isaacson of the Isaacson Wilson Law Firm (www.isaacsonwilson.com) and Duncan Turner of the Badgley Mullins Law Group (www.badgleyullins.com)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Practices and Procedures of the Internal Revenue Service: Hearings Before the Committee on Finance United States Senate*, S. Hrg. 105-190, 4 (1997). This passage was taken from the opening statement of Senator William V. Roth, chairman of the Senate Finance Committee charged with IRS oversight.

¹⁷ *Montgomery*, 122 TC, at 7.

¹⁸ *Id.*

¹⁹ *Id.*, at 9. After *Montgomery* was decided, the IRS changed their litigation position to “no longer argue that a taxpayer is precluded from challenging the existence or amount of an underlying tax liability under Code Sec. 6320 or Code Sec. 6330 solely on the ground that the disputed liability was reported on the taxpayer’s tax return.” CC-2006-005 (Aug. 18, 2006).

²⁰ *Id.*

²¹ This opinion was authored by Judges Dawson, Panuthos and Wells, and also signed by Judges Cohen, Swift, Laro, Foley, Vasquez, Thornton, Haines, Wherry and Kroupa.

²² *Id.*, at 8–9.

²³ *Id.*, at 9.

²⁴ *Id.*, at 21–22.

²⁵ *Id.*, at 13. Judge Laro writes, “We know from the Senate report that the Senate Finance Committee intended that Code Sec. 6330 would establish ‘formal procedures designed to insure due process where the IRS seeks to collect taxes by levy.’” S. REP. No. 105-174, at 67 (1998), 1998-3 CB 537, 603. We also know from that report that the committee believed that the addition of Code Sec. 6330 would afford to taxpayers in dealing with the IRS rights which were similar to the rights afforded to all persons in dealing with any other creditor. S. REP. No. 105-174, at 67, 1998-3 CB, at 603. To this end, the committee declared, the IRS

would by virtue of Code Sec. 6330 need henceforth to “afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property.” *Id.* The committee believed that these procedures would “increase fairness to taxpayers.” *Id.*, at 13; this opinion was also signed by Judge Foley.

²⁶ *Id.*

²⁷ Judge Gale writes, “These aspects of the legislative history, rather than offering any support for respondent’s position, give rise to a negative inference concerning Congress’s intention to foreclose review of self-assessed liabilities in Code Sec. 6330 proceedings. Having been advised of the executive branch’s concern about allowing taxpayers to dispute self-assessed liabilities in Code Sec. 6330 proceedings, the conferees’ failure to refer to self-assessed amounts when modifying the provision at issue, in either the statute itself or the conference report, suggests that they chose not to address this particular concern.” *Id.*, at 17. This opinion was also signed by Judges Swift, Laro, Foley, Marvel and Wherry.

²⁸ *Id.*, at 17.

²⁹ Judge Wells wrote in response to Judge Chiechi’s concurrence and dissent, disagreeing with her reliance upon administrative regulations to support a claim limiting taxpayer’s remedy, stating that he believes “it is incumbent upon this Court to resolve the question the parties raised and by analyzing the controlling statutory provisions, as opposed to relying upon a general statement appearing in an interpretative regulation” and to stress the point that petitioners may challenge “the entire amount of tax, penalties, and interest,” *Id.*, at 11; this opinion was also signed by Judges Foley, Thornton and Kroupa.

³⁰ *Id.*, at 11.

³¹ Judge Goeke writes, “I do not interpret the majority as implying that we have the authority to offer a refund if petitioners establish that they have overpaid their 2000 taxes. Our jurisdiction under 6330 is limited to deciding whether respondent can proceed with the proposed collection action.

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- Accordingly, we need only decide whether petitioners' 2000 tax liability is equal to or less than the amount they previously paid for the year." *Id.*, at 20; this opinion was also signed by Judges Haines and Wherry.
- ³² Judge Chiechi writes, "I dissent from the holding and rationale of the majority opinion. I concur with the majority opinion only to the extent that the majority opinion results in allowing petitioners to challenge the existence or the amount of the tax liability specified in the final notice" according to regulations provided in Reg. §301.6330-1(e) (1), (3) Q&A-E2, Proceed. & Admin. Regs. *Id.*, at 20. This opinion is also signed by Judge Holmes.
- ³³ Judge Gerber writes, "I find it inconceivable that Congress intended that taxpayers who filed returns admitting that they owed tax are to be given the opportunity to contest their own 'assessment' of the tax due, when the respondent seeks to collect it. It is my view that Congress intended to ensure that taxpayers had certain rights with respect to the collection processes and to permit them to contest any changes respondent proposed, if they had not already had the opportunity to do so." *Id.*, at 21. This opinion is also signed by Judge Chiechi.
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.*, at 22–31.
- ³⁷ Judge Halpern writes, "The legislative history of §6330(c)(2)(B) leads me to agree with respondent that, as used in that section, the term "underlying tax liability" refers to liabilities asserted by the Commissioner that differ in amount from liabilities self-assessed by the taxpayer. I conclude, therefore, that, at a §6330 hearing, a taxpayer may not challenge the Government's right to collect from her any reported but unpaid tax. For the reasons stated, I dissent." *Id.*, at 22.
- ³⁸ This last point, that the tax liability must not have been paid, is an interesting one in light of *Greene-Thapedi*; it should also be noted that Judge Halpern's analysis of legislative intent requires significant abstraction (see *id.*, at 30).
- ³⁹ The taxpayer in this case, Llwellyn Greene-Thapedi, was a *pro se* attorney and recently retired judge in Cook County, Illinois.
- ⁴⁰ *Greene-Thapedi*, 126 TC, at 3.
- ⁴¹ *Id.*
- ⁴² *Id.*, at 4.
- ⁴³ *Id.*
- ⁴⁴ *Id.*, at 5.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*, at 13.
- ⁴⁷ *Id.*, at 6.
- ⁴⁸ *Montgomery*, 122 TC, at 22.
- ⁴⁹ Petitioner's claim for a refund arises, if at all, under Code Sec. 6330(c)(2), as an outgrowth of her challenge to the existence of an amount of her underlying 1992 tax liability. Pursuant to Code Sec. 6330(c)(2), however, 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. Inasmuch as the proposed levy is moot, petitioner has no independent basis to challenge the existence or amount of her underlying tax liability in this proceeding.
- ⁵⁰ *Greene-Thapedi*, 126 TC, at 11. This majority opinion written by Judge Thornton was signed by Judges Gerber, Cohen, Wells, Halpern, Chiechi, Laro, Gale, Haines, Goeke, Kroupa and Holesmes. Judge Foley concurs in the result only.
- ⁵¹ The IRS may argue that "[t]he Tax Court has not been granted jurisdiction under section 6330(d) to order a credit or refund in a proceeding under section 6330(d). But see, e.g., sections 6015(g) (authority to allow credits and refunds in cases seeking relief from joint and several liability for joint returns) and 6512(b) (authority to order overpayments in deficiency cases), for which the Tax Court's jurisdiction is specifically authorized. 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; a subsequent refund action would still be subject to the limitations period on credit or refund under section 6511." CC-2006-005 (Aug. 18, 2006).
- ⁵² *Montgomery*, 122 TC, at 13–14.
- ⁵³ *Montgomery*, 122 TC, at 17.
- ⁵⁴ *Greene-Thapedi*, 126 TC, at 11.
- ⁵⁵ See endnotes 10 through 21, *supra*.
- ⁵⁶ *Greene-Thapedi*, 126 TC, at 14. This concurring opinion written by Judge Colvin was also signed by judges Marvel, Wherry and Holmes.
- ⁵⁷ *Id.*, at 16–17.
- ⁵⁸ Judge Vasquez also makes reference to normative arguments (*id.*, at 19–20) and draws upon comparison Code Sec. 6404, Code Sec. 6015 and Code Sec. 6512 (*id.*, at 26–27).
- ⁵⁹ *Id.*, at 21–23.
- ⁶⁰ Judge Vasquez explains, "My view advances our established precedent that 'in view of the statutory scheme as a whole, we think the substantive and procedural protections contained in §6320 and Code Sec. 6330 reflect the congressional intent that the Commissioner should collect the correct amount of tax.' *Montgomery*, 122 TC, at 10. In Code Sec. 6330 cases, taxpayers should be able to claim an overpayment, and the Court should be able to enter a decision for an overpayment to ensure that the Commissioner collects *no more than* the correct amount of tax." *Id.*, at 25 (emphasis added).
- ⁶¹ *Id.*, at 27.
- ⁶² *Id.*
- ⁶³ *P.A. Farley*, 88 TCM 32, Dec. 55,696(M), TC Memo. 2004-168. Publication page references are not available for this document.
- ⁶⁴ *Id.*
- ⁶⁵ *J. Kendricks*, 124 TC 69, 77, Dec. 55,950 (2005).
- ⁶⁶ *Id.*
- ⁶⁷ *Whittinger*, TC Summ. Opp. 2006-163 (2006). Publication page references are not available for this document.
- ⁶⁸ If the challenge to tax liability is not brought when the petition is filed, the IRS may argue that the taxpayer is barred from raising any further challenges.
- ⁶⁹ *T.W. Banis, Jr.*, 88 TCM 367, Dec. 55,779(M), TC Memo. 2004-237. Publication page references are not available for this document.
- ⁷⁰ *Id.*
- ⁷¹ *Id.*
- ⁷² *Id.*
- ⁷³ See *C. Latos*, 94 TCM 257, Dec. 57,088(M), TC Memo. 2007-265; *Ward*, TC Summ. Op. 2007-144; *Conner*, Summ. Op. 2007-1.
- ⁷⁴ The instances in which the Tax Court broadens the application of *Montgomery* are notably more rare than instances in which the *Montgomery* rule is simply applied or the scope is narrowed.
- ⁷⁵ *Perkins*, 129 TC 58 (2007). Publication page references are not available for this document.
- ⁷⁶ *Id.*
- ⁷⁷ *Id.*
- ⁷⁸ *Id.*
- ⁷⁹ *Id.*
- ⁸⁰ *Id.*
- ⁸¹ *Id.*
- ⁸² *Id.*
- ⁸³ *Id.*
- ⁸⁴ *Practices and Procedures of the Internal Revenue Service: Hearings Before the Committee on Finance Unites States Senate*, S. Hrg. 105-190 (1997).
- ⁸⁵ *Id.*, at 122.
- ⁸⁶ *Id.*, at 122.
- ⁸⁷ *Id.*, at 4.
- ⁸⁸ *Id.*, at 135.
- ⁸⁹ *Montgomery*, 122 TC, at 9.
- ⁹⁰ *Greene-Thapedi*, 126 TC, at 9.
- ⁹¹ As Judge Vasquez's dissent points out, "The majority seems to acknowledge that from our inception the Board did have jurisdiction to determine an overpayment in certain circumstances. Majority op. P 14 & note 15." *Greene-Thapedi*, 126 TC, at 21.
- ⁹² *Id.*, at 10.
- ⁹³ *Practices and Procedures of the Internal Revenue Service: Hearings Before the Committee on Finance Unites States Senate*, S. Hrg., at 122.
- ⁹⁴ *Greene-Thapedi*, 126 TC, at 16.