

No. 20-1074

United States Court of Appeals
for the Fourth Circuit

BRIAN H. McLANE,

Plaintiff-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

Docket No. 20317-13L

The Honorable James S. Halpern

BRIEF OF
AMERICAN COLLEGE OF TAX COUNSEL
AS AMICUS CURIAE
IN SUPPORT OF APPELLANT
FOR REVERSAL

FRANK AGOSTINO

PHILLIP COLASANTO

ANDREW LENDRUM

AGOSTINO & ASSOCIATES, P.C.

14 Washington Place

Hackensack, NJ 07601

(201) 488-5400

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that it is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

Pursuant to Fourth Circuit Rule 26.1, *amicus curiae* states that there are no publicly held corporations with a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

STATEMENT OF INTEREST1

SUMMARY OF ARGUMENT4

ARGUMENT5

I. The Tax Court’s Jurisdiction in Collection Due Process Cases Requires that it Determine the Correct Tax Liability even if that Liability Results in an Overpayment5

II. The Tax Court Determination that the Appellant has a “\$0.00” Liability is Res Judicata and Forecloses Further Judicial Review of Appellant's Overpayment Claim.....8

CONCLUSION11

TABLE OF AUTHORITIES

CASES

<i>Comm’r v. Sunnen</i> , 333 U.S. 591 (1948)	4, 5, 8–9
<i>Cromwell v. County of Sac.</i> , 94 U.S. 351 (1876)	9
<i>Estate of Baumgardner v. Comm’r</i> , 85 T.C. 445 (1985)	3, 7
<i>Greene-Thapedi v. Comm’r</i> , 126 T.C. 1 (2006)	3, 7, 8
<i>Goza v. Comm’r</i> , 114 T.C. 176 (2000)	6
<i>Lewis v. Comm’r</i> 128 T.C. 48 (2007)	6
<i>Lunsford v. Comm’r</i> 117 T.C. 159 (2001)	5
<i>McLane v. Comm’r</i> , T.C. Memo. 2018-149	7, 8
<i>Montgomery v. Comm’r</i> , 122 T.C. 1 (2004)	6
<i>Naftel v. Comm’r</i> , 85 T.C. 527 (1985)	5
<i>O’Dwyer v. Comm’r</i> , 266 F.2d 575 (4th Cir. 1959)	6
<i>Porter v. Comm’r</i> , 130 T.C. 115 (2008)	6
<i>Washington v. Comm’r</i> , 120 T.C. 114 (2003)	3

STATUTES

26 U.S.C. § 6330.....2, 5, 7, 10

26 U.S.C. § 6330(b)(1)9–10

26 U.S.C. § 6330(b)(2)8, 10

26 U.S.C. § 6330(c)(2).....4, 5

26 U.S.C. § 6330(c)(2)(B)*passim*

26 U.S.C. § 6330(d)10, 11

26 U.S.C. § 6330(d)(1)4, 5

26 U.S.C. § 7605(b)9, 10

26 U.S.C. § 7803(a)(3)(F)8, 9

REGULATIONS

26 C.F.R. § 601.106(f)(2) 6

RULES

Rule 26.1 of the Federal Rules of Appellate Procedure ii

Rule 29(a)(2) of the Federal Rules of Appellate Procedure 1 n. 1

**BRIEF OF
AMERICAN COLLEGE OF TAX COUNSEL
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT**

The American College of Tax Counsel (the “College”) respectfully submits this brief as *amicus curiae* in support of appellant Brian H. McLane.¹

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

¹ Pursuant to Rule 29(a)(2), counsel for the College provided timely notice of the College’s intent to file this brief, and all parties have consented to its filing. Counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

The College submits this brief because the Tax Court's restrictive interpretation of its jurisdiction and the resulting bifurcation of tax claims is contrary to the judicially created doctrine of res judicata and the Congressional desire to incorporate res judicata into collection due process proceedings under section 6330 of the Internal Revenue Code of 1986, as amended (the "Code") (i.e., : "[o]nce the taxpayer has had a hearing with respect to an issue, the taxpayer would not be permitted to raise the same issue in another hearing." S. Rep. No. 105-206, at 68 (1998)).

Taxpayers in collection due process proceedings may request a de novo review of their tax liabilities. The Tax Court's refusal to determine whether the correct tax liability includes an overpayment may eliminate taxpayers' ability to prosecute a refund claim. Also important to the College is the potential for

duplicative litigation and inconsistent results. The College is mindful of Tax Court

Judge Vasquez's observation in his dissent in *Greene-Thapedi*:

‘Considering the overcrowded dockets in most Federal courts, we cannot be insensitive to opportunities to avoid unnecessary litigation.’ . . . Petitioner has properly invoked the jurisdiction of the Court. By not deciding whether petitioner is entitled to an overpayment we are leaving an essential issue unaddressed. . . . This is ‘inconsistent with the goals of judicial and party economy embodied in the slogan ‘one-stop shopping.’).

Greene-Thapedi v. Comm’r, 126 T.C. 1, 26 (2006) (Vasquez, J., dissenting).

(quoting *Estate of Baumgardner v. Comm’r*, 85 T.C. 445, 458 (1985), and

Washington v. Comm’r, 120 T.C. 114, 134 (2003), respectively).

SUMMARY OF ARGUMENT

Code section 6330(d)(1) gives the Tax Court the jurisdiction to review de novo the determination of the Internal Revenue Service Independent Office of Appeals regarding “any issue relating to the unpaid tax or proposed levy” including, in some cases, the underlying tax liability. 26 U.S.C. § 6330(c)(2). Because “[i]ncome taxes are levied on an annual basis” and “each year is the origin of a new liability and of a separate cause of action,” *Sunnen v. Comm’r*, 333 U.S. 591, 599 (1948), the Tax Court has the obligation to determine the correct tax liability for the years before the Court. Res judicata applies to the Tax Court’s determination of the liability. The Tax Court’s restrictive interpretation of its jurisdiction is contrary to the plain language of the statute. It overlooks the impact of the judicially created doctrine of res judicata and inadvertently eliminates the ability of taxpayers who elect their right to review their underlying liability under Code section 6330(c)(2)(B) from prosecuting overpayment claims.

ARGUMENT

POINT I

The Tax Court’s Jurisdiction in Collection Due Process Cases Requires that it Determine the Correct Tax Liability even if that Liability Results in an Overpayment.

Code section 6330(d)(1) gives the Tax Court the jurisdiction to review de novo the determination of the Internal Revenue Service Independent Office of Appeals regarding “any issue relating to the unpaid tax or proposed levy” including, in some cases, the underlying tax liability. 26 U.S.C. § 6330(c)(2). Because “[i]ncome taxes are levied on an annual basis” and “each year is the origin of a new liability and of a separate cause of action,” *Sunnen*, 333 U.S. at 599, the Tax Court has the obligation to determine the correct tax liability for the years at issue.

To exercise jurisdiction under Code section 6330, the Tax Court requires “a ‘determination’ by Appeals and a timely petition[.]” *Lunsford v. Comm’r*, 117 T.C. 159, 161 (2001). “[O]nce a petitioner invokes the jurisdiction of the Court, jurisdiction lies with the Court and remains unimpaired until the Court has decided the controversy[.]” *Naftel v. Comm’r*, 85 T.C. 527, 529–30 (1985), and “that jurisdiction extends to the entire subject matter of the correct tax for the taxable year.” *Id.* at 533.

The Tax Court reviews the determination of Appeals under Code section 6330(c)(2)(B), which provides:

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.

26 U.S.C. § 6330(c)(2)(B) (emphasis added). Review under Code section 6330(c)(2)(B) includes review of the underlying liability, including challenges to not only the Commissioner’s assessment but also to a taxpayer’s self-assessed tax liability. See *Montgomery v. Comm’r*, 122 T.C. 1, 7–8 (2004).

When reviewing the underlying liability in Collection Due Process (“CDP”) cases, the scope and standard of review is de novo. *Goza v. Comm’r*, 114 T.C. 176, 181–82 (2000). De novo review includes “‘jurisdiction to redetermine the deficiency determined by the Commissioner.’” *Porter v. Comm’r*, 130 T.C. 115, 130 (2008) (quoting *O’Dwyer v. Comm’r* 266 F.2d 575, 580 (4th Cir. 1959)). Moreover, “an opportunity to dispute a tax liability[,]” *Lewis v. Comm’r*, 128 T.C. 48, 59 (2007), whether by Appeals or the Tax Court, includes “‘determin[ing] the correct amount of the tax[.]’” See *Id.* (quoting 26 C.F.R. § 601.106(f)(2), which deals with Appeals’ conference and practice requirements)).

Appellant properly invoked the jurisdiction of the Tax Court. Thus, the Tax Court had jurisdiction over “the entire subject matter of the correct tax for the taxable year,” including the underlying liability. However, instead of actually determining the tax liability and the amount of any resulting overpayment de novo, the Tax Court

accepted the Commissioner's decision to suspend collection of the unpaid tax or proposed levy action and declared that "'petitioner's correct tax liability for 2008 is \$0.00.'" *McLane v. Comm'r*, T.C. Memo. 2018-149, at *3. The Tax Court's reliance on Commissioner's alleged concession was arbitrary because it failed to "determine" the existence or amount of the underlying tax liability under Code section 6330(c)(2)(B). By not deciding whether Appellant was entitled to an overpayment, the Tax Court left an essential issue unaddressed.

Failing to determine whether there was an overpayment could reasonably be anticipated to eliminate the ability to prosecute a refund case. As Judge Vasquez observed in *Greene-Thapedi*:

Accordingly, because taxpayers can claim that they overpaid their taxes ("paid more than was owed") in a sec. 6330 case, majority op. p. 18 note 19, the doctrine of res judicata might bar taxpayers from initiating a refund suit in U.S. District Court or the U.S. Court of Federal Claims. *See Estate of Baumgardner v. Commissioner, supra* at 452; *Newstat v. Commissioner*, T.C. Memo.2004-208 (res judicata applied to the overpayment claim in the section 6330 case because it involved "the same cause of action" as the deficiency case); Lowy, *Thoughts on Practicalities Of the CDP Process*, 107 Tax Notes 783 (May 9, 2005) (in cases involving the underlying tax liability, "the doctrine of res judicata may bar a refund action subsequent to the CDP process").

Greene-Thapedi, 126 T.C. at 34, n. 5 (Vasquez, J., dissenting).

Code section 6330 is remedial legislation. *Id.* at 25. The Tax Court's refusal to calculate the existence or amount of the Appellant's underlying tax liability is

contrary to the language of the structure of the statute and the statute's remedial purpose. Code section 6330(b)(2) provides that "a person shall be entitled to only one hearing under this section with respect to the taxable period." Code section 6330(c)(2)(B) requires the Court to review the Commissioner's determination as to the existence or amount of the underlying tax liability. Code sections 7803(a)(3)(C) and (F) suggest that taxpayers have the right to pay no more than the correct tax as well as the right to finality, respectively.

Bifurcating tax controversy in this way is inconsistent with the goals of judicial and party economy. *Greene-Thapedi*, 126 T.C. at 34, n. 5 (Vasquez, J., dissenting).

POINT II

The Tax Court Determination that Appellant has a "\$0.00" Liability is Res Judicata and Forecloses Further Judicial Review of Appellant's Overpayment Claim.

The Tax Court determined that Appellant's liability is "\$0.00." *McLane v. Comm'r*, T.C. Memo. 2018-149, at *3. That determination forecloses any overpayment claim.

In *Comm'r v. Sunnen*, 333 U.S. 591 (1948), the Supreme Court held that res judicata is "applicable in the federal income tax field." *Id.* at 598. The Court explained the application of res judicata in tax cases:

Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of

action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year.

Id. at 599. The Tax Court’s judgment, therefore, binds the parties “not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter **which might have been offered for that purpose.**” *Id.* at 597 (quoting *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1876)) (emphasis added).

Congress incorporated the doctrine of res judicata into the collection due process procedures. The Taxpayer Bill of Rights (TBOR), Pub. L. No. 114-113, tit. IV, § 401 (2015), applies to the Commissioner’s administrative review of the liability. Specifically, TBOR provides that “[i]n discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including— (F) the right to finality.” 26 U.S.C. § 7803(a)(3)(F). Similarly, “[n]o taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer’s books of account shall be made for each taxable year unless the taxpayer requests otherwise[.]” 26 U.S.C. § 7605(b).

Regarding the conduct of CDP Hearings, Code section 6330(b)(1) provides: “[i]f 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.” However, “[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.” 26 U.S.C. § 6330(b)(2) (emphasis added).

Code section 6330 authorizes, but does not require, a taxpayer to request de novo review of his or her liability. To the extent a taxpayer exercises the right to request de novo review (i.e., a second examination of his liability under Code section 7605(b)), both the plain language and legislative history of Code section 6330 suggests that res judicata applies to the Appeals Office’s determination and the Tax Court’s review of the Appeals Office’s determination.

Congress created a procedure that included de novo review of a taxpayer’s liability by the Tax Court, which resolves all of the claims for the taxable period. The legislative history of Code section 6330 confirms this result: “[o]nce the taxpayer has had a hearing with respect to an issue, the taxpayer would not be permitted to raise the same issue in another hearing.” S. Rep. No. 105-206, at 68 (1998).

Once the Tax Court determines the tax liability for the tax period, res judicata applies. The Tax Court’s restrictive interpretation of its jurisdiction under Code section 6330(d) overlooks the impact of the doctrine of res judicata. The Tax Court’s

refusal to determine Appellant's liability inadvertently abrogates his right and/or ability to bring a claim for refund in the Court of Federal Claims or the United States District Court.

CONCLUSION

The Tax Court's jurisdiction under Code section 6330(d) to determine the existence or amount of the underlying tax liability for any tax period includes the jurisdiction to determine the amount of Appellant's overpayment. The Tax Court's restrictive interpretation of its jurisdiction overlooks the mandatory application of res judicata to tax cases and inadvertently eliminates taxpayers' right to pay only the correct tax. The opinion of the Tax Court should be reversed.

Respectfully submitted,

/s/ Frank Agostino

Frank Agostino

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 2,290 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief amici curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 29 day of June, 2020.

/s/ Frank Agostino
Frank Agostino

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on June 29, 2020.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 29 day of June, 2020.

/s/ Frank Agostino

Frank Agostino

Counsel for Amicus Curiae