4/25/2022

No. 22-291

In The

Supreme Court of the United States

BRIAN MCLANE
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Internal Revenue Service (IRS) determines a taxpayer owes more than reported on a return, it may mail a notice of deficiency to the taxpayer. Upon receipt of such notice, the taxpayer may petition the Tax Court to redetermine the deficiency. If the Tax Court finds there is no deficiency and the taxpayer instead overpaid, it may determine the amount of such overpayment and ultimately order a refund to the taxpayer.

When a taxpayer does *not* receive notice, however, the deficiency is summarily assessed by the IRS. Before the IRS collects that assessed tax liability, it must mail notice to the taxpayer who did not receive notice of the deficiency, and the taxpayer may contest the existence and amount of the "underlying tax liability for any tax period," 26 U.S.C. § 6330(c)(2)(B), in an appeals hearing reviewable by the Tax Court.

***Question*:**

In a review of an appeals hearing pursuant to 26 U.S.C. § 6320 or § 6330, does the United States Tax Court have jurisdiction to determine the amount of any overpayment due a taxpayer who never received a notice of deficiency?

LIST OF PARTIES

The caption contains the names of all parties to the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian McLane ("McLane") respectfully petitions for a writ of certiorari to review a judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals appears at Appendix A, and is published at *McLane v. Commissioner*, 24 F.4th 316 (4th Cir. 2022).[1] The Tax Court denied Petitioner McLane relief, and that opinion, T.C. Memo 2018-149, appears at Appendix B.[2]

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion on January 25, 2022, and amended its opinion on January 27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

INTRODUCTION

This petition presents a first-impression question regarding the extent of jurisdiction Congress granted

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[1] The opinion was issued January 25, 2022, and amended January 27, 2022. (The amendment replaced the words "District Court" with "Tax Court.") The final version is appended.

[2] 116 T.C.M. (CCH) 277. The Tax Court Docket No.: 20317-13L. The opinion was issued September 11, 2018, and amended September 19, 2018. (The amendment corrected two footnote numbers.) The final version is appended. The opinion was made final by an October 18, 2019 Tax Court decision (Docket 86) reproduced at Appendix C.

to the Tax Court in the IRS Restructuring and Reform Act of 1998 (RRA). When a taxpayer has never received a statutory notice of deficiency, he may challenge the existence and amount of his tax liability in an pre-collection appeals hearing, reviewable *de novo* by the Tax Court, which "shall have jurisdiction with respect to such matter." 26 U.S.C. § 6330(d)(1).

Because the Tax Court has *concurrent* jurisdiction over the redetermination of deficiencies under § 6214(a), the RRA gave the Tax Court jurisdiction to fully redetermine IRS-assigned tax liability in a remedial hearing before that Court in cases where taxpayers did not receive any due process *prior* to the assessment of the deficiency.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the *United States Constitution* and the *Internal Revenue Code (I.R.C.)*(26 U.S.C. § 6203, § 6213(a) and (c), § 6214, § 6320, § 6330, § 6512) are set forth in Appendix D, App. 43-56.

STATEMENT OF THE CASE

I. *Background to issue raised below*

Petitioner McLane filed a federal income tax return for tax year 2008; Respondent IRS subsequently issued and mailed, within the applicable statutory limitation, a notice of deficiency (NOD). McLane did not receive the notice of deficiency, and thus was denied his statutorily

granted opportunity to challenge the deficiency in the Tax Court.

When McLane thus failed to petition Tax Court, the IRS assessed the deficiency, and the proposed deficiency became a tax liability. The IRS subsequently mailed McLane a notice of federal tax lien filing (NFTL), and he requested a collection due process (CDP) hearing under the IRS Restructuring and Reform Act of 1998, 26 U.S.C. §§ 6320 and 6330.[3] The IRS Appeals Office, which conducts such hearings, decided to continue collection actions, denying McLane his due-process challenge to the underlying tax liability for the tax period. McLane sought review in Tax Court, and in the course of that *de novo* review, the fact of the mailing of the notice of deficiency was the *basis* upon which the IRS asserted its claim of tax liability.

McLane, who had hired a tax return preparer to prepare the 2008 return, discovered upon re-examination of his records that multiple mistakes had been made in that return; he had actually experienced a *loss* in income for that year. The IRS conceded that he owed *no liability at all* for the tax year, and since McLane had made some tax payments subject to being refunded, McLane requested the Tax Court determine the overpayment.

II. *The Tax Court ruling*

The Tax Court ordered McLane and the IRS to file supplemental briefs concerning whether it had jurisdiction to determine an overpayment in the

[3] All references to sections of law throughout refer to sections of the Internal Revenue Code, Title 26 U.S.C.

context of the CDP hearing. The Tax Court held that in that context, it had "no jurisdiction to consider [Petitioner's] claim that he has overpaid his 2008 Federal income tax." T.C. Memo 2018-149, at *13 (2018). App. 43.

The Tax Court framed its analysis in the context of its precedent in *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006), a case which did not directly present the question at issue here.

III. *The Fourth Circuit decision*

Upon appeal, the Fourth Circuit acknowledged that in a CDP hearing before Appeals, a taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy." 26 U.S.C. § 6330(c)(2)(A).

The appeals court also noted that an *additional* provision under § 6330 allows a taxpayer who did not receive a notice of deficiency for the tax period to raise a non-collection related issue: "challenges to the existence or amount of the *underlying tax liability*." (emphasis added) §6330(c)(2)(B).

Relying on the Commissioner's view that since a taxpayer has a right to a CDP hearing *only* when the IRS seeks to enforce collection of a tax liability via lien or levy, the Fourth Circuit held:

> The Commissioner is correct that the "taxpayer was permitted to challenge the amount of his underlying liability in the [collection due process] hearing ... *only* in the context of determining whether the collection action could proceed."
> App. 8 (emphasis in original).

Thus, the lower Court reasoned, since the IRS had conceded that McLane had no tax liability for the tax year 2008, and no collection could proceed, his appeal to the Tax Court of the Appeals Office's determination was moot. Accordingly, the Tax Court had lost jurisdiction over any continuing overpayment issue.

The Fourth Circuit further stated that it did not need to decide whether the Tax Court had jurisdiction:

> [W]e believe it is unnecessary to decide the "[m]ore fundamental[]" question of whether § 6330 *ever* grants the Tax Court jurisdicton to determine an overpayment or to order a refund given that § 6330 so clearly cannot confer such jurisdiction when no active collection action persists."
> App. 7 (emphasis in original).

McLane petitions herein to reverse the Fourth Circuit's opinion, which disregarded the statutory language of § 6330(c)(2)(B), the greater context of the statutory scheme of the Internal Revenue Code, and the remedial purpose of Congress in enacting the CDP procedures.

REASONS FOR GRANTING THE WRIT

I. *Tax Court's avoidance of its jurisdiction over overpayments thwarts Congress' enactment of due process provisions*

The result of the Fourth Circuit's decision is to fundamentally diminish — and in this case, outright

nullify — the statutory due process protections Congress set in place for taxpayers situated as Petitioner. These protections, which place the IRS and the taxpayer on a equal and fair footing, embody the IRS-proclaimed taxpayer "right to pay only the amount of tax legally due ... and to have the IRS apply all tax payments properly."[4]

The central promise of due process is the opportunity to be heard at a "meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Even though this Court long ago decided that the Due Process Clause of the Fifth Amendment does not *require* the government to give taxpayers a pre-deprivation hearing regarding tax collection, *see Phillips v. Commissioner*, 283 U.S. 589, 595 (1931), Congress *has* enacted the deficiency procedures to give taxpayers a process in which to challenge proposed IRS increases in tax prior to assessment and payment. If that process *fails to notify* of the opportunity to be heard, Congress enacted a safeguard under the RRA to ensure that notification and opportunity to raise challenges to the proposed deficiency were preserved even *after* the assessment of the deficiency.

As reported by the National Taxpayer Advocate, Form 1040 taxpayer returns increased from about 142 million in 2010 to about 169 million in 2021.[5]

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[4] https://www.irs.gov/taxpayer-bill-of-rights. *See also* 26 U.S.C. § 7803(a)(3): "In discharging his duties, the Commissioner shall ensure that [the IRS acts] in accord with taxpayer rights as afforded by other provisions of this title, including – (A) the right to be informed, ... (B) the right to pay no more than the correct amount of tax, ... (F) the right to finality, ... (J) the right to a fair and just tax system."

[5] National Taxpayer Advocate Annual Report to Congress 2021, Executive Summary, p. 1. See https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_ExecSummary.pdf

Over half of those filers trust tax return preparers to prepare their returns, as McLane did here. It is, moreover, no secret — indeed, common knowledge — that the Internal Revenue Code is complicated, voluminous, and baffling to many filers. Without question, a fair number of those taxpayer returns, especially those including complicated credits and deductions, will include factual, mathematical, or legal interpretation errors either increasing or decreasing the correct amount of tax due. Given the economic and financial costs associated with reexamining returns, these errors are unlikely to be detected within the three years' limitation on refund claims.

The statutory scheme

If and when the IRS determines a deficiency for a given tax year within that same three years, however, and sends a taxpayer a timely *notice* of deficiency, the Internal Revenue Code assigns an imputed refund claim to the taxpayer under § 6512(b)(2)(B), which claim is considered filed as of the date of the mailing of the notice of deficiency. The taxpayer may, under the provisions of § 6213(a), petition the Tax Court for a complete redetermination of the deficiency — a prepayment remedy. Through the imputed refund claim Congress has provided, if it appears during the course of the redetermination that errors in the return reduce the amount of the taxpayer's liability to *less* than the taxpayer initially reported, the Tax Court has jurisdiction to determine any overpayment of taxes made for the year in question, and ultimately order a refund to the taxpayer. §§ 6214(a), 6512(b).

The statutory scheme for the deficiency procedure thus includes an administrative due

process requirement that the IRS notify the taxpayer of its determination of a deficiency by certified mail. When a taxpayer *receives* the notification, they are provided with the due process opportunity for redetermination. But when a taxpayer does *not* receive a notice of deficiency, as is the case here, they have been deprived of that opportunity.

Congress remedied this deprivation by providing for additional notification and opportunity after the IRS has *assessed* the proposed deficiency as a "liability" under §§ 6203 and 6213(c), which additional liability is then *included* in the "underlying tax liability for [the] tax period" of the taxpayer.

Under § 6320 and § 6330, the IRS must notify the taxpayer of the filing of a tax lien, or of a proposed levy, prior to moving forward to collect any amounts it has assessed. Upon such notice, the taxpayer may request a CDP hearing before the Appeals Office. When the mailing of a notice of deficiency under § 6511 did not result in the receipt of such notice by the taxpayer, the taxpayer has his *first* opportunity to raise "challenges to the amount and existence of the underlying tax liability for any tax period[.]" § 6330(c)(2)(B). As noted by the Tax Court in 2005, this represents a remedial opportunity for taxpayers: "[S]ection 6330(c)(2)(B) extends the substantive and procedural protections of sections 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. ... [S]ection 6330(c)(2)(B) is fairly read as providing a remedy to such taxpayers." *Montgomery v. Commissioner*, 122 T.C. 1, 9-10 (2004).

If, as here, the Tax Court avoids its jurisdiction to determine the correct *amount* of the "underlying tax liability for any tax period" when it is challenged, and instead is only willing to determine the amount of liability until it no longer exists for IRS collection purposes — *i.e.,* to only determine whether a taxpayer has proven he did not owe any *additional* tax claimed by the IRS — then Congress' guarantee of notice and opportunity, secured by the RRA, has been nullified. If the Tax Court is allowed to circumvent its duty in this manner, every taxpayer who was not notified of, and thus deprived of, the statutory due process created by Congress will continue to be deprived of due process at the collection stage. And ultimately, will be deprived without due process of the property which Congress has protected: a *refund* of taxes paid through an imputed refund claim, when the correct amount of liability has been determined by a judge of the Tax Court.

II. *The Fourth Circuit's foreclosure of Tax Court jurisdiction under § 6330 as limited to collection purposes nullifies the statutory remedy enacted by Congress*

Petitioner sought a complete redetermination of the underlying tax liability for the tax year 2008, but was denied determination of the actual amount of liability, and a subsequent declaration of an overpayment by the Tax Court. The Fourth Circuit holding — that the IRS' concession that it could not collect any additional liability *mooted* Petitioner's imputed refund claim, and thus deprived the Tax Court of jurisdiction — is in error.

"A case 'becomes moot only when it is impossible

for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 164, 172 (2013). "'As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.' *Id.*

The Fourth Circuit failed to consider the question of the Tax Court's jurisdiction within the larger context of the Internal Revenue Code's statutory scheme, but instead assumed Tax Court jurisdiction under § 6330 to only encompass the appropriateness of collection actions, even when a challenge to the "underlying tax liability for any tax period" is in question.

Statutory language is unambiguous

The text of 26 U.S.C. § 6330 irrefutably illustrates that the decisions below are incorrect. When properly challenging the "underlying tax liability" in CDP proceedings, Appeals, and subsequently the Tax Court, have the jurisdiction and duty (*See* § 7803(a)(3)) to determine the correct amount of tax due (*i.e.*, the correct tax liability), which necessarily encompasses refunds due to overpayment.

As the Tax Court itself has stated: "It is well settled that in interpreting a statute, we start with the language of the statute itself. If the language of the statute is plain, clear, and unambiguous, we generally apply it according to its terms." *Montgomery v. Commissioner*, 122 T.C. at 7. In cases where "a statute is ambiguous or silent, we may look to the statute's legislative history to determine congressional intent." *Id.* (cleaned up).

Regarding a taxpayer in the Petitioner's situation, § 6330(c)(2)(B) states that such person may raise, in addition to "any relevant issue relating to

the unpaid tax or the proposed levy":

> ... 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.

With respect to a taxpayer who *has* had previous opportunity to dispute the tax liability, however, a person may *only* raise "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, ...
> § 6330(c)(2)(A).

It is clear that the collection defenses and alternatives available are only for the "unpaid" tax portion of the tax liability, to which the "proposed levy" (or lien, in this instance) relates.

In stark contrast, Congress did *not* provide that taxpayers who never received NODs could only challenge the existence or amount of the "unpaid tax" or the "proposed levy." Instead, Congress clearly stated that such taxpayers may challenge "the existence or amount of the underlying tax liability for any tax period." The tax *period* encompasses all liability, both paid and unpaid, within said period. This language indisputably demonstrates Congress' intent to provide opportunity for a full redetermination of the underlying deficiency, and *does not* connect that opportunity to challenge the underlying

tax liablity solely to the collection of unpaid taxes.

The Tax Court itself explained the meaning of the phrase "underlying tax liability":

> The term "underlying tax liability" is not defined in section 6320 or 6330, nor is there any specific reference to that term in the legislative history of the provisions. Taken in context, it is reasonable to interpret the term "underlying tax liability" as a reference to the amounts that the Commissioner assessed for a particular tax period. In this regard, the term "underlying tax liability" may encompass an amount assessed following the issuance of a notice of deficiency under section 6213(a), an amount "self-assessed" under section 6201(a), or a combination of such amounts. *Montgomery, supra*, at 7-8.

The Montgomerys had filed an amended return for the tax period at issue following their receipt of a collection due process notice (Final Notice of Intent to Levy), and the Tax Court subsequently "remanded the collection case to respondent's Office of Appeals for consideration of petitioners' amended return." *Montgomery v. Commissioner*, 127 T.C. 43, 50 (2006). In other words, consideration of the entire tax period was at issue, not just the amount of unpaid tax showing on the proposed levy. This was, in the Tax Court's view, because "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." *Montgomery*, 122 T.C. at 10.

The Fourth Circuit ignored the plain language of the statute as elucidated by the Tax Court, and cherrypicked a phrase from a concurring opinion, *Id.*, at 12, that "'underlying tax liability' ... is read easily to mean the tax liability underlying the proposed levy," in order to buttress its decision that the "context" in which the phrase "underlying tax liability" is to be understood is the IRS' attempt to collect via lien or levy. As shown above, however, the the statutory language states that all tax liability for the tax period at issue — whether self-assessed or determined by the IRS — is subject to challenge in the CDP process, not just amounts sought to be collected by the IRS. Accordingly, the Fourth Circuit's reliance on the concurring opinion phrase, which does not reflect the majority Tax Court opinion, nor the plain language of the statute, is misplaced.

Fourth Circuit failed to analyze the statutory language and overall deficiency scheme

The Fourth Circuit held that Tax Court only has jurisdiction to determine tax liability in the context of determining whether the collection action could proceed, and once the IRS abandons collection, it has no further jurisdiction.

But the panel simultaneously admitted "[W]e believe it is unnecessary to decide the "[m]ore fundamental[]" question of whether § 6330 *ever* grants the Tax Court jurisdiction to determine an overpayment or to order a refund given that § 6330 so clearly cannot confer such jurisdiction when no active collection action persists." (emphasis in original).

The Court cited *Willson v. Commissioner*, 805

F.3d 316, 320 (D.C. Cir. 2015),[6] for the proposition that if a case resolves a question within the jurisdictional purview of the Tax Court, the case 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. This simply sidesteps the issue Petitioner raised: that the overpayment issue *does fall* within the Tax Court's jurisdiction. The IRS conceded that Petitioner's liability for 2008 was actually $0, a concession which *confirms* Petitioner overpaid the IRS for that year. Without the Tax Court's determination of an overpayment pursuant to his imputed refund claim, however, his property will not be returned. He has a continuing injury following such concession: a loss of his property, a loss that occurred even though Congress sought to protect his due process rights, to place him on an equal footing with the IRS in the determination of the final tax liability of the "amount" due for the period, and to protect his property through the assignment of an imputed refund claim to any and all mailed deficiencies. § 6512(b)(2)(B).

The Fourth Circuit failed to analyze the intent of Congress, the statutory language, and the overall statutory scheme with respect to Petitioner's issue. But if Petitioner's position is correct, then an IRS

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[6] *Willson* is inapposite for another reason. Although *Willson* mentioned *Greene-Thapedi,* its decision did not rely on anything in that case. The "debt created by ... an erroneous refund [sent to Willson by the IRS as the result of a clerical error] is not a tax liability. *See, e.g., O'Bryant v. United States*, 49 F.3d 340, 347 (7th Cir. 1995). ... As for Willson's "underlying tax liability," there is none." *Id.*, at 320. Willson's assertion that the issue involved an "underlying tax liability" was thus completely off the mark.

concession that a taxpayer had no liability cannot defeat Tax Court's jurisdiction over the full redetermination of the underlying tax liability, just as an IRS concession that a taxpayer had no liability in a deficiency proceeding cannot defeat the full redetermination of the amount of liability, including the determination of overpayments. Indeed, without the mailing of the deficiency notice that also imputes a refund claim, *there would be no controversy* at all at the collection stage — the lack of mailing would have already extinguished all IRS claims of tax due.

The Fourth Circuit failed to consider the statutory scheme in light of Congress' remedial purpose

Sections 6320 and 6330 are remedial in purpose. S. Rept. 105-174, at 67 (1998), stated these new provisions were to entitle taxpayers to protections in dealing with the IRS, protections arising out of a concern that taxpayers have due process before being deprived of their property:

> The Committee believes that taxpayers *are entitled to protections* in dealing with the IRS ... the IRS should afford taxpayers adequate *notice of collection activity and a meaningful hearing before the IRS deprives them of their property* ... The Committee believes the following procedures designed to afford taxpayers *due process* in collections will increase fairness to taxpayers. (emphases added)

"Remedial legislation should be construed broadly to effectuate its purposes." *Techerpenin v. Knight,* 389 U.S. 332, 336 (1967). This principle can

be understood to require that any ambiguities ought to be resolved in favor of persons for whose benefit the statute was enacted, and any ambiguity concerning the extent of § 6330(c)(2)(B)'s due process remedy should be resolved in Petitioner's favor.

More importantly, in construing new provisions, it should also be assumed that Congress does not create discontinuities in legal rights and obligations without some clear statement. See, *e.g., Edmonds v. Compagnie Generale Trasatlantique*, 443 U.S. 256 (1979). The clear statement made in conference that the "procedures [are] designed to afford taxpayers due process," "before the IRS deprives them of their property," underscores that no discontinuity from pre-existing legal rights created by law — under which the Tax Court has *concurrent jurisdiction* to decide the issue raised — should be inferred or implied.

Further, Congress has made plain the duties of the IRS to uphold taxpayer rights, including "the right to pay no more than the correct amount of tax, ... the right to finality, ... [and] the right to a fair and just tax system." § 7803(a)(3). Where the Tax Court and the Appeals Office continue to avoid the duty to determine the correct amount of liability for a tax period — including the consideration of imputed refund claims under § 6512(b)(3) where a deficiency notice was *mailed*, triggering the refund claim — unfairness to Petitioner and taxpayers similarly situated allows the IRS to collect and keep tax payments to which it is not entitled. At a minimum, this engenders the very distrust of the Government Congress sought to mitigate and remedy.

The courts below ignored the remedial purpose of the RRA, and the pre-existing legal rights of

taxpayers, reaching an unfair result opposite that intended by Congress. This Court has the opportunity here to affirm the intent of Congress and ensure that the fairness to all taxpayers meant by Congress is upheld by the IRS and the Tax Court.

III. *The Fourth Circuit's decision is at odds with the Second Circuit's determination of Tax Court jurisdiction over CDP issues.*

The courts below both relied on a prior Tax Court decision in *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006). In that case, the Tax Court rejected a taxpayer's request to determine an overpayment and order a refund under § 6330 on two bases. First, because the the proposed levy was "moot," and no further challenge could be made to the existence or amount of tax liability. *Id.* at 7–8. Second, it held that, "[m]ore fundamentally," § 6330 *never* "give[s] [the Tax] Court jurisdiction to determine an overpayment or to order a refund or credit of taxes paid." *Id.* at 8. The Fourth Circuit adopted the first view here, and declined to analyze § 6330, as requested by Petitioner, to determine the ongoing jurisdiction of the Tax Court following IRS concession of $0 liability in a case where an NOD was mailed, but not received, *see supra.*

The second basis of the Tax Court, relying on *Greene-Thapedi*, has already been demonstrated to be in error. In *Wright v. C.I.R.*, 571 F.3d 215 (2009), the Second Circuit invalidated the Tax Court's all-encompassing conclusion. The *Wright* Court pointed out that § 6404(h)(1) authorizes the Tax Court "to determine whether the Secretary's failure to abate

interest ... was an abuse of discretion, and [to] order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest." The I.R.C. further empowers the Tax Court to determine an overpayment and order a refund in those circumstances. 26 U.S.C. § 6404(h)(2)(B) (incorporating § 6512(b)); *Wright*, at 219.

In *Wright*, the Second Circuit found the Tax Court erred when it "declined to exercise that [§ 6404(h)] grant of jurisdiction on the ground that Wright's action challenged a 'Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.'" *Id.* Since Wright raised the issue of interest abatement during the CDP hearing, it followed that the Notice of Determination issued by the agency was "the Secretary's final determination not to abate interest" under § 6404(h)(1), and Wright's petition for redetermination of the Notice of Determination was timely under not only § 6330, but also § 6404(h). Accordingly, the Tax Court had jurisdiction (concurrent with § 6330) to determine whether Wright was entitled to an abatement, and if he was, whether he had made an overpayment and was entitled to a refund. *Id.*, at 220.

Following the Second Circuit in *Wright*, the Tax Court itself has accepted that it can have "concurrent" jurisdiction under sections other than § 6330(d)(1), specifically § 6404. See *Gray v. Commissioner*, 138, T.C. 295 (2012) and *King v. Commissioner*, T.C. Memo 2015-36, *rev'd*, 829 F.3d 795 (7th Cir. 2016) (reversed on other grounds). Thus, as the Tax Court noted below: "[the Tax Court has] concluded that a petition ostensibly filed under [§ 6330] can be viewed as giving independent

jurisdiction under another provision that may provide us with the authority to consider overpayment claims." App. 39.

This "independent" jurisdiction under another provision of the Code extends, in the Tax Court's view, to ordering credits or refunds under the authority of § 6015(g) when innocent spouse relief is sought in connection with a CDP hearing under § 6330(c)(2)(A)(i). App. 33, 39.

The Second Circuit has found Tax Court has jurisdiction to order overpayments or refunds where that jurisdiction is found under other I.R.C. provisions, invoked by the taxpayer through the type of issue raised at the CDP hearing and at the Tax Court review. The Fourth Circuit has, in contrast, failed even to acknowledge that on this point, *Greene-Thapedi*'s holding has been invalidated. This Court should accept *certiorari* to clarify that just as the Second Circuit already acknowledged, Tax Court has jurisdiction under § 6330 where an issue is raised for which the Tax Court has concurrent jurisdiction under another provision.

Judge Halpern, the Tax Court judge below, has previously acknowledged that the Tax Court determines appeals under § 6330, where nonreceipt of an NOD is at issue, according to I.R.C. § 6214, a *separate grant of jurisdiction*:

> Where, upon appeal from a section 6330 determination, a challenge to the existence or amount of the taxpayer's underlying tax liability (*i.e.*, a challenge to the determination of the tax on which the Commissioner based his assessment) is properly before us, the taxpayer is entitled to

> a hearing *de novo* and may make a record, and we should decide that challenge in the same manner as we would redetermine a deficiency pursuant to section 6214.
> *Washington v. Commissioner*, 120 T.C. 114, 128 (2003) (Judge Halpern, concurring).

Given the remedial purpose of Congress in enacting RRA, the overall statutory scheme, and the statutory language of § 6330(c)(2)(B), if the Tax Court has authority to determine an appeal with respect to the underlying tax liability for any tax period pursuant to § 6214, which allows it to *increase* the amount of the underlying tax liability, then it must also have authority to determine such appeal pursuant to § 6512(b) — which allows it to determine *overpayments* — as well.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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