APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1074

BRIAN H. MCLANE,
Petitioner – Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent – Appellee.

AMERICAN COLLEGE OF TAX COUNSEL; TAX FREEDOM INSTITUTE, INC.,
Amici Supporting Appellant.

Appeal from the United States Tax Court.
(Tax Ct. No. 020317-13L)

Argued: October 29, 2021
Decided: January 25, 2022

Before MOTZ, DIAZ, and RICHARDSON,
Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Diaz and Judge Richardson joined.

ARGUED: Daniel M. Lader, DIRUZZO & COMPANY, Fort Lauderdale, Florida, for Appellant. Marion E.M. Erickson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Joseph A. DiRuzzo, III, DIRUZZO & COMPANY, Fort Lauderdale, Florida, for Appellant. David A. Hubbert, Acting Assistant Attorney General, Jacob Christensen, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. Frank Agostino, Phillip Colasanto, Andrew Lendrum, AGOSTINO & ASSOCIATES, P.C., Hackensack, New Jersey, for Amicus American College of Tax Counsel. Donald W. MacPherson, Peoria, Arizona, for Amicus Tax Freedom Institute, Inc.

DIANA GRIBBON MOTZ, Circuit Judge:

This case presents a single question: whether, after the Commissioner of Internal Revenue conceded that a taxpayer owed $0 and was entitled to the removal of any lien or levy, the United States Tax Court had jurisdiction to determine that the taxpayer overpaid and order a refund. The Tax Court held that it did not. We agree and so affirm.

I.

When the Internal Revenue Service ("IRS") determines that a taxpayer owes more than reported in that year's tax return, it may inform the taxpayer

of the discrepancy in a "notice of deficiency." 26 U.S.C. § 6212. The taxpayer may petition for review — asking the Tax Court to redetermine the amount of the deficiency — within 90 days from the time the IRS mails the notice. *Id.* § 6213(a). In the proceeding that follows this timely petition for review, if the Tax Court finds that there is no deficiency and the taxpayer instead overpaid, it may "determine the amount of such overpayment" and order a refund to the taxpayer. *Id.* § 6512(b)(1).

If for any reason — including failure to receive the IRS's notice of deficiency — the taxpayer does not timely file a petition for review, the IRS may place a lien on the taxpayer's property or levy the property to satisfy the amount owed. *Id.* §§ 6321, 6331 *et seq.* But the IRS can only do this after it notifies the taxpayer of its intent to do so and of the taxpayer's right to seek a pre-collection hearing in accordance with §§ 6320(a) and 6330(a) of the Internal Revenue Code (the "Code"). These statutes provide a second path to the Tax Court. After receiving notice of a lien or levy, the taxpayer may request a collection due process ("CDP") hearing before the IRS Independent Office of Appeals ("Appeals Office") and may thereafter petition the Tax Court for review of the Appeals Office's determination. *Id.* §§ 6320, 6330(b)(1)–(d)(1).

The taxpayer here, Brian McLane, filed a return for the year 2008 claiming deductions for business losses. The IRS denied "almost all of" those deductions and determined that he had underreported his liability by $23,615. The IRS mailed McLane a notice of deficiency advising him of the discrepancy, but the parties agree that he never received that notice. *See* Appellee's Br. at 9–10. When McLane did not attempt to pay or otherwise respond to that initial notice, the Commissioner

informed him in a second notice that the IRS sought to collect the amount of the deficiency through a lien on his property.

McLane then requested a CDP hearing under § 6330. During those proceedings, McLane presented enough information to substantiate the losses reported in his return. Based on the new evidence, the Commissioner conceded that McLane was entitled to deductions exceeding those he initially claimed and concluded that he owed the IRS $0.

In February 2018, after the Commissioner removed the assessment of liability, McLane asserted for the first time, in a telephone call with the Tax Court, that he overpaid his taxes for the year 2008 and now sought a refund. The Tax Court held that it lacked jurisdiction to determine and order a refund of overpayment and thus dismissed McLane's case. McLane then timely noted this appeal.

II.

We review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1); *see also Iames v. Comm'r*, 850 F.3d 160, 163 (4th Cir. 2017). Thus, we review jurisdictional determinations de novo. *See Nauflett v. Comm'r*, 892 F.3d 649, 651 (4th Cir. 2018). Because the Tax Court, as an Article I court, may exercise only jurisdiction authorized by statute, "[t]he question of Tax Court jurisdiction is one of statutory interpretation." *Borenstein v. Comm'r*, 919 F.3d 746, 748 (2d Cir. 2019); *see also Willson v. Comm'r*, 805 F.3d 316, 319–20 (D.C. Cir. 2015) ("[T]he tax court possesses only 'limited jurisdiction,' and may exercise it 'only to the extent expressly authorized by Congress.'" (internal citations omitted)).

In CDP hearings like the one at the heart of this appeal, a taxpayer may raise before the Appeals Office "any relevant issue relating to the unpaid tax or the proposed levy." 26 U.S.C. § 6330(c)(2)(A). Relevant issues include "appropriate spousal defenses," "challenges to the appropriateness of collection actions," and "offers of collection alternatives." *Id.* § 6330(c)(2)(A)(i)–(iii).

In addition, if a taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability," the taxpayer may raise "challenges to the existence or amount of the *underlying tax liability*." *Id.* § 6330(c)(2)(B) (emphasis added). A taxpayer may then appeal to the Tax Court, which may review only the issues considered in the first instance by the Appeals Office. *Id.* § 6330(d)(1). Because McLane never received a notice of deficiency from the IRS, he falls within this latter category. In other words, § 6330(c)(2)(B) permits him to raise in a CDP hearing a challenge to his "underlying tax liability" for any tax period that he has not yet had an opportunity to dispute. McLane contends that the phrase "underlying tax liability" (a phrase Congress left undefined) confers jurisdiction on the Tax Court to determine that he overpaid and order a refund. We disagree.

III.

Sections 6330 and 6320 provide a taxpayer with the right to a CDP hearing only when the IRS seeks to enforce collection of tax liability via lien or levy. If the taxpayer requests a CDP hearing, the Appeals Office determines in the first instance whether the IRS's collection action may go forward. When as here, the Commissioner has already conceded that a

taxpayer has no tax liability and that the lien should be removed, any appeal to the Tax Court of the Appeals Office's determination as to the collection action is moot. No collection action remains, for which there is underlying tax liability, to appeal. *See Willson*, 805 F.3d at 320–21 ("As for Willson's 'underlying tax liability,' there is none. The IRS has entirely abated the 2006 liability it improperly assessed, returned the $2,206.55 it collected in satisfaction of that improper liability and abandoned its levy.").

We cannot read the phrase "underlying tax liability" in isolation, but instead must read it in "the specific context in which that language is used." *Yates v. United States*, 574 U.S. 528, 537 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Here, the "specific context" is the IRS's attempt to collect via lien or levy. *See Montgomery v. Comm'r*, 122 T.C. 1, 12 (2004) (Laro, J., concurring) ("The relevant term, 'underlying tax liability', is clear and unambiguous and is read easily to mean the tax liability underlying the proposed levy."). The phrase "underlying tax liability" does not provide the Tax Court jurisdiction over independent overpayment claims when the collection action no longer exists.*

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* In holding that the phrase "underlying tax liability" did not confer jurisdiction for it to determine an overpayment or order a refund, the Tax Court relied on its prior decision in *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006). In *Greene-Thapedi*, the Tax Court rejected a taxpayer's request that it determine an overpayment and order a refund under § 6330 on two bases. *Id.* First, it held that, because the Commissioner had already acknowledged in that case "that there [was] no unpaid liability for the determination year upon which a levy could be based," the proposed levy was "moot," and the taxpayer could no longer "challenge the existence or amount of her underlying tax liability in [that] proceeding." *Id.* at 7–8. Second, it held that,

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." Appellee's Br. at 15–16 (emphasis added); *see Iames*, 850 F.3d at 162 ("Section 6330 provides a set of procedural safeguards for taxpayers *facing* a potential levy action by the IRS . . ." (emphasis added)). McLane no longer faces such an action.

For the foregoing reasons, the judgment of the Tax Court is

AFFIRMED.

"[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. Here, we 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. *See Willson*, 805 F.3d at 320 ("[I]f a case raises a question within the jurisdictional purview of the tax court, and that question is subsequently resolved, 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."); *Byers v. Comm'r*, 740 F.3d 668, 679 (D.C. Cir. 2014).

APPENDIX B

T.C. Memo. 2018-149

UNITED STATES TAX COURT

BRIAN H. MCLANE, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 20317-13L.
Filed September 11, 2018.

P filed a Federal income tax return for his 2008 taxable year that claimed deductions on Schedule C, Profit or Loss From Business. R determined a deficiency for that year on the basis of his disallowance of those deductions and purportedly mailed P a notice of deficiency that P did not receive. R later issued to P a notice of Federal tax lien (NFTL) in regard to P's 2006 and 2008 taxable years. After a collection due process hearing, R issued a notice of determination sustaining the NFTL for both years. In his petition seeking review of the notice of determination, P assigned no error in regard to his 2006 taxable year but challenged R's assessment of a deficiency for 2008 on the grounds that R had not mailed him a notice of deficiency. P also claimed that R's Appeals Office (Appeals) had not given him sufficient opportunity to substantiate the expenses underlying the disallowed deductions. In a supplemental hearing following our remand of the case, Appeals allowed about half of the deductions P claimed. P presented further documentation of his business expenses during and after our trial of the

case that eventually led R to concede P's entitlement to deductions in excess of those **[*2]** claimed on his return. R has thus agreed to abate his assessment of a deficiency for P's 2008 taxable year and release the lien for that year. P asks us to determine an overpayment of his 2008 Federal income tax and order a refund of that amount.

Held: I.R.C. sec. 6330(d)(1) gives us no jurisdiction to determine and order the credit or refund of an overpayment for any of the years in issue. Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006), followed.

Brian H. McLane, *pro se.**
Wendy Yan, Nancy M. Gilmore, and Elizabeth C. Mourges, for respondent.

MEMORANDUM OPINION

HALPERN, Judge: This case is before us to review a determination by the Internal Revenue Service Appeals Office (Appeals) to sustain a notice of Federal tax lien (NFTL) respondent issued to petitioner in regard to his taxable years ended December 31, 2006 and 2008. In his petition, petitioner made no assignment of error concerning his 2006 taxable year but alleged that an assessment of additional tax for his 2008 taxable year was invalid because the **[*3]** period of limitations

*Brief amicus curiae was filed by Jacqueline Lainez-Flanagan (Professor), Carlton M. Smith, and Roxy Araghi (student), University of the District of Columbia David A. Clarke School of Law Tax Clinic.

provided in section 6501[1] had expired before assessment. Petitioner also claimed that Appeals did not give him sufficient opportunity to substantiate expenses underlying deductions he claimed on his 2008 Federal income tax return that respondent had disallowed.

Petitioner's 2008 return included a Schedule C, Profit or Loss From Business, reporting a net profit (gross income less deductible expenses) from his contracting business. Respondent's notice of deficiency disallowed almost all of the deductions petitioner claimed on his Schedule C. At a supplemental hearing that Appeals conducted after we remanded the case to allow for fuller consideration of petitioner's challenges to the validity of respondent's assessment for his 2008 year, petitioner presented documentation that led Appeals to allow about half of the deductions he had claimed on his 2008 Schedule C. Petitioner presented additional documentation at and after our trial of the case that led respondent to allow further deductions. Petitioner eventually established to respondent's satisfaction that he was entitled to deductions in amounts in excess of those claimed on his return. As a result, respondent now concedes that "petitioner's correct tax liability for 2008 is $0.00." Respondent's concession **[*4]** regarding petitioner's liability renders moot any issue regarding the validity of respondent's assessment of additional tax liability for petitioner's 2008 taxable year. Respondent further concedes that petitioner is entitled to abatement of the additional liability respondent sought to collect and the release of the lien for his 2008 taxable year.

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[1] All section references are to the Internal Revenue Code in effect at all relevant times. We round all dollar amounts to the nearest dollar.

Although, as respondent observes, his abatement of petitioner's 2008 tax liability and release of the lien for that year is "the very relief that petitioner sought when he challenged the original * * * notice of determination", petitioner is unsatisfied with that result and claims that he is entitled to a refund of tax for his 2008 taxable year. Thus, the only issue remaining for our consideration is our jurisdiction to determine and order a credit or refund of any overpayment petitioner might have made for 2008.

Background

Petitioner filed a Federal income tax return for the taxable year ended December 31, 2008, that reported a tax liability of $2,426. Respondent received petitioner's 2008 return on October 19, 2009.

Petitioner's 2008 return included a request for an installment agreement under which petitioner would pay his 2008 tax liability in monthly payments of $100. Between December 24, 2009, and October 14, 2010, petitioner made **[*5]** payments of $957 toward that liability. He paid an additional $800 between November 29, 2010, and September 21, 2012.

In February 2013, respondent assessed petitioner additional tax of $23,615 for his 2008 taxable year. Petitioner, however, did not receive a notice of deficiency concerning that assessment.

After respondent issued petitioner the NFTL in March 2013, petitioner timely requested a collection due process (CDP) hearing. Following that hearing, respondent issued petitioner a notice of determination sustaining the NFTL. In response, petitioner, who then resided in Maryland, filed with this Court a "Petition for Lien Action Under Code Sections 6320(c) and 6330(d)". That petition assigns

no error in regard to petitioner's 2006 taxable year but asserts that respondent issued no notice of deficiency to him for 2008.

During a conference call with the parties on February 21, 2018, upon being apprised by respondent's counsel that the deductions respondent allowed as a result of petitioner's submission of additional documentation during and following trial had eliminated petitioner's tax liability for 2008, we asked the parties whether they objected to our entry of a decision upholding respondent's determination only in regard to petitioner's 2006 taxable year. While respondent's counsel voiced no objection, **[*6]** petitioner objected on the basis of his belief that he is now entitled to a refund of all or part of the tax he had previously paid for 2008.

Petitioner's petition makes no claim that he overpaid his 2008 Federal income tax liability. Neither the case activity record printout concerning petitioner's CDP hearing nor respondent's notice of determination provides any indication that petitioner raised during that hearing the possibility that he was entitled to a refund of tax paid for 2008.

Because the postrial briefs the parties initially submitted did not address the question of our jurisdiction in a CDP case to determine and order the credit or refund of an overpayment, we requested the parties to submit supplemental briefs addressing the issue. Our request for supplemental briefs asked the parties to address, among other things, Appeals' jurisdiction to consider refund claims.

Because of its view that the present case has potential significance "in the area of taxpayer rights and procedural efficiency", the University of the District of Columbia David A. Clarke School of Law Tax Clinic moved for leave to file an amicus

memorandum of law in support of petitioner. We granted the clinic's motion and filed the memorandum it had lodged with its motion.

[*7] Discussion

I. Applicable Law

A. Relevant Statutory Provisions

Section 6511 governs the timeliness of refund claims. Section 6511(a) limits the time during which a taxpayer can file a claim. Even when the taxpayer files a claim that is timely under section 6511(a), he is entitled to a refund only of payments made during a specified lookback period. Under section 6511(b)(2) the applicable lookback period turns on whether the taxpayer filed a return for the taxable year in question and, if so, whether he received any extensions of the time for filing that return. If the taxpayer filed a return for the year, his refund cannot exceed "the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." Sec. 6511(b)(2)(A).

Section 6214(a) gives us "jurisdiction to redetermine the correct amount of * * * [a] deficiency" determined by the Commissioner when a taxpayer files a timely petition for redetermination. Section 6512(b)(1) gives us jurisdiction in a deficiency case to determine the amount of any overpayment of income tax made by the taxpayer for a taxable year before us (whether or not we also find a deficiency for that year). Any overpayment we determine under section [8*] 6512(b)(1) must be refunded or credited to the taxpayer. But section 6512(b)(3) limits our jurisdiction to order a credit or refund to only that portion of a tax paid after the mailing of a notice of deficiency or in regard to which a timely claim for

refund was pending (or could have been filed) on the date of mailing of the notice of deficiency.

Sections 6320 and 6330 provide a taxpayer the right to notice and the opportunity for an Appeals hearing before the Commissioner can collect unpaid taxes by means of a lien or levy against the taxpayer's property. If a taxpayer requests a CDP hearing, the Appeals officer conducting the hearing must verify that the requirements of any applicable law or administrative procedure have been met. Secs. 6320(c), 6330(c)(1). The taxpayer may raise at a hearing any relevant issue relating to the unpaid tax or the collection action, including appropriate spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives. See sec. 6330(c)(2)(A). The taxpayer may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any period if he did not receive a statutory notice for that liability or did not otherwise have an opportunity to dispute it. See sec. 6330(c)(2)(B). Section 6330(d)(1) allows a taxpayer to petition this Court for a review of a **[*9]** determination made under section 6320 or 6330 and grants us jurisdiction with respect to the matter upon the timely filing of a petition.

Section 6404(e)(1)(A) allows the Secretary to abate the assessment of interest on a deficiency that is "attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service * * * in performing a ministerial or managerial act". If the Secretary denies a taxpayer's claim for abatement of interest, section 6404(h) allows the taxpayer to petition this Court, within a prescribed period, to determine whether the Secretary's failure to abate interest was an abuse of discretion. Section 6404(h)(2)(B) provides

that "[r]ules similar to the rules of section 6512(b)" apply for purposes of section 6404.

B. Greene-Thapedi v. Commissioner

In Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006), we considered a petition to review the Commissioner's determination to collect by levy a taxpayer's 1992 tax liability, as established by a stipulated decision in a prior deficiency proceeding. After the taxpayer filed a petition to review the Commissioner's determination to uphold the proposed levy, the Commissioner offset that liability by applying against it an overpayment for the taxpayer's 1999 taxable year. We thus accepted the Commissioner's request to dismiss the case as moot. **[10*]** Before dismissing the case, however, we had to address the taxpayer's claim that she was entitled to a refund of interest that had accrued before she received from the Commissioner a Form CP 504 advising her of his intent to levy on specified assets. The taxpayer's refund claim was an alternative to her argument that she was not liable at all for her 1992 deficiency or interest thereon because the Commissioner failed to assess that deficiency and mail her a timely notice and demand to pay it. We thus viewed the taxpayer's refund claim as having arisen "under section 6330(c)(2), as an outgrowth of her challenge to the existence and amount of her underlying 1992 tax liability." Id. at 8. The taxpayer's right to challenge her liability, however, arose "only in connection with her challenge to the proposed collection action." Id. Once the proposed levy became moot, we reasoned, the taxpayer's opportunity to challenge her liability vanished, and with it any right to claim a refund of any improperly accrued interest. "More fundamentally," we observed,

"section 6330 does not expressly give this Court jurisdiction to determine an overpayment or to order a refund or credit of taxes paid." Id. And in the absence of explicit statutory authority, we declined to assume jurisdiction in a CDP case "either to determine an overpayment or to order a refund or credit of taxes paid". Id. at 11. We saw no indication that Congress, in enacting section 6330, "intended, sub silentio, to provide taxpayers a back-door **[*11]** route to tax refunds and credits free of the[] longstanding and well-established limitations" provided in sections 6511 and 6512(b) regarding when taxpayers can claim refunds and the amounts they can claim. Greene-Thapedi v. Commissioner, 126 T.C. at 12. Moreover, "in light of the detailed and comprehensive codification of such limitations" we doubted "that Congress would have intended that such limitations should arise by inference in section 6330 with respect to claims for tax refunds or credits as to which our jurisdiction would similarly arise under section 6330, if at all, only by inference." Id. We thus concluded "that Congress did not intend section 6330 to provide for the allowance of tax refunds and credits." Id.

In a footnote to our Opinion in Greene-Thapedi v. Commissioner, 126 T.C. at 11 n.19, we allowed for the possibility that our consideration in a CDP case of the taxpayer's possible overpayment might be "necessary for a correct and complete determination of whether the proposed collection action should proceed." In a case unlike the one before us in Greene-Thapedi in which the taxpayer is entitled to challenge his underlying liability, we reasoned, "the validity of the proposed collection action might depend upon whether the taxpayer has any unpaid balance, which might implicate the question of

whether the taxpayer has paid more than was owed." Id.

[*12] Because the refund claim of the taxpayer in Greene-Thapedi involved accrued interest, we also considered the potential applicability of section 6404. On the basis of the cross-reference in section 6404(h)(2)(B) to section 6512(b), we determined in Goettee v. Commissioner, T.C. Memo. 2003-43, 2003 WL 464862 at *19, aff'd, 192 F. App'x 212 (4th Cir. 2006), that we have jurisdiction to determine any overpayment that results from the abatement of interest under section 6404(e).

The taxpayer in Greene-Thapedi v. Commissioner, 126 T.C. at 12 n.21, did not "expressly assert[] any claim for interest abatement pursuant to sec. 6404." Moreover, the record before us in that case provided no evidence that the interest the taxpayer sought to have refunded had accrued as the result of an "unreasonable error or delay resulting from a 'ministerial act'." Id. at 13 n.21. Therefore, we did not view the taxpayer's refund claim as "being predicated on a claim for interest abatement pursuant to section 6404." Id. at 12. We added:

> [E]ven if * * * [the taxpayer's] claim were so construed, that circumstance would not affect our conclusion that we lack jurisdiction under section 6330 to determine any overpayment or to order a refund or credit. Unlike section 6404(h), section 6330 contains no cross-reference to the rules of section 6512(b), nor does section 6330 cross-reference section 6404(h)(2)(B) * * *. Section 6404(h)(2)(B) illustrates that Congress has acted infrequently to extend this Court's overpayment jurisdiction, and then only in a

> deliberate and circumscribed manner. These considerations buttress [*13] our conclusion that we should not assume overpayment jurisdiction in a section 6330(d) proceeding absent express statutory provision. Id. at 12-13.

In a separate dissenting opinion joined by one other Judge, Judge Vasquez invoked the importance of construing remedial legislation broadly to implement its purposes and, on the basis of that principle, suggested that the Commissioner could not "unilaterally deprive the Court of jurisdiction in section 6330 cases by merely stating that he no longer intends to proceed with collection." Id. at 15, 16-17 (Vasquez, J., dissenting). Granting the Commissioner that authority, he reasoned, would frustrate "[t]he congressional intent behind the enactment of section 6330". Id. at 17 (Vasquez, J., dissenting).

Judge Vasquez also accused the majority in Greene-Thapedi of failing to acknowledge that this Court's predecessor, the Board of Tax Appeals, "decided it had overpayment jurisdiction pursuant to the Revenue Act of 1924" even though Congress had not granted the Board that jurisdiction in "explicit statutory language". Id. at 21 (Vasquez, J., dissenting). He cited four cases that, in his view, exemplified the Board's exercise of its assumed overpayment jurisdiction: Barry v. Commissioner, 1 B.T.A. 156 (1924), Hickory Spinning Co. v. Commissioner, 1 B.T.A. 409 (1925), Walker-Crim Co. v. Commissioner, [*14] 1 B.T.A. 599 (1925), and Maritime Sec. Co. v. Commissioner, 2 B.T.A. 188 (1925).

Because the taxpayer before us in Greene-Thapedi v. Commissioner, 126 T.C. at 25 (Vasquez, J., dissenting), had "properly invoked" our jurisdiction, Judge Vasquez reasoned, our failure to address the taxpayer's entitlement to an underpayment left "an essential issue unaddressed."

Finally, Judge Vasquez described the majority opinion in Greene-Thapedi as "creat[ing] a trap for the unwary." Id. at 26 (Vasquez, J., dissenting). He elaborated:

> Taxpayers who choose to litigate their section 6015 [innocent spouse] and section 6404 claims as part of a section 6330 proceeding cannot obtain decisions of an overpayment or a refund in Tax Court. If those same taxpayers had made claims for section 6015 relief or interest abatement in a non-section-6330 proceeding, we could enter a decision for an overpayment and could order a refund. * * * Id.

II. Analysis

The case before us requires that we revisit the issue we addressed in Greene-Thapedi: whether we should infer jurisdiction not expressly granted to us by the applicable statutory provisions that allows us, in a CDP case brought under section 6330(d)(1), to determine and order the credit or refund of an overpayment **[*15]** for any of the years in issue. Neither petitioner nor amicus has given us sufficient reason to depart from that precedent.

A. Whether Greene-Thapedi Is Distinguishable

Petitioner attempts to differentiate challenges to the amount of a taxpayer's tax liability and those that relate to alleged failures by the Commissioner to

follow the procedures required to collect that liability. He observes that the taxpayer in Greene-Thapedi had had a prior opportunity to contest before this Court her tax liability for the year in issue and that her claim for a refund of interest arose from her allegation that the Commissioner had not properly assessed the tax on which the interest accrued and timely issued to her a notice and demand for payment. On the basis of those observations, petitioner describes the refund claim of the taxpayer in Greene-Thapedi as an assertion that the Appeals officer had failed to verify under section 6330(c)(1) compliance with applicable law and administrative procedure. Therefore, our inability to consider the taxpayer's refund claim in Greene-Thapedi, in petitioner's view, does not establish that we lack jurisdiction to determine an overpayment by a taxpayer entitled to challenge his underlying liability under section 6330(c)(2)(B).

Petitioner describes as "very limited" the overpayment jurisdiction he claims that we have in CDP cases. In particular, he argues that we have such jurisdiction **[*16]** "only where the underlying tax liability is at issue because of the non-receipt of a mailed" notice of deficiency. Petitioner reads section 6512(b)(3)(B) to mean that the mailing of a notice of deficiency "preserve[s] an imputed refund claim for the taxpayer as of the date of that mailing — a claim that is activated by a petition to Tax Court."[2] When the taxpayer does not receive the notice of deficiency,

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[2] Sec. 6512(b)(3)(B) allows for a credit or refund of amounts paid "within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an Overpayment".

however, "he will, through no fault of his own, miss the opportunity to file a petition and activate that automatic refund claim." Thus, section 6330(c)(2)(B), which allows a taxpayer to challenge the existence or amount of his underlying tax liability in a CDP hearing when he did not receive a notice of deficiency for the year in issue, also allows the taxpayer, in petitioner's view, to raise any refund claim that would have been "activated" by a petition for redetermination filed in response to the undelivered notice of deficiency.

Because petitioner's argument rests on the mailing of a notice of deficiency not received by the taxpayer, he now accepts the premise that respondent mailed him a notice of deficiency for his 2008 taxable year — although that premise conflicts with the position he had consistently maintained before learning of his **[*17]** potential overpayment for that year. In the assignment of errors in his petition, petitioner repeatedly asserted: "No Notice of Deficiency was issued to * * * [him]". In his postrial briefs, petitioner continued to challenge the validity of respondent's assessment, claiming that respondent had not established that a notice of deficiency had been mailed to him before the expiration of the period of limitations on assessment. Petitioner abandons that position in his supplemental brief, which he describes as "based on the premise that a notice of deficiency for tax year 2008 was in fact mailed".

We see no reason why the issuance of a notice of deficiency that petitioner never received should allow him to pursue a claim for refund that would otherwise have become time barred long before he manifested any awareness of it. Because respondent received petitioner's 2008 Federal income tax return

on October 19, 2009, the period of limitations on a claim for refund of any of the $957 petitioner paid between December 24, 2009, and October 14, 2010, expired no later than October 19, 2012.[3] See sec. 6511(a). The period of limitations on a claim for refund of any of the $800 petitioner paid between November 29, 2010, and [*18] September 21, 2012, expired two years after the date of each payment.

Respondent's issuance in August 2012 of a notice of deficiency for petitioner's 2008 taxable year (if such a notice was actually mailed)[4] in no way lulled petitioner into complacency in his pursuit of any refund claim because — as the parties agree — he never received the notice.

A taxpayer's filing with this Court of a petition for redetermination in response to a notice of deficiency effectively tolls the period of limitations on any claim for refund for a year covered by the notice because the petition cuts off the taxpayer's right to seek a refund for the year in any other forum. See sec. 6512(a). But the issuance of a notice of deficiency, by itself, does not bar the taxpayer from seeking a refund in other courts. Thus, petitioner's nonreceipt of any notice of deficiency for his 2008 taxable year did not deprive him of an opportunity to pursue a claim for a refund of any overpayment he made for that year. But petitioner manifested no

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[3] If the envelope containing petitioner's 2008 Federal income tax return were postmarked on or before the return's due date, the return would be treated as having been filed on the date of the postmark rather than the date respondent received it. See sec. 7502(a).

[4] Respondent claims that he "mailed petitioner a statutory notice of deficiency on August 7, 2012." Petitioner accepts that date as "[t]he assumed date that the SNOD [statutory notice of deficiency] for 2008 was mailed".

awareness of the possibility that he had overpaid his 2008 Federal income tax until our call with the parties on February 21, 2018 — long after the period of limitations on any refund claim had expired. We see no reason to read into section 6330(d) jurisdiction that that section does not explicitly grant us **[*19]** to give those in petitioner's situation another opportunity to pursue a refund claim in regard to which they took no action during the applicable period of limitations.[5]

Amicus' efforts to distinguish Greene-Thapedi are similar to petitioner's and also unavailing. Like petitioner, amicus points to the receipt of a notice of deficiency by the taxpayer in Greene-Thapedi and her opportunity to contest the deficiency in this Court as factors that distinguish that case from the present one. Unlike petitioner, however, amicus offers us no reason why that distinction should make a difference. In particular, amicus misreads note 19 to our Opinion in Greene-Thapedi. In that footnote, we accepted the potential relevance of a taxpayer's payment of more tax than was owed — but not because we assumed we would have jurisdiction in such a case to determine the amount of the taxpayer's overpayment and order that it be credited or refunded. Instead, we saw the question as relevant only in that a taxpayer's overpayment would mean

[5] Petitioner suggests that "[a]ttempting to apply § 6330 in isolation, apart from th[e] [statutory] scheme [governing the assessment of deficiencies], could lead to an absurd conclusion that when a person did not receive an SNOD, but no greater liability was assessed than that showing on his return, a challenge to his own self-assessed liability is allowed." The absurdity of that conclusion, however, is far from self-evident. See Montgomery v. Commissioner, 122 T.C. 1, 9 (2004). (allowing taxpayers in a CDP case to challenge the liability reported on their return).

that he had **[*20]** no unpaid liability and that the proposed collection action would thus be invalid. In other words, the relevant question (overpayment or not?) could be answered without the need to determine the precise amount of any overpayment. Simply determining that the taxpayer had paid more than he owed — by some amount — would mean that the Commissioner's collection action could not go forward.

B. Whether Greene-Thapedi Is Correct

Amicus argues that we should overrule Greene-Thapedi if we find ourselves unable to distinguish it. Most of amicus' arguments for overruling Greene-Thapedi appear in the dissenting opinion Judge Vasquez filed in that case. Having considered those arguments in issuing our Opinion in Greene-Thapedi, we might be justified in setting them aside without further explanation. Nonetheless, in response to amicus' invitation that we reconsider those arguments, we will explain why we do not view them as grounds for overruling our established precedent.

1. Implementation of Congress' Remedial Purpose

First, amicus argues, as did Judge Vasquez in Greene-Thapedi, that our holding in that case is contrary to section 6330's "remedial purpose". We fail to see, however, how our holding in Greene-Thapedi that we lack jurisdiction in a CDP case to determine and order the refund or credit of an overpayment **[*21]** undermines the objectives Congress sought to achieve in enacting the CDP provisions. The legislative history of those provisions indicates that Congress enacted them to "insure due process" in the use by the Internal Revenue Service of its authority

to collect taxes by means of liens and levies. See generally S. Rept. No. 105-174, at 67-68 (1998), 1998-3 C.B. at 537, 603-604. Respondent concedes that petitioner is entitled to abatement of his 2008 Federal income tax liability and the release of the lien to collect that liability. That concession ensures that respondent will not use his collection authority in a manner that violates petitioner's rights, and thus it fully satisfies the purpose of the CDP provisions. Nothing in the relevant legislative history of those provisions suggests that their purpose extends to protecting taxpayers from the consequences of their failure to pursue refund claims timely.

Petitioner and amicus both invoke our observation in Montgomery v. Commissioner, 122 T.C. 1, 10 (2004), that "the substantive and procedural protections contained in sections 6320 and 6330 reflect congressional intent that the Commissioner should collect the correct amount of tax". If respondent ends up having collected too much tax from petitioner for 2008, however, it will not be because of respondent's misuse of his collection authority but instead because of **[*22]** petitioner's failure to realize in time that documents in his possession established his entitlement to deductions in excess of those he claimed on his return.

2. Need for Resolution of Continuing Controversy

Amicus suggests that petitioner's appeal of respondent's determination to sustain the NFTL for his 2006 and 2008 taxable years vests us with jurisdiction to resolve the parties' "entire controversy". Amicus reasons that the parties' disagreement over whether we have jurisdiction to

consider petitioner's claim for a refund of any overpayment he made for his 2008 taxable year means that we have jurisdiction to resolve that disagreement. Amicus explains:

> [A]lthough Respondent has conceded to petitioner's substantiations of deductions for the tax year at issue, Respondent's concession should have no bearing on this court's jurisdiction because there remains a controversy between the parties which this Court must address. * * * Petitioner believes that he has made an overpayment of his income tax and is entitled to a refund of this amount. Respondent argues that, even if there is admittedly now an overpayment, the Tax Court lacks jurisdiction to decide the overpayment in a collection review proceeding. It follows that there remains a controversy which this Court should address, its jurisdiction having been properly invoked pursuant to [section] 6330(d)(1).

We readily agree that "[w]e have jurisdiction to determine our jurisdiction." Buczek v. Commissioner, 143 T.C. 301, 307 (2014). But accepting that we have **[*23]** jurisdiction to answer the question of whether we can determine an overpayment in a CDP case does not dictate an affirmative answer to that question.[6]

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[6] In Naftel v. Commissioner, 85 T.C. 527, 530 (1985), on which amicus relies, we wrote that "generally, once a petitioner invokes the jurisdiction of the Court, jurisdiction lies with the Court and remains unimpaired until the Court has decided the controversy." We determined that we had jurisdiction in Naftel to resolve a dispute about whether the taxpayer had received

3. Precedent for Imputing Jurisdiction

Amicus also repeats Judge Vasquez's claim in Greene-Thapedi that our predecessor, the Board of Tax Appeals, assumed overpayment jurisdiction under the Revenue Act of 1924 that the statute did not expressly grant it. Amicus urges us to follow our predecessor's example and "assume that * * * [we have] overpayment jurisdiction in collection review proceedings".

In the cases to which amicus refers — the same cases to which Judge Vasquez referred in his dissent in Greene-Thapedi — the Board determined overpayments not for the purpose of ordering a credit or refund but instead as a necessary step in **[*24]** redetermining the taxpayers' deficiencies for the years before it. The revenue acts governing those cases required that a taxpayer's deficiency for a given year be reduced by any overpayments made in prior years. Thus, for example, in Barry, the Commissioner reduced the deficiency he determined for the taxpayer's 1921 taxable year by the overassessment he determined for 1920. The taxpayer claimed that the amount by which he was overassessed for 1920 was greater than the amount the Commissioner allowed. The Board rejected the Commissioner's contention that its jurisdiction

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refund checks the Commissioner had issued. But we did so because resolution of that dispute fell within our express statutory jurisdiction to redetermine deficiencies and determine the existence and amount of any overpayments. As we explained: "When we are presented with a case over which we have jurisdiction and in which we possess the necessary and usual powers to resolve the dispute, we must consider all the issues raised by the case." Id. at 535. Thus, Naftel does not establish that we must address disputes whose resolution is outside our "necessary and usual powers".

covered only the taxpayer's 1921 taxable year and that it could not determine the amount of the taxpayer's overassessment for 1920. In the Board's view, the exercise of its jurisdiction to determine the proper deficiency for 1921 required a determination of the amount of any overpayment for 1920. Thus, the Board did not assume jurisdiction beyond that expressly granted to it. Instead, it simply undertook those determinations necessary for the effective exercise of its statutorily defined jurisdiction. See Barry v. Commissioner, 1 B.T.A. at 158 ("We think it was clearly the intention of Congress in creating the Board that, on appeals by taxpayers, we should consider every question necessary to a correct and complete determination of any deficiency which the Commissioner proposes to assess.").

[*25] Cases like Barry thus do not establish a precedent for our arrogation of authority beyond what Congress expressly granted to us. In particular, they do not support our assuming jurisdiction in a CDP case to determine and order the credit or refund of any overpayment the taxpayer may have made for the years in issue. In contrast to the situation the Board addressed in Barry and similar cases, our determination of an overpayment in a CDP case is not a required element of our statutorily defined jurisdiction.

If Appeals had the authority to consider refund claims and its determination in a particular case included the denial of a taxpayer's refund claim, our consideration of that claim might be an element of our review of Appeals' determination under section 6330(d)(1). Cf. Wright v. Commissioner, 571 F.3d 215 (2d Cir. 2009) (treating a taxpayer's petition under section 6330(d)(1) as invoking our jurisdiction to review Appeals' failure to abate interest and

determine any overpayment of interest because the taxpayer had raised the interest abatement issue in his CDP hearing), vacating in part T.C. Memo. 2006-273.[7] In his supplemental brief, petitioner cites a delegation order that grants Appeals the authority provided in section 7121 to enter into closing agreements. See Internal **[*26]** Revenue Manual pt. 1.2.47.4 (Aug. 18, 1997). Because section 7121(b)(2) refers to credits and refunds, petitioner reasons that "Congress has thus given Appeals, through the Secretary's delegation, broad-based authority to enter into agreements extending even [to] refunds and credits."[8] Petitioner misreads the delegation order. That Appeals can enter into closing agreements and closing agreements can result in refunds or credits does not establish that Appeals has the authority to order refunds or credits — particularly those barred by the statute of limitations. Therefore, even if petitioner had advanced his refund claim before Appeals, reviewing Appeals' failure to consider that claim would not be a necessary element of our review of Appeals' determination under section 6330(d)(1).

Amicus also claims that our jurisdiction to consider refunds in innocent spouse cases brought under section 6015(e) lacks explicit statutory

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[7] We discuss infra part II.B.4 the implications for the present case of Wright v. Commissioner, 571 F.3d 215 (2d Cir. 2009), vacating in part T.C. Memo. 2006-273.

[8] Sec. 7121(a) authorizes the Secretary to enter into agreements concerning a taxpayer's tax liability. Sec. 7121(b) concerns the finality of those agreements and provides in para. (2) that, as a general rule, "in any suit, action, or proceeding, * * * [a closing] agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

foundation. We disagree. When an individual to whom the Commissioner denies relief under section 6015 from joint and several liability petitions this Court for review of the **[*27]** Commissioner's determination, section 6015(e)(1)(A) gives us jurisdiction "to determine the appropriate relief available to the individual under * * * [that] section". And section 6015(g)(1) expressly authorizes credits or refunds (to the extent not time barred) as part of the appropriate relief.[9]

4. Potential Concurrent Jurisdiction Under Multiple Code Sections

Wright illustrates that petitions ostensibly filed under section 6330(d)(1) can give us jurisdiction to determine and order the refund or credit of an overpayment when the petition includes a claim for interest abatement. Wright involved the Commissioner's effort to collect a taxpayer's tax liabilities for 1987 and 1989. The taxpayer had received a notice of deficiency for those years and

[9] Amicus observes that sec. 6015(g) includes no express statement that sec. 6512(b) applies in an innocent spouse case. Instead, sec. 6015(g)(1) requires the allowance of a credit or making of a refund to the extent attributable to the application of sec. 6015 "[n]othwithstanding any other law or rule of law" other than specified sections including secs. 6511 and 6512(b). Thus, sec. 6015(g) assumes that secs. 6511 and 6512(b) apply simply because their application is not expressly negated. But the exclusion of secs. 6511 and 6512(b) from those provisions that cannot override sec. 6015(g) does not establish our overpayment jurisdiction in an innocent spouse case. Instead, it simply ensures that claims to refunds or credits under sec. 6015(g) are subject to the same limitations as claims made on grounds other than relief from joint and several liability. (If sec. 6015(g)(1) made no mention of secs. 6511 and 6512(b), we could award credits or refunds in innocent spouse cases without regard to when the taxpayer paid the amounts in issue.)

petitioned this Court for redetermination of the deficiencies. See Wright v. [*28] Commissioner, T.C. Memo. 1998-224, aff'd without published opinion, 173 F.3d 848 (2d Cir. 1999). Although the taxpayer was therefore barred from contesting his underlying liability in his subsequent CDP case, he sought the abatement of interest that had accrued on that liability because of the Commissioner's failure to apply a refund due him for 1993 to reduce his liabilities for the years in issue without notifying him of that failure. Although we agreed with the taxpayer that he was entitled to additional interest abatement beyond what the Commissioner had allowed, we did not consider his claim that he was also entitled to a refund of interest already paid. Citing Greene-Thapedi, we noted that we "lack[ed] jurisdiction to determine whether an overpayment exists or to order a refund or credit for 1989 to the extent that the amount of the abatement of interest exceeds the amount remaining unpaid for 1989." Wright v. Commissioner, T.C. Memo. 2006-273, 2006 WL 3782718, at *6. On appeal, the Court of Appeals for the Second Circuit disagreed with our conclusion regarding the scope of our jurisdiction:

> Since Wright properly raised the issue [of interest abatement] at the agency, it follows that the subsequent Notice of Determination — which did not grant Wright an abatement — was "the Secretary's final determination not to abate interest" under § 6404(h)(1). And because Wright appealed the Notice of Determination to the Tax Court within the time period required by § 6404(h)(1), the Tax Court had jurisdiction to determine whether Wright was entitled to an abatement, [*29]

> and if he was, whether he made an overpayment and is entitled to a refund. Wright v. Commissioner, 571 F.3d at 220.

The opinion of the Court of Appeals in Wright does not call into question Greene-Thapedi's central holding that a petition filed under section 6330(d)(1) does not give us jurisdiction to determine and order the credit or refund of an overpayment for any of the taxable years in issue. Wright rests on the proposition (which, as explained below, we have since accepted) that a petition ostensibly filed under section 6330(d)(1) can also be viewed as having been filed under section 6404(h)(1) if the taxpayer had raised the issue of interest abatement in his CDP hearing. By contrast, because the taxpayer in Greene-Thapedi made no claim of entitlement to interest abatement under section 6404(e), and the record provided no evidence that she was so entitled, we did not view her claim as predicated on section 6404.

Although amicus accepts that Wright may be "distinguishable on several grounds", it suggests that the Court of Appeals opinion in that case warns against a crabbed interpretation of the scope of our jurisdiction in CDP cases. We have already heeded that warning. In Gray v. Commissioner, 138 T.C. 295 (2012), we accepted that a petition ostensibly filed under section 6330 that includes a claim **[*30]** for interest abatement can be treated as having been filed as well under section 6404. Citing the Court of Appeals opinion in Wright with approval, we explained: "Because * * * [the taxpayer] requested an abatement of interest in connection with her section 6330 hearing, the notice of determination included a determination not to abate interest under section

6404(e), and the petition seeks our review of that determination, we conclude that the notice and petition confer jurisdiction under section 6404(h) that is independent of section 6330." Id. at 305. Although the issue at hand was the timeliness of the taxpayer's petition, which was filed too late for review under section 6330(d)(1) but would have been timely as a petition under section 6404(h), our conclusion that the petition gave us jurisdiction under section 6404(h) suggests that we could have considered under section 6404(h)(2)(B) any claim for refund resulting from the abatement of interest. See King v. Commissioner, T.C. Memo. 2015-36, rev'd, 829 F.3d 795 (7th Cir. 2016).

In King, we followed Gray and concluded, in the exercise of our jurisdiction under section 6404(h), that the Commissioner had abused his discretion in not abating interest we viewed as "excessive" within the meaning of section 6404(a)(1).[10]

[*31] Because the taxpayer had paid the interest (along with taxes, penalties, and additions to tax) after the Commissioner's determination to sustain a notice of Federal tax lien, our conclusion was tantamount to the determination of an overpayment. Although the Court of Appeals for the Seventh

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[10] Because the interest at issue in King v. Commissioner, T.C. Memo. 2015-36, rev'd, 829 F.3d 795 (7th Cir. 2016), related to employment taxes, it could not be abated under sec. 6404(e). See Woodral v. Commissioner, 112 T.C. 19, 25 (1999); Scanlon White, Inc. v. Commissioner, T.C. Memo. 2005-282, aff'd, 472 F.3d 1173 (10th Cir. 2006); Miller v. Commissioner, T.C. Memo. 2000-196, aff'd, 310 F.3d 640 (9th Cir. 2002); see also sec. 301.6404-2(a), Proced. & Admin. Regs. The general abatement provision of sec. 6404(a), however, authorizes the Secretary to abate "the unpaid portion of the assessment of any tax or any liability in respect thereof" if, among other things, the assessment "is excessive in amount". See sec. 6404(a)(1).

Circuit reversed our decision in King, it did so not because it disagreed with our exercise of jurisdiction to review the Commissioner's failure to abate interest. Instead, the court concluded that we had applied the wrong standard in determining when interest is "excessive" within the meaning of section 6404(a)(1).

Our acceptance of the views expressed by the Court of Appeals in Wright is of no help to petitioner. Again, the Court of Appeals' opinion in Wright does not conflict with Greene-Thapedi's central holding that section 6330(d)(1) does not give us overpayment jurisdiction. Instead, the principle underlying Wright calls into question only the view we expressed in dicta in Greene-Thapedi that, even if the taxpayer's refund claim had been grounded in section 6404, we would still have concluded that we lacked jurisdiction to determine and order the credit or **[*32]** refund of any overpayment resulting from the abatement of interest. Because a claim for interest abatement made in connection with a CDP hearing gives us jurisdiction under section 6404(h) that is independent of our jurisdiction under section 6330, it follows that, in our review of a notice of determination denying abatement, we can consider any claim by the taxpayer that the abatement requested would result in an overpayment that should be refunded to the taxpayer or credited to his account.

The refund petitioner seeks, however, is not grounded in a claim for abatement of interest. And, more generally, on the facts before us, we cannot view the petition filed in this case as one filed not only under section 6330(d)(1) but also under another provision that would give us overpayment jurisdiction. In particular, we cannot accept the

petition as one for redetermination of the deficiency in petitioner's 2008 Federal income tax that would provide us with ancillary overpayment jurisdiction under section 6512(b)(1). Petitioner's supplemental brief posits that respondent mailed him a notice of deficiency for his 2008 taxable year on August 7, 2012. On that premise, a petition for redetermination of that deficiency would have been timely under section 6213(a) only if filed by November 5, 2012 —a date that preceded by almost nine months the issuance of the notice of determination in response to which petitioner filed his **[*33]** petition. (Moreover, neither in that petition nor, as far as the record discloses, in his CDP hearing did petitioner claim that he had overpaid his 2008 Federal income tax liability.)

5. Disparate Treatment of Innocent Spouse Claims

Amicus also repeats Judge Vasquez's argument that our declining to exercise jurisdiction in a CDP case to determine and require the refund or credit of an overpayment would result in disparate treatment of innocent spouse claims depending on whether they were brought as stand-alone claims under section 6015 or instead as defenses in CDP cases. Although the taxpayer in Greene-Thapedi, like petitioner, did not raise a spousal defense under section 6330(c)(2)(A), amicus reasons that, if Greene-Thapedi were pushed "to its logical conclusions", it would preclude us from considering in a CDP case a claim for refund grounded in a valid spousal defense. That may be so. But cases following Greene-Thapedi have read it more narrowly. Instead of accepting that we cannot exercise in a CDP case overpayment jurisdiction grounded in a provision other than

section 6330(d)(1), we have concluded that a petition ostensibly filed under that section can be viewed as giving independent jurisdiction under another provision that may provide us with the authority to consider overpayment claims. Although Gray and King involved **[*34]** interest abatement rather than innocent spouse relief, we see no reason why the rationale of those cases would not extend to a claim for refund made under section 6330(c)(2)(A)(i) in connection with a CDP hearing that would give us authority under section 6015(g) to order a credit or refund as part of the "appropriate relief" to a taxpayer who successfully establishes a spousal defense.

In that case, amicus' concerns about the potential disparate treatment of standalone innocent spouse claims and those made in CDP cases would prove unfounded.

Even if amicus' premise were correct, the resulting disparate treatment of innocent spouse claims depending on their jurisdictional posture would be required by the applicable statutory provisions. Section 6330(c)(2)(A)(i) allows for the raising of "appropriate spousal defenses" when "relevant * * * to the unpaid tax or the proposed levy". In contrast to section 6015(g), section 6330(c) provides no express basis for a taxpayer to claim (or for Appeals to consider) a taxpayer's claim for a refund arising from a grant of relief from joint and several liability. Such a claim could be considered only if the taxpayer's request for a CDP hearing and petition to this Court for review of a notice of determination denying the requested relief could be viewed as grounded in section 6015 as well as section 6330. Cf. Gray v. Commissioner, 138 T.C. at 305.

[*35] 6. Plain Language of Section 6512(b)(1)

Amicus argues that "[t]he plain language of section 6512(b)(1) authorizes the Court to determine the existence of a deficiency or an overpayment in all cases other than small tax proceedings brought under section 7463, so long as the requirements of section 6512(b)(3)(A), (B), or (C) are met." Cf. Greene-Thapedi v. Commissioner, 126 T.C. at 26 (Vasquez, J., dissenting) ("Congress added section 6512(b)(2) to the Code, giving us authority to order a refund of any overpayment."). We disagree. Section 6512(b)(1) gives us jurisdiction to determine an overpayment in a case in which we also determine the existence of a deficiency. It provides, in pertinent part:

> [I]f the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year * * * in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

Thus, the plain terms of section 6512(b)(1) indicate that our jurisdiction to determine overpayments is ancillary to the jurisdiction granted us by section 6214(a) to redetermine deficiencies. Moreover, the limitations on our jurisdiction to order a credit or refund of an overpayment provided in section 6512(b)(3) are **[*36]** based in part on the date

of mailing of a notice of deficiency, which we take as further indication that our overpayment jurisdiction under section 6512(b)(1) is ancillary to our deficiency jurisdiction. We therefore reject amicus' argument that section 6512(b)(1), by its plain terms, grants us jurisdiction in this CDP case to determine and order a credit or refund of any overpayment petitioner might have made in his Federal income tax for 2008.

7. Petitioner's Due Process Claim

Petitioner does not explicitly ask us to overrule Greene-Thapedi, but he implicitly criticizes our failure to exercise overpayment jurisdiction in that case when he suggests that respondent's retention of an acknowledged overpayment would violate due process. According to petitioner: "Where a tax is not owed, but the payment thereof (the overpayment) is retained by Respondent, the question arises whether that overpayment, the property of the taxpayer, has been taken from him without due process, in violation of the Fifth Amendment to the Constitution."

Whenever the statute of limitations bars a taxpayer from pursuing a claim for refund, however, it will result in the Commissioner's retention of an overpayment of tax. That result cannot be viewed as violating the taxpayer's due process rights because his loss of any refund to which he might have been entitled would arise from his own failure to claim the refund timely. Moreover, most of the payments **[*37]** that petitioner now seeks to have refunded to him were voluntary payments of the tax he reported on his 2008 Federal income tax return. We fail to see how our decision not to assume jurisdiction to consider a refund claim of which petitioner manifested no awareness before the expiration of the

applicable period of limitations would result in an unconstitutional violation of his due process rights.

8. Inferences Drawn in Greene-Thapedi From the Absence in Section 6330 of a Cross Reference to Section 6404(h)(2)(B) or 6512(b)

Petitioner also claims that the inferences we drew in Greene-Thapedi from the absence in section 6330 of a cross-reference to section 6404(h)(2)(B) or 6512(b) "trespasses the provision at § 7806". Section 7806(a) provides: "The cross references in this title to other portions of the title, or other provisions of law, where the word 'see' is used, are made only for convenience, and shall be given no legal effect." Nothing in section 7806(a) precludes the drawing of inferences from the absence of cross-references (such as the one provided in section 6404(h)(2)(B)) that do not use the word "see" and thus have operative effect.

[*38] C. Conclusion

The notice of determination that petitioner asked us to review sustained an NFTL concerning respondent's efforts to collect amounts petitioner allegedly owed for his taxable years 2006 and 2008. Petitioner's petition assigned no error in regard to his 2006 taxable year, and in his supplemental brief he "concedes sustaining the lien for that year is appropriate." Respondent concedes that petitioner is entitled to "abatement of * * * [his] 2008 liability and subsequent release of the lien on the 2008 tax year".

For the reasons explained above, we have no jurisdiction to consider petitioner's claim that he has overpaid his 2008 Federal income tax. Consequently, we will issue an order upholding the NFTL for 2006 and directing respondent to release the lien for 2008 and abate his assessment of tax against petitioner for that year as appropriate to reflect his concessions

regarding petitioner's substantiation of deductions related to his contracting business.

An appropriate order and decision will be entered.

APPENDIX C

UNITED STATES TAX COURT

BRIAN H. MCLANE, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 20317-13L.

DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion (T.C. Memo. 2018-149) filed September 11, 2018 and amended September 19, 2018, and pursuant to the agreement of the parties in this case with regards only to reasonable litigation and administrative costs under I.R.C. §7430, it is

ORDERED AND DECIDED: That respondent may proceed with the collection action for the taxable year 2006, as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated July 30, 2013, upon which this case is based. It is further

ORDERED AND DECIDED: That respondent shall release the lien for 2008, and abate petitioner's assessment of tax for that year to reflect his concessions regarding petitioner's substantiation of deductions relating to his contracting business. It is further

ORDERED AND DECIDED: That petitioner is entitled to $1,994.04 in reasonable litigation and administrative costs under I.R.C. § 7430.

(Signed) James S. Halpern
Judge

Entered: OCT 18 2019

APPENDIX D

CONSTITUTIONAL PROVISION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

26 U.S.C. § 6203

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

26 U.S.C. §6213

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for

a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed. ....

(c) Failure to file petition

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

26 U.S.C. §6214

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax

Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

(b) Jurisdiction over other years and quarters

The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid. Notwithstanding the preceding sentence, the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims.

(c) Taxes imposed by section 507 or chapter 41, 42, 43, or 44

The Tax Court, in redetermining a deficiency of any tax imposed by section 507 or chapter 41, 42, 43, or 44 for any period, act, or failure to act, shall consider such facts with relation to the taxes under chapter 41, 42, 43, or 44 for other periods, acts, or failures to act as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the taxes under chapter 41, 42, 43, or 44 for any other period, act, or failure to act have been overpaid or underpaid. The Tax Court, in redetermining a deficiency of any second tier tax (as defined in section 4963(b)), shall make a

determination with respect to whether the taxable event has been corrected.

(d) Final decisions of Tax Court

For purposes of this chapter, chapter 41, 42, 43, or 44, and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

(e) Cross reference

For provision giving Tax Court jurisdiction to order a refund of an overpayment and to award sanctions, see section 6512(b)(2).

26 U.S.C. §6320

(a) Requirement of notice

(1) In general

The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323.

(2) Time and method for notice

The notice required under paragraph (1) shall be-

(A) given in person;

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

(C) sent by certified or registered mail to such person's last known address, not more than 5 business days after the day of the filing of the notice of lien.

(3) Information included with notice

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

(A) the amount of unpaid tax;
(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2);
(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals;
(D) the provisions of this title and procedures relating to the release of liens on property; and
(E) the provisions of section 7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts pursuant to section 32101 of the FAST Act.

(b) Right to fair hearing

(1) In general

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

(2) One hearing per period

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

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6330. A taxpayer may waive the requirement of this paragraph.

(4) Coordination with section 6330

To the extent practicable, a hearing under this section shall be held in conjunction with a hearing under section 6330.

(c) Conduct of hearing; review; suspensions

For purposes of this section, subsections (c), (d) (other than paragraph (3)(B) thereof), (e), and (g) of section 6330 shall apply.

26 U.S.C. § 6330

(a) Requirement of notice before levy

(1) In general

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

(2) Time and method for notice

The notice required under paragraph (1) shall be—

(A) given in person;

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

(C) sent by certified or registered mail, return receipt requested, to such person's last known address; not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice

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

(A) the amount of unpaid tax;

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

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

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

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

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

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

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

(b) Right to fair hearing

(1) In general

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

(2) One hearing per period

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

(3) Impartial officer

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

(c) Matters considered at hearing

In the case of any hearing conducted under this section—

(1) Requirement of investigation

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

(2) Issues at hearing

(A) In general

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

(i) appropriate spousal defenses;

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

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

(B) Underlying liability

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

(3) Basis for the determination

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

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

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

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

(4) Certain issues precluded

An issue may not be raised at the hearing if—

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

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

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

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

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing

(1) Petition for review by Tax Court

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

26 U.S.C. § 6512

(a) Effect of petition to Tax Court

If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except-

(1) As to overpayments determined by a decision of the Tax Court which has become final, and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final, and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax

Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive, and

(4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63, and

(5) As to any amount collected within the period during which the Secretary is prohibited from making the assessment or from collecting by levy or through a proceeding in court under the provisions of section 6213(a), and

(6) As to overpayments the Secretary is authorized to refund or credit pending appeal as provided in subsection (b).

(b) Overpayment determined by Tax Court

(1) Jurisdiction to determine

Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the

decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction to enforce

If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest.

An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(3) Limit on amount of credit or refund

No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid-

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the

date of the mailing of the notice of deficiency-
(i) which had not been disallowed before that date,
(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or
(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.
In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years.
(4) Denial of jurisdiction regarding certain credits and reductions
The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402.

(c) Cross references
(1) For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.
(2) For provision giving the Tax Court jurisdiction to award reasonable litigation costs in proceedings to enforce an overpayment determined by such court, see section 7430.