Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

FREDRIC A. GARDNER,	)	
	)	
Petitioner(s),	)	**ALS**
	)	
v.	)	Docket No. 14877-13 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
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O R D E R

This case was on the Court's September 22, 2014 trial calendar for Phoenix, Arizona. It started when Mr. Gardner challenged the IRS's decision to take his property, or put a lien against it, to collect penalties that the IRS says he owes. The next step in this process is for the Court to review the IRS's work, which it does through summary-judgment motions. The IRS has filed one of these motions in which the IRS lawyer argues that no trial is necessary in this case because (the IRS says) no relevant facts are in dispute -- everything is in the record that the IRS Appeals Officer already looked at (which is called the "administrative record"). The IRS argues that, on the basis of these undisputed facts, the Court has to rule in the IRS's favor.

The Court heard argument on this motion during its Phoenix trial calendar. The gist of the IRS's argument is that Mr. Gardner and his wife were selling a program of trusts, limited liability companies (LLCs), and corporations sole to people as part of a tax-evasion scheme. The government in fact won an injunction against the Gardners in 2008. The District Court that granted that injunction found that the Gardners made false statements about the tax consequences of what they were selling. This meant that they were violating 26 U.S.C. § 6700. That Court also found that they had organized or set up more than 300 corporations sole and

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10 LLCs, and that the Gardners had charged $1200 per corporation sole, $800 for a trust, and $500 for an LLC. *United States v. Gardner*, No. CV05-3073-PCT-EHC, 2008 WL 906696, at *4 (D. Ariz. Mar. 21, 2008), *aff'd*, 457 F. App'x 611 (9th Cir. 2011). The injunction is a final judgment and collaterally estops the Gardners from relitigating the issues it decided.

But after winning the injunction, the government assessed a $47,000 penalty against the Gardners, and in late 2012 began to try to collect that penalty – first by sending them a notice of intent to levy and then a notice of filing a federal tax lien. Mr. Gardner asked for a collection due process (or CDP) hearing, which was held by phone in November. The only issue that that he raised was his liability for the $47,000 penalty. At the end of May 2013, the Settlement Officer issued his notice of determination in Mr. Gardner's case, in which he upheld both the lien and the levy. In the notice of determination, the Settlement Officer states that he rejected Mr. Gardner's challenge because

> I verified through transcripts that the taxpayer received his notice and demand. An injunction order was issued by the district court. The taxpayer has already had an opportunity to dispute the liability and is precluded from raising the issue again during the CDP hearing.

At oral argument, respondent's counsel argued that the Gardners were estopped from rearguing the issue of liability. Counsel was unable, however, to point out anywhere in the district-court order or transcript anywhere that the District Judge had found a $47,000 penalty to be appropriate, and admitted that it was a revenue agent who had made the decision to assess that amount. (We should note that penalties under § 6700 are immediately assessable – there's no need for a notice of deficiency before recording the debt in the records of the IRS. *See* IRC §§ 6671 and 6703.) And it likewise proved impossible for respondent's counsel to pinpoint any district-court findings supporting that amount. This made it impossible for us to sustain the Commissioner's argument that the *amount*, even if not the liability for *some* amount, was essential to the District Court's decision or necessarily decided in the injunction action – both essential elements on a claim of collateral estoppel. *See Peck v. Commissioner*, 90 T.C. 162, 166-67 (1988), *aff'd,* 904 F.2d 525 (9th Cir. 1990) (the elements are (1) the issue in the second suit is identical in all respects with the one decided in the first suit, (2) there must be a final judgment rendered by a court of competent jurisdiction, (3) collateral estoppel must be used against a party to the previous suit or someone in privity with the party, (4) the issues must have actually been litigated and essential to the prior

decision, and (5) the facts and applicable legal rules must remain unchanged from the prior litigation).

Respondent's counsel even suggested that the $47,000 figure "was actually the revenue agent conflating section 6700 with aiding and abetting penalties in section 6701. . . . [T]hat appears to be why he referenced an underpayment . . ."[1]

The Court agrees – though with the important quibble that it would find "confusing" rather than "conflating" to be the right word–i.e., we think the revenue agent just made a mistake. But, more importantly here, Mr. Gardner never had the opportunity to challenge this mistake before or during his CDP hearing.

When we discussed this problem, respondent's counsel argued instead that the penalty under § 6700 might have been set at $1000 per violation, and with the District Court's finding that the Gardners had 300 clients, the $47,000 amount set by the revenue agent might be a bargain. This might be true, but under the *Chenery* doctrine we cannot sustain a notice of determination on grounds other than what the settlement officer relied on. *See SEC v. Chenery Corp.,* 332 U.S. 194 (1947) (*Chenery II*); *SEC v. Chenery Corp.,* 318 U.S. 80 (1943) (*Chenery I*). This doctrine is an administrative-law principle that says "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196 (describing its holding in

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[1] The penalties imposed by §§ 6700 and 6701 are similar in some regards – and often the IRS will attempt to impose both penalties on the same party – but they are different and target distinct activities. Section 6700 imposes a penalty for "promoting abusive tax shelters." IRC § 6700. It generally requires a person to help organize an entity and then make false statements about deductions or credits arising from the ownership in the entity. *Id.* By contrast, § 6701 imposes a penalty for "aiding and abetting understatement of tax liability." IRC § 6701. It penalizes anyone who knowingly assists in the preparation of a return or other document that will result in an understatement of tax liability. *Id.* Although similar behavior may trigger both penalties, the Code draws a distinction; for example, § 6701(f)(3) specifically prohibits bringing both penalties for the same action of preparing a document that leads to an understatement of tax. Thus, the Code is very clear about treating these two penalties differently. Section 6700, the section under which the Gardners were penalized, doesn't mention underpayments or understatements; § 6701 does.

Chenery I). The Supreme Court not too long ago announced that "we are not inclined to carve out an approach to administrative review good for tax law only" and noted "the importance of maintaining a uniform approach to judicial review of administrative action." *Mayo Found. for Med. Educ. & Research v. United States,* 562 U.S. 44, ___, 131 S. Ct. 704, 713 (2011) (citation and internal quotation marks omitted). This dictates that we follow the *Chenery* doctrine in CDP cases. *See Jones v. Commissioner,* 104 T.C.M. (CCH) 364, 369 (2012); *Salahuddin v. Commissioner,* 103 T.C.M. (CCH) 1764, 1768 (2012).

Applying *Chenery* means that we can't uphold a notice of determination on grounds other than those actually relied upon by the settlement officer. *See Chenery I,* 318 U.S. at 87-88; *Spiva v. Astrue,* 628 F.3d 346, 353 (7th Cir. 2010) (agency has the responsibility to articulate its reasoning); *Salahuddin,* 103 T.C.M. (CCH) at 1768 (stating that "our role under section 6330(d) is to review actions that the IRS took, not the actions that it could have taken"). Those grounds must be clearly set forth so that we do not have to guess about why the IRS decided what it did. *See Chenery II,* 332 U.S. at 195. We cannot uphold a determination simply because findings might have been made and considerations might be disclosed which might justify a conclusion. *Chenery I,* 318 U.S. at 93-94.

It is therefore

ORDERED that respondent's July 24, 2014 summary-judgment motion is denied. It is also

ORDERED that the Motion for Continuance, filed August 14, 2014, is no longer under advisement to the undersigned.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
December 15, 2014