

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

ERIC R. WHITE,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 9967-15 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
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**ORDER and DECISION**

This case was on the Court’s May 16, 2016 trial calendar for Buffalo, New York, and is a challenge to a notice of determination that the Commissioner issued after a collection due process (CDP) hearing. That determination sustained the Commissioner’s decision to try to collect Mr. White’s 2007 and 2008 tax debts by placing a lien on his property. We continued the case because it was headed to a possible resolution by motion.

In an earlier order we dismissed the case as to tax year 2007 on the ground of mootness--Mr. White’s tax debt for that year had been paid. That’s not true for his 2008 tax debt, and respondent has moved for summary judgment on that year.

The key fact is that Mr. White filed his 2008 tax return in 2013, and the Commissioner assessed the amount shown on that return in July 2013. The return was late, and the Commissioner assessed both a late-filing penalty and a late-payment penalty. This part of Mr. White’s case is almost all about his desire to challenge these penalties. Here is the list of the relevant events:

October 4, 2013 -- Mr. White writes to IRS Appeals to ask for relief from the penalties;

January 24, 2014 -- IRS Appeals denies his request;

April 9, 2014 -- Mr. White files an administrative appeal of the denial;

May 20, 2014 -- while this administrative appeal is pending, the IRS sends Mr. White a notice of federal tax lien;

June 6, 2014 -- Mr. White files his request for a CDP hearing and states that he only wants to challenge the penalties;

October 28, 2014 -- The administrative appeal leads to a partial abatement of the penalties;

December 24, 2014 -- the Appeals settlement officer conducting the CDP hearing writes to Mr. White to schedule the hearing but warns him that his filing of a request with IRS Appeals and pursuit of an administrative appeal constituted his one chance to challenge his liability;

March 17, 2015 -- The Appeals settlement officer issues the notice of determination in which he rules that Mr. White may not challenge the penalties in a CDP hearing because he had challenged them administratively.

Mr. White then filed a timely petition for review of this notice of determination. The Commissioner assembled the administrative record and moved for summary judgment. His argument is simple -- Mr. White challenges only the penalties, which are part of his underlying tax liability for the 2008 tax year. The Appeals settlement officer determined that Mr. White's request to another part of IRS Appeals was a prior opportunity to challenge that liability. And IRC § 6330(c)(2)(B) (which applies to CDP hearings that arise from liens, *see* IRC § 6320(c)) says that a taxpayer can't challenge his underlying tax liability if he already had "an opportunity to dispute such tax liability."

The relevant regulation is 26 CFR § 301.6320-1(e)(3), A-E2 (emphasis added) and provides

An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals *that was offered* either before or after the assessment of the liability. An opportunity for a conference with Appeals *prior to* the assessment of *a tax subject to deficiency procedures* is not a prior opportunity for this purpose.

The tax that Mr. White is challenging is his income tax for 2008, which is the prime example of “a tax subject to deficiency procedures.” *See, e.g., Copeland Mangum v. Commissioner*, 111 T.C.M. (CCH) 1099 (2016). We have already held, however, that the assessment of an income-tax liability based on a taxpayer’s own return does *not* preclude him from challenging his underlying tax liability in a CDP hearing. *Montgomery v. Commissioner*, 122 T.C. 1, 9 (2004).

We know that the second sentence of the quoted regulation doesn’t apply here because Mr. White got an Appeals conference outside the CDP hearing *after* the IRS assessed his 2008 income-tax liability.

Whether the first sentence applies might appear to be a bit trickier. In his brief the Commissioner cites two cases, *Mason v. Commissioner*, 132 T.C. 301, 317 (2009), and *Orian v. Commissioner*, 100 TCM 356, 359 (2010). These both involved trust-fund-recovery penalties, which are not subject to deficiency procedures. *Id.* The Commissioner, moreover, has procedures in place to formally offer taxpayers a chance to contest those penalties before IRS Appeals -- a Letter 1153. There are a few other such letters, which one can find at <https://www.irs.gov/individuals/letters-and-notices-offering-an-appeal-opportunity>.

It might be that this sort of specific offer of an opportunity to challenge a liability before IRS Appeals is what the language of the first sentence of the regulation means. Our Court, however, has construed “offer” in the broader sense of “to make available, at least if the taxpayer takes advantage of its availability.” In a case very similar to this one, *Lewis v. Commissioner*, 128 T.C. 48 (2007), the taxpayer was assessed late-filing and late-payment penalties on his income-tax debt. Just like Mr. White did, he wrote to IRS Appeals to try to get them abated. *Id.* at 49. When they weren’t, the IRS came to collect and the taxpayer tried to challenge them again in his CDP hearing. *Id.* We held in *Lewis* that his previous correspondence with IRS Appeals meant that he had a prior opportunity to

challenge his liability.<sup>1</sup> *Id.* at 61. *Lewis* is a T.C. opinion. We must follow it here. *See Sec. State Bank v. Commissioner*, 111 T.C. 210, 213 (1998), *aff'd*, 214 F.3d 1254 (10th Cir. 2000).

It is therefore

ORDERED that respondent's motion for summary judgment is granted. It is also

DECIDED that respondent may proceed with the collection of petitioner's federal income tax liability for the tax year 2008, as described in the Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated March 17, 2006.

**(Signed) Mark V. Holmes  
Judge**

ENTERED: **JAN 03 2017**

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<sup>1</sup> We did reserve the question of whether the mere existence of the possibility of writing to IRS Appeals (which is available in almost every case) itself constitutes an offer of an opportunity to contest the underlying liability. *Lewis*, 128 T.C. at 50, n.2. This might be a trap for the unwary, *see* 26 CFR § 301.6320-1(c)(2), A-C9 (encouraging taxpayers to try to resolve lien and levy issues with the IRS before or after asking for a CDP hearing).