***Lewis v. Commissioner, 128 T. C. 48 (U. S. Tax Court 2007)***

In Lewis v. Commissioner, the U. S. Tax Court ruled that a taxpayer retains the right to challenge the underlying tax liability in a Collection Due Process (CDP) hearing under section 6330 if the IRS has not completed its consideration of the taxpayer's appeal before the CDP hearing is requested. This decision ensures that taxpayers have a meaningful opportunity to dispute their tax liabilities before collection actions are enforced, reinforcing the procedural protections intended by Congress when enacting the CDP provisions.

**Parties**

Petitioner: Lewis, the taxpayer, seeking review of the IRS's determination to proceed with a levy to collect his 2000 Federal income tax liability.
Respondent: Commissioner of Internal Revenue, defending the IRS's determination and proposed collection action.

**Facts**

Lewis timely filed his 2000 Federal income tax return, reporting a $55,778. 28 loss from securities sales but did not attach a Schedule D or make an election under section 475(f). Following a request by the IRS, Lewis submitted a Schedule D, which the IRS subsequently adjusted under the math error procedures of section 6213(b)(1), limiting his loss to $3,000. Lewis appealed this adjustment, but before the appeal was resolved, the IRS sent him a Final Notice of Intent to Levy, prompting Lewis to request a CDP hearing under section 6330. The IRS Appeals Office denied Lewis's appeal and later conducted the CDP hearing, refusing to consider challenges to the underlying tax liability, claiming Lewis had a prior opportunity to dispute it.

**Procedural History**

Lewis appealed the IRS's disallowance of his claimed loss, which was under consideration by the IRS Appeals Office when the IRS issued a Notice of Intent to Levy. Lewis timely requested a CDP hearing under section 6330. After the hearing, the IRS Appeals Office issued a Notice of Determination concluding that the proposed levy was appropriate and that Lewis could not challenge the underlying liability due to a prior opportunity to appeal. Lewis petitioned the U. S. Tax Court for review of this determination.

**Issue(s)**

Whether a taxpayer retains the right to challenge the underlying tax liability in a section 6330 hearing if the IRS has not completed its consideration of the taxpayer's appeal before the hearing is requested?

**Rule(s) of Law**

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Under section 6330(c)(2)(B), a taxpayer may challenge the underlying tax liability in a CDP hearing if the taxpayer did not receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute the liability. The statute and regulations, including section 301. 6330-1(e)(3), Q&A-E2 of the Procedure and Administration Regulations, define an opportunity to dispute as a prior opportunity for a conference with the IRS Appeals Office.

**Holding**

The U. S. Tax Court held that Lewis did not have an "opportunity to dispute" the underlying tax liability within the meaning of section 6330(c)(2)(B) because the IRS Appeals Office had not completed its consideration of Lewis's appeal at the time he requested the CDP hearing. Therefore, Lewis was entitled to challenge the underlying tax liability in his section 6330 hearing, and the court conducted a de novo review of his challenges.

**Reasoning**

The court reasoned that the right to challenge the underlying tax liability in a CDP hearing is contingent upon the taxpayer not having had a prior opportunity to dispute it. The court interpreted the past tense used in section 6330(c)(2)(B) to indicate that Congress intended the dispute opportunity to have already occurred before the CDP hearing. The court rejected the IRS's position that Lewis's pending appeal constituted a prior opportunity, noting that allowing the IRS to complete its appeal consideration after a CDP hearing request would effectively allow the IRS to determine whether the underlying liability could be judicially reviewed. This interpretation would undermine the Congressional intent to provide taxpayers with judicial review in CDP proceedings. The court also considered the de novo review of Lewis's underlying liability claims, finding them to be without merit due to the lack of an election under section 475(f) and insufficient evidence of trading as a business. The court addressed other issues, such as the verification requirement under section 6330(c)(1) and the involvement of the Appeals officer, but found no basis for remand due to harmless error.

**Disposition**

The court sustained the IRS's determination to proceed with the levy, finding that the refusal to allow Lewis to challenge the underlying liability and the possible participation of an Appeals officer with prior involvement were harmless errors that did not necessitate a remand.

**Significance/Impact**

Lewis v. Commissioner is significant for clarifying the scope of a taxpayer's right to challenge the underlying tax liability in a CDP hearing. The decision ensures that taxpayers are not precluded from such challenges merely because an appeal is

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pending when the CDP hearing is requested. This ruling reinforces the procedural protections intended by Congress in enacting the CDP provisions, ensuring that taxpayers have a meaningful opportunity to dispute their tax liabilities before collection actions are enforced. The case also underscores the importance of timely and proper elections under section 475(f) for taxpayers claiming trader status and highlights the court's willingness to conduct de novo reviews in appropriate circumstances.

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