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APPELLATE VENUE IN NON-LIABILITY CDP CASES: Amend IRC § 7482 to Provide That The Proper Venue to Seek Review of a Tax Court Decision in All Collection Due Process Cases Lies With the Federal Court of Appeals for the Circuit in Which the Taxpayer Resides

PROBLEM

Byers v. Commissioner recently considered the issue of proper appellate venue in Collection Due Process (CDP) cases that do not involve a redetermination of liability.¹ The court concluded the proper venue for appealing United States Tax Court decisions in non-liability CDP cases lies with the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) unless the case type falls under one of the rules specified in Internal Revenue Code (IRC) § 7482(b)(1) or (b)(3) or the parties both stipulate in writing.² Prior to this decision, taxpayers, tax practitioners, and the government adhered to a general practice of appealing all Tax Court decisions involving IRC §§ 6320 and 6330 to the court of appeals for the circuit in which the taxpayer lived (regional court).³

The *Byers*⁴ decision may create confusion among taxpayers and practitioners regarding the proper venue for appeals of non-liability CDP determinations from the Tax Court. In addition, it may create uncertainty for the Tax Court, which follows its own precedent unless the court of appeals to which the case would be appealable has ruled to the contrary under the *Golsen* rule.⁵ Additionally, *Byers* did not provide any guidance as to what will happen when there is a non-liability CDP appeal filed in a regional court without stipulation to venue.

Finally, the *Byers* decision may result in some forum shopping by litigants who are aware of its implications.⁶ This could mean that taxpayers with similar procedural issues residing in the same place could get vastly different results, if one taxpayer challenging the underlying liability obtains review by the regional circuit, and the other taxpayer not challenging liability obtains review by the D.C. Circuit. The difference in results could lead to an increased perception of the unfairness of the tax system. This could also lead to an increase in unwarranted challenges to a taxpayer's underlying liability and unnecessary litigation because the taxpayer wants to create a clear path to the regional circuit court. Having all cases go to the regional court could avoid these problems.

Absent congressional clarification,⁷ the confusion about proper venue may impact taxpayers' *right to be informed*, which provides that taxpayers "have the right to know what they need to do to comply with the

1 740 F.3d 668 (D.C. 2014), *aff'g* T.C. Memo. 2012-27. For a detailed discussion of the case, see Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330, infra*.

2 IRC § 7482(b)(2).

3 See James Bamberg, *A Different Point of Venue: The Plain Meaning of Section 7482(b)(1)*, 61 TAX LAW. 445 (Winter 2008).

4 *Byers v. Comm'r*, 740 F.3d 668 (D.C. 2014), *aff'g* T.C. Memo. 2012-27.

5 *Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

6 Having a choice of the D.C. Circuit or the regional circuits by stipulation may lead one party to have an advantage during litigation. Either the IRS or the taxpayer can now file motions to transfer venue or block requests to stipulate a change in venue, depending on what benefits the case.

7 The taxpayer filed a petition for certiorari, which the Supreme Court denied. See *Byers v. Comm'r*, 740 F.3d 668 (D.C. 2014), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-74).

tax laws.”⁸ Additionally, the *Byers* interpretation of IRC § 7482(b)(1) may foster a system where represented taxpayers are better equipped to navigate the appeal process, negatively affecting the *right to a fair and just tax system* for unrepresented taxpayers.⁹

EXAMPLE

Taxpayer A files a petition in Tax Court to appeal a CDP determination, with the appeal involving an IRS decision to reject an offer in compromise. The taxpayer does not contest the tax liability. The Tax Court upholds the IRS’s determination. However, the unrepresented taxpayer is unaware that the D.C. Circuit has held that it provides proper venue for her case. She files her appeal in the circuit court of appeals for the state in which she resides. The government does not contest venue. In light of the *Byers* decision, it is unclear what the regional court should do with her case.

RECOMMENDATION

To address the proper venue for appealing Tax Court determinations under IRC §§ 6320 and 6330 that do not involve liability issues, the National Taxpayer Advocate recommends that Congress:

- Amend IRC § 7482(b)(1)(A) to provide that proper appellate venue for all CDP cases lies with the circuit court of appeals based on the taxpayer’s legal residency.

PRESENT LAW

A court must have jurisdiction and venue to hear a case.¹⁰ If the court does not have jurisdiction, it must dismiss the case.¹¹ However, if venue is incorrect, the court may dismiss the case *or* transfer the case to the correct venue.¹² Generally, the correct venue for appeals from the Tax Court is the D.C. Circuit unless one of the rules specified in IRC § 7482(b)(1) or exceptions specified in IRC § 7482(b)(2) or (b)(3) applies. For instance, IRC § 7482(b)(1)(A) provides that in cases where a petitioner, other than a corporation, seeks redetermination of a tax liability, venue for review by the United States Court of Appeals lies with the Court of Appeals for the circuit based upon the taxpayer’s legal residence.¹³ Pursuant to IRC § 7482(b)(2), the taxpayer and the IRS may stipulate the venue for an appeal in writing.

8 IRS, Publication 1, *Your Rights as a Taxpayer* (June 2014).

9 Between June 1, 2013 and May 31, 2014, *pro se* taxpayers constituted 63 percent of litigated CDP cases. See Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330*, *infra*.

10 Jurisdiction is defined generally as “A court’s power to decide a case or issue a decree.” *Black’s Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS. Venue is defined as the “proper or a possible place for a lawsuit to proceed.” *Black’s Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS.

11 See *Ex parte McCordle*, 74 U.S. 506, 514 (1869) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

12 See *Georgia-Pacific Corp. v. Federal Power Com.*, 512 F.2d 782, 783-784 (5th Cir. 1975) (citing *Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362 (1966)).

13 IRC § 7482(b)(1) also provides that the proper venue lies with the court of appeals for the circuit in which it is located: B) in the case of a corporation seeking redetermination of tax liability, the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in any judicial circuit, then the office to which was made the return of the tax in respect of which the liability arises, C) in the case of a person seeking a declaratory decision under IRC § 7476, the principal place of business, or principal office or agency of the employer, D) in the case of an organization seeking a declaratory decision under IRC § 7428, the principal office or agency of the organization, E) in the case of a petition under IRC §§ 6226, 6228(a), 6247, or 6252, the principal place of business of the partnership, and F) in the case of a petition under section IRC § 6234(c), (i) the legal residence of the petitioner if the petitioner is not a corporation, and (ii) the place or office applicable under subparagraph (B) if the petitioner is a corporation. IRC § 7482(b)(1).

Deciding the issue of proper venue in *Byers v. Commissioner*, the D.C. Circuit held it would not transfer cases to regional courts unless the parties stipulate. In *Byers*, the taxpayer timely requested a CDP hearing in response to a levy notice. The proposed levy action was sustained by the Appeals Officer (AO). The taxpayer appealed to the Tax Court, which granted summary judgment to the IRS, whereupon the taxpayer appealed the grant of summary judgment to the D.C. Circuit.

The IRS argued that since CDP hearings often include challenges to the underlying liabilities, venue is properly placed in the circuit where the taxpayer resides under IRC § 7482(b)(1)(A).¹⁴ The IRS made a motion to transfer the case to the Eighth Circuit. However, the court determined that IRC §7482(b)(1)(A) was not applicable since the taxpayer was not challenging the underlying liability. Thus, the proper venue was in the D.C. Circuit.¹⁵

REASONS FOR CHANGE

The *Byers* decision will have several ramifications. For instance, the court does not answer the question of whether another court of appeals could hear an appeal of a non-liability CDP decision without stipulation of the venue.¹⁶ Without congressional action, this issue will likely be addressed by other circuit courts separately and may result in a split in circuits.¹⁷ In the meantime, taxpayers will be left with uncertainty, which impacts *the right to be informed*.

Byers will also create complications for how the Tax Court hears its cases. Under the *Golsen* rule, the court follows its own precedent unless the court of appeals to which the case would be appealable has ruled to the contrary.¹⁸ How will the Tax Court know which circuit's law to apply if the taxpayer has a choice in venue? As noted above, this could mean that taxpayers with similar procedural issues residing in the same place could get vastly different results, if one taxpayer challenged the underlying liability and the other taxpayer did not. The difference in results could lead to an increased perception of the unfairness of the tax system. This could also lead to an increase in unwarranted challenges to a taxpayer's underlying liability and unnecessary litigation because the taxpayer wants to create a clear path to the regional circuit court.

14 At a CDP hearing, the taxpayer may raise challenges to the existence or amount of the underlying tax liability for any tax period, if the 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. IRC § 6330(c)(2)(B). Such challenges would fall under the exception in IRC § 7482(b)(1)(A). However, taxpayers may also raise any relevant issue relating to the unpaid tax or the proposed levy, including (i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise. IRC § 6330(c)(2)(A). Certain issues, such as the rejection of a collection alternative, do not challenge the underlying liability and therefore, the taxpayer is not seeking a redetermination of the liability when they raise such issues.

15 The Court held “[v]enue cannot be proper in the Eighth Circuit unless the parties so stipulate in writing.” *Byers v. Comm’r*, 740 F.3d 668 at 675.

16 The court notes “we have no occasion to decide in this case whether a taxpayer who is seeking review of a CDP decision on a collection method may file in a court of appeals other than the D.C. Circuit if the parties have not stipulated to venue in another circuit.” *Byers*, 740 F.3d at 677. This language leaves it open for interpretation whether venue would be proper in another circuit court when neither party addresses it, such as the appellate cases decided prior to *Byers*.

17 Legislation has also been proposed to address this issue. J. Comm. on Tax’n, *Technical Explanation Of The Senate Committee On Finance Chairman’s Staff Discussion Draft Of Provisions To Reform Tax Administration*, JCX-16-13,39-40 (November 20, 2013). The legislation provides that cases under IRC §§ 6015, 6320, and 6330 will be appealable to the circuit in which is located the petitioner’s legal residence (in the case of an individual). While this provision has appeared in several bills, it has gained little traction.

18 *Golsen v. Comm’r*, 54 T.C. 742 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

In a Tax Court case subsequent to *Byers*, also involving a non-liability CDP hearing, the Tax Court applied the rules of the appellate court based on the residence of the taxpayer (in this instance the Ninth Circuit), stating:

In light of *Byers*, we are mindful of the uncertainty of appellate venue and the controlling law in this case. We further note, however, that we have not found a case wherein the Court of Appeals for the District of Columbia Circuit has either adopted or rejected the administrative record rule in a collection case under sec. 6320 or sec. 6330.¹⁹

The changes in practice brought by *Byers* mean that taxpayers and practitioners appealing a non-liability CDP case must now understand the type of case they have and whether it involves liability redetermination, so that they obtain the appropriate venue. The court in *Byers* was not concerned with taxpayer confusion over types of CDP cases, explaining instead:

[j]ust as we see in this case, it normally will be obvious from the taxpayer’s statement of the issues whether an appeal involves a challenge to a redetermination decision, a CDP decision on a collection method, or both. Therefore, it will not be difficult for this court to distinguish between the two types of cases to determine whether venue is proper in the D.C. Circuit.²⁰

In practice, making the distinction between liability and non-liability CDP hearings could prove difficult for taxpayers, especially *pro se* taxpayers. Taxpayers should also be prepared for litigation over the meaning of “redetermination.”²¹

If the regional circuit courts of appeal agree with *Byers*, and hold that the D.C. Circuit is proper venue for CDP cases in which taxpayers are not seeking a redetermination of liability, such holding would require all of these cases to be appealed to the D.C. Circuit. This holding would disproportionately burden low-income taxpayers who do not have the means to travel to the District of Columbia or the means to pay someone to travel to the District of Columbia if the case is scheduled for oral argument.

If the regional circuit courts of appeals find that venue is proper in their courts when the taxpayer only disputes a non-liability issue, taxpayers (and the IRS) may now be able to “forum shop.” Taxpayers may consider how their regional circuit would handle their non-liability CDP case in comparison to the D.C. Circuit. For instance, in *Robinette v. Comm’r*, the Tax Court held that it could consider evidence that was not part of the administrative record when it reviews an AO’s determination for abuse of discretion.²² This decision was overturned by the Eighth Circuit, which held that evidence is limited to what is in the administrative record.²³

It is possible that the D.C. Circuit could rule in a way opposite to the Eighth Circuit in regards to evidence at trial. If that happens, taxpayers wishing to submit new evidence during a trial may benefit from

19 *Boulware v. Commr*, T.C. Memo 2014-80 at 19, n. 4, *appeal docketed*, No. 14-1147 (D.C. Cir. Aug. 4, 2014). For a discussion on how this can affect the outcome of a case, see *Robinette v. Comm’r*, *infra*.

20 *Byers*, 740 F.3d at 676.

21 It is not always clear whether the taxpayer is seeking a redetermination of the tax liability. For instance, some court cases have held that issues related to the collection statute expiration date (CSED) relate to the underlying debt and others have held that CSED issues do not relate to the underlying debt. See Legislative Recommendation: *STANDARD OF REVIEW: Amend IRC § 6330(d) to Provide for a De Novo Standard of Review of Whether the Collection Statute Expiration Date Is Properly Calculated by the IRS*, *supra*.

22 *Robinette v. Comm’r*, 123 T.C. 85 (2004).

23 *Robinette v. Comm’r*, 439 F.3d 455 (8th Cir. 2006).

having their non-liability CDP appeal heard by the D.C. Circuit. Both the IRS and the taxpayer would be free to either file a motion to transfer venue or block a stipulation, depending on what forum they wanted. In the event the D.C. Circuit Court of Appeals approves the Tax Court's position articulated in *Robinette*, taxpayers challenging a non-liability issue may ask the D.C. Circuit to remand the case and order the Tax Court to permit the parties to submit evidence outside the administrative record. If the taxpayer does not reside in the District of Columbia and chooses not to stipulate to the court of appeals based on his or her residence, the taxpayer will have to incur the travel costs associated with trying the case in the D.C. Circuit. This creates an obstacle for low income taxpayers who cannot use the potentially more advantageous forum.

EXPLANATION OF RECOMMENDATION

While the *Byers* decision now realigns practice with the law, it has created many unanswered questions that could negatively impact taxpayers. In particular, it places a burden on unrepresented taxpayers who must now understand what type of appeal they have so that they can file their appeal with the court with the proper venue. They must have an understanding of how their choice in venue will affect the outcome of their case. Although the court in *Byers* finds this impact to be minimal on taxpayers, the National Taxpayer Advocate respectfully disagrees, particularly with respect to *pro se* taxpayers, who constituted 63 percent of litigated CDP cases between June 1, 2013 and May 31, 2014.²⁴ The Tax Court is also affected because in some cases it may have a difficult time ascertaining which law to apply to their analysis. In the absence of congressional action, these issues may continue to linger.

24 See Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330* at 19, *infra*.