

# TAX PROCEDURE: MOOTNESS AND MERITS REVIEW IN COLLECTION DUE PROCESS CASES.

Posted on [July 31, 2017](#) by [Jim Malone](#)



When the IRS loses a *pro se* case in Tax Court, it's noteworthy. When it loses to a prisoner who allegedly made frivolous tax filings, and the court issues a precedential opinion, something strange is going on. Last week that happened in a collection due process case. [Vigon v. Comm'r](#), No. 28788-14L, 2017 U.S. Tax Ct. LEXIS 37 (July 24, 2017).

When the IRS files a notice of federal tax lien or a notice of intent to levy against a taxpayer's property, it is required to provide the taxpayer with notice of his right to a collection due process hearing. See I.R.C. §§ 6320(a) (notice in connection with lien filing); 6330(a) (notice in connection with levies). If the taxpayer requests a hearing, then the proposed collection activity is put on hold pending a hearing before IRS appeals. At the hearing, the taxpayer can raise a variety of issues, including challenges to the propriety of the collection activity, and consideration of an alternative, such as an installment agreement. I.R.C. § 6330(c)(2)(A). The taxpayer can also challenge the underlying liability, but only if there was no prior opportunity to do so. I.R.C. § 6330(c)(2)(B). If the taxpayer is not satisfied with the resolution before IRS appeals, she can petition the Tax Court to review the proposed collection activity. I.R.C. § 6330(d)(1). Between June 2010 and July 2011, Dean Michael Vigon submitted nine separate returns on Form 1041, which is the form used for estates and trusts, for tax years 2007, 2008, and 2009. *Vigon*, 2017 U.S. Tax Ct. LEXIS 37 at \*1. The IRS determined that the filings were frivolous, and it assessed Mr. Vigon with nine separate penalties under section 6702 of the Internal Revenue Code, which authorizes a penalty of \$5,000 for each frivolous filing. *Id.* at \*2. It also issued a notice of federal tax lien and provided Mr. Vigon with notice of his collection due process rights. *Id.*

Mr. Vigon filed a request for a hearing and challenged his liability for the penalties, but the appeals officer assigned to his case rejected that challenge. *Id.* at \*2-\*3. Mr. Vigon then filed a petition with the Tax Court. With Vigon incarcerated in Canada, his case was initially remanded to the appeals officer to clarify the record on administrative approval for the penalties. *Id.* at \*4-\*5. Once the case returned to the Tax Court, the IRS filed a motion for summary judgment. Two days later, the court denied the motion, indicating that there were factual issues concerning the number of returns filed and managerial approval for the penalties. *Id.* at \*5.

With the case now scheduled for trial, the IRS shifted its tactics; it moved for a continuance, indicating that it would abate the penalties, release the lien, and file a motion to dismiss on the basis of mootness. *Id.* at \*5-\*6. While the court granted the continuance, it also ordered the government to incorporate into its motion an explanation of how this disposition of the case would provide "adequate relief to the petitioner." *Id.* at \*6. After abating the relevant penalties, and filing a release of the relevant tax lien, the IRS moved to dismiss the case as moot. Vigon, still in jail, did not respond.

The Tax Court flagged several concerns with the government's motion to dismiss. First, while the IRS had technically filed a release of the tax lien, the release indicated that the service could refile the lien until 2021 for certain tax years and 2022 for others. *Id.* at \*7. The government's motion also indicated that a dismissal on the basis of mootness would not preclude it from assessing the same penalties all over again and indicated that penalties under section 6702 were not subject to any statute of limitations. The government

explicitly refused to concede that Mr. Vigon was not liable for the penalties, and it posited that Vigon's interests were protected because he could seek judicial review if the government were to issue a new assessment and pursue collection action. *Id.* at \*7-\*8.

In addressing the motion to dismiss, the court first addressed whether release of the tax lien eliminated its jurisdiction. While the IRS asserted that the court's jurisdiction was dependent upon pending collection action, the Tax Court ruled that it had jurisdiction to consider the underlying merits of the relevant liability, even though the lien had been released. *Id.* at \*15-\*16. The court reasoned that it had jurisdiction to review the "determination" by appeals under section 6330(d)(1) of the Code, and appeals had made a determination that addressed not only the tax lien, but the validity of the liability. *Id.* Since the court's jurisdiction extended to every aspect of the administrative determination, the Tax Court concluded that if jurisdiction existed to review the merits of a particular liability when the petition was filed, the mere fact that the IRS released the lien that had triggered the collection due process proceeding did not destroy the court's jurisdiction. *Id.* at \*16-\*17.

The court then turned to the question of mootness. At the outset, the court noted that in typical collection due process cases that involve a liability challenge, a voluntary abatement of the relevant assessment typically terminates any dispute over the liability because the assessment statute of limitations has expired by the time the case reaches the Tax Court. *Id.* at \*17. The court also noted that most motions to dismiss in that circumstance incorporate a concession by the IRS on the disputed liability. *Id.* In contrast, Vigon presented distinctive circumstances:

- The underlying liability was not subject to any limitations period; and
- The IRS refused to concede the liability issue. *Id.* at \*18.

While the IRS characterized the prospect of a new assessment as "theoretical" and "hypothetical," it refused to state that it would not renew its effort to collect penalties from Mr. Vigon. *Id.* at \*19. The IRS argued that if it did renew its efforts to collect the penalties, Mr. Vigon could file a new request for a collection due process hearing, but the court expressed concern with that prospect, noting that taxpayers frequently stumble over the required filings to secure a hearing at appeals and review in the Tax Court. The court also expressed concern that the IRS could simply moot the second case unilaterally. *Id.* at \*19-\*20.

On the merits, the Tax Court concluded that the voluntary cessation of collection activity in the absence of a concession was not enough to moot Mr. Vigon's case because the IRS had not demonstrated that there was no prospect that collection activity would recur, and the mere abatement of the penalty was not sufficient relief to eradicate his potential liability. *Id.* at \*22-\*23.

The Tax Court's holding that its jurisdiction to review the merits of tax liabilities that were properly considered in a collection due process hearing cannot be eliminated through the simple ruse of releasing a tax lien rests on a sound reading of the section 6330 of the Code, and it will provide an important protection for taxpayers whose only opportunity to review their liabilities prior to payment may come in a collection due process hearing.

The court's solicitude for the challenges faced by pro se taxpayers is also commendable: The IRS wanted to have its cake and eat it too. The court said no.



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