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From:

Sent: Tuesday, November 04, 2008 11:46:11 AM

To:

Cc:

Subject: RE: -related CDP Matter ()

I was asked the following:

Please handle this matter. will be the reviewer. I'm waiting to hear back from whether she has a case number. If not, please have contact TSS and have a case opened. Thanks.

* * *

My question: Does the prior Tefra Litigation constitute prior opportunity to dispute the computational adjustment with regard to the taxpayer's 1040 tax returns? Can they raise this issue in this CDP?

I am sending this e-mail to memorialize the advice that we discussed yesterday. I did speak with this morning and I believe that we all are on the same page, in that there is no TEFRA issue that we have failed to consider that might affect our conclusion. I also vetted our conclusion with .

You had asked for guidance on whether section 6330(c)(2)(B) might prohibit a T/P from contesting in a CDP hearing the existence or amount of the underlying liability if such liability stems from -related schedule F income shown on an individual Form 1040, because a previous TEFRA P/S proceeding might constitute a prior "opportunity."

The simple answer is that section 6330(c)(2)(B) would not be implicated if the T/P did not receive a stat. notice because the T/P would not otherwise have had an opportunity to dispute the liability solely based on the TEFRA proceeding. This conclusion would follow even if the T/P actually participated in the TEFRA proceeding and actually made the argument that the individually reported schedule F income properly should have been characterized as P/S income and even if this were the sole argument that the T/P were proffering in the CDP hearing. This conclusion is based on our interpretation that (c)(2)(B) either is or is not triggered by a prior opportunity involving the liability at issue. In this case, the liability at issue would be the individual Form 1040 liability for the year in issue.

Admittedly, the T/P had a prior opportunity to discuss one particular issue that might affect the underlying Form 1040 liability, but that opportunity (the prior TEFRA P/S proceeding) would not have afforded the T/P the opportunity fully to contest the liability. For example, in addition to alleging that the items of income properly should have been included in at the P/S-level, the T/P also might want to argue that (1) the income was not attributable to the individual's activities because the individual was incarcerated during the relevant time periods; (2) the Form 1040 liability should be reduced for unclaimed dependants; (3) the Form 1040 liability should be eliminated because of an argument in protest of the federal income

tax (i.e., the 16th Amendment has not been ratified), etc. In this event, the T/P surely would be allowed to raise the issues numbered (1) and (2). Moreover, even the protest argument (technically) would be allowable under (c)(2)(B), although the SO otherwise would be able to ignore it as frivolous. The bottom line is that a (c)(2)(B) prohibition would prohibit a T/P from raising any underlying liability issue. The Service cannot pick and choose simply because it might know *ex ante* that this particular T/P only will raise the same P/S-level argument that could have been (or was) raised in a prior P/S level proceeding.

[REDACTED] Section 6330(c)(4) seems squarely to address this issue. It is tailored specifically to issues that in fact were raised. If a T/P materially participated in a TEFRA proceeding, then arguably this particular issue properly may be excluded from CDP consideration. However, as we discussed, it might be the case that the Service maintains that (c)(4) is limited to non-liability issues. If this remains the case, then (c)(4) becomes a non-starter. I don't see why an SO simply can't take a TEFRA court-decision in hand and rely on it as a basis to sustain a levy or lien action in a case in which the T/P was allowed to raise the existence or amount of the underlying tax liability, but chose only to reiterate whatever argument failed in the prior TEFRA proceeding. [REDACTED]

In any event, feel free to call me to further discuss this issue. Let me remind you that I will be out of the office beginning next Thursday for several weeks. During my absence, feel free to call [REDACTED] if you want to discuss the (c)(4) aspects. Also, please know that no one in the National Office approved this e-mail, so if you take exception to any of my analysis, feel free to discuss it further or to ask for a more formal response.

I look forward to discussing [REDACTED] with you when I return to the office in January.

Best Regards,