

Preserving the Administrative Record of the CDP Hearing

By Steven L. Jager

Steven L. Jager examines how to ensure that the Administrative Record contains a complete and accurate record.

One of the real benefits of filing a timely request for a Collection Due Process Hearing is the jurisdiction of the Tax Court, should it be necessary after the Appeals Settlement Officer issues the required Notice of Determination. Its true value to the taxpayer, however, can quickly fade, if the administrative record is incomplete or inaccurate, and I recommend that we practitioners do everything possible to ensure that the Administrative Record contains a complete and accurate record of what actually transpired.

Simply put, if some action, event, discussion or issue is not in the administrative record, it is presumed not to have occurred. The Tax Court, in hearing these cases, places great importance on the administrative record. At trial, the Tax Court will first examine its proper standard of review. For those cases where the validity of the underlying tax liability is appropriately at issue, the court reviews the tax liability *de novo*.¹ For all other cases where the underlying tax liability is not at issue, the Tax Court uses an “abuse of discretion” standard.²

The general rule, which has come to be known as the “Giamelli Rule,” is explained in *M.D. Hoyle*,³ reciting *J. Giamelli*, and essentially says that a taxpayer is prohibited from raising in Tax Court any issues not raised at the Collection Due Process (CDP) Hearing. Moreover, the Committee Report for Code Sec. 6330(d) makes clear that “it is the responsibility of the taxpayer to raise all relevant issues at the time of the pre-levy hearing.”⁴

So while it is the taxpayer’s responsibility to *raise* any relevant issues, whose responsibility is it to *create* the administrative record? Most of us are familiar with the “Notice of Determination” that the Appeals Settlement Officer publishes at the conclusion of the CDP conference, which will usually include some recitation as to the issues raised and discussed, but as Judge Wherry points out about the accuracy of the administrative record, it is “not sacrosanct ... Errors in the record

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will inevitably occur from time to time, given the large number of records, their complexity, and the number of people participating in the various stages of the collection due process (CDP) procedures.”⁵

Given this recognition by the Tax Court that the accuracy (and completeness) of the administrative record may be challenged, it is incumbent upon we lawyers, CPAs and

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EAs who represent these taxpayers to proactively ensure that the administrative record includes all issues which are validly raised by us. Since the law imposes the duty upon the taxpayer to raise the issue, a failure to do so as part of representing a taxpayer could raise allegations of malpractice liability.

So, then, what should we do to ensure that the record properly reflects all issues that we raised? Be or become a

memo-maniac! Although it takes additional time, there is tremendous value in writing letters and memos to Appeals Settlement Officers which fully document those discussions, and when something is of particular importance, I write in language in the body of the Memorandum or letter requesting that it be included as an inextricable part of the administrative record.

It is important to include the magic language to ensure that the Settlement Officer understands your intention that your Memorandum or Letter needs to become a part of the record. I recommend language such as: “*This memorandum is an important and inextricable component of our Collection Due Process Hearing and I respectfully ask that it become a formal part of the administrative record.*” As to whether I put this language in at the beginning versus the end of my missive is not terribly important so long as you insert it where it seems to “flow” most naturally.

ENDNOTES

- ¹ *H. Goza*, 114 TC 176, 181–182, Dec. 53,803 (2000).
- ² *Id.*, at 182; *see also S. Sego*, 114 TC 604, 610, Dec. 53,938 (2000).
- ³ *M.D. Hoyle*, 131 TC 197, Dec. 57,598 (2008).
- ⁴ H. Conf. Rept. 105-599, at 266 (1998), 1998-3 CB 747, 1020.
- ⁵ *J. Giamelli*, 129 TC 107, Dec. 57,155 (2007).

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