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A PREFERENCE FOR DEFERENCE: THE BENEFITS OF THE FIRST
CIRCUIT'S CUSTOMIZED STANDARD OF REVIEW FOR
COLLECTION DUE PROCESS APPEALS IN
DALTON v. COMMISSIONER

ADAM M. COLE*

“It is not our role . . . to determine whether the IRS applied the correct rule of law. . . . [W]e need only determine whether the IRS applied a reasonable view of what the law is or might be.”¹

I. INTRODUCTION

Typical hardworking Americans pay their taxes on time and in full.² Some citizens even do so because they view paying taxes as a civic duty.³ Unfortunately, not all people pay the tax they owe, which places a higher burden on the law-abiding, compliant taxpayers.⁴ A significant portion of

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1. *Dalton v. Comm'r*, 682 F.3d 149, 157 (1st Cir. 2012).

2. See 1 INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE: 2006 ANNUAL REPORT TO CONGRESS 6 (2006) [hereinafter 2006 TAXPAYER ADVOCATE REPORT], available at http://www.irs.gov/pub/irs-utl/2006_arc_vol_1_cover_section_1.pdf (noting over 95% compliance rate for taxpayers whose income is reported to IRS on Form W-2 wage withholding or other comparable schedules). In 2009, approximately 116 million tax returns were filed with reported income from salaries and wages. See INTERNAL REVENUE SERV., ESTIMATED DATA LINE COUNTS INDIVIDUAL INCOME TAX RETURNS 9 (2009), available at <http://www.irs.gov/pub/irs-soi/09inlinecount.pdf> (showing estimated number of tax returns filling out selected line items on return).

3. See Kevin Drawbaugh, *Taxes Not Just Certain, They're Right Thing To Do-Survey*, TAX BREAK (Jan. 31, 2012), <http://blogs.reuters.com/taxbreak/2012/01/31/taxes-not-just-certain-theyre-right-thing-to-do-survey/> (“Most Americans believe strongly that it's a civic duty to pay their ‘fair share’ in taxes, that cheating on taxes is wrong and that cheaters should be held accountable”); see also INTERNAL REVENUE SERV., IRS OVERSIGHT BOARD: 2011 TAXPAYER ATTITUDE SURVEY 1 (2011), available at <http://www.treasury.gov/irsob/reports/2012/IRSOB~Taxpayer%20Attitude%20Survey%202012.pdf> (noting 84% of public feels it is “not at all acceptable to cheat on one's income taxes,” while 72% feel it is their civic duty to pay taxes).

4. See 2006 TAXPAYER ADVOCATE REPORT, *supra* note 2, at 6 (noting each compliant taxpayer was assessed effective subsidy of \$2,200 because of costs from noncompliant taxpayers). The subsidy amount was calculated by dividing the estimated uncollected tax amount by the number of individual income tax returns filed. See *id.* (calling “surtax” on compliant taxpayers “an extraordinary burden to expect the average taxpayer to bear”).

uncollected tax is attributable to businesses failing to pay the payroll taxes they withheld from employees.⁵ Every uncollected tax dollar adds to the already rising federal deficit.⁶ As a result, politicians have called for some Americans to pay their “fair share” of income tax to help reduce the deficit.⁷ Furthermore, the Internal Revenue Service (IRS) is under pressure to collect more tax during periods of budget deficits.⁸ The current uncollected amount is substantial: at the end of 2010, there was approximately \$359 billion of uncollected tax.⁹

5. See U.S. GOV'T ACCOUNTABILITY OFFICE, TAX COMPLIANCE: BUSINESSES OWE BILLIONS IN FEDERAL PAYROLL TAXES 7 (2008), *available at* <http://www.gao.gov/assets/280/278637.pdf> (commenting that businesses owed over \$58 billion in unpaid payroll taxes in 2007). The Internal Revenue Service (IRS) has the power to hold business owners personally liable for unpaid payroll taxes. See I.R.C. § 6672(a) (2006) (imposing penalty equal to tax amount for willful failure to collect or pay); see also T. Keith Fogg, *Leaving Money on the Table and Providing an Incentive Not to Pay—The Story of a Flawed Collection Device* 9–18 (Villanova Univ. Sch. of Law, Pub. Law & Legal Theory Working Paper Grp., Paper No. 2008-22), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1226903 (examining legislative history of section 6672 and arguing statute could better serve as collection tool if revised to provide liability to responsible company officers).

6. See, e.g., Corey Boles, *U.S. Government Records Deficit Higher Than \$1 Trillion for 4th Consecutive Year—CBO*, EUROINVESTOR (Oct. 5, 2012), <http://www.euroinvestor.com/news/2012/10/05/us-government-records-deficit-higher-than-1-trillion-for-4th-consecutive-year-cbo/12106049> (describing record budget deficits and how higher tax revenues decrease deficit).

7. See, e.g., Editorial, *The State of the Union in 2012*, N.Y. TIMES, Jan. 25, 2012, at A28. President Obama has called for wealthy Americans to pay their “fair share” in taxes. See *id.* (describing President Obama’s state of union address stating that “any credible plan to wrestle down the deficit must include the wealthy paying a fairer share of taxes”). Republican presidential candidate Mitt Romney disagrees with President Obama’s definition of fairness. See Michael D. Shear, *Obama vs. Romney: Battles of Fairness Doctrines*, THE CAUCUS (Apr. 27, 2012, 7:26 AM), <http://thecaucus.blogs.nytimes.com/2012/04/27/obama-vs-romney-battle-of-the-fairness-doctrines/> (describing definition of fairness in various contexts as key campaign issue). This Note argues that a fairness distinction should be drawn between compliant and delinquent taxpayers, and delinquent taxpayers who owe the government taxes should pay their “fair share.” For a discussion of the distinction between these two groups, see *infra* note 12. This Note argues that judicial review of tax collection should be configured to allow the government to collect the “fair share” of taxes owed from all citizens if it uses reasonable methods. For a discussion of how a de novo standard of review can create unfairness in tax collection, see *infra* notes 153–62 and accompanying text.

8. See 1 INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE: 2008 ANNUAL REPORT TO CONGRESS viii (2008), *available at* http://www.irs.gov/pub/irs-utl/08_tas_arc_intro_toc_msp.pdf (“On the other hand, as the budget deficit grows, the IRS comes under subtle pressure to collect more federal revenue and close the tax gap.”); Marilyn E. Phelan, *Taxpayers’ Procedural Rights Can Clash With Aggressive Tax Enforcement*, 82 PRAC. TAX STRATEGIES 149, 149 (2009) (“A concern with the tremendous and ever-increasing federal budget deficit (estimated to be in the trillions given the enormous projected costs of the recently enacted financial rescue and economic stimulus plans) may lend continuing support for the Treasury Department’s current more aggressive tax enforcement policy.”).

9. See INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE: 2010 ANNUAL REPORT TO CONGRESS 42 (2010) (Volume 2), *available at* <http://www.irs.gov/pub/>

Given the importance of tax collection in periods of budget deficits, a well-functioning tax collection system must be fair and efficient.¹⁰ A fair tax system treats similarly situated taxpayers the same, a concept known as horizontal equity.¹¹ To treat everyone fairly in the collection context, the IRS must try to collect from delinquent taxpayers, otherwise law-abiding, compliant taxpayers would be at a disadvantage.¹² An efficient tax system collects taxes as quickly and inexpensively as possible.¹³ However, collecting unpaid tax is not cheap: the IRS spent over \$5 billion on enforcement in 2011.¹⁴

Because collecting tax revenue is of great importance, Congress historically allowed the IRS to collect taxes with no court interference prior

irs-utl/vol_2_tasresearchandrelatedstudies2010arc.pdf (noting unpaid assessments increased thirty-three percent from fiscal year 2009 to 2010).

10. See Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 430 (2008) [hereinafter Cords, *Administrative Law*] (“Good tax policy is often said to require efficiency, equity, transparency, simplicity, and administrability.”).

11. See David Elkins, *Horizontal Equity as a Principal of Tax Theory*, 24 YALE L. & POL’Y REV. 43, 43–44 (2006) (explaining concept of horizontal equity and declaring it is “universally accepted as one of the more significant criteria of a ‘good tax’”). Accordingly, any “[v]iolation of horizontal equity, while not necessarily fatal, is nevertheless considered a serious flaw in any proposed tax arrangement.” *Id.* at 44. See also Cords, *Administrative Law*, *supra* note 10, at 430 (“A high rate of voluntary compliance requires, in part, that the tax system be equitable.”); see generally Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323 (2008) (explaining concept of horizontal equity and advocating for its adoption into tax system based on theoretical and practical justifications).

12. See 2006 TAXPAYER ADVOCATE REPORT, *supra* note 2, at 6–7 (explaining that compliant taxpayers help support shortcomings of delinquent taxpayers and in part that IRS enforcement against delinquent taxpayers could help collect more tax). For the purposes of this Note, a delinquent taxpayer refers to a taxpayer with a properly assessed tax liability that does not pay the amount owed to the IRS. A compliant taxpayer is a taxpayer who pays their tax liability in full and on time.

13. See Cords, *Administrative Law*, *supra* note 10, at 430–31 (describing efficient tax collection as being “prompt and cost-effective”).

14. See INTERNAL REVENUE SERV. FY 2013: BUDGET IN BRIEF 1 (2012) [hereinafter FY 2013 BUDGET], available at <http://www.irs.gov/pub/newsroom/budget-in-brief-fy2013.pdf> (showing prior year budgets by IRS and requested budget for fiscal year 2013). The \$5.5 billion investment yielded \$55 billion in collection, or approximately \$10 for every \$1 spent. See *id.* at 11 (commenting that IRS enforcement measures are meant to “ensure that taxpayers pay what they owe”). The National Taxpayer Advocate has identified the IRS’s inadequate funding as the “most serious problem facing U.S. taxpayers.” INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE: 2011 ANNUAL REPORT TO CONGRESS 3 (2011) (Volume 1) [hereinafter 2011 TAXPAYER ADVOCATE REPORT], available at http://www.irs.gov/pub/irs-utl/irs_tas_arc_2011_vol_1.pdf (arguing one consequence of inadequate funding is IRS’s inability to “maximize revenue collection, contributing to the federal budget deficit”); see also Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1045–48 (2003) (analyzing IRS’s past budgets and arguing agency lacks sufficient resources to fulfill its compliance responsibilities).

to collection.¹⁵ However, some members of Congress grew concerned about the IRS's "nearly unlimited collection discretion."¹⁶ This prompted Congress to pass the IRS Restructuring and Reform Act of 1998 ("RRA"), which gave taxpayers limited pre-collection rights.¹⁷ These rights are referred to as the Collection Due Process ("CDP") rights.¹⁸

CDP provides taxpayers with the right to a pre-collection administrative hearing to raise challenges to the proposed IRS collection action.¹⁹

15. See Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 56 (2004) [hereinafter Cords, *How Much Process Is Due?*] ("Historically, due process has not entitled a taxpayer to pre-deprivation review of IRS decisions to collect assessed, unpaid taxes."). Before 1998, a taxpayer generally had no right to protest collection actions until after collection. See *id.* at 57 (describing no pre-assessment review as justified "because of the significant hardship the government would suffer without the ability to promptly collect taxes owed"). Judicial review over tax collection was traditionally limited to post-collection refund claims in either the United States District Court or the Court of Federal Claims. See *id.* at 58 (explaining how administrative request for refund needed to be made and denied before filing refund suit).

16. Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1156 (2004) (describing desire to "bring IRS powers more in line with other creditors"); see also Christine K. Lane, *On-The-Record Review of CDP Determinations: An Examination of Policy Reasons Encouraging Judges to Stick to the Administrative Record*, 6 FLA. ST. U. BUS. L. REV. 149, 150 (2007) (comparing IRS to "Gestapo" because of its approach to collection activity). But see Bryan T. Camp, *Tax Administration As Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 78–83 (2004) (describing Senate hearings as "dramatic" and explaining how Senate Finance Committee spent year gathering collection horror stories to spur change in collection powers); Bryan T. Camp, *"The Evil That Men Do Lives After Them . . ."*, 104 TAX NOTES 439, 442 (2004) (describing perceived abuse as "fundamental misunderstanding of tax administration").

17. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, 112 Stat. 685 (codified as amended at scattered sections of I.R.C.).

18. Hereinafter referred to as "CDP," "CDP rights," or "CDP regime." See I.R.C. §§ 6320, 6330 (2006) (providing rights for notice of federal tax lien and rights for notice of intent to levy). Some commentators have criticized the CDP regime for unnecessarily slowing collection. See Bryan T. Camp, *The Failure of CDP, Part 2: Why It Adds No Value*, 104 TAX NOTES 1567, 1569–70 (2004) (describing collection process as deciding whether delinquent taxpayer is classified as "can't pay" or "won't pay" and arguing CDP does not generate any new information to help with that decision); see also Book, *supra* note 16, at 1188–89 (arguing CDP is too broad because it allows taxpayers too many opportunities to challenge underlying tax liability); Cords, *How Much Process Is Due?*, *supra* note 15, at 99–100 (arguing CDP hearing procedures should be revised to create uniformity). This Note does not take a position on the merits of the CDP regime, but rather argues that the standard of review for subsidiary determinations should be for reasonableness in order for the current CDP regime to work as well as possible. For an argument as to how a deferential standard of review benefits the tax system, see *infra* notes 127–76 and accompanying text.

19. See I.R.C. § 6330(c)(2) (allowing taxpayer to raise spousal defenses, raise challenges to collection action, and propose collection alternatives). The taxpayer can also challenge the underlying tax liability if the taxpayer did not have a previous opportunity to do so. See *id.* § 6330(c)(2)(B) (providing opportunity for challenge if taxpayer did not receive "statutory notice of deficiency for such tax liability").

Taxpayers can also make an offer-in-compromise to settle the tax debt.²⁰ These CDP rights also include the ability to appeal unfavorable collection decisions to the Tax Court.²¹ Since 2003, appeals from collection due process hearings are one of the most commonly litigated issues in Tax Court.²²

In *Dalton v. Commissioner*,²³ the First Circuit dealt with an issue of first impression: whether subsidiary determinations made during a CDP hearing—such as legal ownership of an asset—should be reviewed de novo or under a more deferential standard of review.²⁴ In a typical case, an appellate court reviews all questions of law de novo, giving no deference to legal conclusions made by lower courts.²⁵ *Dalton* held the opposite to be true, stating that in CDP appeals, all subsidiary determinations are reviewed for reasonableness, not correctness.²⁶

This Note analyzes how the *Dalton* standard of review departs from the Tax Court's previous de novo approach, and argues that the deferential review benefits the tax system because it treats taxpayers fairly and allows the IRS proper deference to collect taxes in an efficient manner.²⁷ Part II provides a brief background of the CDP process, with an emphasis on the offers-in-compromise issue discussed in *Dalton*.²⁸ Part II also describes the standard of review that past courts have used in CDP appeals,

20. For a further discussion of the offer-in-compromise procedure, see *infra* notes 42–44 and accompanying text.

21. See § 6330(d)(1) (providing Tax Court with jurisdiction for appeals within thirty days of determination).

22. See 2011 TAXPAYER ADVOCATE REPORT, *supra* note 14, at 619 (analyzing significant CDP cases decided during year).

23. 682 F.3d 149 (1st Cir. 2012).

24. See *id.* at 151–52 (acknowledging that “no court has had the occasion to parse that standard and analyze how it plays out with respect to subsidiary factual and legal determinations made by the IRS during the CDP process”); see also *Tax Court Collection Due Process Standard of Review Upended by the First Circuit*, TAX TRIALS (June 25, 2012), <http://taxtrials.com/?p=1346> (suggesting *Dalton* decision “could dramatically change collection due process”). This Note refers to the subsidiary factual and legal determinations that are made before the final CDP determination simply as “subsidiary determinations.” For a further explanation of subsidiary determinations in the CDP context, see *infra* notes 45–46 and accompanying text.

25. See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (describing typical standards of review); 5 AM. JUR. 2D *Appellate Review* § 646 (2013) (“An appellate court freely reviews a trial court’s decision concerning an issue of law and no deference is owed to the views of the trial court in this context.”).

26. See *Dalton*, 682 F.3d at 156 (“In sum, a court’s job is not to review the IRS’s CDP determinations afresh. Rather, its job is twofold: to decide whether the IRS’s subsidiary factual and legal determinations are reasonable and whether the ultimate outcome of the CDP proceeding constitutes an abuse of the IRS’s wide discretion.”).

27. For a discussion of how *Dalton* departs from the Tax Court’s previous approach, see *infra* notes 110–26 and accompanying text. For a discussion of the reasons why the *Dalton* standard benefits the tax system, see *infra* notes 127–76 and accompanying text.

28. For a discussion of the CDP process and relevant statutory background, see *infra* notes 36–49 and accompanying text.

as well as how the standard has been applied to subsidiary legal determinations.²⁹ Part III describes the factual and procedural background of the *Dalton* case and analyzes the First Circuit's reasoning.³⁰ Part IV argues that the First Circuit reached the correct result because the *Dalton* standard of review increases efficiency and fairness, and is consistent with the purpose of CDP.³¹ Part V concludes by urging Congress to expressly incorporate this standard into the CDP statutes because of the likelihood that the Tax Court will not apply the standard in cases appealable to the other circuits.³²

II. A PECULIAR PROCESS: A BRIEF OVERVIEW OF CDP AND ITS TRADITIONAL ABUSE OF DISCRETION STANDARD OF REVIEW

CDP gives taxpayers the right to an administrative hearing to dispute a proposed collection action.³³ An important part of the regime is the ability to appeal unfavorable administrative decisions to the Tax Court, which generally uses an abuse of discretion standard of review.³⁴ The Tax Court has also used a *de novo* review of certain subsidiary determinations that are made before the final CDP determination.³⁵

A. CDP: What Are Your "Rights" Before Collection?

The IRS can assess a tax liability in one of two ways: (1) through an underpayment, when a taxpayer files a tax return showing a balance due and does not pay; and (2) through the deficiency process, when the IRS claims that the taxpayer should have paid more tax than was paid on the finalized return.³⁶ Once the IRS properly assesses a tax liability, it can

29. For a discussion of the standard of review the Tax Court uses in CDP cases and how it has been applied in certain circumstances, see *infra* notes 50–62 and accompanying text. For a discussion of the standard of review the Tax Court used to review subsidiary determinations in prior CDP cases, see *infra* notes 63–75 and accompanying text.

30. For a discussion of *Dalton* and an analysis of the First Circuit's decision, see *infra* notes 76–106 and accompanying text.

31. For a discussion how the *Dalton* standard increases efficiency in the tax system, see *infra* notes 131–52 and accompanying text. For a discussion of how it increases fairness in the tax system, see *infra* notes 153–62 and accompanying text. For a discussion of how the standard adheres to CDP's purpose, see *infra* notes 163–76 and accompanying text.

32. For a discussion of why Congress should codify the *Dalton* standard of review, see *infra* notes 177–82 and accompanying text.

33. For a general overview of the CDP process, see *infra* notes 36–49 and accompanying text.

34. For a discussion of judicial review of CDP decisions, see *infra* notes 50–62 and accompanying text.

35. For a discussion of the standard of review the Tax Court used in past cases involving subsidiary determinations, see *infra* notes 63–75 and accompanying text.

36. See Book, *supra* note 16, at 1150 (explaining how IRS properly assesses tax liabilities). If a taxpayer does not pay after a valid assessment, an automatic lien in favor of the IRS arises on all of a taxpayer's property. See *id.* (explaining lien is in amount of tax liability and includes potential interest and penalties).

exercise its “powerful administrative collection powers.”³⁷ The IRS has two main collection powers affected by CDP: tax liens and tax levies.³⁸ After an assessment of liability and demand for payment, the IRS can levy a taxpayer’s property to satisfy the debt if the tax remains unpaid.³⁹

Under CDP, after the IRS files a Notice of Intent to Levy or a Notice of Federal Tax Lien, it must inform a taxpayer of their right to request a CDP hearing with the IRS Office of Appeals.⁴⁰ At the hearing, the taxpayer can propose collection alternatives.⁴¹ One common collection alter-

37. *Id.* at 150–52 (providing background on tax liens and levies); *see also* Cords, *How Much Process Is Due?*, *supra* note 15, at 54 (describing assessment as “first step” in collection process).

38. *See* I.R.C. § 6331(b) (2006) (“The term ‘levy’ as used in this title includes the power of distraint and seizure by any means.”); *see also* Bryan T. Camp, *Failure of Collection Due Process, Pt. 1: The Collection Context*, 104 TAX NOTES 969, 970 (2004) [hereinafter Camp, *Collection Context*] (providing explanation of all three collection powers but noting ability to offset liabilities with refunds not relevant to CDP because RRA did not address it). Tax liens arise automatically after the IRS assesses a tax liability. *See* I.R.C. § 6321 (providing lien arises “upon all property and rights to property, whether real or personal, belonging to such person”); *see also* Camp, *Collection Context*, *supra*, at 970 (describing lien as “virtual sticky note[] claiming ‘Pay Me’ on all property the taxpayer has or acquires”). The lien is misunderstood because the IRS does not file for a lien like a typical creditor would, but instead files the notice of the lien. *See id.* (explaining lien already exists because of automatic trigger from Code). The IRS must file a Notice of Federal Tax Lien to give notice of the lien to third parties. *See id.* (explaining that lien is effective tool for real property because lien is paid off when property is sold). Although only one lien exists, the IRS can file multiple notices of the lien depending on where the taxpayer has assets. *See id.* (noting IRS can enforce lien through “either inquisitorial process (levy) or adversarial process (court action)” if lien is not paid off when property sold).

39. *See* I.R.C. § 6331(a) (delegating authority to Secretary of Treasury to collect tax through levy power). The IRS must give thirty days notice before levying property. *See id.* § 6331(d)(2) (providing notice must be in person, left at dwelling or usual place of business, or sent by certified mail); *see also* Camp, *Collection Context*, *supra* note 38, at 971 (describing levy as another misunderstood tool and as statutory power to take property to settle tax debt). The levy must be asserted against a specific piece of property, unlike a lien that “attaches to all future acquired property as well as current property.” *Id.* (noting liens and levies can be used together even though they are separate collection tools).

40. *See* I.R.C. §§ 6320(a)(1), 6330(a)(1) (providing for tax liens and tax levies). The hearing must be conducted by an IRS agent with no previous connection to the taxpayer’s case. *See id.* § 6330(b)(3) (allowing taxpayer to waive impartial officer requirement). The hearing is informal in nature. *See* Cords, *How Much Process Is Due?*, *supra* note 15, at 65–70 (describing various ways hearings are conducted, including telephone, face-to-face, correspondence only, or combination of all three). Taxpayers must submit a request for a hearing in writing, and are encouraged to use Form 12153 “Request for a Collection Due Process Hearing.” *See* Treas. Reg. § 301.6320-1(c)(2) (as amended in 2006) (describing alternative steps to properly request CDP hearing and detailing written requirement important for evidentiary purposes to ensure timely request).

41. *See* I.R.C. § 6330(c)(2)(A)(iii) (allowing taxpayer to raise “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”). Although the Code lists these issues that can be raised, it is not a fully inclusive list. *See* Cords,

native is the offer-in-compromise (“OIC”), a procedure in which a taxpayer offers to settle a tax liability for less than the full amount.⁴²

Before deciding whether to accept or reject an OIC, the IRS first calculates a taxpayer’s reasonable collection potential (“RCP”), or what it expects the taxpayer could reasonably pay in tax.⁴³ The IRS calculates the RCP by analyzing the taxpayer’s expected income, estimated living expenses, assets, and liabilities.⁴⁴ The IRS’s initial conclusions on the tax-

How Much Process Is Due?, *supra* note 15, at 89 (explaining legislative history of RRA shows list was not meant to be limited). Taxpayers are generally excluded from raising any issue that was “raised in a prior proceeding in which the taxpayer meaningfully participated” *Id.*

42. See I.R.C. § 7122(a) (2006) (authorizing Secretary of Treasury to “compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense”). A taxpayer must submit Form 656: Offer in Compromise, describing the taxpayer’s circumstances and why the IRS should accept, along with at least a 20% payment of the offer amount. See Shu-Yi Oei, *Getting More by Asking Less: Justifying and Reforming Tax Law’s Offer-In-Compromise Procedure*, 160 U. PA. L. REV. 1071, 1077–81 (2012) (describing OIC procedure in detail); see also MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE ¶¶ 15.07[3][a]-[b] (2010) (listing advantages and disadvantages to taxpayer of making offer-in-compromise); see generally I. Jay Katz, *An Offer in Compromise You Can’t Confuse: It Is Not the Opening Bid of a Delinquent Taxpayer to Play Let’s Make a Tax Deal with the Internal Revenue Service*, 81 MISS. L.J. 1673, 1681 (2012) (offering detailed history of development of OIC process and analyzing major developments in law). The regulations provide three reasons why the IRS would exercise its discretion and accept an OIC: (1) doubt as to liability; (2) doubt as to collectability; and (3) the promotion of effective tax administration. See Treas. Reg. § 301.7122-1(b)(iii) (2002) (prohibiting compromise if it would “undermine compliance by taxpayers with the tax laws”); see also Oei, *supra*, at 1078–80 (describing all three grounds for compromise and circumstances in which IRS would accept OIC under each). The OIC procedure has several policy goals:

- Effect collection of what can reasonably be collected at the earliest possible time and at the least cost to the government.
- Achieve a resolution that is in the best interests of both the individual taxpayer and the government.
- Provide the taxpayer a fresh start toward future voluntary compliance with all filing and payment requirements.
- Secure collection of revenue that may not be collected through any other means.

Oei, *supra*, at 1078. The IRS most often accepts an OIC because of doubt as to collectability. See *id.* (detailing IRS’s procedure for determining taxpayer’s ability to pay).

43. See Oei, *supra* note 42, at 1078 (commenting that IRS must calculate RCP to “determine the taxpayer’s ability to pay”). The Internal Revenue Manual, a non-binding guide for IRS employees, defines RCP as “the amount that can be collected from all available means, including administrative and judicial collection remedies.” IRM 5.8.4.3(2) (June 1, 2010).

44. See Oei, *supra* note 42, at 1079 (“Essentially, in determining whether a doubt-as-to-collectability offer should be accepted, the IRS has to analyze the taxpayer’s assets, expenses, and liabilities.”). The RCP calculation accounts for the “taxpayer’s expected future income after taking into account necessary living expenses.” *Id.* (commenting that IRS uses national and local standards for calculating living expenses). The RCP calculation considers the “net realizable equity” in assets. See *id.* at 1079 n.24 (noting net realizable equity is calculated using “quick

payer's financial circumstances—such as whether the taxpayer owns certain assets—can be referred to as subsidiary determinations.⁴⁵ They are subsidiary determinations because the IRS must make these decisions before making the final determination of whether to accept the OIC.⁴⁶

Although the IRS has complete discretion to accept or reject an OIC, the IRS will almost always reject an OIC if it calculates a RCP that is higher than the taxpayer's offer.⁴⁷ The Appeals Officer issues a final written determination as to whether the collection action can proceed after the officer reviews the proposed action and any proposed collection alternatives.⁴⁸ The taxpayer then has thirty days to appeal an unfavorable CDP determination to the Tax Court.⁴⁹

sale value," or value if taxpayer had to sell within ninety days). The calculation also includes a taxpayer's "income or assets that are available to the taxpayer but beyond the reach of the IRS, such as property held abroad." *Id.* at 1079.

45. See *Dalton v. Comm'r*, 682 F.3d 149, 152 (1st Cir. 2012) (describing IRS's conclusions as to taxpayer's legal ownership of certain assets before deciding whether to accept OIC as subsidiary determinations). Although these issues could be referred to as underlying legal or factual issues, for the purposes of this Note they will be called subsidiary determinations to be consistent with the First Circuit's language in *Dalton*. See *id.* (describing IRS's decision on underlying ownership issue as "subsidiary determination"). Whether a taxpayer wrongly dissipated an asset prior to making an OIC is another example of a subsidiary determination. See, e.g., *Tucker v. Comm'r*, 101 T.C.M. (CCH) 1307, 1315 (2011) (affirming IRS's decision to include value of taxpayer's stock trading losses in RCP because it determined taxpayer disregarded tax liability and could have used money to pay outstanding taxes), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012). If the IRS determines the taxpayer wrongly dissipated an asset without regard to an outstanding tax liability, it will include the asset's value in the RCP. See *id.* at 1314 (noting that although inclusion of dissipated assets does not increase actual collection potential, inclusion rule deters "delinquent taxpayers from wasting money that they owe and should pay as taxes"). Therefore, an asset dissipation issue is a subsidiary determination because the IRS must first determine whether the dissipated asset should be included in the RCP before deciding whether to accept or reject the OIC. See IRM 5.8.5.16 (Oct. 16, 2010) (giving instructions to IRS employees to consider asset dissipation prior to ruling on OIC). Another example of a subsidiary determination is when the IRS determines whether a taxpayer's liabilities were discharged in bankruptcy before ruling on a proposed collection action. For a discussion of the Tax Court's standard of review of subsidiary determinations for bankruptcy issues, see *infra* notes 63–75 and accompanying text.

46. See *Oei*, *supra* note 42, at 1078 (explaining OIC requires IRS to first determine taxpayer's RCP to facilitate comparison with offer amount).

47. See IRM 5.8.4.3(2) (June 1, 2010) ("[T]he decision to accept or reject usually rests on whether the amount offered reflects the reasonable collection potential (RCP)."); *Oei*, *supra* note 42, at 1074 ("The taxpayer must meet certain requirements and conditions in order to qualify, and the IRS has the discretion to accept or deny the offer.").

48. See I.R.C. § 6330(c)(3) (2006) (requiring officer to consider valid issues raised by taxpayer before making final determination). The Appeals Officer must also consider whether the "proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." *Id.* § 6330(c)(3)(C).

49. See *id.* § 6330(d)(1) (giving Tax Court exclusive jurisdiction for appeals). The Tax Court is an Article I court of record that only has jurisdiction over cases

B. *Judicial Review of CDP Appeals*

The Internal Revenue Code (the “Code”) does not set the standard of review for collection due process appeals.⁵⁰ Instead, the Tax Court looks to the legislative history of the RRA for guidance on the proper standard.⁵¹ The Tax Court uses an abuse of discretion review when the underlying tax liability is not in dispute.⁵² Under the abuse of discretion standard, the Tax Court will only reverse the IRS’s final determination if it finds the decision “arbitrar[y], capricious[], or without sound basis in fact or law.”⁵³ Circuit courts that have considered the issue have all ruled that abuse of discretion is the proper standard of review.⁵⁴

While the final IRS decision is reviewed for abuse of discretion, in *Robinette v. Commissioner*⁵⁵ the Tax Court held that it could consider new evidence that was not part of the administrative record to determine whether the IRS abused its discretion.⁵⁶ Consideration of new evidence

Congress specifically assigns to it by statute. See SALTZMAN, *supra* note 42, at 1.06[1] (explaining history of Tax Court and noting that it “adjudicates cases in the same manner as a federal district court judge sitting without a jury”). The Tax Court is a single court located in Washington D.C. that travels around the country in designated cities to conduct trials. See *About the Court*, U.S. TAX COURT (last updated May 25, 2011), <http://www.ustaxcourt.gov/about.htm> (giving general background of Tax Court). It is comprised of nineteen judges that are appointed by the President. See *id.* (explaining appointed judges are experts in tax law).

50. See I.R.C. §§ 6320, 6330 (presenting provisions for CDP, but not judicial review).

51. See, e.g., *Sego v. Comm’r*, 114 T.C. 604, 609–10 (2000) (noting standard of review not provided in Code, but guidance found in legislative history).

52. See *id.* at 610 (“Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion.”).

53. *Woodral v. Comm’r*, 112 T.C. 19, 23 (1999).

54. See *Schwartz v. Comm’r*, 348 F. App’x 806, 808 (3d Cir. 2009) (noting parties did not dispute that rejection of OIC was reviewed for abuse of discretion); *Salazar v. Comm’r*, 338 F. App’x 75, 77–78 (2d Cir. 2009) (finding IRS did not abuse discretion in rejecting OIC); *Keller v. Comm’r*, 568 F.3d 710, 716 (9th Cir. 2009) (“Like the Tax Court, our review of the decision by the Commissioner whether to accept an offer-in-compromise is for an abuse of discretion.”); *Poindexter v. Comm’r*, 321 F. App’x 771, 773 (10th Cir. 2009) (applying abuse of discretion review to IRS administrative determinations); *Marshall v. United States*, 300 F. App’x 636, 638 (11th Cir. 2008) (applying abuse of discretion review to IRS decision that taxpayer’s ability to pay exceeded OIC); *Murphy v. Comm’r*, 469 F.3d 27, 32 (1st Cir. 2006) (holding abuse of discretion review of administrative determination appropriate in collection due process appeal when underlying tax liability not in dispute); *Orum v. Comm’r*, 412 F.3d 819, 820 (7th Cir. 2005) (citing *Jones* and noting “[j]udicial review of [IRS determinations] is deferential”); *Living Care Alts. of Utica, Inc. v. United States*, 411 F.3d 621, 625–26 (6th Cir. 2005) (looking to legislative history for guidance on applying abuse of discretion review when tax liability is not in dispute); *Jones v. Comm’r*, 338 F.3d 463, 466 (5th Cir. 2003) (stating courts review IRS administrative determinations for abuse of discretion).

55. 123 T.C. 85 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006).

56. See *id.* at 95–96 (holding Administrative Procedure Act not applicable and therefore court could consider new evidence in abuse of discretion review).

under an abuse of discretion standard of review is referred to as a de novo scope of review.⁵⁷ The Tax Court stated that it reviewed the IRS's final decision for abuse of discretion, but effectively held a trial de novo by considering new evidence.⁵⁸ The de novo scope of review allowed the Tax Court to substitute its judgment for that of the IRS because the court considered evidence that the IRS did not, creating a standard of review that was similar to de novo.⁵⁹ Under the rule of *Golsen v. Commissioner*,⁶⁰ the Tax Court follows the law of the circuit court to which an appeal would follow.⁶¹ Therefore, although the Eighth Circuit expressly overturned the *Robinette* decision, the Tax Court continues to follow *Robinette* in cases appealable to circuits that have not yet ruled on the issue.⁶²

C. *The Decision Before the Decision: Standard of Review for Subsidiary Determinations in Past Tax Court Cases*

Whereas the final CDP determination is reviewed using an abuse of discretion standard of review, the IRS must first make several subsidiary

57. See *Porter v. Comm'r*, 130 T.C. 115, 122–23 (2008) (discussing intersection and differences of scope of review and standard of review). The standard of review refers to the level of deference an appellate court will give to a lower court's findings; the scope of review refers to whether the court will consider new evidence or not. See *id.* (explaining standard of review and scope of review). If a reviewing court considers new evidence, it is referred to as a de novo scope of review. See *id.* (referring to admission of new evidence as holding “de novo trial”).

58. See *Med. Practice Solutions, L.L.C. v. Comm'r*, 99 T.C.M. (CCH) 1392, 1395 (2010) (describing *Robinette* as providing for “de novo trial”). Nevertheless, the *Robinette* court purported to review the IRS decision for abuse of discretion. See *Robinette*, 123 T.C. at 105 (“Where, as here, the validity of the underlying tax liability is not at issue, we review the determination for abuse of discretion.”).

59. See Cords, *Administrative Law*, *supra* note 10, at 445 (describing Tax Court's standard of review as “more closely resembl[ing] de novo review” and arguing Tax Court applies de novo standard “because of its limited experience with abuse of discretion review”); see also Book, *supra* note 16, at 1173–74 (describing Tax Court's approach as “taxpayer friendly” because it holds “trials de novo in situations where an abuse of discretion standard applies”).

60. 54 T.C. 742 (1970).

61. See *id.* at 757 (“[W]e think that where the Court of Appeals to which appeal lies has already passed upon the issue before us, efficient and harmonious judicial administration calls for us to follow the decision of that court.”), *aff'd*, 445 F.2d 985 (10th Cir. 1971). For individuals, the proper venue for appeal is determined by the circuit in which the taxpayer resides. See I.R.C. § 7482(b)(1)(A) (2006) (providing residence determined at time petition filed). But see James Bamberg, *A Different Point of Venue: The Plain Meaning of Section 7482(b)(1)*, 61 TAX LAW. 445, 457–60 (2008) (arguing D.C. Circuit is proper venue for CDP appeals according to plain meaning of statute).

62. See, e.g., *Med. Practice Solutions, L.L.C.*, 99 T.C.M. (CCH) at 1395 (declining to follow *Robinette* solely because of *Golsen* in light of realization that appeal would be to First Circuit). No circuit has followed the Tax Court's approach in *Robinette* to allow new evidence that was not part of the administrative record. See *Keller v. Comm'r*, 568 F.3d 710, 718 (9th Cir. 2009) (“[O]ur review is confined to the record at the time the Commissioner's decision was rendered.”); *Murphy v. Comm'r*, 469 F.3d 27, 31 (1st Cir. 2006) (following administrative record rule to disallow new evidence during appeal in Tax Court).

factual and legal determinations before making the final CDP determination and the issue of which standard of review applies to these determinations has arisen in past Tax Court decisions.⁶³ In *Swanson v. Commissioner*,⁶⁴ the Tax Court held that if the IRS committed an error of law, it was an automatic abuse of discretion.⁶⁵ The court, analyzing a subsidiary bankruptcy law issue, never stated under which standard of review it would analyze the subsidiary determination of law.⁶⁶ Nevertheless, the standard of review resembled de novo because the Tax Court performed its own analysis of the law and substituted its own view without any mention of the IRS's interpretation.⁶⁷

The Tax Court addressed the issue again in *Kendricks v. Commissioner*,⁶⁸ stating that the outcome regarding the subsidiary determination of law was the same—whether reviewed de novo or for abuse of discretion—because erroneous views of the law cannot stand under either standard.⁶⁹ The Tax Court relied on its previous decision in *Swanson* and the

63. For a discussion of the subsidiary decisions that the IRS must make before deciding whether to accept or reject an OIC, see *supra* notes 45–46 and accompanying text. For a discussion of cases addressing the issue of the standard of review for subsidiary determinations, see *infra* notes 64–75 and accompanying text.

64. 121 T.C. 111 (2003).

65. See *id.* at 119 (“If [the IRS]’s determination was based on erroneous views of the law . . . then we must reject [the IRS]’s views and find that there was an abuse of discretion.”); see also *Freije v. Comm’r*, 125 T.C. 14, 36 (2005) (holding that IRS error of law was “accordingly an abuse of discretion”).

66. See *Swanson*, 121 T.C. at 119 (declaring that it would be abuse of discretion if IRS determination was erroneous view of law, but not stating how appellate court would review that determination). In *Swanson*, the taxpayer argued that the collection action should not proceed because the taxpayer’s liabilities were discharged in a bankruptcy proceeding. See *id.* at 120–25 (analyzing whether taxpayer’s tax liability was “dischargeable debt” under bankruptcy law). Under bankruptcy law, all of a debtor’s debts are generally discharged. See *id.* at 120 (describing general rule for debts incurred prior to filing). Although the bankruptcy court’s order discharged the debtor from all “dischargeable debts,” the order did not address whether the debtor’s tax liabilities were discharged. See *id.* at 121 (commenting that record was unclear whether specific tax liabilities were included in bankruptcy court discharge order).

67. See *id.* at 125 (“Accordingly, we hold that pursuant to [the Bankruptcy Code], the U.S. Bankruptcy Court for the Northern District of Texas did not discharge petitioner from his unpaid liabilities . . .”). The court did not discuss the IRS’s determination, but merely declared its own judgment—a review similar to de novo. See *id.* at 120–25 (analyzing bankruptcy law issue without reference to IRS’s conclusions).

68. 124 T.C. 69 (2005).

69. See *id.* at 75 (“When faced with questions of law . . . the standard of review makes no difference. Whether characterized as a review for abuse of discretion or as a consideration ‘de novo’ (of a question of law), we must reject erroneous views of the law.”). In *Kendricks*, the question of law turned on whether the taxpayer had an opportunity to contest the tax liability at the taxpayer’s bankruptcy proceeding. See *id.* at 73 (describing taxpayer’s request for CDP hearing to dispute underlying tax liability). The court analyzed the Bankruptcy Code, the Tax Code, and case law to hold that the taxpayer did have the opportunity to dispute the liability in

Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.*⁷⁰ for the principle that errors of law cannot stand under an abuse of discretion review.⁷¹ The *Hartmarx* Court noted that an abuse of discretion would always occur if the ruling was based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence."⁷²

Swanson and *Kendricks* consistently support the proposition that a clearly erroneous view of the law is an abuse of discretion.⁷³ However, neither court addressed the issue of how an appellate court should review subsidiary determinations of law for unsettled legal areas—where any view of the law is unlikely to be clearly erroneous.⁷⁴ The First Circuit addressed exactly that scenario in *Dalton*.⁷⁵

III. DALTON: THE FIRST CIRCUIT CREATES A CUSTOMIZED STANDARD OF REVIEW FOR CDP APPEALS

The First Circuit in *Dalton* ruled on the issue of how to review subsidiary determinations in CDP appeals.⁷⁶ The reasonableness of the IRS's final collection determination turned on the subsidiary issue of whether the taxpayer's primary residence should be considered in the Daltons' reason-

bankruptcy court. See *id.* at 78–79 (looking to other district court decisions for guidance).

70. 496 U.S. 384 (1990).

71. See *Kendricks*, 124 T.C. at 75 (citing *Swanson* and *Hartmarx* for idea that erroneous views of law must be reversed under abuse of discretion review). In *Hartmarx*, the Court held that appellate courts should review a district court's legal determinations in a Rule 11 decision for abuse of discretion. See *Hartmarx*, 496 U.S. at 405 ("[A]n appellate court should apply an abuse-of-discretion standard in reviewing *all* aspects of a district court's Rule 11 determination." (emphasis added)). The Court relied on a prior decision that held a determination should pass an abuse of discretion review if it "has a reasonable basis in law and fact." *Id.* at 403 (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988)). In holding that a deferential standard was appropriate, the Court noted that the district court was in a better position to carry out Rule 11's policy goals. See *id.* at 404 (noting district court's familiarity with local bar to enforce rule's goal to provide specific and general deterrence). The Court relied on *Pierce* to find that "deference was owed to the 'judicial actor . . . better positioned than another to decide the issue in question.'" *Id.* at 403 (quoting *Pierce*, 487 U.S. at 560).

72. *Hartmarx*, 496 U.S. at 405.

73. For a discussion of both Tax Court decisions, see *supra* notes 64–72 and accompanying text.

74. For a discussion of how the *Dalton* court filled in this gap by deciding which standard of review should apply for subsidiary determinations of uncertain legal issues, see *infra* notes 95–106 and accompanying text.

75. For an analysis of the *Dalton* decision, see *infra* notes 110–26 and accompanying text.

76. For a complete discussion of the *Dalton* decision, see *infra* notes 79–106 and accompanying text.

able collection potential.⁷⁷ In ruling for the IRS, the First Circuit created a deferential, customized standard of review for CDP appeals.⁷⁸

A. *Telling the IRS That You Do Not Own Your Home to Escape a Tax Liability: Background and Procedural History of Dalton*

The Daltons were married taxpayers whose former business—like many other businesses—owed the IRS payroll taxes withheld from their employees' paychecks, but never paid to the IRS.⁷⁹ The Daltons were personally liable for \$400,000 of unpaid tax from their business.⁸⁰ The IRS filed a notice of intent to levy, seeking the Daltons' equity interest in their primary residence (the "Property").⁸¹ Before the Daltons' tax trouble started, legal title in the Property was transferred to a trust for little consideration.⁸² The Daltons did not request a CDP hearing to dispute the amount of tax owed, but to propose an offer-in-compromise (OIC) to settle their debt for pennies on the dollar.⁸³

At the hearing, the Daltons argued that they would never be able to pay their full tax debt because they did not own the Property and had insufficient income.⁸⁴ The Daltons made an OIC to settle their \$400,000

77. For a discussion of the facts and procedural background of the *Dalton* case, see *infra* notes 79–93 and accompanying text.

78. For an analysis of the *Dalton* decision and a discussion of why the court held for the IRS, see *infra* notes 95–106 and accompanying text.

79. See *Dalton v. Comm'r*, 682 F.3d 149, 152–53 (1st Cir. 2012) (describing tax debt that arose from unpaid payroll taxes from taxpayer's former business). Unpaid payroll taxes represent a significant portion of the total unpaid, assessed tax. See T. Keith Fogg, *In Whom We Trust*, 43 CREIGHTON L. REV. 357, 361 (2010) (acknowledging small businesses account for higher portion of unpaid payroll taxes than large businesses and how concentration is problematic because of high failure rate for small businesses); Fogg, *supra* note 5, at 7–9 (giving example of how companies usually "borrow" payroll taxes withheld for current cash needs instead of paying to IRS).

80. See *Dalton*, 682 F.3d at 153 (noting taxpayers were personally liable for company's tax debt under Code provision).

81. See *id.* (noting taxpayers had substantial equity interest in residence).

82. See *id.* at 152 (giving background of trust transaction). In 1983, the Daltons sold the Property to Mr. Dalton's father for \$1, who then transferred the Property to a trust. See *id.* The father was originally the trustee before his death, when Mr. Dalton named his brother-in-law, Robert Pray, the successor trustee. See *id.* at 152–53. The Daltons' children were the primary beneficiaries of the trust; however, the Daltons acted as the Property's owners. See *id.* at 152 (noting Daltons granted mortgage interest in Property and signed mortgage documents as owner). Certain legal formalities associated with trusts were not observed, such as legal paperwork being forwarded to the Daltons instead of the trustee. See *id.* at 153 (calling efforts to comply with legal formalities "less than scrupulous"). In addition, the Daltons also used the Property as their primary residence and paid all of its expenses. See *id.* at 152–53 (noting trustee Pray claimed to control trust Property).

83. See *id.* (noting hearing requested under Section 6330(b)).

84. See *id.* at 153 (noting that "based on their assets and income, [the Daltons] could never come close to satisfying their total tax liability"). For a dis-

debt for \$10,000.⁸⁵ The IRS calculated that the Daltons' reasonable collection potential was higher than the \$10,000 OIC because it considered the Property among the Daltons' assets, and therefore rejected the offer.⁸⁶ The IRS analyzed federal nominee law to conclude that the Daltons legally owned the Property, not the trust.⁸⁷ The Daltons appealed the determination to the Tax Court, which held that the IRS abused its discretion by not considering state nominee law and remanded the case back to the IRS.⁸⁸ On remand, the IRS analyzed Maine law and again concluded that the Daltons owned legal title and therefore rejected the OIC a second time.⁸⁹

Hearing the case again, the Tax Court reviewed the subsidiary ownership issue *de novo*, but reviewed the IRS's final decision to reject the OIC for abuse of discretion.⁹⁰ The Tax Court performed a lengthy analysis of state and federal nominee law and held that the Daltons did not own the Property.⁹¹ Therefore, the court held that the IRS abused its discretion by rejecting the OIC.⁹² The IRS appealed the decision to the First Circuit.⁹³

cussion of scenarios in which the IRS accepts OICs, including doubt as to collectability, see *supra* note 38 and accompanying text.

85. See *Dalton*, 682 F.3d at 153 (noting Daltons asserted OIC should be accepted because of doubt as to collectability). The offer represented less than 3% of the total liability. See *id.* (stating that total liability was \$400,000 and Daltons' offer was \$10,000).

86. See *id.* at 153–54 (commenting that taxpayer's equity interest in Property could be liquidated to provide more funds than current \$10,000 offer).

87. See *id.* (noting IRS determined “trust . . . held naked legal title purely for [the taxpayers'] convenience” and therefore trust was nominee for taxpayer). A nominee is “an ‘individual who holds legal title to property of a taxpayer while the taxpayer enjoys full use and benefit of that property.’” Stephanie Hoffer et al., *To Pay or Delay: The Nominee's Dilemma Under Collection Due Process*, 82 TUL. L. REV. 781, 807 (2008) (quoting IRM 5.17.2.5.7.2(1) (Mar. 27, 2012)) (explaining that nominee determination requires “facts and circumstances analysis[.]” with no one factor being determinative). Among the factors listed in the Internal Revenue Manual are whether the taxpayer retains possession or control of the property, whether the nominee paid little or no consideration for the property, and whether the taxpayer pays all or most of the property's expenses. See *id.* (noting “federal tax lien extends to property ‘actually’ owned by the taxpayer even though a third party holds ‘legal’ title to the property as nominee” (quoting IRM 5.17.2.5.7.2(1) (Mar. 27, 2012))).

88. See *Dalton v. Comm'r*, 96 T.C.M. (CCH) 3, 8 (2008) (reasoning court could not conclude whether IRS abused discretion because it did not consider nominee issue under state law); SALTZMAN, *supra* note 42, ¶ 14.15 (noting that state law can decide whether nominee exists and listing factors courts consider).

89. See *Dalton*, 682 F.3d at 154 (explaining IRS concluded Maine court would look to federal law for nominee issue and therefore it followed its original legal conclusion under federal law).

90. See *id.* (“Reviewing the IRS's ownership finding *de novo*, the [Tax] court determined that the trust was not a nominee of the taxpayers under Maine law.”).

91. See *generally* *Dalton v. Comm'r*, 135 T.C. 393, 405–21 (2010) (discussing federal and state nominee law), *rev'd*, 682 F.3d 149 (1st Cir. 2012).

92. See *id.* at 423 (concluding trust not taxpayer's nominee under federal law).

93. See *Dalton*, 682 F.3d at 154 (“This timely second-tier appeal ensued.”). The IRS issued a Chief Counsel Advisory disagreeing with the Tax Court's decision

B. *The First Circuit: "One Size Does Not Fit All"*⁹⁴ for CDP Standards of Review

The court first noted that the proper standard of review for subsidiary determinations the IRS makes during a CDP hearing was an issue of first impression.⁹⁵ To resolve the issue, the court created a two-step, customized standard of review for CDP: first, a reviewing court must determine whether the IRS's subsidiary determinations were reasonable using evidence in the administrative record; second, it must determine whether the final determination constituted an abuse of discretion.⁹⁶

The court gave three reasons for its decision.⁹⁷ First, the deferential standard of review carried out the purpose of CDP: to ensure that IRS collection decisions are not arbitrary.⁹⁸ CDP was meant as an oversight of IRS decisions, not as a means to adjudicate individual collection actions.⁹⁹ The court stated that erroneous views of the facts or law would be unreasonable and therefore always constitute an abuse of discretion.¹⁰⁰ A de novo review was inappropriate because it "would result in the courts 'inevitably becom[ing] involved on a daily basis with tax enforcement details that judges are neither qualified, nor have the time, to administer.'"¹⁰¹ Second, the court found that the customized, deferential standard of re-

in *Dalton* and directed agents to look at the decision to see "how complex the [nominee] question may become." I.R.S. Chief Couns. Advisory 201211023 (Mar. 16, 2012).

94. *Dalton*, 682 F.3d at 154 ("In the exercise of powers of judicial review, one size does not fit all.").

95. *See id.* at 151–52 ("[N]o court has had the occasion to parse that standard and analyze how it plays out with respect to subsidiary factual and legal determinations made by the IRS during the CDP process. We grapple with that issue today."). Although past courts "had the occasion" to analyze how the standard applied to subsidiary determinations, the First Circuit was the first to explicitly rule on the issue. For a discussion of past Tax Court cases addressing this issue, see *supra* notes 63–75 and accompanying text.

96. *See Dalton*, 682 F.3d at 156 (summarizing new standard of review). Both components of the two-step, customized standard of review will hereinafter be referred to collectively as the "*Dalton* standard." The first part of the standard—review of subsidiary determinations—when referred to alone will be called the "reasonableness standard." The second part of the standard—review of the final CDP determination—when referred to alone will be called the "abuse of discretion standard."

97. *See id.* at 154–56 (justifying decision that courts should use deferential standard of review over subsidiary determinations).

98. *See id.* at 155 (explaining judicial review must be "tailored" to CDP's purpose of ensuring IRS decisions are not arbitrary).

99. *See Book, supra* note 16, at 1195–96 (arguing de novo review "tends to become more of a judicial substitution of judgment, rather than a mechanism for external control of agency practice—the very rationale for CDP in the first place").

100. *See Dalton*, 682 F.3d at 159 n.6 ("Of course, an absurd factual determination or a legal determination that flies in the face of settled precedent will never be reasonable and, thus, will always constitute an abuse of the IRS's discretion.").

101. *Id.* at 155 (quoting *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005)).

view made sense because of the informal nature of CDP hearings and the likelihood the administrative record would be incomplete.¹⁰² Lastly, the court noted that a de novo standard of review would create judicial inefficiencies by allowing the taxpayers “two bites at the cherry.”¹⁰³

Once the court established the customized, deferential standard of review, it ruled that the IRS did not abuse its discretion by rejecting the Daltons’ OIC.¹⁰⁴ The court found that the IRS took a reasonable view of state and federal nominee law—a complex and unsettled area of law—to determine the Daltons legally owned the property.¹⁰⁵ The IRS therefore did not abuse its discretion by rejecting the OIC because it reasonably determined the Daltons had the ability to pay more than their offer.¹⁰⁶

IV. UNDERSTANDING *DALTON*’S CUSTOMIZED STANDARD OF REVIEW AND HOW IT BENEFITS THE TAX SYSTEM

The First Circuit’s customized standard of review for CDP benefits the tax system for several reasons.¹⁰⁷ The *Dalton* standard of review departs from the Tax Court’s previous de novo review of subsidiary determina-

102. *See id.* at 155–56 (explaining that because Congress knew of possibility of limited record to review, it never intended for courts to “undertake de novo review of subsidiary determinations made during that process”).

103. *See id.* at 156 (noting if taxpayers lost, Commissioner would have to litigate the ownership issue at proceeding with trust joined as party). In this case, the “cherry” was the issue of who owned the property. *See id.* (explaining that deciding ownership issue would adjudicate rights of third party).

104. *See id.* at 158 (concluding IRS’s view of nominee law was reasonable—because IRS reasonably concluded Daltons legally owned property and could afford to pay more—and therefore IRS did not abuse discretion by rejecting Daltons’ offer).

105. *See id.* at 157–59 (“In this instance, we believe that the IRS acted reasonably in looking to case law from other jurisdictions to fill the void and illuminate Maine’s nominee doctrine.”). The court agreed with the IRS’s adoption of a balancing test that weighed several factors to analyze the nominee issue. *See id.* at 158 (“Viewed against this backdrop, the IRS’s decision to apply a balancing test to resolve the nominee question appears reasonable.”). The court further agreed that the IRS’s application of the test to conclude the Daltons legally owned the property was reasonable. *See id.* (discussing various nominee factors and noting most factors weighed against Daltons). The court noted that the application of nominee law was not an easy decision. *See id.* at 159 (commenting that some factors weighed in favor of Daltons, but true question was not who owned property, but “whether the IRS’s determination, correct or not, falls within the wide universe of reasonable outcomes”). For a further discussion of nominee law and the relevant factors, see *supra* note 87.

106. *See Dalton*, 682 F.3d at 158 (implying that IRS included Property in Daltons’ RCP, and therefore Daltons’ \$10,000 offer fell well below their RCP). For a discussion on what information the IRS uses to calculate a taxpayer’s RCP, see *supra* note 44.

107. For a discussion of how a deferential review of subsidiary determinations made during a CDP hearing benefits the tax system, see *infra* notes 127–76 and accompanying text.

tions, which essentially gave taxpayers a new trial.¹⁰⁸ The First Circuit's more deferential standard of review benefits the tax system because it (1) increases efficiency for both the government and courts; (2) promotes fairness for taxpayers; and (3) is consistent with the purpose of CDP.¹⁰⁹

A. *Saying "No" to De Novo: How the Dalton Standard Differs From the Tax Court's Approach*

The *Dalton* decision provided new guidance for the Tax Court because it explicitly analyzed the proper standard of review in CDP appeals when the IRS decides subsidiary questions of law and fact.¹¹⁰ Specifically, *Dalton* dealt with a subsidiary question involving an unsettled area of law.¹¹¹ The First Circuit and the Tax Court previously agreed that erroneous views of the law constituted a per se abuse of discretion.¹¹² This principle found support in *Dalton*.¹¹³ *Dalton*, however, provided further guidance by holding that a reasonable view of the law should be affirmed under its customized reasonableness standard, not analyzed de novo.¹¹⁴

The decision in *Dalton* departs from the Tax Court's unarticulated de novo standard used in prior cases because it held that a subsidiary legal issue is reviewed for reasonableness.¹¹⁵ It also implicitly conflicts with the Tax Court's assertion that the standard of review for subsidiary legal ques-

108. For a discussion of how the First Circuit's decision departed from the Tax Court's previous approach for subsidiary determinations in CDP hearings, see *infra* notes 110–26 and accompanying text.

109. For a discussion of the efficiencies promoted by the *Dalton* standard, see *infra* notes 131–52 and accompanying text. For a discussion of how the standard increases fairness in the tax system, see *infra* notes 153–62 and accompanying text. For a discussion of how the standard reinforces CDP's purpose, see *infra* notes 163–76 and accompanying text.

110. For a discussion of how *Dalton* presented an issue of first impression for the First Circuit, see *supra* note 24 and accompanying text.

111. See *Dalton*, 682 F.3d at 159 (“Whether an IRS determination reached during the CDP process rests upon a purely factual question, a purely legal question, or a mixed question of fact and law, a reviewing court’s mission is the same: to evaluate the reasonableness of the IRS’s subsidiary determination.”). The court implies that the nominee issue was an unsettled issue of law, and therefore it was unlikely that any view of the law could be erroneous. See *id.* at 157 (noting IRS acted reasonably to look at other jurisdictions for law to fill “void” in Maine law).

112. See, e.g., *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7–8 (1st Cir. 2009) (noting under abuse of discretion review “material error of law constitutes a per se abuse of discretion”); *Swanson v. Comm’r*, 121 T.C. 111, 119 (2003) (holding erroneous views of law cannot stand under abuse of discretion review).

113. See *Dalton*, 682 F.3d at 159 n.6 (acknowledging erroneous views of law would be unreasonable and therefore constitute abuse of discretion).

114. See *id.* at 156 (“[A] court’s job is not to review the IRS’s CDP determinations afresh.”).

115. See, e.g., *Swanson*, 121 T.C. at 125 (reviewing subsidiary bankruptcy law issue “afresh” by giving no deference to IRS conclusions, but failing to state exact standard of review). For a discussion of the *Dalton* reasonableness standard of review for subsidiary determinations, see *supra* note 96 and accompanying text.

tions “makes no difference.”¹¹⁶ Undeniably, if the IRS took an erroneous view of the law, it should be reversed under either standard of review.¹¹⁷ Conversely, if the IRS took a reasonable view of the law—albeit a view with which the Tax Court disagreed—it would be upheld under the *Dalton* reasonableness standard, but reversed in a de novo review.¹¹⁸

Dalton is also consistent with the Supreme Court’s general guidance in *Hartmarx* because the *Dalton* standard of review also gives the original reviewing body, the IRS, proper deference.¹¹⁹ The IRS is in a better position to make collection decisions and carry out policy goals than the Tax Court.¹²⁰ Just as in *Hartmarx*, *Dalton* allows for the opportunity for an appellate court to overturn “absurd” legal or factual conclusions under an abuse of discretion standard.¹²¹

The *Dalton* court avoided turning an abuse of discretion review of the final determination into a de novo trial.¹²² A de novo review of subsidiary determinations, paired with an abuse of discretion review of the final determination, would convert the analysis into a de novo trial because the court’s review would give no deference to the IRS’s judgment.¹²³ Effec-

116. *Kendricks v. Comm’r*, 124 T.C. 69, 75 (2005) (“Whether characterized as a review for abuse of discretion or as a consideration ‘de novo’ (of a question of law), we must reject erroneous views of the law.”).

117. See, e.g., *Dalton*, 682 F.3d at 159 n.6 (discussing in dicta that absurd views of law would always be unreasonable and constitute abuse of discretion); *Kendricks*, 124 T.C. at 75 (rejecting erroneous views of law under either de novo or abuse of discretion standard).

118. Compare *Dalton*, 682 F.3d at 159 (“[T]he IRS acts within its discretion as long as it makes a reasonable prediction of what the facts and/or the law will eventually show.”), with *infra* note 123 (discussing courts taking independent view and substituting their judgment in place of IRS under de novo review).

119. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (deciding proper standard of review for Rule 11 determinations). In *Hartmarx*, the Supreme Court noted that the district court was in a better position to make decisions on Rule 11 than an appellate court, and therefore it should be afforded more deference, even on legal issues. See *id.* (noting deference would conserve court resources). Similarly, *Dalton* recognized that the IRS, not courts, should be making collection decisions, and therefore the IRS should be afforded more deference. See *Dalton*, 682 F.3d at 155 (finding stricter standard of review would result in courts, not IRS, enforcing collection actions that “judges are neither qualified, nor have the time, to administer” (quoting *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005))).

120. See Cords, *Administrative Law*, *supra* note 10, at 467 (arguing that courts should give deference because it is IRS’s responsibility to make collection decisions).

121. See *Dalton*, 682 F.3d at 159 n.6 (stating “absurd” legal or factual determination would be unreasonable and therefore is de facto abuse of discretion).

122. For a discussion of how the *Dalton* decision avoided de novo trials by providing a deferential standard of review, see *infra* notes 123–26 and accompanying text.

123. See Book, *supra* note 16, at 1194–97 (arguing that when Tax Court substitutes its judgment for IRS in abuse of discretion review, it resembles de novo review). A de novo review of subsidiary determinations and *Robinette*’s de novo scope of review that allows new evidence both allow courts to substitute their judgment for that of the IRS. See *supra* notes 55–62 and accompanying text (discussing *Robi-*

tively, the de novo review of subsidiary determinations would swallow the abuse of discretion standard because it would allow courts to substitute their judgment for the IRS's.¹²⁴ In *Dalton*, the entire question of whether the IRS abused its discretion in rejecting the Daltons' OIC turned on the subsidiary issue of whether the Property should be included in the Daltons' reasonable collection potential.¹²⁵ Therefore, the de novo review of the subsidiary ownership issue would effectively usurp an abuse of discretion review of the final decision of rejecting the OIC.¹²⁶

B. *A Preference for Deference: The Benefits of Dalton's Customized Standard of Review*

The *Dalton* standard benefits the tax system for three reasons.¹²⁷ First, it increases both collection efficiency and judicial efficiency because it reduces delay in collection and allows the IRS to be the primary decision-maker.¹²⁸ Second, it promotes fairness in collection by discouraging noncompliance.¹²⁹ Third, it is consistent with the purpose of CDP because deferential review is sufficient to ensure the IRS's collection actions are reasonable.¹³⁰

1. *Efficiency: Let the IRS, Not Courts, Handle Day-To-Day Tax Collection*

The *Dalton* standard of review benefits the tax system because it promotes two types of efficiency: collection efficiency and judicial effi-

nette's de novo scope of review). Therefore, the collection system reaps the same benefits from rejecting a de novo review in both contexts. See *infra* notes 127–76 and accompanying text (discussing benefits of deferential review of IRS decisions).

124. See Cords, *Administrative Law*, *supra* note 10, at 459–60 (explaining Tax Court's approach in abuse of discretion "closely resembles a trial de novo," which "encourages the court to substitute its judgment for that of the Service"); Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021, 1041 (2005) [hereinafter Cords, *Scope and Nature of Judicial Review*] ("[C]ourt[s] should seldom, if ever, substitute [their] judgment for that of the Service. The Service has vast experience dealing with tax collections.").

125. See *Dalton*, 682 F.3d at 159 (commenting that IRS does not abuse its discretion if it reasonably determines taxpayer can pay more than offer amount). If the valuable Property is included in the amount the Daltons could reasonably pay, the Daltons' \$10,000 offer is much lower than what they could pay. See *id.* (noting IRS acted within its discretion by rejecting Daltons' offer).

126. For a discussion of how de novo review of evidence, paired with abuse of discretion review of final decisions, allows courts to substitute their judgment for the IRS's, see *supra* notes 58–59 and accompanying text.

127. For a discussion of the reasons the *Dalton* standard benefits the tax system, see *infra* notes 131–76 and accompanying text.

128. For a discussion of how the *Dalton* standard promotes efficiency, see *infra* notes 131–52 and accompanying text.

129. For a discussion of how the *Dalton* standard encourages fairness in tax collection, see *infra* notes 153–62 and accompanying text.

130. For a discussion of why the *Dalton* standard is consistent with the purpose of CDP, see *infra* notes 163–76 and accompanying text.

ciency.¹³¹ First, the standard increases efficiency in tax collection for both the government and taxpayers because it reduces delay.¹³² Second, the standard increases efficiency for courts by entrusting the day-to-day collection responsibilities to the IRS.¹³³

a. Collection Efficiency: How *Dalton's* Deferential Standard Reduces Collection Costs

A de novo review of subsidiary determinations would result in delayed collection, costing both taxpayers and the government.¹³⁴ A de novo review of subsidiary factual and legal decisions delays collection because it could result in more litigation.¹³⁵ For example, in *Dalton*, if the court performed a de novo review of the ownership issue and found that the taxpayer owned the property, the IRS would need to re-litigate the issue in another proceeding with the trust.¹³⁶ Giving taxpayers such as the Daltons a second “bite at the cherry” through de novo review further delays collection because of the lengthy nature of adjudicating issues in court.¹³⁷ CDP cases already represent one of the most litigated issues in tax court, and judicial review that potentially creates more litigation only further burdens the IRS.¹³⁸

Collection that is further delayed through additional layers of judicial review also costs the government money because of the decreased likeli-

131. For a discussion of how the *Dalton* standard enhances efficiency in the tax collection system, see *infra* notes 134–52 and accompanying text.

132. For a discussion of how the *Dalton* standard of review reduces delay and increases efficiency for taxpayers and the government, see *infra* notes 134–44 and accompanying text.

133. For a discussion of how the *Dalton* standard of review increases judicial efficiency, see *infra* notes 145–52 and accompanying text.

134. For a discussion of how de novo review of subsidiary determinations delays collection and how that costs taxpayers and the government, see *infra* notes 135–44 and accompanying text.

135. See *Dalton v. Comm’r*, 682 F.3d 149, 156 (1st Cir. 2012) (explaining that de novo review would give Daltons multiple opportunities to contest ownership issue).

136. See *id.* (“Such a duplication of effort would both undermine the significant public interest in the speedy and efficient resolution of disputes and open the door to inconsistent decisions.”).

137. *Id.* See also I.R.C. § 6330(e)(1) (2006) (suspending collection during CDP hearing and ensuing appeals pending). Resolving CDP cases in court can take up to “300–400 days or more.” Bryan T. Camp, *The Costs of CDP*, 105 TAX NOTES 1445, 1446 (2004) (analyzing sample of Tax Court cases to determine length of time between CDP notice and final court decision). In *Dalton*, the IRS first issued a CDP notice in 2004; the final court decision was filed in 2012. See *Dalton*, 682 F.3d at 153 (detailing history of case and notice of intent to levy sent in 2004). The original tax liability was from 1996. See *id.* (explaining that tax liability increased with accrued interest).

138. See 2011 TAXPAYER ADVOCATE REPORT, *supra* note 14, at 619 (“Since 2003, CDP has been one of the federal tax issues most frequently litigated in the federal courts”); FY 2013 BUDGET, *supra* note 14, at 9 (requesting over \$4.8 billion for enforcement activities).

hood of collection the longer the process is prolonged.¹³⁹ A de novo review of subsidiary determinations could add years in litigation before a final court decision.¹⁴⁰ Those years of litigation increase the chance that, even if the IRS eventually proves its collection action was reasonable, it could collect nothing.¹⁴¹

Delay also hurts the delinquent taxpayer because of accumulated interest and penalties that must be paid if the IRS eventually wins.¹⁴² In some cases, the accumulated interest can exceed the original tax liability.¹⁴³ A de novo standard of review that encourages more litigation and delay could lead to taxpayers unnecessarily owing more money to the government.¹⁴⁴

b. Judicial Efficiency: Easing the Burden on the Tax Court's Already Heavy Docket

A deferential review of subsidiary determinations promotes efficiency because it allows for minimal court interference in tax collection.¹⁴⁵ A de novo review of IRS subsidiary determinations would place an even higher hurdle on collecting taxes, risking courts becoming "involved on a daily basis with tax enforcement details that judges are neither qualified, nor have the time, to administer."¹⁴⁶ CDP cases already clog the Tax Court's

139. See Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 105 (2009) [hereinafter Camp, *Failure of Adversarial Process*] (commenting that "after three years, collections on each unpaid dollar reaches zero.").

140. For a discussion of how de novo review adds time to CDP cases, see *supra* note 137 and accompanying text.

141. See INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE: 2004 ANNUAL REPORT TO CONGRESS 233 (2004) (Volume 1), available at <http://www.irs.gov/pub/irs-utl/ntafy2004annualreport.pdf> (showing diminishing collections with passage of time).

142. See Camp, *Failure of Adversarial Process*, *supra* note 139, at 105 ("For every day that taxpayers delay collection, they owe additional interest and possible penalties on their taxes."); see also *Dalton*, 682 F.3d at 153 (noting interest accumulation on original tax liability).

143. See Camp, *Failure of Adversarial Process*, *supra* note 139, at 105 (commenting that National Taxpayer Advocate has noted "accumulation of interest and penalties on those taxpayer accounts not resolved during the Notice stage will often equal or exceed the original delinquencies").

144. See *id.* (describing that extended CDP process leads most taxpayers "further and further into debt").

145. See Cords, *Administrative Law*, *supra* note 10, at 464 ("Significant limits on judicial interference with tax collection are necessary to prevent the tax collection system from screeching to a halt.").

146. *Living Care Alts. of Utica, Inc. v. United States*, 411 F.3d 621, 631 (6th Cir. 2005). A de novo review of subsidiary determinations would create the same judicial inefficiencies as the *Robinette* de novo scope of review that allows the court to consider new evidence during appellate review because both standards require courts to substitute their judgment for the IRS and become the primary collection decision-maker. See Lane, *supra* note 16, at 160 (noting de novo scope of review on appeal would "require an enormous amount of time"). Lane argues that "the Tax Court simply does not have the time, resources, or energy to admit new evidence

docket.¹⁴⁷ A more burdensome review is inefficient because it diverts limited court resources away from other cases.¹⁴⁸

In addition to the increased burden on scarce judicial resources, a de novo standard of review would shift tax collection decisions away from the experts, the IRS, and to the judiciary.¹⁴⁹ A de novo review of subsidiary determinations would require the courts to substitute their judgment for the IRS's.¹⁵⁰ The IRS is best suited to make decisions about the most efficient and effective way to collect taxes because it has resources and expertise that the judiciary does not, such as the ability to analyze and verify a taxpayer's information.¹⁵¹ Accordingly, judicial review should give deference to the IRS's judgments and expertise.¹⁵²

2. *Fairness: Applying the Principle of Horizontal Equity to CDP's Standard of Review*

Dalton's deferential standard of review of subsidiary determinations promotes horizontal equity in tax collection because it discourages tax evasion.¹⁵³ A tax system with horizontal equity requires that similarly situated

of the kind admitted in *Robinette*." *Id.* See also Cords, *Administrative Law*, *supra* note 10, at 464 ("Significant limits on judicial interference with tax collection are necessary to prevent the tax collection system from screeching to a halt."). Likewise, a de novo review of subsidiary legal and factual conclusions would consume the same, if not greater, judicial resources. See *Dalton*, 682 F.3d at 156 (noting de novo scope would create inefficiency because "[s]uch a duplication of effort would both undermine the significant public interest in the speedy and efficient resolution of disputes and open the door to inconsistent decisions").

147. See 2011 TAXPAYER ADVOCATE REPORT, *supra* note 14, at 619 (discussing CDP appeal as one of most litigated issues in Tax Court since 2003).

148. See Lane, *supra* note 16, at 160 (arguing de novo scope of review "may slow the court's ability to efficiently manage an already voluminous caseload").

149. See Cords, *Administrative Law*, *supra* note 10, at 467 (noting that IRS is "charged with collecting taxes and making decisions about the most appropriate way to collect taxes[,] which does not 'require the substitution of the court's judgment for the Service's judgment'"); see also *Robinette v. Comm'r*, 439 F.3d 455, 459 (8th Cir. 2006) ("We see merit in the observation of these courts that Congress likely contemplated review for 'a clear abuse of discretion in the sense of clear taxpayer abuse and unfairness by the IRS,' lest the judiciary become involved on a daily basis with tax enforcement details that Congress intended to leave with the IRS." (quoting *Olsen v. United States*, 414 F.3d 144, 150 (1st Cir. 2005))).

150. See Lane, *supra* note 16, at 160–61 (arguing responsibility to make determinations in CDP cases rests with IRS, not Tax Court).

151. See Camp, *Failure of Adversarial Process*, *supra* note 139, at 97 ("[T]o allow taxpayers to introduce new evidence at the judicial review stage would make courts assume the agency's role and work the cases. . . . Not only do courts lack the expertise of the agency employees to make a fair evaluation of the information, they also lack the resources to verify the information presented.").

152. See Cords, *Scope and Nature of Judicial Review*, *supra* note 124, at 1041 (arguing courts should rarely overturn IRS's collection judgments because IRS has more experience dealing with tax collection).

153. For a discussion of how the *Dalton* standard promotes fairness by discouraging tax evasion, see *infra* notes 154–62 and accompanying text.

taxpayers be treated the same.¹⁵⁴ Allowing de novo review of subsidiary determinations could lead to similarly situated taxpayers having different tax burdens, depending on whether a taxpayer has “the time, energy, and persistence to fight the Service into submission.”¹⁵⁵ Delinquent taxpayers are given favorable treatment with de novo review because of their ability to further delay reasonable collection actions, while compliant taxpayers pay their taxes on time and in full.¹⁵⁶ A delinquent taxpayer that can extend court review through a de novo examination of subsidiary determinations can delay paying a tax liability, leaving compliant taxpayers to foot the bill.¹⁵⁷

A de novo standard of review for subsidiary determinations could also encourage taxpayers to practice tax evasion, further slowing collection and creating inequity in the tax system.¹⁵⁸ Allowing courts to second-guess the IRS through de novo review of subsidiary determinations could lead to the

154. For a discussion of the concept of horizontal equity, see *supra* note 11.

155. Lane, *supra* note 16, at 171. Lane argues that an expanded scope of review would lead to more taxpayers trying to evade taxes, but the same logic applies to an expanded review of subsidiary determinations because both situations allow the Tax Court to substitute its judgment for the IRS. See *id.* (“[T]he system will operate rewarding those who are less-honest and willing to fight, while punishing those who are more-honest or less inclined to fight.”). Lane notes that compliant taxpayers are hurt by delinquent taxpayers in two ways: first, they pay their fair share while delinquent taxpayers do not; second, as a result of increasing delinquency, taxes are likely to increase because of the inability to collect revenues. See *id.* at 171–72 (arguing de novo scope of review would also “significantly drive-up overall costs of collecting taxes by increasing the Service’s time spent litigating cases”).

156. See Camp, *Failure of Adversarial Process*, *supra* note 139, at 110 (arguing against CDP partly because of a “won’t pay” taxpayer’s ability to delay collection “at the expense of compliant taxpayers”).

157. See Lane, *supra* note 16, at 171 (describing unfairness to honest taxpayers who “not only pay their current fair-share, but face increasing tax hikes as a result of tax increases because of the system’s inability to collect sufficient revenues”); see also 2006 TAXPAYER ADVOCATE REPORT, *supra* note 2, at 6 (describing “extraordinary burden” delinquent taxpayers place on compliant taxpayers because of non-payment of validly owed taxes).

158. See Lane, *supra* note 16, at 171 (discussing possible “chilling effect of scrutiny” and possibility it could “increase the number of individuals who practice tax evasion, and may further embolden them to continue evading after realizing the Service is less likely to pursue them”). One commentator estimates frivolous claims already represented at least one-third of CDP cases. See Camp, *Failure of Adversarial Process*, *supra* note 139, at 116 (examining select CDP appeals and noting early on CDP was “a ‘boon to tax protestors and a pain to everyone else’” (quoting Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 122 (2004))). Professor Camp noted that frivolous claims decreased with more court-imposed sanctions. See *id.* (noting direct correlation between lower frivolous claims and increased sanctions); see also Nick A. Zotos, *Service Collection Abuse of Discretion: What Is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals?*, 62 TAX LAW. 223, 237 (2008) (noting IRS can assess \$5,000 penalty for frivolous arguments and Tax Court can assess \$25,000 penalty). Zotos notes that “the Tax Court has demonstrated an increased willingness to impose sanctions as a means of dealing with frivolous claims.” *Id.*

IRS settling more cases before court review.¹⁵⁹ In turn, taxpayers would then be encouraged to avoid paying taxes, fight the IRS through CDP, and hope to secure a lower tax liability through an OIC.¹⁶⁰ Taxpayers might sense unfairness in a system that allows some to avoid liabilities through CDP, and those individuals are then less likely to comply with tax laws in the future.¹⁶¹ Ultimately, if courts allowed a de novo review of subsidiary determinations, compliant taxpayers would lose while delinquent taxpayers would win—the definition of unfairness.¹⁶²

3. *Sticking to the Point: De Novo Review of Subsidiary Determinations Is Inconsistent with the Purpose of CDP*

Judicial review is a critical part of the CDP regime because CDP is intended to ensure the IRS's collection actions are reasonable through third party oversight.¹⁶³ To be consistent with CDP's purpose, courts only need to decide whether the IRS's collection action is reasonable, not nec-

159. See Lane, *supra* note 16, at 171 (arguing judicial substitution of judgment will result in more settlements because IRS “will become more afraid of close scrutiny”).

160. See *id.* (commenting that IRS “will likely try to settle more CDP cases through OIC’s that are substantially inadequate to the tax liability actually owed” if judges can substitute judgment in place of IRS). This hypothesis is not theoretical: if the Tax Court had its way with de novo review of subsidiary determinations, this would have been the exact result in the *Dalton* case. See *Dalton v. Comm’r*, 682 F.3d 149, 153 (1st Cir. 2012) (noting taxpayers offered to settle tax debt for just \$10,000 of \$400,000).

161. See Johnson, *supra* note 14, at 1020–21 (showing decreases in IRS enforcement activity leads to decrease in compliance rate and arguing for increased IRS budget); Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner’s Law and Social Norms*, 36 U. RICH. L. REV. 367, 378–80 (2002) (discussing how awareness of others cheating on taxes affects compliance rates). Professor Kahan details a study by the Minnesota Department of Revenue in which letters were sent to taxpayers telling them that compliance rates were higher than public perception. See *id.* at 380 (using study as example to show taxpayer trust in system correlates to higher compliance rate). Taxpayers who received the letter “reported more income and claimed fewer deductions than did individuals in a control group.” *Id.* (“[S]imply advising taxpayers that others were inclined to comply was more cost-effective than the threat of an audit!”). It follows that a public perception of decreased compliance and low trust in the system would result in a higher rate of non-compliance among taxpayers. See *id.*

162. For a discussion of how de novo review of subsidiary determinations benefits delinquent taxpayers while harming compliant taxpayers, see *supra* notes 153–61 and accompanying text.

163. See Book, *supra* note 16, at 1195–96 (arguing introduction of new evidence during CDP appeal allows “judicial substitution of judgment, rather than a mechanism for external control of agency practice—the very rationale for CDP in the first place”); see also Leslie Book, *A Response To Professor Camp: The Importance of Oversight*, 84 IND. L.J. SUPPLEMENT 63, 73 (2009) (defending judicial review in CDP as “important safety valve” because “CDP’s limited review has served its intended oversight function of limited aspects of the collection process, and correct for egregious agency error”).

essarily whether it is “correct.”¹⁶⁴ Abuse of discretion review is intended to ensure results are not arbitrary, while de novo review is intended to reach the correct result.¹⁶⁵ A de novo review of subsidiary determinations would be inconsistent with the purpose of CDP because it would require courts to make individual determinations of correctness, while overturning potentially reasonable IRS collection actions.¹⁶⁶ After thoughtful consideration, Congress rejected a version of CDP that allowed courts to perform a full de novo review of individual IRS collection actions.¹⁶⁷ The *Dalton*

164. See *Dalton*, 682 F.3d at 156 (explaining appellate court’s purpose is to ensure “factual and legal conclusions reached at a CDP hearing are reasonable”). The *Dalton* court noted that the “CDP process presents no occasion for a reviewing court to demand incontrovertibly correct answers to subsidiary questions, whatever their nature.” *Id.* at 159. The Tax Court traditionally functions as a trial court, not as an appellate court. See Book, *supra* note 16, at 1195–96 (explaining Tax Court’s history as court of original jurisdiction and holding de novo trials in context of deficiencies cases to determine taxpayer’s true liability). Because the Tax Court is accustomed to reviewing matters de novo in order to find the correct answer, it is not as familiar with true abuse of discretion review. See *id.* at 1196 (explaining Tax Court’s de novo record rule approach as “fail[ing] to appreciate that review of collection determinations is intended as a means to provide oversight to IRS activities and is not about identifying agency error on an individualized basis”); see also Cords, *Administrative Law*, *supra* note 10, at 463 (observing that “district courts have more experience conducting abuse of discretion review than does the Tax Court”). The Tax Court’s de novo approach in CDP review where abuse of discretion is appropriate fails to consider that different standards of review apply in different circumstances. See Cords, *Administrative Law*, *supra* note 10, at 463 (explaining Tax Court has justified its de novo approach in CDP cases by pointing to its approach in deficiency cases); Lane, *supra* note 16, at 168 (“While the motivation to ‘get the right answer’ may be noble . . . it likely is not what Congress intended for the Tax Court in reviewing CDP cases.”).

165. See *Woodral v. Comm’r*, 112 T.C. 19, 23 (1999) (describing abuse of discretion standard); Book, *supra* note 16, at 1196 (describing de novo review in CDP context as one in which “court is concerned with the right answer, regardless of the agency action preceding the court review”); Lane, *supra* note 16, at 168 (stating “purpose of a de novo review is to get to the right answer[,]” but that “it likely is not what Congress intended for the Tax Court in reviewing CDP cases.”); Richard H. W. Maloy, “Standards of Review”—*Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 609 (2000) (noting that de novo review is “intended to produce the correct substantive result”).

166. See Book, *supra* note 16, at 1195 (arguing that limiting IRS’s ability to offer post-hearing justification for actions in de novo review would create incentives for IRS to act reasonably during administrative hearing). But see Eliza Mae Scheibel, Note, *Mixing It Up: The Tax Court Pairs a De Novo Scope of Review with an Abuse of Discretion Standard of Review Under Section 6330(D)* in *Robinette v. Commissioner*, 58 TAX LAW. 941, 953–54 (2005) (arguing de novo scope of review carries out purpose of CDP to protect taxpayers because limited scope of review would not be sufficient to curb abuse). For the argument that abuse of discretion review of subsidiary determinations is sufficient to protect taxpayers from IRS error, see *infra* notes 173–76 and accompanying text.

167. See Camp, *Collection Context*, *supra* note 38, at 975–76 (describing earlier version of CDP passed by Senate as having provisions that would make collection “full-blown shift to adversarial process and would have severely restricted IRS collection activity”). The provisions allowed taxpayers to obtain court review of “each and every collection decision made by the IRS in their individual case,” as well as “contest the merits of an assessment in all CDP hearings.” *Id.* at 975 (arguing these

court properly recognized that the deferential reasonableness review of subsidiary determinations carries out CDP's purpose.¹⁶⁸

While the *Dalton* standard will likely result in more courts affirming the IRS's judgments, lopsided results would not mean the standard of review is ineffective.¹⁶⁹ Although it seems counterintuitive, it would be beneficial to taxpayers as a whole if the IRS frequently prevailed on appeal because it would mean the IRS's proposed collection action was reasonable—the entire purpose of CDP.¹⁷⁰ There is also concern that a deferential review of subsidiary determinations could provide an incentive for the IRS to develop an insufficient record to increase the chances a reviewing court will affirm its determination.¹⁷¹ However, this concern is addressed by the Tax Court's policy to remand cases where the administrative record is insufficient to review the IRS's determination.¹⁷²

provisions would undermine automatic nature of bulk collection and effectively abolish long-standing rule that taxpayers pay liability in full before contesting it). These provisions were even too extreme for the Clinton administration. *See id.* (describing argument against provisions was that they would effectively give taxpayers "multiple bites at the apple[,] with apple being opportunity to contest tax liability). The *Dalton* court also expressed this concern about de novo review of subsidiary determinations, using a cherry metaphor instead of an apple. *See Dalton*, 682 F.3d at 156 ("De novo review would also give the taxpayers two bites at the cherry.").

168. *See Dalton*, 682 F.3d at 155 ("We conclude, therefore, that judicial review must be tailored to effecting the purpose of the CDP process; that is, to ensuring that the IRS's determinations, whether of fact or of law, are not arbitrary."); *see also* *Murphy v. Comm'r*, 469 F.3d 27, 32 (1st Cir. 2006) (declining to find abuse of discretion in order to avoid "transform[ing] CDP hearings from a shield against invasive government conduct into a taxpayer's tool to delay the timely collection of delinquent tax liabilities by seeking endless extensions"); *Olsen v. United States*, 414 F.3d 144, 151 (1st Cir. 2005) ("While Congress clearly wanted to prevent mere bureaucratic harassment, we do not understand it to have intended to strip the IRS of effective and reasonable tax collection procedures.").

169. *See Zotos*, *supra* note 158, at 228–29 (explaining high rate of success for IRS when its determinations are appealed); 2011 TAXPAYER ADVOCATE REPORT, *supra* note 14, at 624 (showing IRS success rate from 2003 through 2011, with lowest success rate for any year at 89% and highest success rate at 96%). For a discussion of why lopsided results would not necessarily show that the system is ineffective, *see infra* note 170 and accompanying text.

170. *See Book*, *supra* note 16, at 1203 (suggesting "success of [CDP] should not be based on the number of reversals . . . but rather on the broader effects that [CDP] would create, thereby improving IRS collection procedures"); *Zotos*, *supra* note 158, at 236 (examining reasons IRS wins majority of appeals and explaining one reason is IRS has "cleaned up its act so to speak, and the CDP provisions have been successful in preventing the very institutional abuses the statute was intended to prevent").

171. *See, e.g., Dalton v. Comm'r*, 135 T.C. 393, 423 n.30 (2010) (acknowledging taxpayer's argument that IRS purposely failed to create sufficient administrative record but ruling for taxpayer on other grounds), *rev'd*, 682 F.3d 149 (1st Cir. 2012).

172. *See Robinette v. Comm'r*, 123 T.C. 85, 126 (2004) ("In the event the administrative record of such an informal proceeding is insufficiently developed, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" (quoting *Fla. Power & Light Co. v. Lo-*

Supporters of *de novo* review could argue the deferential *Dalton* standard does not sufficiently ensure that the IRS's collection actions are reasonable.¹⁷³ Put another way, the *Dalton* standard of review is only appropriate if the risk of IRS error is low and no other relief is available for the taxpayer.¹⁷⁴ However, the *Dalton* standard properly protects taxpayers from IRS abuse because it catches egregious agency errors while allowing the IRS to carry out its collection function without unnecessary intrusion.¹⁷⁵ Further, as the *Dalton* court noted, there are usually alternative avenues of relief available to taxpayers when a CDP hearing is inadequate.¹⁷⁶

V. CONCLUSION

At the end of fiscal year 2011, the IRS Office of Appeals had over 32,000 CDP cases pending before it.¹⁷⁷ The question of the proper stan-

tion, 470 U.S. 729, 744 (1985))); Lane, *supra* note 16, at 162 (detailing "well-established" rule that remand back to IRS is appropriate if record is insufficiently developed). But see Carlton M. Smith, *The Tax Court Keeps Growing Its Collection Due Process Powers*, TAX NOTES TODAY, Nov. 17, 2011, at 222–11 (questioning whether Tax Court has power to remand CDP cases and arguing Tax Court has inherent power to order IRS to accept OIC).

173. See Zotos, *supra* note 158, at 237–38 (questioning whether abuse of discretion is proper standard of review in CDP cases).

174. See, e.g., Smith, *supra* note 172 ("A robust Tax Court review proceeding is necessary to effectuate what I believe was Congress's intent in setting up the CDP in the first place—preventing the IRS from overreaching in the collection process.").

175. See Cords, *Administrative Law*, *supra* note 10, at 468–69 (arguing "de novo review is not necessary to protect taxpayers" in collection decisions); Zotos, *supra* note 158, at 237–38 (arguing that abuse of discretion standard protects against "overreaching Service practices while at the same time providing [IRS] agents with the discretion necessary to carry out their day-to-day functions, which is precisely the result the statute was intended to produce"). Professor Cords argues that *de novo* review would shift some tax collection decisions to the Tax Court, "which does not have the experience or expertise to efficiently make these decisions." See Cords, *Administrative Law*, *supra* note 10, at 468 (arguing shift of decision making power to Tax Court would "hamper the functioning of the tax collection system"); see also Book, *supra* note 16, at 1203 (arguing "even highly deferential judicial review of agency action provides incentives for better agency practice, increases public confidence in agency practice, and is an integral part of our system of checks and balances . . .").

176. See *Dalton v. Comm'r*, 682 F.3d 149, 156 n.4 (1st Cir. 2012) (noting "deferential standard of review by no means leaves a taxpayer at the mercy of the IRS"). The *Dalton* court notes that the Daltons could seek a court order to remove the attachment of the Property, or the trust itself could attempt to remove the attachment through either wrongful levy or quiet title actions. See *id.* ("There are almost always other legal channels through which a taxpayer may develop a complete record and secure a definitive legal ruling on a contested point of law or fact.").

177. See *SOI Tax Stats—Appeals Workload, By Type of Case*, I.R.S., <http://www.irs.gov/uac/SOI-Tax-Stats—Appeals-Workload,by-Type-of-Case,IRS-Data-Book-Table-21> (last updated Aug. 3, 2012) (providing IRS statistics for Appeals Office workload by year). The source of potential CDP cases is also massive: only approximately 1.2% of taxpayers that receive a CDP notice request a hearing. See

dard of review of subsidiary determinations made during a CDP hearing is likely to arise again because a significant number of CDP cases are appealed to the Tax Court.¹⁷⁸ The Tax Court is unlikely to apply *Dalton*'s customized standard of review in future cases that are not appealable to the First Circuit because of the *Golsen* rule.¹⁷⁹ Therefore, Congress should amend the CDP statutes to codify *Dalton*'s customized standard of review.¹⁸⁰ If Congress does not amend CDP, other circuits should adopt the *Dalton* standard because of its benefits in providing tax efficiency, tax fairness, and consistency with the purpose of CDP.¹⁸¹ In the current period of rising budget deficits, courts should not make it more difficult for the IRS to collect taxes when it uses reasonable methods.¹⁸²

Camp, *Failure of Adversarial Process*, *supra* note 139, at 99 (suggesting high non-response rate could mean either IRS properly classified taxpayers, or taxpayers agree they are "won't pay"). In fiscal year 2004, over 2 million CDP notices were sent, resulting in 28,133 hearings requested. See INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE: 2005 ANNUAL REPORT TO CONGRESS 459 (2005), available at http://www.irs.gov/pub/irs-utl/section_2.pdf (noting large number of unrequested hearings).

178. See 2011 TAXPAYER ADVOCATE REPORT, *supra* note 14, at 619 (identifying CDP appeals as one of most litigated issues in Tax Court since its inception).

179. See, e.g., *Klingenberg v. Comm'r*, 102 T.C.M. (CCH) 398, 401 (2011) (describing Tax Court's willingness to follow *Robinette*'s de novo scope of review rule, despite being previously overturned by another circuit court, because of adherence to *Golsen* rule). Under the *Golsen* rule, the Tax Court will only be bound by the *Dalton* decision in cases appealable to the First Circuit and is free to apply its de novo review of subsidiary determinations in the other circuits. See *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970) (holding Tax Court follows law of circuit to which case is appealable). For a further discussion of the *Golsen* rule, see *supra* note 61 and accompanying text.

180. See Cords, *Scope and Nature of Judicial Review*, *supra* note 124, at 1057 ("Congressional clarification of the CDP provisions relating to judicial review is essential. . . . [T]he CDP provisions need to make clear exactly what standards the courts are to apply to CDP appeals, and in which contexts.").

181. For a discussion of the benefits the *Dalton* standard provides, see *supra* notes 127–76 and accompanying text.

182. For a discussion of the rising budget deficit and how increased tax collection decreases the deficit, see *supra* note 6 and accompanying text.

