MLI #2 Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

SUMMARY

The IRS Restructuring and Reform Act of 1998 (RRA 98)[1] created Collection Due Process (CDP) hearings to provide taxpayers with an independent review by the IRS Office of Appeals (Appeals) of the decision to file a Notice of Federal Tax Lien (NFTL) or the IRS's proposal to undertake a levy action. In other words, a CDP hearing gives taxpayers an opportunity for a meaningful hearing before the IRS issues its first levy or immediately after it files its first NFTL with respect to a particular tax liability. At the hearing, the taxpayer has the statutory right to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and under certain circumstances, the underlying tax liability.[2]

Taxpayers have the right to judicial review of Appeals' determinations if they timely request the CDP hearing and timely petition the United States Tax Court.[3] Generally, the IRS suspends levy actions during a levy hearing and any judicial review that may follow.[4]

Since 2001, CDP has been one of the federal tax issues most frequently litigated in the federal courts and analyzed in the National Taxpayer Advocate's Annual Reports to Congress. The trend continues this year, with our review of litigated issues finding 99 opinions on CDP cases during the review period of June 1, 2015 through May 31, 2016, which is an increase of 25 percent since last year's report.[5] Taxpayers prevailed in full in ten of these cases (ten percent) and, in part, in six others (six percent). The 16 percent success rate for the taxpayers is one of the highest success rates since the inception of CDP hearings. Of the 16 opinions where taxpayers prevailed in whole or in part, eight taxpayers appeared *pro se*[6] and eight were represented.

The cases discussed below demonstrate that CDP hearings serve an important role in providing taxpayers with a venue to raise legitimate issues before the IRS deprives the taxpayer of property. Many of these decisions shed light on substantive and procedural issues.

CDP hearings are particularly valuable because they provide taxpayers with an enforceable remedy with respect to several rights articulated in the Taxpayer Bill of Rights (TBOR), which was adopted by the IRS in 2014 and was subsequently incorporated in the Internal Revenue Code (IRC) in response to National Taxpayer Advocate recommendations.[7] In particular, by providing an opportunity for a taxpayer to

1 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998).

2 Internal Revenue Code (IRC) §§ 6320(c) (lien) and 6330(c) (levy). IRC § 6320(c) generally requires Appeals to follow the levy hearing procedures under IRC § 6330 for the conduct of the lien hearing, the review requirements, and the balancing test.

3 IRC § 6330(d) (setting forth the time requirements for obtaining judicial review of Appeals' determination); IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B) (setting forth the time requirements for requesting a CDP hearing for lien and levy matters, respectively).

4 IRC § 6330(e)(1) provides that generally, levy actions are suspended during the CDP process (along with a corresponding suspension in the running of the limitations period for collecting the tax). However, IRC § 6330(e)(2) allows the IRS to resume levy actions during judicial review and upon a showing of "good cause," if the underlying tax liability is not at issue.

5 For a list of all cases reviewed, see table 2 in Appendix 3, *infra*.

6 *Pro se* means "[f]or oneself; on one's own behalf; without a lawyer." *Pro Se*, Black's Law Dictionary (10th ed. 2014).

7 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

challenge the underlying liability and raise alternatives to the collection action, the CDP hearing enables the taxpayer's *right to challenge the IRS's position and be heard*. If the taxpayer does not agree with the Appeals' determination, he or she may file a petition in Tax Court, which furthers the taxpayer's *right to appeal an IRS decision in an independent forum*. Lastly, since the Appeals Officer (AO) must consider whether the IRS's proposed collection action balances the overall need for efficient collection of taxes with the legitimate concern that the IRS's collection actions are no more intrusive than necessary, the CDP hearing protects a taxpayer's *right to privacy* while also ensuring the taxpayer's *right to a fair and just tax system*.

TAXPAYER RIGHTS IMPACTED[8]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Current law provides taxpayers an opportunity for independent review of an NFTL filed by the IRS or of a proposed levy action.[9] As discussed above, the purpose of CDP rights is to give taxpayers adequate notice of IRS collection activity and a meaningful hearing before the IRS deprives the taxpayer of property.[10] The hearing allows taxpayers to raise issues related to collection of the liability, including:

- The appropriateness of collection actions;[11]
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), posting a bond, or substitution of other assets;[12]
- Appropriate spousal defenses;[13]
- The existence or amount of the underlying tax liability, but only if the taxpayer did not receive a statutory notice of deficiency (SNOD) or have another opportunity to dispute the liability;[14] and
- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.[15]

8 See TBOR, www.irs.gov/advocate/taxpayer-rights.

9 IRC §§ 6320 and 6330. *See* RRA 98, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685 (1998).

10 Prior to RRA 98, the U.S. Supreme Court had held that a post-deprivation hearing was sufficient to satisfy due process concerns in the tax collection arena. *See U.S. v. Nat'l Bank of Commerce*, 472 U.S. 713, 726-31 (1985); *Phillips v. Comm'r*, 283 U.S. 589, 595-601 (1931).

11 IRC § 6330(c)(2)(A)(ii).

12 IRC § 6330(c)(2)(A)(iii).

13 IRC § 6330(c)(2)(A)(i).

14 IRC § 6330(c)(2)(B).

15 IRC § 6330(c)(2)(A); Treas. Reg. §§ 301.6320-1(e) and 301.6330-1(e).

A taxpayer cannot raise an issue considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.[16]

Procedural Collection Due Process (CDP) Requirements

The IRS must provide a CDP notice to the taxpayer after filing the first NFTL and generally before its first intended levy for the particular tax and tax period.[17] The IRS must provide the notice not more than five business days after the day of filing the NFTL, or at least 30 days before the day of the proposed levy.[18]

If the IRS files a lien, the CDP lien notice must inform the taxpayer of the right to request a CDP hearing within a 30-day period, which begins on the day after the end of the five-business day period after the filing of the NFTL.[19] In the case of a proposed levy, the CDP levy notice must inform the taxpayer of the right to request a hearing within the 30-day period beginning on the day after the date of the CDP notice.[20]

Requesting a Collection Due Process (CDP) Hearing

Under both lien and levy procedures, the taxpayer must return a signed and dated written request for a CDP hearing within the applicable period.[21] The Code and regulations require taxpayers to provide their reasons for requesting a hearing.[22] Failure to provide the basis may result in denial of a face-to-face hearing.[23] Taxpayers who fail to timely request a CDP hearing will be afforded an "equivalent hearing," which is similar to a CDP hearing but lacks judicial review.[24] Taxpayers must request an equivalent hearing within the one-year period beginning the day after the five-business day period following the

16 IRC § 6330(c)(4).

17 IRC § 6330(f) permits the IRS to levy without first giving a taxpayer a CDP notice in the following situations: the collection of tax is in jeopardy, a levy was served on a state to collect a state tax refund, the levy is a disqualified employment tax levy, or the levy was served on a federal contractor. A disqualified employment tax levy is any levy to collect employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a CDP hearing with respect to unpaid employment taxes arising in the most recent two-year period before the beginning of the taxable period with respect to which the levy is served. IRC § 6330(h)(1). A federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a federal contractor. IRC § 6330(h)(2). Under IRC § 6330(f), the IRS must still provide the opportunity for a CDP hearing "within a reasonable period of time after the levy."

18 IRC §§ 6320(a)(2) or 6330(a)(2). The CDP notice can be provided to the taxpayer in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail (return receipt requested, for the CDP levy notice) to the taxpayer's last known address.

19 IRC § 6320(a)(3)(B); Treas. Reg. § 301.6320-1(b)(1).

20 *Id*.

21 IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B); Treas. Reg. §§ 301.6320-1(c)(2), Question and Answer (Q&A) (C)(1)(ii) and 301.6330-1(c)(2), Q&A (C)(1)(ii).

22 Treas. Reg. §§ 301.6320-1(c)(2), Q&A (C)(1)(ii) and 301.6330-1(c)(2), Q&A (C)(1)(ii).

23 IRC §§ 6320(b)(1) and 6330(b)(1); Treas. Reg. §§ 301.6320-1(c)(2), Q&A (C)(1); 301.6330-1(c)(2), Q&A (C)(1); 301.6320-1(d)(2), Q&A (D)(8); and 301.6330-1(d)(2), Q&A (D)(8). The regulations require the IRS to provide the taxpayer an opportunity to "cure" any defect in a timely filed hearing request, including providing a reason for the hearing. Form 12153 includes space for the taxpayer to identify collection alternatives that he or she wants Appeals to consider, as well as examples of common reasons for requesting a hearing. *See* IRS Form 12153, *Requests for Collection Due Process or Equivalent Hearing* (Dec. 2013).

24 Treas. Reg. §§ 301.6320-1(i)(2), Q&A (I6) and 301.6330-1(i)(2), Q&A (I6); *Business Integration Servs., Inc. v. Comm'r*, T.C. Memo. 2012-342 at 6-7; *Moorhouse v. Comm'r*, 116 T.C. 263 (2001). A taxpayer can request an Equivalent Hearing by checking a box on Form 12153, *Requests for Collection Due Process or Equivalent Hearing*, by making a written request, or by confirming that he or she wants the untimely CDP hearing request to be treated as an Equivalent Hearing when notified by Collection of an untimely CDP hearing request. Internal Revenue Manual (IRM) 5.19.8.4.3, *Equivalent Hearing (EH) Requests and Timeliness of EH Requests* (Nov. 1, 2007).

filing of the NFTL, or in levy cases, within the one-year period beginning the day after the date of the CDP notice.[25]

Conduct of a Collection Due Process (CDP) Hearing

The IRS generally will suspend the levy action throughout a CDP hearing involving a notice of intent to levy. However, the requirement to suspend a levy action is inapplicable in certain circumstances where the IRS is not required to provide a CDP hearing prior to the levy and is only required to provide the CDP hearing within a reasonable time after the levy.[26] These circumstances occur when the IRS determines that:

- The collection of tax is in jeopardy;
- The collection resulted from a levy on a state tax refund;
- The IRS has served a disqualified employment tax levy; or
- The IRS has served a federal contractor levy.[27]

The IRS also suspends levy action throughout any judicial review of Appeals' determination, unless the IRS obtains an order from the court permitting levy on the grounds that the underlying tax liability is not at issue, and the IRS can demonstrate good cause to resume collection activity.[28]

CDP hearings are informal. When a taxpayer requests a hearing with respect to both a lien and a proposed levy, Appeals will attempt to conduct one hearing.[29] Courts have determined that a CDP hearing need not be face-to-face but can take place by telephone or correspondence,[30] and Appeals will typically conduct the hearing by telephone unless the taxpayer requests a face-to-face conference.[31] The CDP regulations state that taxpayers who provide non-frivolous reasons for opposing the IRS collection

25 Treas. Reg. §§ 301.6320-1(i)(2), Q&A (I7) and 301.6330-1(i)(2), Q&A (I7).

26 *See, e.g.*, *Dorn v. Comm'r*, 119 T.C. 356 (2002); *Zapara v. Comm'r*, 124 T.C. 223 (2005); *Bibby v. Comm'r*, T.C. Memo. 2013-281.

27 IRC § 6330(e)(1) provides the general rule for suspending collection activity. IRC § 6330(f) provides that if collection of the tax is deemed in jeopardy, the collection resulted from a levy on a state tax refund, or the IRS served a disqualified employment tax levy or a federal contractor levy, IRC § 6330 does not apply, except to provide the opportunity for a CDP hearing within a reasonable time after the levy. *See Clark v. Comm'r*, 125 T.C. 108, 110 (2005) (citing *Dorn v. Comm'r*, 119 T.C. 356 (2002)).

28 IRC §§ 6330(e)(1) and (e)(2).

29 IRC § 6320(b)(4).

30 *Katz v. Comm'r*, 115 T.C. 329, 337-38 (2000) (finding that telephone conversations between the taxpayer and the Appeals Officer (AO) constituted a hearing as provided in IRC § 6320(b)). Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(6), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(6), Q&A (D)(8).

31 *See, e.g.*, *Appeals Letter 4141* (rev. June 2013) (acknowledging the taxpayer's request for a CDP hearing and providing information on the availability of face-to-face conference). The National Taxpayer Advocate has repeatedly raised concerns regarding the inadequacy of Appeals' communication to taxpayers on how to request a face-to-face hearing and where this information is included in the letter. *See* National Taxpayer Advocate 2005 Annual Report to Congress 136 (Most Serious Problem: *Appeals Campus Centralization*); National Taxpayer Advocate 2009 Annual Report to Congress 70 (Most Serious Problem: *Appeals' Efficiency Initiatives Have Not Improved Customer Satisfaction or Confidence in Appeals*); National Taxpayer Advocate 2010 Annual Report to Congress 128 (Most Serious Problem: *The IRS's Failure to Provide Timely and Adequate Collection Due Process Hearings May Deprive Taxpayers of an Opportunity to Have Their Cases Fully Considered*). For information regarding the availability of Virtual Service Delivery (VSD) teleconferencing, which provides a virtual face-to-face meeting in remote locations, *see* National Taxpayer Advocate 2012 Annual Report to Congress 462 (Status Update: *The IRS Has Made Significant Progress in Delivering Face-to-Face Service and Should Expand its Initiatives to Meet Taxpayer Needs and Improve Compliance*). *See also* Director, Policy, Quality and Case Support, *Implementation of Virtual Service Delivery (VSD)*, Memorandum AP-08-0714-0007 (July 24, 2014). Additionally, the IRS has recently adopted a new IRM, IRM 8.6.1.4.1, *Conference Practice* (Oct. 1, 2016), and the issue of how this new policy will be applied in the case of CDP appeals remains an open and troubling question. For a more detailed discussion of the Appeals policy of generally limiting in-person conferences, see Most Serious Problem: *Appeals: The Office of Appeals' Approach to Case Resolution Is Neither Collaborative Nor Taxpayer Friendly and Its "Future Vision" Should Incorporate Those Values*, *supra*.

action will generally be offered but not guaranteed face-to-face conferences.[32] Taxpayers making frivolous arguments are not entitled to face-to-face conferences.[33] A taxpayer will not be granted a face-to-face conference concerning a collection alternative, such as an IA or OIC, unless other taxpayers would be eligible for the alternative under similar circumstances.[34] For example, the IRS will not grant a face-to-face conference to a taxpayer who proposes an OIC as the only issue to be addressed but failed to file all required returns and is therefore ineligible for an offer. Appeals may, however, at its discretion, grant a face-to-face conference to explain the eligibility requirements for a collection alternative.[35]

The CDP hearing is to be held by an impartial officer from Appeals, who is barred from engaging in *ex parte*[36] communication with IRS employees about the substance of the case and who has had "no prior involvement."[37] In addition to addressing the issues raised by the taxpayer, the AO must verify that the IRS has met the requirements of all applicable laws and administrative procedures.[38] An integral component of the CDP analysis is the balancing test, which requires the IRS AO to weigh the issues raised by the taxpayer and determine whether the proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection be "no more intrusive than necessary."[39] The balancing test is central to a CDP hearing because it instills a genuine notion of fairness into the process from the perspective of the taxpayer.[40]

Special rules apply to the IRS's handling of hearing requests that raise frivolous issues. IRC § 6330(g) provides that the IRS may disregard any portion of a hearing request based on a position the IRS has identified as frivolous or that reflects a desire to delay or impede the administration of tax laws.[41] Similarly, IRC § 6330(c)(4) provides that a taxpayer cannot raise an issue if it is based on a position identified as frivolous or reflects a desire to delay or impede tax administration.

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32 Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(7) and 301.6330-1(d)(2), Q&A (D)(7).

33 Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(8).

34 *Id.*

35 *Id.*

36 *Ex parte* means "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest." *Ex parte*, Black's Law Dictionary (10th ed. 2014).

37 IRC §§ 6320(b)(1), 6320(b)(3), 6330(b)(1), and 6330(b)(3). *See also* Rev. Proc. 2012-18, 2012-1 C.B. 455. *See, e.g.*, *Industrial Investors v. Comm'r*, T.C. Memo. 2007-93; *Moore v. Comm'r*, T.C. Memo. 2006-171, *action on dec.*, 2007-2 (Feb. 27, 2007); *Cox v. Comm'r*, 514 F.3d 1119, 1124-28 (10th Cir. 2008), *action on dec.*, 2009-22 (June 1, 2009).

38 IRC § 6330(c)(1); *Hoyle v. Comm'r*, 131 T.C. 197 (2008).

39 IRC § 6330(c)(3)(C); IRM 8.22.4.2.2, *Summary of CDP Process* (Sept. 25, 2014). *See also* H.R. Rep. No. 105-599, at 263 (1998). For simplicity, we use the term "proposed collection action" referring to both the actions taken and proposed. IRC § 6330 requires the IRS to notify the taxpayer of the right to request a CDP hearing not less than 30 days before issuing the first levy to collect a tax. Pursuant to IRC § 6320, the taxpayer is notified of the right to request a CDP hearing within five business days after the first NFTL for a tax period that is filed. Thus, Treasury Regulations under IRC § 6320 require a Hearing Officer to consider "[w]hether the continued existence of the filed [NFTL] represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary." *See* Treas. Reg. § 301.6320-1(e)(3), Q&A (E)(1)(vi). Similarly, a levy action can be taken before a hearing in the following situations: collection of the tax was in jeopardy; levy on a state to collect a federal tax liability from a state tax refund; disqualified employment tax levies; or a federal contractor levy under the Federal Payment Levy Program (FPLP). *See* IRC § 6330(f); IRM 8.22.4.2.2, *Summary of CDP Process* (Sept. 25, 2014).

40 *See* National Taxpayer Advocate 2014 Annual Report to Congress 185-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*). *See also* Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, 63 Tax Law. 227 (2010).

41 IRC § 6330(g). IRC § 6330(g) is effective for submissions made and issues raised after the date on which the IRS first prescribed a list of frivolous positions. Notice 2007-30, 2007-1 C.B. 833, which was published on or about April 2, 2007, provided the first published list of frivolous positions. Notice 2010-33, 2010-17 C.B. 609, contains the current list.

IRC § 6702(b) allows the IRS to impose a penalty for a specified frivolous submission, including a frivolous CDP hearing request.[42] A request is subject to a penalty if any part of it "(i) is based on a position which the Secretary has identified as frivolous … or (ii) reflects a desire to delay or impede the administration of Federal tax laws."[43] A taxpayer can timely petition the Tax Court to review an Appeals decision if Appeals determined that a request for an administrative hearing was based entirely on a frivolous position under IRC § 6702(b)(2)(A) and issued a notice stating that Appeals will disregard the request.[44] An Appeals letter disregarding a CDP hearing request is a determination that confers jurisdiction under IRC § 6330(d)(1), because it authorizes the IRS to proceed with the disputed collection action.[45] The IRS Office of Chief Counsel disagreed with the Tax Court precedent in *Thornberry* and is maintaining the position that the Tax Court lacks jurisdiction to review a petition resulting from the denial of a frivolous hearing request under section 6330(g).[46]

Recently, in *Ryskamp v. Commissioner*, the D.C. Circuit upheld the Tax Court's precedent in *Thornberry* that the IRS's disregard of a taxpayer's CDP hearing request as frivolous under IRC § 6330(g) is subject to judicial review, and affirmed the Tax Court's holding that the IRS abused its discretion in rejecting a taxpayer's request for a hearing by sending boilerplate rejection letters that do not articulate the grounds of the frivolousness determination.[47] While the IRS Office of Chief Counsel disagrees with *Ryskamp* on both issues, Counsel has modified its litigating guidelines as follows:

- Counsel will no longer file a motion to dismiss to contest the Tax Court's threshold jurisdiction to evaluate whether a CDP hearing was properly denied under IRC § 6330(g);
- Counsel will request a remand to Appeals where a hearing was improperly denied;
- Where a hearing was properly denied, instead of filing a motion to remand so Appeals can more fully explain the reasons for rejecting the taxpayer's arguments as frivolous, Counsel will file an appropriate motion with the court to resolve the case through a dismissal or summary judgment; and
- Counsel will also consider filing a motion to permit levy so that the Service can immediately levy after the Tax Court's order.[48]

42 The frivolous submission penalty applies to the following submissions: CDP hearing requests under IRC §§ 6320 and 6330, OIC under IRC § 7122, IAs under IRC § 6159, and applications for a TAO under IRC § 7811.

43 IRC § 6702(b)(2)(A). Before asserting the penalty, the IRS must notify the taxpayer that it has determined that the taxpayer filed a frivolous hearing request. The taxpayer has 30 days to withdraw the submission to avoid the penalty. IRC § 6702(b)(3).

44 *See Thornberry v. Comm'r*, 136 T.C. 356, 367 (2011). The D.C. Appeals Court recently upheld *Thornberry* in *Ryskamp v. Comm'r*, 116 A.F.T.R.2d (RIA) 5614 (D.C. Cir. Aug. 14, 2015) *cert. denied*, 136 U.S. 834 (2016). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 489 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

45 *Thornberry v. Comm'r*, 136 T.C. 356, 364 (2011).

46 *See* IRS Chief Counsel Notice CC-2012-003, *Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Dec. 2, 2011).

47 *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015), *cert. denied*, 136 U.S. 834 (2016). For a further discussion of *Ryskamp*, *see* Issues Litigated, *infra*.

48 IRS Chief Counsel Notice CC-2016-008, *Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Apr. 4, 2016). In her 2014 Annual Report to Congress, the National Taxpayer Advocate expressed concerns about the Office of Appeals not giving proper attention to the CDP balancing test, especially to legitimate concerns of taxpayers regarding the intrusiveness of the proposed collection action, and often using *pro forma* statements that the balancing test has been conducted. *See* National Taxpayer Advocate 2014 Annual Report to Congress 185-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*).

Judicial Review of a Collection Due Process (CDP) Hearing

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.[49] The court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing.[50] An issue is not properly raised if the taxpayer fails to request Appeals' consideration of the issue or requests consideration but fails to present any evidence regarding that issue after being given a reasonable opportunity.[51] The Tax Court, however, may remand a case back to Appeals for more fact finding when the taxpayer's factual circumstances have materially changed between the hearing and the trial.[52] When the case is remanded, the Tax Court retains jurisdiction.[53] The resulting hearing on remand provides the parties with an opportunity to complete the initial hearing while preserving the taxpayer's right to receive judicial review of the ultimate administrative determination.[54]

Where the validity of the underlying tax liability is properly at issue in the hearing, the court will review the amount of the tax liability on a *de novo*[55] basis.[56] Where the Tax Court is reviewing the appropriateness of the collection action or subsidiary factual and legal findings, the court will review these determinations under an abuse of discretion standard.[57]

Appellate Venue From Decisions of the Tax Court

Generally, the correct venue for appeals from the Tax Court is the D.C. Circuit unless one of the rules specified in IRC § 7482(b)(1) or exceptions specified in IRC §§ 7482(b)(2) or (b)(3) applies. For instance, IRC § 7482(b)(1)(A) provides that in cases where a petitioner other than a corporation seeks redetermination of a tax liability, venue for review by the United States Court of Appeals lies with the Court of Appeals for the circuit based upon the taxpayer's legal residence.[58] Pursuant to IRC § 7482(b)(2), the taxpayer and the IRS may stipulate the venue for an appeal in writing.

It has been the longstanding practice of taxpayers and the IRS to appeal CDP, innocent spouse, and interest abatement cases to the circuit of the petitioner's legal residence, principal place of business, or principal office or agency. The Tax Court has also followed this approach. Under the rule established in *Golsen v. Commissioner*,[59] the Tax Court follows the precedent of the circuit court to which the parties have the right to appeal regardless of whether the taxpayer's tax liability was at issue.

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49 IRC § 6330(d)(1).

50 *Giamelli v. Comm'r*, 129 T.C. 107 (2007).

51 Treas. Reg. §§ 301.6320-1(f)(2), Q&A (F)(3); 301.6330-1(f)(2), Q&A (F)(3).

52 *Churchill v. Comm'r*, T.C. Memo. 2011-182; *see also* CC-2013-002 (Nov. 30, 2012), which provides Counsel attorneys with instructions on when a remand based on changed circumstances might be appropriate.

53 *See, e.g.*, *Pomeroy v. Comm'r*, T.C. Memo. 2013-26 at 20.

54 *Wadleigh v. Comm'r*, 134 T.C. 280, 299 (2010).

55 *De novo* means "anew." *De Novo*, Black's Law Dictionary (10th ed. 2014).

56 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. Rep. No. 1059-99, at 266. *See also* CC-2014-002 (May 4, 2014).

57 *See, e.g.*, *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006); *Dalton v. Comm'r*, 682 F.3d 149 (1st Cir. 2012).

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

59 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

In *Byers v. Commissioner*, the D.C. Circuit held that it will not transfer cases in non-liability CDP cases unless both parties stipulate to the transfer.[60] The D.C. Circuit did not answer the question of whether another Court of Appeals could hear an appeal of a non-liability CDP decision without stipulation.[61] The Court acknowledged that in some CDP cases involving both challenges to the tax liability and collection issues, the venue presumably would be in the appropriate regional circuit.[62]

Byers was overruled by the Protecting Americans from Tax Hikes (PATH) Act of 2015, enacted December 18, 2015.[63] Section 423 of the PATH Act added new subparagraph IRC § 7482(b)(1)(G), which specifies that CDP cases are appealable to the circuit of the petitioner's legal residence (if the petitioner is an individual) or the petitioner's principal place of business, office, or agency (if the petitioner is not an individual). According to section 423(b) of the PATH Act, the new subparagraph applies only to cases filed after December 18, 2015, but they should not be construed to create any inference regarding cases filed before that date.[64] In 2014, to address the uncertainty and confusion among taxpayers and practitioners that impact *the right to be informed*, the National Taxpayer Advocate recommended this precise legislative change to Congress.[65]

ANALYSIS OF PUBLISHED OPINIONS

We identified and reviewed 99 CDP court opinions, a 25 percent increase from the 79 published opinions in last year's report. As shown in Figure 3.2.1, we have identified on average over 130 opinions per year since 2001.

From 2003 to 2007, the average number of published opinions was approximately 200. Since 2011, the average number of published opinions has dropped to about 94. This decline may seem to be attributed, in part, to a series of operational changes in fiscal years (FYs) 2011 and 2012, collectively known as the

60 740 F.3d 668 (D.C. Cir. 2014). For a more detailed discussion of the *Byers* case *see* National Taxpayer Advocate 2014 Annual Report to Congress 477-94 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

61 740 F.3d at 677. The Court noted that it had "no occasion to decide … whether a taxpayer who is seeking review of a CDP decision on a collection method may file in a court of appeals other than the D.C. Circuit if the parties have not stipulated to venue in another circuit."

62 *Id*. at 676.

63 Pub. L. No. 114-113, Div. Q, 129 Stat. 2242, 3041-3129 (2015). *See* IRS Office of Chief Counsel, Notice CC-2016-006, *PATH Act Legislative Amendments: Appellate Venue for CDP and Innocent Spouse Cases, Tax Court Jurisdiction and S-case Status for Interest Abatement Cases, and Applicability of Federal Rules of Evidence to the Tax Court* (Feb. 1, 2016), *superseding* CC-2015-006, *Venue for Appeals from Decisions of the Tax Court* (June 30, 2015).

64 For cases filed before that date, the guidance in CC-2015-006 applies.

65 *See* National Taxpayer Advocate 2014 Annual Report to Congress 387-91 (Legislative Recommendation: *Appellate Venue in Non-Liability CDP Cases: Amend IRC § 7482 to Provide That the Proper Venue to Seek Review of a Tax Court Decision in All Collection Due Process Cases Lies with the Federal Court of Appeals for the Circuit in Which the Taxpayer Resides*).

"Fresh Start" initiative,[66] which led to fewer NFTL filings and more accepted OIC.[67] However, it is not clear that the reduction in CDP published opinions is attributable to the reduced number of lien filings. Furthermore, the annual number of CDP cases petitioned fluctuated inconsistently over this time.[68]

The increase in CDP cases received suggests that the reduced number of CDP opinions identified may not be the result of fewer taxpayers requesting a CDP hearing and then contesting the CDP determination by filing a Tax Court petition. Instead, it could be the result of more taxpayers deciding not to pursue litigation after filing a petition, more settlements, or more non-precedential CDP orders or bench opinions that do not result in a published opinion.[69] Moreover, the decline in litigated cases may be due to taxpayers litigating many issues of first impression in the years immediately following the enactment of IRC §§ 6320 and 6330, which now have been resolved by the courts.

Thus, the 99 published opinions identified this year do not reflect the full number of CDP cases.[70] Table 2 in Appendix 3 provides a detailed list of the published CDP opinions, including specific information about the issues, the types of taxpayers involved, and the outcomes of the cases.

Litigation Success Rate

Taxpayers prevailed in full in ten of the 99 published opinions issued during the year ending May 31, 2016 (ten percent). Taxpayers prevailed in part in six other cases (six percent). Of the published opinions in which the courts found for the taxpayer, in whole or in part, the taxpayers appeared *pro se* in eight cases and were represented in eight cases. The IRS prevailed fully in 83 cases (approximately 84 percent) of the published opinions, an increase from the 82 percent last year.[71] The 16 percent success rate[72] for the taxpayer is one of the highest success rates since the inception of CDP hearings and may be an indication that the IRS is not addressing collection alternatives adequately at the administrative hearing.

66 *See* IRS, IR-2011-20, *IRS Announces New Effort to Help Struggling Taxpayers Get a Fresh Start; Major Changes Made to Lien Process* (Feb. 24, 2011); IR-2012-31, *IRS Offers New Penalty Relief and Expanded Installment Agreements to Taxpayers under Expanded Fresh Start Initiative* (Mar. 7, 2012); IR-2012-53, *IRS Announces More Flexible Offer-in-Compromise Terms to Help a Greater Number of Struggling Taxpayers Make a Fresh Start* (May 21, 2012). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 114, National Taxpayer Advocate 2012 Annual Report to Congress 348-51; National Taxpayer Advocate Fiscal Year (FY) 2013 Objectives Report to Congress 32-35.

67 For instance, in FY 2016, the IRS filed about 55 percent fewer NFTLs than in FY 2011, including a corresponding 58 percent reduction in liens filed by the Automated Collection System (ACS). In FY 2011, the IRS filed 1,042,230 liens. *See* IRS, Collection Activity Report 5000-23 (Oct. 11, 2011). In FY 2016, the IRS filed 470,602 liens. *See* IRS, Collection Activity Report 5000-25 (Oct. 4, 2016). Additionally, the dollars collected increased from about $17 billion in FY 2011 to about $20.2 billion in 2016. *See* IRS, Collection Activity Report 5000-2 (Oct. 3, 2011); IRS, Collection Activity Report 5000-6 (Oct. 3, 2011); IRS, Collection Activity Report 5000-108 (Oct. 5, 2011); IRS, Collection Activity Report 5000-2 (Oct. 3, 2016); IRS, Collection Activity Report 5000-6 (Oct. 3, 2016); IRS, Collection Activity Report 5000-108 (Oct. 4, 2016). We also note that the IRS has accepted 36 percent more OICs than during FY 2011, and that the actual number of accepted offers has almost doubled when compared to FY 2010, with FY 2016 having an acceptance rate of 40.4 percent. *See* IRS, Collection Activity Report 5000-108 (Oct. 5, 2010); IRS, Collection Activity Report 5000-108 (Oct. 5, 2011); IRS, Collection Activity Report 5000-108 (Oct. 4, 2016). During FY 2016, thousands of financially struggling taxpayers have successfully obtained lien withdrawals to help regain their financial viability. *See* IRS, Collection Activity Report 5000-25 Report (Oct. 4, 2016).

68 IRS Office of Chief Counsel Reports, CDP Cases Received Between June 1, 2000 and May 31, 2015 (on file with TAS).

69 For a discussion regarding the number of CDP unpublished opinions, see Carlton Smith, *Unpublished CDP Orders Dwarf Post-trial Bench Opinions in Uncounted Tax Court Rulings*, Procedurally Taxing (Jan. 29, 2015), http://www.procedurallytaxing.com/unpublished-cdp-orders-dwarf-post-trial-bench-opinions-in-uncounted-tax-court-rulings/.

70 *See* U.S. Tax Court, Orders Search, https://www.ustaxcourt.gov/InternetOrders/OrdersSearch.aspx.

71 National Taxpayer Advocate 2015 Annual Report to Congress 489 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC § 6320 and 6330*).

72 The success rate includes decisions for the taxpayer as well as split decisions.

FIGURE 3.2.1, Success Rates in Collection Due Process (CDP) Opinions Identified[73]

Court Decision	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Decided for IRS	95%	95%	89%	90%	92%	90%	92%	89%	92%	86%	84%	89%	82%	84%
Decided for Taxpayer	1%	3%	8%	8%	5%	8%	4%	10%	3%	7%	8%	7%	14%	10%
Split Decision	4%	2%	3%	2%	3%	2%	4%	2%	3%	6%	9%	4%	4%	6%
Neither	n/a	n/a	n/a	n/a	<1%	n/a	n/a	n/a	1%	<1%	n/a	n/a	n/a	n/a

Issues Litigated

The cases discussed below are those the National Taxpayer Advocate considers significant or noteworthy. Their outcomes can provide important information to Congress, the IRS, and taxpayers about the rules and operation of CDP hearings. All of the cases offer the IRS an opportunity to improve the CDP process and collection practices in both application and execution.

Ryskamp v. Commissioner

In *Ryskamp v. Commissioner*, the IRS Office of Appeals sent a letter denying the taxpayer a CDP hearing.[74] The letter simply stated that the grounds upon which he requested a CDP hearing were frivolous or reflected a desire to delay or impede the administration of the federal tax laws.[75] In taxable years (TYs) 2003–2009, Mr. Ryskamp incurred tax liabilities because he did not have adequate withholding and failed to make estimated tax payments. In 2011, the IRS notified Mr. Ryskamp that it intended to levy his property in order to collect these delinquent liabilities. Mr. Ryskamp had submitted a CDP hearing request which was later lost by the IRS. The IRS rejected the request pursuant to IRC § 6330(g) stating that Mr. Ryskamp had not offered a legitimate reason for requesting a hearing and asked that he withdraw his frivolous positions and amend his request to provide a legitimate reason. Mr. Ryskamp submitted an amended request and attempted to state legitimate grounds. The AO disregarded Mr. Ryskamp's request and issued a "boilerplate" letter which did not contain a statement of reasons why the taxpayer's request was illegitimate.[76] Instead, the IRS letter recited the various possible reasons a position can be frivolous without specificity.

Having previously decided that the Tax Court had jurisdiction to review the IRS's frivolousness determination,[77] the Tax Court found the IRS's boilerplate letter rejecting Mr. Ryskamp's arguments as frivolous was inadequate and remanded the case to Appeals.

On remand from the Tax Court, Appeals gave the taxpayer another opportunity to submit a new CDP request. He did so, and raised both frivolous and non-frivolous arguments. Appeals held a hearing by

73 Total percentages may not add to 100 percent, as a result of rounding.

74 *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015), *cert. denied*, 136 U.S. 834 (2016).

75 *Id*.

76 The IRS's letter failed to identify any allegedly frivolous positions and lacked any explanation of how and whether the taxpayer's CDP request showed a desire to delay or impede tax administration. The Appeals letter "merely included a bullet point list of all of the possible reasons the [IRS] could find a request to be frivolous and did not correlate them with any aspects of Ryskamp's request." *Ryskamp*, 797 F.3d at 1151.

77 *See Thornberry v. Comm'r*, 136 T.C. 356 (2011) (the IRS's determination that a taxpayer's entire request for a CDP hearing is frivolous is subject to judicial review to verify the frivolousness determination).

correspondence, at which it rejected Mr. Ryskamp's frivolous positions and substantively considered his non-frivolous positions. Because Mr. Ryskamp refused to provide Appeals with necessary financial information and failed to offer any proof that he was in filing compliance, Appeals issued a notice of determination sustaining the IRS's proposal to levy. After remand, the Tax Court decided that Appeals did not abuse its discretion in concluding the IRS could proceed with collection action.

The taxpayer then appealed to the Court of Appeals for the District of Columbia. The IRS once again argued that the Tax Court lacked jurisdiction over an IRC § 6330(g) denial of a CDP hearing.

The D.C. Circuit reaffirmed the Tax Court's decision in *Thornberry,* concluding that the Tax Court's review is limited to assessing whether the IRS has adequately identified why it deems the taxpayer's CDP request, or portions thereof, to be frivolous, and whether that frivolousness assessment is facially plausible.[78] The court reasoned that this limited review would provide a safeguard against the IRS misconstruing or inadvertently overlooking a non-frivolous ("plausible or potentially meritorious") CDP request.[79]

The D.C. Circuit also affirmed the Tax Court's holding that the IRS's initial boilerplate determination letter denying the taxpayer's CDP hearing request was inadequate. It also found that the IRS abused its discretion in rejecting Ryskamp's request without first articulating the grounds of its frivolousness determination.[80]

However, the D.C. Circuit agreed with the Tax Court that on remand, Appeals provided the taxpayer with the opportunity to submit a new CDP request and adequately considered taxpayer's frivolous and non-frivolous arguments, concluding that the IRS could proceed with collection.

Charnas v. Commissioner

In *Charnas v. Commissioner*, the IRS issued a notice of intent to levy to the taxpayer, a lawyer, whose main source of income was contingency fees from representing clients in personal injury actions.[81] The taxpayer timely requested a CDP hearing on Form 12153, *Request for a Collection Due Process or Equivalent Hearing*, and checked boxes for all three collection alternatives.[82] The Settlement Officer (SO) scheduled a telephone CDP hearing and requested financial documentation for a collection alternative to be considered. Rather than sending in the documents, the taxpayer arrived at the IRS office with the documents in hand. The SO was on sick leave that day and not physically present at the office when the taxpayer arrived. The taxpayer left the financial documents at the IRS office and identified on the documents that his income varied widely from year to year due to the nature of his employment. The SO checked over the documents and denied the taxpayer a collection alternative based on the unexplained fluctuating income and sustained the levy action, without waiting for an explanation from the taxpayer.

78 136 T.C. at 367–69.

79 *Ryskamp*, 797 F.3d at 1149.

80 797 F.3d at 1151.

81 T.C. Memo. 2015-153.

82 Form 12153 lists the following three items as collection alternatives: 1) Installment Agreement, 2) Offer in Compromise, and 3) I Cannot Pay Balance. *See* IRS Form 12153, *Requests for Collection Due Process or Equivalent Hearing* (Dec. 2013).

Additionally, the SO never afforded the taxpayer a face-to-face conference to explain his situation.[83] The taxpayer petitioned the Tax Court to review the SO's determination.

The Tax Court held that the SO acted arbitrarily and capriciously in rendering a determination against the taxpayer and remanded the case to Appeals. The court found that the SO did not weigh the taxpayer's fluctuating income in either the notice of determination or the case activity report when assessing the taxpayer's ability to pay. Additionally, the court found that the taxpayer presented relevant and non-frivolous reasons for disagreement with the proposed action and should have been given a "fair" hearing, providing him the opportunity to explain the significant fluctuations in his income.

The case is important because it reemphasizes the legislative requirement for Appeals to balance the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action will be no more intrusive than necessary.[84] This opinion is in line with the *Budish* case where the court also remanded the case to Appeals for the failure to give proper attention to the balancing test in sustaining a collection action.[85] The Tax Court consistently views Appeals' failure to meaningfully perform the balancing test as an abuse of discretion.[86]

Abu-Dayeh v. Commissioner

Abu-Dayeh v. Commissioner involves a tax preparer who pled guilty to aiding and assisting in the preparation of materially false and fraudulent tax returns.[87] In 2008, the taxpayer agreed to terms of a plea agreement to dismiss some of the counts against him, which required him to serve five months in prison and pay the IRS $79,070 in restitution for the total tax losses due to the taxpayer's conduct.[88] The taxpayer paid all of the court-order restitution.

Later, in 2010, the IRS assessed multiple $1,000 penalties under IRC § 6694(b) for understatements due to willful or reckless conduct by the tax return preparer.[89] The taxpayer protested the assessment by requesting a hearing with Appeals, and a conference was held on March 23, 2011. During the conference with Appeals, the taxpayer raised three defenses to the IRC § 6694(b) penalties:

(1) He believed he had already paid the penalties as part of his restitution payment;

(2) He believed the plea agreement covered all issues with respect to his preparation of the 39 fraudulent returns, and as a result it would be unfair for the IRS to assess civil penalties against him; and

83 In prior Annual Reports to Congress, and this report, the National Taxpayer Advocate criticizes Appeals for failing to provide face-to-face hearings to many taxpayers. *See, e.g.*, Most Serious Problem: *Appeals: The Office of Appeals' Approach to Case Resolution Is Neither Collaborative Nor Taxpayer Friendly and Its "Future Vision" Should Incorporate Those Values*, *supra*; National Taxpayer Advocate 2014 Annual Report to Congress 46-54 (Most Serious Problem: *Appeals: The IRS Lacks a Permanent Appeals Presence in 12 States and Puerto Rico, Thereby Making It Difficult for Some Taxpayers to Obtain Timely and Equitable Face-to-Face Hearings with an Appeals Officer or Settlement Officer in Each State*).

84 IRC § 6330(c)(3)(C). *See also* National Taxpayer Advocate 2014 Annual Report to Congress 186-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*).

85 *Budish v. Comm'r*, T.C. Memo. 2014-239.

86 *See* National Taxpayer Advocate 2014 Annual Report to Congress 186-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*).

87 T.C. Memo. 2015-136.

88 *See United States v. Husam Abu-Dayeh*, No. 08-cr-00173-SCB-TBM (M.D.Fla., Apr. 22, 2009) (judgment in criminal case).

89 IRC § 6694(b). Taxpayer was assessed 36 separate $1,000 penalties for returns prepared in taxable years 2003 to 2004.

(3) His criminal proceedings had been handled by a special criminal investigation agent, and thus the IRS did not independently examine him for preparer penalties.

The AO determined the penalties were properly assessed.[90] The IRS issued a Letter 1058, *Final Notice of Intent to Levy and Notice of Your Right to a Hearing* on October 18, 2011, to which the taxpayer responded 31 days after the notice was mailed. On May 1, 2012, the IRS mailed to the taxpayer Letter 3172, *Notice of Federal Tax Lien Filing and Notice of Your Right to a Hearing Under IRC 6320*, and filed the NFTL on May 3, 2012. The taxpayer timely requested a CDP hearing. He also requested a withdrawal of the lien and checked the box for "I Cannot Pay Balance."

The IRS SO held a CDP hearing telephonically, and the taxpayer challenged his underlying liability. The taxpayer also suggested an OIC in the amount of $5,000, but did not submit an application fee or pay the initial required payment with a completed Form 656.[91] During the CDP process, the taxpayer repeatedly insisted to the SO that he had already paid any applicable penalties by virtue of having paid restitution in his criminal case. The Centralized Offer in Compromise (COIC) office returned the taxpayer's OIC as not processable due to his failure to submit the application fee or required initial payment.

The SO issued the notice of determination to the taxpayer which sustained the NFTL; concluded that the taxpayer could not raise his underlying liability because he had a prior opportunity to do so; upheld the rejection of the OIC for failure to submit the required payments; and noted that the taxpayer had not proposed any other collection alternatives. The taxpayer petitioned the Tax Court to review the IRS's determination.

The Tax Court upheld the SO's determination that the taxpayer could not challenge the underlying liability in the CDP hearing because he had a prior opportunity to do so during his conference with the AO.[92] Because the validity of the underlying liability was not properly at issue, the Tax Court reviewed the SO's administrative determination for abuse of discretion.[93]

In considering whether the IRS abused its discretion, the Tax Court looked at whether the SO considered any relevant issues raised at the hearing, and properly applied the CDP balancing test ensuring that any proposed collection action balanced the need for the efficient collection of taxes with petitioner's legitimate concern that any collection action be no more intrusive than necessary.[94] While expressing empathy for the taxpayer, the Tax Court determined that the SO did not abuse her discretion in rejecting the taxpayer's OIC because the taxpayer failed to pay the application fee, to make a partial payment of his proposed $5,000 offer, and to submit supporting financial documents as required by IRC § 7122(c) and relevant Treasury Regulations.[95]

90 The AO determined that the taxpayer be properly assessed 36 total penalties of $1,000 each based on the taxpayer's admission of guilt as to 39 counts in his plea agreement and the fact that understatements of tax liability existed on only 36 of those counts.

91 *See* IRM 5.8.2.4.1, *Determining Processability* (July 28, 2015) (stating that an "OIC will be returned as not processable if one or more of the criteria below are present: … • [t]axpayer did not submit the application fee with the offer[;] … • [t]axpayer did not submit the required initial payment with the offer").

92 IRC § 6330(c)(2)(B).

93 *Goza v. Comm'r*, 114 T.C. 176, 181–182 (2000).

94 *See* IRC §§ 6320(c)(1), 6330(c)(2) and (3)(A), (B), and (C).

95 IRC § 7122(c)(1) and (2)(B); Treas. Reg. § 301.7122–1(d)(1).

The opinion is important because it discusses the issue of contesting the underlying liability at the CDP hearing after the taxpayer has had a prior opportunity to dispute the liability.[96] It is important to note that the Tax Court verified that the SO properly conducted the CDP balancing test, which is an integral part of the taxpayer's *right to privacy*.

Yasgur v. Commissioner

In *Yasgur v. Commissioner*, the Tax Court was asked to determine if a taxpayer, Mr. Yasgur, was precluded under IRC § 6330(c)(2)(B) from challenging the underlying tax liability because he either "received, was aware of, or deliberately failed to learn of" an April 30, 2005, levy notice issued to him.[97] This case involves the unique set of facts regarding the mailing location of the notices.

The taxpayer in question was married, but lived separately and had a distant relationship from his wife, despite the fact that they continued to file joint tax returns after establishing separate residences.[98] For these joint tax returns, including the year 2003 in question, the taxpayers listed the wife's residence, which was their jointly-owned home ("marital home") 100 miles away from the taxpayer's residence. In addition to living separately, the taxpayers had a "cordial but distant relationship," in which they would communicate sporadically and often go several months without any communication. The taxpayer stipulated that the marital home address was his "last known address" for purposes of taxes and admitted that the address was primarily used for correspondence related to federal and New York state taxes. The taxpayer's wife would generally forward any unopened mail addressed to Mr. Yasgur individually and would open jointly addressed mail and forward Mr. Yasgur a copy or the original.

In October 2004, the taxpayer filed a joint federal income tax return for 2003 indicating a tax due of $60,801.[99] In January 2005, the IRS field office in Holtsville, NY had notified both the taxpayer and his wife of the amount owed in reported unpaid tax. The taxpayer swiftly contacted the collection manager and requested collection actions be stalled until the taxpayers could file an amended return. The collection manager suggested that Mr. Yasgur enter into an IA, a topic he discussed with his distant wife, until, at least, May 23, 2005. However, on April 30, 2005, the IRS Automated Collection System (ACS) Support office mailed, certified, separate notices of intent to levy to Mr. and Mrs. Yasgur, which Mrs. Yasgur picked up at the U.S. Post Office near her home. Mrs. Yasgur neither forwarded this notice to Mr. Yasgur nor requested a CDP hearing within the 30 day time period. Although Mr. Yasgur did not receive the April 30, 2005 notice or have knowledge of it prior to early August 2005, Mr. Yasgur contacted an attorney "regarding one or both of the notices of levy," and, on August 17, 2005, the attorney requested a hearing with respect to the April 30, 2005 levy notice. The attorney sent a second letter to the IRS requesting another hearing with respect to the notice of lien filing, specifically a Letter 3172, *Notice of*

96 *See, e.g.*, *Our Country Home Enters., Inc. v. Comm'r*, No. 16-1279 (7th Cir. Aug. 25, 2016) (reply brief of appellant) (arguing that the government's contention that the limitations of § 6330(c)(4) prohibited the Tax Court from determining the merits of the penalty assessment is contradictory towards IRS Chief Counsel memos and a prior argument made by Department of Justice, upheld in *Lewis v. Comm'r*, 128 T.C. 48 (2007), that courts should defer to regulation under § 6330(c)(2)(B)); *James v. Comm'r*, No. 16-1154 (4th Cir. Aug. 25, 2016) (reply brief of appellant) (same); and *Keller Tank Serv. v. Comm'r*, No. 16-9001 (10th Cir. Aug. 24, 2016) (reply brief of appellant) (same). These briefs also cite to the National Taxpayer Advocate's 2013, 2014, and 2015 Annual Reports to Congress for a discussion on the issues with "independence" by the Office of Appeals.

97 T.C. Memo. 2016-77.

98 A prior decision by the court had determined that the taxpayer's wife was precluded from challenging the existence or amount of the underlying tax liability for 2003 since she had prior opportunity to do so. *Yasgur v. Comm'r*, T.C. Memo. 2016-77.

99 The taxpayer's liability was primarily attributable to his reporting of passive income from his interest in a law partnership via a Schedule K-1 (Form 1065), *Partner's Share of Income, Credits, Deductions, etc.*, received before the extended due date of the 2003 return. The taxpayer believes the income was overstated and had a difficult relationship with his law partners so, at the advice of his accountant, they reported the income but intended to file an amended return when they could document Mr. Yasgur's claim of a lesser share of partnership income.

Federal Tax Lien Filing and Your Rights to a Hearing Under IRC § 6320, sent jointly to both Mr. and Mrs. Yasgur on August 16, 2005. In late September 2005, the taxpayers submitted an amended 2003 joint income tax return reflecting a lower tax liability and a refund request for almost $4,000. Finally, on October 13, 2005, the taxpayer's attorney submitted a Form 12153, *Request for a Collection Due Process or Equivalent Hearing*, requesting a hearing with respect to both the levy and lien notices.

The Appeals SO determined that the husband and wife's requests for a hearing were untimely with respect to both the lien and levy notices but did provide them with an equivalent hearing and issued a decision letter.[100] The decision letter determined that the taxpayers were not entitled to challenge the existence or amount of the underlying tax liability since they had prior opportunity to "discuss" the tax liability. The taxpayer petitioned the Tax Court that the determination made by Appeals to sustain the lien notice was an abuse of discretion since he had no unpaid tax liability for 2003, as shown on the amended return. The Tax Court held that Mr. Yasgur was entitled to challenge the underlying tax liability because he neither received prior notice of the levy nor deliberately refused the delivery of the notice.

The court looked to if Mr. Yasgur either "received, was aware of, or deliberately failed to learn of" the levy notice since, in cases where there is joint and several liability for an unpaid tax, the IRS must send a separate notice to each spouse whose property the IRS intends to levy, and the government has the burden of production to prove the taxpayer received the notice.[101] The taxpayer provided significant evidence to rebut the presumption of receipt, including the fact that the taxpayer did not reside at the marital home and his testimony. Specifically, the court did not agree with the government's assertion that since Mrs. Yasgur was aware of the levy, she "would undoubtedly have told him about something so serious and significant affecting their financial circumstances." The court determined that Mrs. Yasgur could have believed that the levy notices addressed the same issues that Mr. Yasgur was working with the Holtsville office on and failed to notify him. Furthermore, the court found evidence of Mr. Yasgur's tendency to be "punctilious and transparent" in his dealings with the IRS and this "pattern of conduct … is at odds with the contention that [the taxpayer] … received, or was aware of, the levy notice … and simply ignored it." Finally, the court found no evidence of the IRS's alleged scheme where the taxpayer arranged to have all his IRS correspondence sent to the marital home while residing elsewhere so that he could disclaim knowledge of any notices. The Tax Court held that the taxpayer did not deliberately refuse delivery nor deliberately failed to learn of the levy notices and thus he did not have the prior opportunity to challenge the underlying tax liability.

The Tax Court opinion reveals the importance of the due process afforded to a taxpayer before a collection action can be sustained. If a taxpayer does not receive notice and does not deliberately thwart an attempt by the IRS to deliver a notice, then the taxpayer must be afforded his or her due process to challenge the underlying tax liabilities. Furthermore, this opinion shows the importance of the IRS's obligation to listen to the taxpayer, as the Tax Court did, instead of assuming the taxpayer is a bad actor. This is at the heart of the taxpayer's *right to challenge the IRS position and be heard*, since there is an obligation on the part of the IRS to listen to the taxpayer, and the *right to a fair and just tax system*, since the IRS failed to consider the specific facts and circumstances of the taxpayers' living situation.

100 Although the decision letter and SO determination was in respect to both the lien and the levy, the IRS conceded that the lien hearing request was timely and the Tax Court has jurisdiction. This was because the decision letter contained a determination with respect to the lien which may be reviewed by the Tax Court. *See Craig v. Comm'r*, 119 T.C. 252 (2002); *cf. Wilson v. Comm'r*, 113 T.C. 47 (2008) and *MacDonald v. Comm'r*, T.C. Memo. 2009-63.

101 *See Moorhouse v. Comm'r*, 116 T.C. 263, 271 (2001) (discussing the need for separate levy notice to each spouse).

CONCLUSION

CDP hearings provide instrumental protections for taxpayers to meaningfully address the appropriateness of IRS collection actions. Given the important safeguard that CDP hearings offer taxpayers, it is unsurprising that CDP remains one of the most frequently litigated issues. The cases discussed this year were important for a variety of reasons.

The cases affirmed important protections for taxpayers, substantiated the Tax Court's test for abuse of discretion, and addressed procedural issues. The *Ryskamp* opinion confirmed the taxpayer's *right to challenge the IRS's position and be heard*. In *Ryskamp*, the court reaffirmed the Tax Court's holding in *Thornberry* and prevented the IRS from denying a CDP hearing by simply labeling the hearing request as entirely frivolous.[102] The opinion also validated a taxpayer's *right to be informed* because the court held that the IRS could not send standardized letters, but rather, must give some indication as to which issues raised by a taxpayer are frivolous.

Chief Counsel issued a notice changing the guidelines for handling frivolous CDP hearing requests under IRC § 6330(g) in response to *Ryskamp*.[103] Counsel attorneys will no longer file motions to dismiss, but rather motions to remand cases to Appeals for a substantive hearing to address legitimate issues if Counsel determines that the taxpayer raised at least one legitimate issue and the CDP hearing request should not have been denied in its entirety. The Tax Court in *Ryskamp* held that the IRS cannot send standardized letters and must articulate the bases of its denial under section 6330(g) by explaining why each argument of the taxpayer is not proper.[104] Counsel continues to disagree with the holdings in *Ryskamp* but recognized, in view of the settled Tax Court and D.C. Circuit law, that it would be a waste of Counsel resources to continue to contest Tax Court jurisdiction in those forums.

Charnas illustrates the importance of a taxpayer's *rights to privacy*, *to challenge the IRS's position and to be heard*, and *to a fair and just tax system* because the opinion reemphasizes the importance of the CDP balancing test.[105] Similar to the *Budish* case discussed in last year's report,[106] the *Charnas* court found that by failing to perform the proper balancing test, the IRS had abused its discretion in sustaining a levy. The *Charnas* and *Budish* decisions show the Tax Court's consistency in scrutinizing Appeals' determinations lacking elaboration or proper analysis. In *Charnas*, the Tax Court also concluded that a correspondence-only hearing was not sufficient to provide the taxpayer the fair hearing under IRC §§ 6330 and 6320. The *Charnas* decision pushes the IRS to live up to its commitment to provide face-to-face conferences

102 *Thornberry v. Comm'r*, 136 T.C. 356, 367 (2011).

103 Notice CC-2016-008 *Subject: Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Apr. 4, 2016).

104 *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015), *cert. denied*, 136 U.S. 834 (2016). *Cf. Lunnon v. Comm'r*, T.C. Memo. 2015-156, *aff'd*, 117 A.F.T.R.2d (RIA) 2094 (10th Cir. 2016). In *Lunnon*, the taxpayer called the revenue officer handling the case the "spawn of Satan himself" and attached a 30-page frivolous document published by Truth Attack entitled "The Real Truth About the IRS's Truth About Frivolous Tax Arguments." Despite making frivolous arguments during the pre-CDP phase of the case, the taxpayer used neutral language in his CDP request disputing the proposed levy, requesting the withdrawal of the NFTL, and stating that he did not owe taxes. During the CDP conference despite the SO's warning Mr. Lunnon about making frivolous arguments, the taxpayer "wanted to discuss only constitutional challenges to his tax liabilities and how he disagreed with [RO's] 'intrusive' investigation." Nonetheless, the SO did not invoke IRC § 6330(g) but instead made a substantive determination on the merits. The Tax Court affirmed the Appeals' determination. The contrast of the handling these two cases shows that administering the frivolous provisions is a challenging task for Appeals employees facing a taxpayer who raises potentially frivolous issues and does not properly articulate legitimate arguments.

105 IRC § 6330(c)(3)(C).

106 *See Budish v. Comm'r*, T.C. Memo. 2014-230; *see also* National Taxpayer Advocate 2015 Annual Report to Congress 481-98 (Most Litigated Issue: *Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330*); National Taxpayer Advocate 2014 Annual Report to Congress 186-96.

with Appeals to taxpayers who present relevant, non-frivolous reasons for disagreement.[107] Moving away from *pro forma* statements and boilerplate language (without proper analysis) and encouraging hearing officers to fully consider relevant, non-frivolous issues in a face-to-face setting could go a long way in reducing future litigation. By not giving proper attention to the balancing test and conducting correspondence-only hearings, the IRS is missing opportunities to improve compliance, enhance taxpayer trust and confidence, relieve undue burden on taxpayers, and support the taxpayer's *right to privacy*.[108]

Abu-Dayeh is important because it identified the necessity of taxpayers to follow the procedural requirements of offering a collection alternative (*e.g.*, an OIC).[109] Thus taxpayers and the IRS are held accountable to the uniform procedural standards of the taxpayer's *right to a fair and just tax system* is protected.

Yasgur sheds important light on a taxpayer's *right to be informed*, *right to pay no more than the correct amount of tax*, and *the right to challenge the IRS's position and be heard*. If a taxpayer does not receive notice of an IRS collection action and does not deliberately prevent an attempt by the IRS to deliver the notice, then the taxpayer must be afforded his or her due process right to challenge the underlying tax liabilities.[110] A taxpayer may challenge the existence or amount of the underlying tax liability, but only if he or she did not receive a notice of deficiency with respect to the liability or otherwise have an opportunity to dispute the liability.[111] The IRS cannot assume taxpayers have had an opportunity to dispute the liability simply because a notice has been sent.

In sum, the CDP hearing is a powerful tool for taxpayers. Genuine two-way communication, rather than boilerplate letters, between the IRS and the taxpayer is crucial for the process to work properly. When taxpayers provide full documentation and develop a complete and comprehensive administrative record, they have a better chance of prevailing on Appeal and during judicial review. To reduce litigation in this area, the IRS Office of Appeals should commit to making substantive determinations in CDP cases properly considering the balancing test and all relevant, nonfrivolous issues, and better take into account all facts and circumstances. The IRS needs to thoroughly address the legitimate issues of a taxpayer disputing a collection action to further the taxpayer's *rights to be informed*, *to privacy*, *to pay no more than the correct amount of tax*, *to challenge the IRS's position and to be heard*, *to appeal an IRS decision in an independent forum*, and *to a fair and just tax system*.

107 Treas. Reg. § 301.6330–1(d)(2), Q&A D-7 (stating that "a taxpayer who presents in the CDP hearing request relevant, non-frivolous reasons for disagreement with the proposed levy will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to taxpayer's residence.").

108 *See* National Taxpayer Advocate 2014 Annual Report to Congress 185-96 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*).

109 *Abu-Dayeh v. Comm'r*, T.C. Memo. 2015-136.

110 IRC § 6330(c)(2)(B).

111 *Id.*