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

## SUMMARY

The IRS Restructuring and Reform Act of 1998 (RRA 98)<sup>1</sup> 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 is an opportunity for a taxpayer to have a meaningful hearing prior to the IRS's first levy or immediately after its first NFTL filing to enforce a tax liability. At the hearing, the taxpayer has the 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.<sup>2</sup>

Once Appeals issues a determination, a taxpayer has the right to judicial review of the determination if the taxpayer timely requests a CDP hearing and timely petitions the United States Tax Court.<sup>3</sup> Generally, the IRS suspends levy actions during a levy hearing and any judicial review that may follow.<sup>4</sup>

Only a small fraction of taxpayers exercise their right to an administrative hearing, and far fewer taxpayers petition the Tax Court to review their case. Between 2004 and 2018, only 1.43 percent of the taxpayers who received a CDP notice requested an administrative hearing (*i.e.*, 390,041 out of 27,264,457) and only 0.08 percent filed a petition in Tax Court (*i.e.*, 22,012 out of 27,264,457).

Yet CDP has been one of the federal tax issues most frequently litigated in the federal courts since 2001. Our review of litigated issues found 74 opinions on CDP cases during the review period of June 1, 2017, through May 31, 2018, which is a decrease of about 13 percent since last year's report.<sup>5</sup> Taxpayers prevailed in full in five of these cases (about seven percent) and, in part, in four others (over five percent). The 12 percent success rate for the taxpayers is higher than last year. Of the nine opinions where taxpayers prevailed in whole or in part, four taxpayers appeared without a representative authorized to advocate to the court on their behalf (*pro se*),<sup>6</sup> and five were represented by an attorney or other court-approved professional.

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

- 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)(2) (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 Collection Due Process (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 upon a determination by the Tax Court of "good cause," if the underlying tax liability is not at issue.
- 5 For a list of all cases reviewed, see Table 5 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).

CDP hearings provide taxpayers with a way to exercise several rights articulated in the Taxpayer Bill of Rights, which was adopted by the IRS in 2014 and was subsequently incorporated in the Internal Revenue Code (IRC) in response to the National Taxpayer Advocate's recommendations.<sup>7</sup> For example, by providing an opportunity for a taxpayer to challenge the underlying liability and raise alternatives to the collection action, the CDP hearing empowers the taxpayer *to challenge the IRS's position and be heard*. If the taxpayer disagrees with Appeals' determination, he or she may file a petition in Tax Court, an exercise of 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<sup>8</sup>

- *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.<sup>9</sup> As discussed above, CDP rights ensure taxpayers receive adequate notice of IRS collection activity and an opportunity for a meaningful hearing before the IRS deprives the taxpayer of property.<sup>10</sup> The hearing allows taxpayers to raise issues related to collection of the liability, including:

- The appropriateness of collection actions;<sup>11</sup>
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), posting a bond, or substitution of other assets;<sup>12</sup>
- Appropriate spousal defenses;<sup>13</sup>

7 See Taxpayer Bill of Rights (TBOR), <http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights>, IRC § 7803(a)(3).

8 See TBOR, <http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights>. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

9 IRC §§ 6320 and 6330.

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, 726-731 (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).

- The existence or amount of the underlying tax liability, but only if the taxpayer did not receive a statutory notice of deficiency or have another opportunity to dispute the liability;<sup>14</sup> and
- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.<sup>15</sup>

A taxpayer cannot raise an issue considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.<sup>16</sup>

## PROCEDURAL COLLECTION DUE PROCESS REQUIREMENTS

The IRS must provide a CDP notice to the taxpayer indicating the particular tax and tax period after filing the first NFTL and generally before its first intended levy is issued.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup>

## REQUESTING A 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.<sup>21</sup> The Code and regulations require taxpayers to provide their reasons for requesting a hearing.<sup>22</sup> Failure to provide the basis may result in denial of a face-to-face hearing.<sup>23</sup> Taxpayers who fail to timely request a CDP hearing will be afforded an “equivalent hearing,”

14 IRC § 6330(c)(2)(B).

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

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 IRC § 6330(a)(3)(B); Treas. Reg. § 301.6330-1(b)(1).

21 IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B); Treas. Reg. §§ 301.6320-1(c)(2), Question and Answer (Q&A) (C1)(ii) and 301.6330-1(c)(2), Q&A (C1)(ii).

22 Treas. Reg. §§ 301.6320-1(c)(2), Q&A (C1)(ii) and 301.6330-1(c)(2), Q&A (C1)(ii).

23 IRC §§ 6320(b)(1) and 6330(b)(1); Treas. Reg. §§ 301.6320-1(c)(2), Q&A (C1); 301.6330-1(c)(2), Q&A (C1); 301.6320-1(d)(2), Q&A (D8); and 301.6330-1(d)(2), Q&A (D8). 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); Internal Revenue Manual (IRM) 8.6.1.4.1, *Conference Practice* (Oct. 1, 2016).

which is similar to a CDP hearing but lacks judicial review.<sup>24</sup> Taxpayers must request an equivalent hearing within the one-year period beginning the day after the five-business-day period following the filing of the NFTL, or in levy cases, within the one-year period beginning the day after the date of the CDP notice.<sup>25</sup>

The IRS generally is required to 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.<sup>26</sup> 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.<sup>27</sup>

The IRS also is required to suspend levy action throughout any judicial review of Appeals' determination, unless the IRS obtains an order from the court permitting levy action because the underlying tax liability is not at issue, and the IRS can demonstrate good cause to resume collection activity.<sup>28</sup>

## HOW A CDP HEARING IS CONDUCTED

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.<sup>29</sup> A taxpayer can request that the hearing be in person; however, courts have ruled that a CDP hearing need not be face-to-face but can take place by telephone or correspondence,<sup>30</sup> and Appeals will typically conduct the hearing by telephone

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. IRM 5.19.8.4.3, *Equivalent Hearing (EH) Requests and Timeliness of EH Requests* (Nov. 1, 2007).

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).

unless the taxpayer requests a face-to-face conference.<sup>31</sup> The CDP regulations state that taxpayers who provide non-frivolous reasons for opposing the IRS collection action will generally be offered but not guaranteed face-to-face conferences.<sup>32</sup> Taxpayers making frivolous arguments are not entitled to face-to-face conferences.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

The CDP hearing is to be held by an impartial officer from Appeals, who is barred from engaging in *ex parte*<sup>36</sup> communications with IRS employees about the substance of the case and who has had “no prior involvement.”<sup>37</sup> 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.<sup>38</sup> An integral component of the CDP analysis is the balancing test, which requires the IRS AO to determine whether the proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be “no more intrusive than necessary.”<sup>39</sup> The balancing test is central to a CDP hearing because it instills a notion of fairness into the process from the perspective of the taxpayer.<sup>40</sup>

31 Under the recently adopted IRM 8.6.1.4.1, *Conference Practice* (Oct. 1, 2016), the default rule became telephone conferences, with in-person conferences only being available in cases meeting certain criteria and where the Appeals Team Manager approved. Appeals recently announced that it would issue guidance to employees “informing them that Appeals will return to allowing taxpayers to have in-person Appeals conferences in field cases.” However, the policy change is limited to field offices, which leaves the low income taxpayer and much of the middle class without access to in-person conferences.

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.*, 2009-1 (June 1, 2009), 2009-22 I.R.B.1.

38 IRC § 6330(c)(1); *Hoyle v. Comm’r*, 131 T.C. 197 (2008); *Talbot v. Comm’r*, T.C. Memo. 2016-191 (2016).

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 Notice of Federal Tax Lien (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. 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 185-196 (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).

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.<sup>41</sup> Similarly, IRC § 6330(c)(4)(B) 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.

IRC § 6702(b) allows the IRS to impose a penalty for a specified frivolous submission, including a frivolous CDP hearing request.<sup>42</sup> 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.”<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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 IRC § 6330(g).<sup>46</sup>

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.<sup>47</sup> 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 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

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.

42 The frivolous submission penalty applies to the following submissions: CDP hearing requests under IRC §§ 6320 and 6330, offer in compromise (OIC) under IRC § 7122, installment agreements (IAs) under IRC § 6159, and applications for a Taxpayer Assistance Order 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 upheld *Thornberry* in *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015) cert. denied, 136 S. Ct. 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-2016-008, *Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Apr. 4, 2016).

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

- Counsel will also consider filing a motion to permit levy so that the Service can immediately levy after the Tax Court's order.<sup>48</sup>

## JUDICIAL REVIEW OF AN IRS DETERMINATION AFTER A CDP HEARING

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.<sup>49</sup> In several recent court cases,<sup>50</sup> taxpayers filed their petitions one day late because they miscalculated the time period for filing their Tax Court petitions. The Tax Court found it lacked jurisdiction to review the IRS's determination, and several courts of appeal affirmed.<sup>51</sup> The court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing.<sup>52</sup> An issue is not properly raised if the taxpayer fails to request that Appeals consider the issue, or if the taxpayer fails to present any evidence regarding consideration of that issue after being given a reasonable opportunity.<sup>53</sup> 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 date and the trial.<sup>54</sup> When the case is remanded to Appeals, the Tax Court retains jurisdiction.<sup>55</sup> The resulting hearing on remand provides the parties with an opportunity to complete the initial hearing while preserving the taxpayer's right to return to Court and receive judicial review of the ultimate administrative determination.<sup>56</sup>

The standard of review the court will apply depends on the nature of the issue it is reviewing. 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*<sup>57</sup> basis, and the scope of its review extends to evidence

48 IRS Chief Counsel Notice CC-2016-008, *Disregarding Frivolous CDP Hearing Requests Under Section 6330(g)* (Apr. 4, 2016). In the 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 185-196 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*).

49 IRC § 6330(d)(1).

50 See, e.g., *Duggan v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 4100-15L (2015) (dismissing for lack of jurisdiction where petition was filed "31 days after the mailing of the notices of determination."); *Pottgen v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 1410-15L (2016) (dismissing for lack of jurisdiction where petition was received by Tax Court one day late); *Integrated Event Management, Inc. v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 27674-16SL (2017) (dismissing for lack of jurisdiction where petition was filed one day late, disagreeing with taxpayer's calculation putting the day of the letter as day zero rather than as day one); *Protter v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 22975-15SL (2017) (dismissing for lack of jurisdiction where petition was mailed 31 days after the date on the notice of determination, disagreeing with Taxpayer's construction of the operative language effectively putting the day of the letter as day zero).

51 See, e.g., *Cunningham v. Comm'r*, 716 F. App'x 182 (4th Cir. 2018), *aff'g* No. 16-014090 (T.C. Dec. 7, 2016); *Duggan v. Comm'r*, 879 F.3d 1029 (9th Cir. 2018), *aff'g* No. 15-4100 (T.C. June 26, 2015).

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

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

54 *Churchill v. Comm'r*, T.C. Memo. 2011-182; see also IRS Chief Counsel Notice CC-2013-002, *Remands to Appeals in CDP Cases When There Is a Post-Determination Change in Circumstances* (Nov. 30, 2012), which provides Counsel attorneys with instructions on when a remand based on changed circumstances might be appropriate; *but see Kehoe v. Comm'r*, T.C. Memo. 2013-63 (taxpayer's eligibility to make withdrawals from his IRA without the threat of penalty does not amount to a material change in circumstances such that remand would be appropriate).

55 See, e.g., *Pomeroy v. Comm'r*, T.C. Memo. 2013-26 at 20; Bob Kamman, *For IRS Appeals Office, An Epidemic of Remands*, PROCEDURALLY TAXING (Oct. 9, 2018), <http://procedurallytaxing.com/for-irs-appeals-office-an-epidemic-of-remands/>.

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

57 *De novo* means "anew." *De Novo*, BLACK'S LAW DICTIONARY (10th ed. 2014).

introduced at the trial that was not a part of the administrative record.<sup>58</sup> 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.<sup>59</sup>

### Court Review of Facts Outside the Administrative Record

When the review is for abuse of discretion, it is the position of the Tax Court that the scope of its review extends beyond the administrative record to include evidence adduced at trial, although in nonliability CDP cases appealable to the U.S. Courts of Appeals for the First, Eighth, and Ninth Circuits, the scope of review is limited to the administrative record.<sup>60</sup> However, in cases appealable to the other U.S. Courts of Appeals, which have yet to address that precise issue in a precedential opinion, the court may consider new evidence not contained in the administrative record.<sup>61</sup>

### Opportunity to Contest an Underlying Liability

The regulations distinguish between liabilities that are subject to deficiency procedures and those that are not. For liabilities subject to deficiency procedures, an opportunity for a post-examination conference with the IRS Office of Appeals does not bar the taxpayer (in appropriate circumstances) from contesting his or her liability in a later CDP proceeding.<sup>62</sup> On the other hand, where a liability is not subject to deficiency procedures, “[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability.”<sup>63</sup> For example, an IRC § 6707A penalty<sup>64</sup> is an assessable penalty not subject to deficiency procedures.

In March 2017, in *Bitter v. Commissioner*,<sup>65</sup> the Tax Court further reiterated that a taxpayer is entitled to challenge his underlying liability for a § 6707A penalty only if the taxpayer did not have a prior opportunity to dispute it. A “prior opportunity” was found to include a prior opportunity for a conference with Appeals. The *Bitter* determination was a culmination of similar developments in circuit court decisions on the same issue, including the Fourth Circuit decision *James v. Commissioner*,<sup>66</sup> the Tenth Circuit decision in *Keller Tank Serv. II v. Commissioner*,<sup>67</sup> and the Seventh Circuit decision in *Our Country Home Enterprises, Inc. v. Commissioner*.<sup>68</sup>

58 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals’ CDP determinations. H.R. REP. NO. 105-599, at 266. See also IRS Chief Counsel Notice CC-2014-002, *Proper Standard of Review for Collection Due Process Determinations* (May 5, 2014).

59 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).

60 See *Keller v. Comm’r*, 568 F.3d 710, 718 (9th Cir. 2009), *aff’g* in part as to this issue T.C. Memo. 2006-166; *Murphy v. Comm’r*, 469 F.3d 27; *Robinette v. Comm’r*, 439 F.3d 455 (8th Cir. 2006), *rev’g* 123 T.C. 85 (2004).

61 See IRC § 7482(b)(1)(G)(i), *Rozday v. Comm’r*, 703 F. App’x. 138, 139 (3d Cir. 2017); *Tuka v. Comm’r*, 324 F. App’x 193, 195 n.2 (3d Cir. 2009); *Emery Celli Cuti Brinckerhoff & Abady, P.C. v. Comm’r*, T.C. Memo. 2018-55; and *Robinette v. Comm’r*, 123 T.C. at 103.

62 See Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330-1(e)(3), Q&A-E2. Cf. IRC § 6330(c)(2)(B) (receiving the statutory notice of deficiency precludes the taxpayer from contesting the underlying liability).

63 See Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330-1(e)(3), Q&A-E2.

64 IRC § 6707A provides a monetary penalty for the failure to include a reportable transaction required to be disclosed under IRC § 6011.

65 *Bitter v. Comm’r*, T.C. Memo. 2017-46.

66 See *James v. Comm’r*, 850 F.3d 160 (4th Cir. 2017).

67 See *Keller Tank Serv. II, Inc. v. Comm’r*, 854 F.3d 1178 (10th Cir. 2017).

68 See *Our Country Home Enterprises, Inc. v. Comm’r*, 855 F.3d 773 (7th Cir. 2017).

## APPELLATE VENUE FROM DECISIONS OF THE TAX COURT

IRC § 7482(b)(1)(G) specifies that CDP cases are appealable to the circuit of the taxpayer's legal residence (if the taxpayer is an individual) or the taxpayer's principal place of business, office, or agency (if the taxpayer is not an individual). This provision applies only to cases filed after December 18, 2015, but it should not be construed to create any inference regarding cases filed before that date.<sup>69</sup>

For cases filed before December 18, 2015, the correct venue for appeals from the Tax Court generally was the D.C. Circuit Court unless one of the rules specified in IRC § 7482(b)(1) or exceptions specified in IRC § 7482(b)(2) or (b)(3) applied. For instance, IRC § 7482(b)(1)(A) provides that in cases where a taxpayer 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.<sup>70</sup> Pursuant to IRC § 7482(b)(2), the taxpayer and the IRS may stipulate the venue for an appeal in writing. In *Byers v. Commissioner*, the D.C. Circuit held that it would not transfer cases in non-liability CDP cases unless both parties stipulate to the transfer.<sup>71</sup> However, 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.<sup>72</sup>

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 taxpayer'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*,<sup>73</sup> 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. In 2014, to address the uncertainty and confusion among taxpayers and practitioners caused by the *Byers* decision, the National Taxpayer Advocate recommended that Congress amend IRC § 7482 to provide that the proper

69 Pub. L. No. 114-113, Div. Q, Title IV, § 423(a), (b) (2015). See also IRS Chief Counsel Notice CC-2016-006, *Path [Protecting Americans from Tax Hikes] 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 the Tax Court* (Feb. 1, 2016). For cases filed before that date, the guidance in IRS Chief Counsel Notice CC-2015-006, *Venue for Appeals from Decisions of the Tax Court* (June 30, 2015) applies.

70 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 (for partnership taxable years beginning on or before Dec. 31, 2017), or in the case of a petition under IRC § 6234 (for partnership taxable years beginning after Dec. 31, 2017), the principal place of business of the partnership; in the case of a taxpayer under section IRC § 6234(c) (for partnership taxable years beginning on or before Dec. 31, 2017), (i) the legal residence of the taxpayer if the taxpayer is not a corporation, and (ii) the place or office applicable under subparagraph (B) if the taxpayer is a corporation; in the case of a petition under IRC § 6015(e) (for partnership taxable years beginning after Dec. 31, 2017), the legal residence of the taxpayer; or in the case of a petition under IRC §§ 6320 or 6330 (for partnership taxable years beginning after Dec. 31, 2017), (i) the legal residence of the taxpayer if the taxpayer is an individual, and (ii) the principal place of business or principal office or agency if the taxpayer is an entity other than an individual.

71 740 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 477-494 (Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

72 740 F.3d at 676. 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." *Id.* at 677.

73 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

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.<sup>74</sup> Congress made this precise legislative change in 2015.<sup>75</sup>

## ANALYSIS OF PUBLISHED OPINIONS

We identified and reviewed 74 CDP court opinions, a decrease of about 13 percent from the 85 published opinions in last year's report. From 2003 to 2010, the average number of published opinions was approximately 185. Since 2011, the average number of published opinions has dropped by about half, to 90. We analyzed potential factors that could have affected CDP litigation. First, we looked at the number of CDP notices the IRS issued to taxpayers, either in relation to an NFTL or a levy. The number of CDP notices increased from 2003, peaking in 2012 at just over 2,778,000, and then began to decrease. By 2018, the number of notices had decreased by 47 percent from 2012. Second, we determined the number of CDP hearing requests has generally followed the same trend.<sup>76</sup> In 2011, the number of CDP hearing requests peaked at 36,755, up from 10,889 requests in 2003. However, between 2011 and 2018, the number of hearing requests has declined by 34 percent. Finally, the number of Tax Court petitions also grew from 2003 to 2012, peaking at 1,963, and then started falling in 2012. From 2012 to 2018, petitions dropped by about ten percent. These trends are depicted in Figure 3.5.1, Collection Due Process (CDP) Notices, Hearing Requests, Petitions, and Litigation.

74 National Taxpayer Advocate 2014 Annual Report to Congress 387-391 (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*).

75 See Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113, Div. Q, Title IV, § 423(b).

76 IRC §§ 6320 and 6330 provide a taxpayer the right to a hearing if a request is made within a 30-day period.

**FIGURE 3.5.1**

**Collection Due Process (CDP) Notices, Hearing Requests, Petitions, and Litigation**

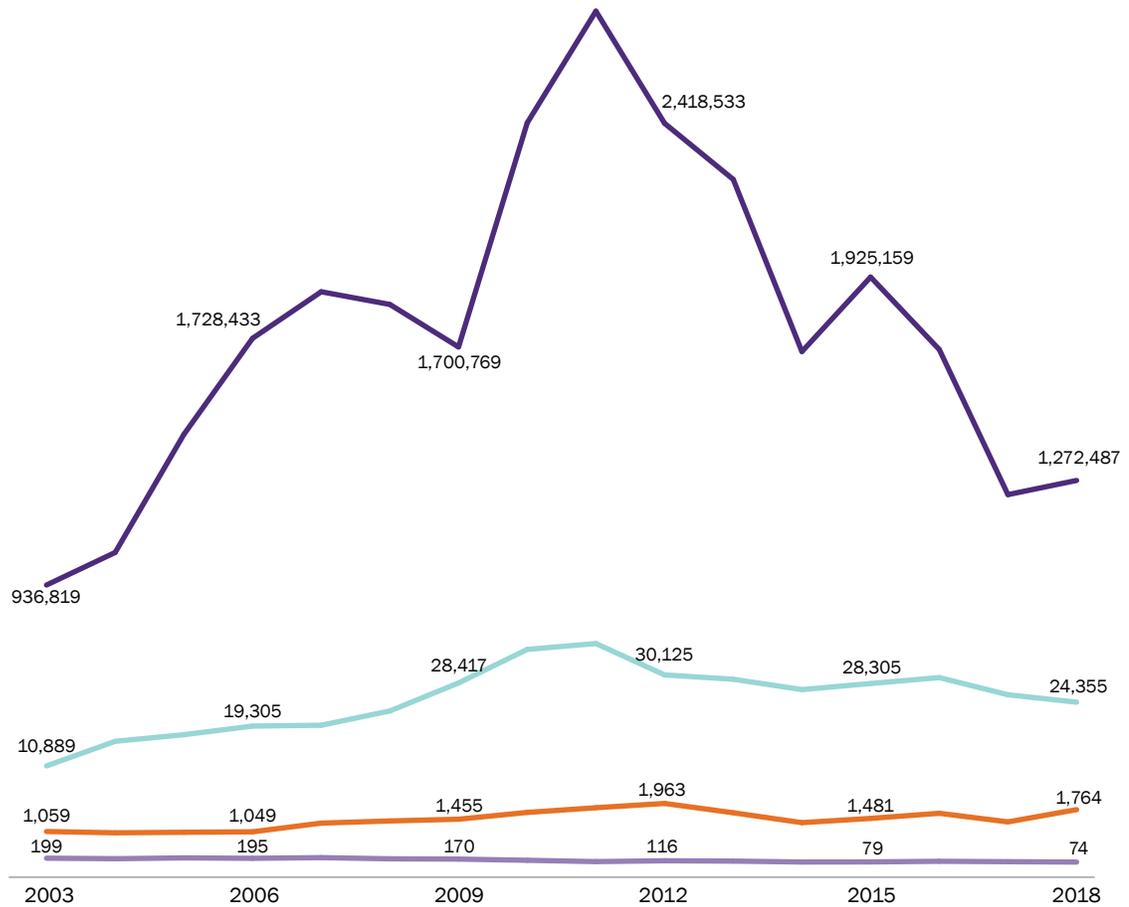
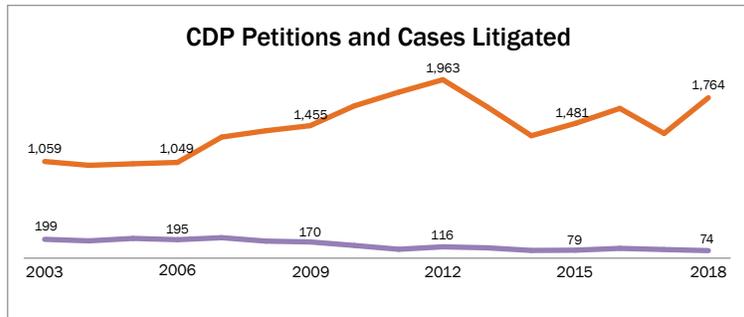


Chart is not to exact scale

- CDP Notices Mailed
- CDP Hearing Requests
- CDP Petitions
- CDP Cases Litigated



The decline in notices, hearing requests, and petitions may be attributed, in part, to a series of operational changes in fiscal years (FYs) 2011 and 2012 that led to fewer NFTL filings during the past few years and a higher number of accepted OICs than in 2011 and 2012.<sup>77</sup> These factors likely had a positive impact on many taxpayers and revenue collection. Fewer NFTL filings directly impacts the number of CDP notices issued to taxpayers, which in turn influence the number of CDP hearing requests and subsequent petitions to review IRS CDP determinations in Tax Court.

We acknowledge that there may be some additional reasons for the general decline in the number of litigated CDP cases. The IRS has experienced significant budget and staff reductions since 2010, which likely had an impact on enforced collection action. Any decline in litigated cases in the years after 2010 may also be due to taxpayers litigating many issues of first impression in the years immediately following the enactment of IRC §§ 6320 and 6330, which have been resolved by the courts.

The 74 opinions identified this year do not reflect the full number of CDP cases because the court does not issue an opinion in all cases.<sup>78</sup> Some are resolved through settlements, and in other cases, taxpayers do not pursue litigation after filing a petition with the court.<sup>79</sup> The Tax Court also disposes of some cases by issuing unpublished orders.<sup>80</sup> Table 5 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 five of the 74 opinions issued during the year ending May 31, 2018 (about seven percent). Taxpayers prevailed in part in four other cases (over five percent). Of the nine published opinions in which the courts found for the taxpayer, in whole or in part, the taxpayers appeared *pro se* in four cases and were represented in five cases. Cognizant of the distinct disadvantage that *pro se* litigants face, federal courts routinely read their submissions liberally and interpret them to raise the strongest arguments that they suggest.<sup>81</sup> The IRS prevailed fully in 65 cases (about 88 percent) of the published

77 For instance, in fiscal year (FY) 2017, the IRS filed about 57 percent fewer NFTLs than in FY 2011, including a corresponding 62 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 2017, the IRS filed 446,378 liens. See IRS, Collection Activity Report 5000-25 (Oct. 4, 2017). We also note that the IRS has accepted 29 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 2017 having an acceptance rate of 38.1 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. 2, 2017).

78 See U.S. Tax Court, Orders Search, <https://www.ustaxcourt.gov/InternetOrders/OrdersSearch.aspx>.

79 Prior to Oct. 17, 2006, the taxpayer could also petition the federal district court if the Tax Court did not have jurisdiction over the underlying tax liability (e.g., if the matter involved an employment tax liability).

80 The statistics analyzing the number of litigated cases excludes Tax Court summary judgments and bench orders, which are unpublished, however Appendix 3, Tables 11 and 12 of the Most Litigated Issues section lists the summary judgments and bench orders. Each division or memorandum opinion goes through a legislatively mandated pre-issuance review by the Chief Judge. IRC §§ 7459(b); 7460(a). While division opinions are precedential, orders are not, being issued “in the exercise of discretion” by a single judge. See 7463(b); Rule 50(f), Tax Court Rules of Practice and Procedure (denying precedential status to orders) and 152(c) (denying precedential status to bench opinions). See also *Introduction: Most Litigated Issues*, *supra*.

81 See *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994); *Buczek v. U.S.*, No. 15-CV-273S, 2018 U.S. Dist. LEXIS 77471, at \*3 (W.D.N.Y. May 8, 2018).

opinions, a decrease from the 92 percent success rate last year.<sup>82</sup> The 12 percent success rate<sup>83</sup> among taxpayers is higher than last year.

## Issues Litigated

### *Cunningham v. Commissioner*

In *Cunningham v. Commissioner*,<sup>84</sup> the taxpayer sought Court of Appeals review of the Tax Court’s dismissal of her petition for review of an IRS CDP determination. The Tax Court concluded that it lacked the necessary jurisdiction to review Ms. Cunningham’s petition, which she filed one day after the 30-day deadline set forth in IRC § 6330(d)(1).

The IRS issued Cunningham a final notice of intent to levy in October 2015 for unpaid income tax she allegedly owed from 2010, 2011, 2013, and 2014.<sup>85</sup> After receiving the notice, Cunningham exercised her right to a CDP hearing before the IRS Office of Appeals.<sup>86</sup> Following the hearing, the IRS sent Cunningham a letter dated May 16, 2016, advising her of its decision. The letter explained the IRS’s determination that the levy notice was properly issued and that the proposed levy was appropriate and no more intrusive than necessary.<sup>87</sup> It also advised Cunningham that if she wished to dispute the determination, she “must file a petition with the United States Tax Court within a 30-day period beginning the day after the date of this letter.” Finally, it cautioned that “[t]he law limits the time for filing your petition to the 30-day period mentioned above. The courts cannot consider your case if you file late.”

On June 16, 2016—31 days after the date of the determination letter—Cunningham mailed a petition to the Tax Court seeking to challenge the IRS’s decision. The IRS moved to dismiss for lack of jurisdiction, and the Tax Court granted the motion since she filed it after the statutory deadline.<sup>88</sup> Cunningham appealed.

In her appeal, Cunningham claimed the letter was misleading and tricked her and other taxpayers into filing late as equitable grounds for why the filing deadline should have been tolled.

The Court of Appeals applied reasoning from a recent Supreme Court decision analyzing a statutorily prescribed deadline for appealing the determination of a government agency to consider whether the 30-day deadline to file a petition with the Tax Court for review of a CDP determination was jurisdictional, distinguishing jurisdictional time limits from claim processing rules.<sup>89</sup> There is a

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

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

84 *Cunningham v. Comm’r*, 716 F. App’x 182 (4th Cir. 2018), *aff’g* No. 16-014090 (T.C. Dec. 7, 2016).

85 IRC § 6330(a).

86 IRC § 6330(a), (b).

87 IRC § 6330(a), (b), and (c)(3).

88 IRC § 6330(d)(1).

89 716 F. App’x at 183-184. While acknowledging that noncompliance with a jurisdictional time limit can never be excused, the Court of Appeals noted that “mandatory claim-processing rules” are “less stern,” and “may be waived or forfeited.” See *Cunningham*, 716 F. App’x at 184 (citing *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (“A provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time.”)).

rebuttable presumption that equitable tolling is available to litigants, even in cases where the government is a party.<sup>90</sup>

The Court of Appeals concluded that “even if” the 30-day period specified in the statute to file a petition for Tax Court review of a CDP hearing was subject to equitable tolling, the specific circumstances of Cunningham’s appeal “must warrant the application of equitable tolling in this particular case.”<sup>91</sup> Federal courts employ equitable tolling sparingly, and only in those rare instances where—due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result, when a litigant can establish:

- That he or she has been pursuing his or her rights diligently, and
- That some extraordinary circumstance stood in his or her way and prevented timely filing.<sup>92</sup>

Cunningham did not show that she had been pursuing her rights diligently and that extraordinary circumstances external to her own conduct prevented her from timely filing her appeal. The court noted that Cunningham’s miscalculation of the filing deadline may well have been an innocent mistake—she either misread (or misunderstood) the IRS’s notice, or else simply miscounted the number of days—but posited that granting equitable tolling on those grounds alone would erode the authority of the filing deadline to mere advisory status.

The court stated that the IRS’s letter notifying Cunningham of the filing deadline stated that she had a 30-day period beginning the day after the date of the letter to file an appeal, which was not misleading and could only be construed to require counting the day after the date of the letter as day one. The court went on to say Cunningham’s interpretation of the letter as requiring her to count the day after the date of the letter as day zero was contrary to U.S. Tax Court Rules of Practice and Procedure, Rule 25(a), the plain language of the letter, and common sense. For these reasons, the Court of Appeals for the Fourth Circuit affirmed the Tax Court’s dismissal of Cunningham’s petition, as the facts did not warrant equitable tolling of the petition filing deadline.

### *Duggan v. Commissioner*

The Court of Appeals for the Ninth Circuit in *Duggan v. Commissioner*<sup>93</sup> analyzed whether the 30-day period to file a Tax Court petition was jurisdictional and whether an untimely petition strips the Tax Court of jurisdiction to hear the case. In a manner similar to Ms. Cunningham, Mr. Duggan erroneously calculated the deadline for mailing a petition for review to the Tax Court, mistakenly counting the first day after the date of the IRS determination letter as day zero and mailing his petition 31 days after the date of the IRS determination.

90 *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). The court noted that it is uncertain whether the presumption applies at all outside the context of Article III courts. See *Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 158-159, (2013) (“We have never applied the *Irwin* presumption to an agency’s internal appeal deadline....”).

91 716 F. App’x at 183-184. While acknowledging that noncompliance with a jurisdictional time limit can never be excused, the Court of Appeals noted that “mandatory claim-processing rules” are “less stern,” and “may be waived or forfeited.” See *Cunningham*, 716 F. App’x at 184 (citing *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (internal quotation marks omitted)).

92 *Menominee Indian Tribe of Wis. v. U.S.*, 136 S. Ct. 750, 755 (2016), and *Whiteside v. U.S.*, 775 F.3d 180, 184 (4th Cir. 2014) (*en banc*).

93 *Duggan*, 879 F.3d 1029 (9th Cir. 2018), *aff’g* T.C. No. 15-4100 (T.C. June 26, 2015).

The IRS moved the Tax Court to dismiss the petition for lack of jurisdiction. Mr. Duggan, proceeding *pro se*, opposed the IRS's motion, arguing that the IRS's notices were "incomplete, misleading, or ambiguous," and that his attempts to comply with the filing deadline were reasonable. The Tax Court granted the IRS's motion and dismissed Duggan's petition on jurisdictional grounds. Duggan moved for reconsideration, contending, among other things, that he should not be faulted for his reasonable interpretation of the filing deadline. The Tax Court denied Duggan's motion to reconsider, and Duggan timely appealed his case to the Court of Appeals for the Ninth Circuit.

Unlike the Fourth Circuit in *Cunningham*, the Court of Appeals for the Ninth Circuit first analyzed whether the 30-day deadline to file a CDP petition in Tax Court was jurisdictional before considering equitable tolling, "because a party's failure to satisfy a deadline that is jurisdictional places the case beyond the powers of the court."<sup>94</sup> If the 30-day period is jurisdictional, the court concluded that it would not have authority to entertain "such a suit even if the timeliness objection were waived by the other party, or if a compelling argument for equitable tolling could otherwise be made."<sup>95</sup> After reviewing cases holding that the IRC § 6015(e)(1)(A) 90-day deadline to file an innocent spouse petition in the Tax Court is jurisdictional, the court applied similar reasoning to IRC § 6330(d)(1).<sup>96</sup>

An amicus brief filed in the case discussing the import of recent Supreme Court decisions on the jurisdiction of IRC § 6330(d)(1)<sup>97</sup> cited a prior version of § 6330(d)(1) that allowed a person who brought an appeal in an incorrect court 30 days to refile in the correct court as evidence of Congressional intent that the filing deadline was not jurisdictional. The court disagreed, stating that the plain language of the current version of IRC § 6330(d)(1) confers jurisdiction on the Tax Court only if a CDP petition is filed in that court within 30 days of the IRS's determination, and noting that "[t]he starting point in discerning congressional intent ... is the existing statutory text and not predecessor statutes."<sup>98</sup> Addressing the amicus brief arguments, the court pointed out that Congress might have intended the 30-day deadline to file an appeal in the Tax Court to be non-jurisdictional while including a clause explicitly granting a second 30-day deadline for misdirected appeals out of an abundance of caution or to sweep in cases not comprehended by the doctrine of equitable tolling. Alternatively, the court speculated that Congress might have intended the second 30-day deadline to act as an exception that mitigates the harshness of an otherwise jurisdictional rule. Regardless, the court concluded that "such speculation must yield to the text of the statute."<sup>99</sup>

Accordingly, the court held that because the text of IRC § 6330(d)(1) conditions the Tax Court's jurisdiction on the timely filing of a petition for review, the 30-day deadline in IRC § 6330(d)(1) is jurisdictional. Duggan's failure to meet this deadline divested the Tax Court of the power to hear his case and foreclosed any argument for equitable tolling.

94 *Duggan*, 879 F.3d 1029, 1031 (citing *U.S. v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015)).

95 *Duggan*, 879 F.3d 1029, 1031.

96 Several courts of appeal have held that the 90-day deadline in § 6015(e)(1)(A) is a jurisdictional requirement and the Tax Court lacks jurisdiction to hear untimely petitions for innocent spouse relief, regardless of whether equitable considerations supporting the extension of the prescribed time period exist. See *Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017); *Rubel v. Comm'r*, 856 F.3d 301 (3d Cir. 2017), *aff'g* No. 16-9183 (T.C. July 11, 2016); *Calvo v. Comm'r*, 117 A.F.T.R.2d (RIA) 2246 (D.C. Cir. 2016). See also National Taxpayer Advocate 2017 Annual Report to Congress 462-72; 299-306. See also *Maier v. Comm'r*, 360 F.3d 361 (2d Cir. 2004).

97 *Duggan*, 879 F.3d at 1034, n. 2. The court granted leave to file an amicus brief "discussing the import of recent Supreme Court decisions on the jurisdictionality of § 6330(d)(1)" to another taxpayer, because the decision in this case could potentially have affected the outcome of her appeal.

98 *Duggan*, 879 F.3d at 1034 (citing *Lamie v. U.S.*, 540 U.S. 526, 534, (2004)) (internal citations omitted).

99 *Duggan*, 879 F.3d 1029, 1034 (citing *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 550 (1996)) (internal quotations omitted).

### *McCree v. Commissioner*

In *McCree v. Commissioner*,<sup>100</sup> the IRS Integrity & Verification Operation (IVO) screened the taxpayer's timely filed 2010 return for possible fraudulent inflated withholdings, after she reported a zero taxable amount on an IRA distribution, claiming a refund of more than \$8,000.<sup>101</sup> She reported the distribution as a rollover, but failed to deposit the distribution in a qualified account. IVO determined that the withholdings reported on her tax return were correct, but it did not evaluate or determine whether she had reported her income correctly. IVO sent Ms. McCree Letter 4464C, *Questionable Refund 3rd Party Notification*, informing her that her refund was being held for review and verification, and that she was "not required to do anything at this time" and that if she did not receive her refund within 45 days, she could call the telephone number provided. She received her refund 39 days later.

Sixteen months later, the IRS mailed her a statutory notice of deficiency determining a deficiency in her 2010 federal income tax of \$5,637 and an accuracy-related penalty under IRC § 6662(a) of \$1,127.40; however, Ms. McCree did not receive the notice.

Ms. McCree made several attempts to contest the liability, but IRS incorrectly told her she could not, because she had already had an opportunity to contest the underlying liability. Before the initial CDP hearing, Ms. McCree submitted documents that supported reducing her underlying liability and eliminating the accuracy-related penalty. During the CDP hearing, Appeals abated some of the tax liability and the entire accuracy-related penalty based on the documentation she provided, despite erroneously informing Ms. McCree that she would be unable to contest the 2010 tax liability.

Ms. McCree, who represented herself at all stages of the controversy, claimed Letter 4464C was an audit letter, and she was improperly audited twice.<sup>102</sup> She argued that IRS should not be able to issue a refund after reviewing a return and later audit that return and determine a deficiency.

The issuance of a refund to the taxpayer after acceptance of the taxpayer's return and verification of withholding did not preclude the IRS from subsequently determining a deficiency in the taxpayer's income tax and seeking to recover the refund. A letter from the IRS informing the taxpayer that the refund was being withheld to verify withholdings did not constitute an unnecessary examination since the letter did not request documents or information and was only a limited informational contact by the IRS. The Court noted that the IRS IVO does not conduct audits of taxpayers' tax returns but does screen tax returns to detect false wages or withholding.

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100 T.C. Memo. 2017-145.

101 For concerns about the IRS's fraud detection and wage verification programs, see National Taxpayer Advocate 2016 Annual Report to Congress 151-160 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*) and National Taxpayer Advocate 2017 Annual Report to Congress 219-226 (Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected by These Systems, Resulting in Refund Delays*).

102 See National Taxpayer Advocate 2017 Annual Report to Congress 49-63 (Most Serious Problem: *Audit Rates: The IRS Is Conducting Significant Types and Amounts of Compliance Activities That It Does Not Deem to Be Traditional Audits, Thereby Underreporting the Extent of Its Compliance Activity and Return on Investment, and Circumventing Taxpayer Protections*) and Nina Olson, "Real" vs. "Unreal" Audits and Why This Distinction Matters, NTA BLOG (July 6, 2018), <https://taxpayeradvocate.irs.gov/news/nta-blog-real-vs-unreal-audits-and-why-this-distinction-matters>.

Research of records in IRS possession to verify withholdings does not constitute an examination in violation of IRC § 7605(b).<sup>103</sup> Letter 4464C was not an indication of an audit or an examination, but one of the “narrow, limited contacts or communications between the Service and a taxpayer that do not involve the Service inspecting the taxpayer’s books of account.”<sup>104</sup>

Because Ms. McCree properly challenged her underlying liability, the proper standard of review for the court with respect to this issue is *de novo*.<sup>105</sup> Since Ms. McCree made the necessary showing that there was a genuine issue of material fact for trial, the court awarded her a partial victory and agreed that she could contest her underlying liability at a future trial setting.

### *Seminole Nursing Home, Inc. v. Commissioner*

In *Seminole Nursing Home, Inc. v. Commissioner*,<sup>106</sup> the corporate taxpayer did not contest the underlying tax liability, but contended that the business would suffer economic hardship if the proposed levy were sustained. At the CDP hearing, the corporate taxpayer proposed a monthly payment that would allow it to stay current on its federal tax deposit payments as a collection alternative, and argued that it was less intrusive than enforced levy action. The IRS Settlement Officer (SO) rejected the installment agreement because the taxpayer was not in compliance with its federal employment tax deposit obligations. Rejecting a collection alternative because of noncompliance with estimated tax payment requirements does not violate the proper balancing requirement, but noncompliance is not the only factor involved in the balancing requirement. The taxpayer claimed the SO either did not conduct the required CDP balancing test<sup>107</sup> or did not explain her reason for concluding that its requirements were met.

The Tax Court noted that economic hardship relief is only available to individual taxpayers,<sup>108</sup> pursuant to Treas. Reg. § 301.6343-1(b)(4)(i).<sup>109</sup> The court held the SO was not required to consider the taxpayer’s economic hardship argument in the light of IRC § 6343(a)(1)(D) and thus, it was not an abuse of discretion. Although a corporation may not claim economic hardship as a defense,

103 See Rev. Proc. 2005-32, § 4.03; see also *Grossman v. Comm’r*, 74 T.C. 1147, 1156 (1980) (holding that mere examination of a taxpayer’s income tax return and accompanying schedules does not constitute a second inspection of that taxpayer’s books within the meaning of section 7605(b)); *Rice v. Comm’r*, T.C. Memo. 1994-204.

104 See Rev. Proc. 2005-32, § 4.03.

105 See *Giamelli v. Comm’r*, 129 T.C. at 111.

106 *Seminole Nursing Home, Inc. v. Comm’r*, T.C. Memo. 2017-102.

107 See National Taxpayer Advocate 2014 Annual Report to Congress 185-196 (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).

108 See National Taxpayer Advocate 2017 Annual Report to Congress, Purple Book 34 (*Authorize the IRS to Release Levies That Cause Economic Hardship for Business Taxpayers*).

109 See *Lindsay Manor Nursing Home, Inc. v. Comm’r*, 148 T.C. 9 (2017). The court found that the discretion provided to the Secretary by IRC § 6343(a) and the existence of other avenues for nonindividuals in similar circumstances to obtain the relief (e.g., such as offers in compromise based on doubt as to collectability or public policy considerations) intended by Congress indicate that the limiting of “economic hardship” to individuals by Treas. Reg. § 301.6343-1(b)(4)(i) is not inconsistent with the provisions of IRC § 6343(a). Moreover, the regulations note that applying an economic hardship standard to nonindividuals would not necessarily promote effective tax administration because it might result in the Government’s determining whether and when to forgo the collection of taxes to support a nonviable business; but see National Taxpayer Advocate 2011 Annual Report to Congress 537-543 (Legislative Recommendation: *Amend IRC § 6343(a) to Permit the IRS to Release Levies on Business Taxpayers that Impose Economic Hardship*); and Protecting Taxpayers Act, S. 3278, 115th Cong. § 303 (2018).

the balancing test should consider a taxpayer's specific economic realities and the consequences of a proposed collection action.<sup>110</sup>

Prior to the CDP hearing, the taxpayer submitted a Form 433-B, *Collection Information Statement for Businesses*, showing that its monthly income exceeded its monthly expenses, and it had adequate net monthly income for monthly payments. However, the SO made a substantial mathematical error, reflected both in her case activity report and on the Form 433-B. The error made it appear that the taxpayer's monthly expenses far exceed its income. This factual error, while harmless to the SO's denial of the taxpayer's proposed installment agreement request, was consistently repeated.<sup>111</sup>

The Court remands a CDP case to the IRS Appeals Office when the Court determines that a further hearing would be "helpful," "necessary," or "productive."<sup>112</sup> The additional hearing is not intended as a new hearing or a "do over" for a taxpayer whose missteps during the CDP process resulted in its collection alternative's being rejected, but rather a supplement to the taxpayer's original hearing.<sup>113</sup>

Because the SO repeated her error and because there was nothing in the record reflecting a correction of that error, the Court found that the balancing test under IRC § 6330(c)(3)(C) could have been affected, and remanded the case back to Appeals for the limited purpose of reconsidering the balancing analysis in the light of the corrected facts and circumstances.

## 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 U.S. Tax Court has jurisdiction over appeals from CDP hearings only if the taxpayer files a timely petition. If a taxpayer misses the deadline, the Tax Court does not have jurisdiction to review the IRS's determination and the taxpayers are deprived of their *rights to be informed, to appeal the IRS's decision in an independent forum, and to a fair and just tax system*.

Current law does not require the IRS to provide the date by which a taxpayer must file his or her CDP petition in the U.S. Tax Court, only the date of the determination that is subject to judicial review. Several recent court cases demonstrate that taxpayers misinterpret the calculation of the last day to file a request for a CDP hearing or to file a CDP or innocent spouse petition with the Tax Court. Thus, the *Cunningham* and *Duggan* decisions discussed herein illustrate the importance of complying with the filing deadlines for taxpayers to avail themselves of judicial review and exercise their *right to appeal an IRS decision in an independent forum*.<sup>114</sup> The *Cunningham* opinion reviewed the concept of equitable tolling, which is only available if the taxpayer shows diligent pursuit of rights and that timely filing

110 The Tax Court found in *Lindsay Manor Nursing Home, Inc. v. Comm'r*, 148 T.C. 9 (2017) that the § 6330(c)(3)(C) balancing test must consider a taxpayer's specific economic realities and the consequences of a proposed collection action.

111 *Cf. Sulphur Manor, Inc. v. Comm'r*, T.C. Memo. 2017-95, at 11 n.7 (finding harmless a poorly worded sentence in the Settlement Officer's (SO's) case activity report where the SO's notes elsewhere reflected proper calculation).

112 *Seminole Nursing Home, Inc. v. Comm'r*, T.C. Memo. 2017-102 (citing *Kelby v. Comm'r*, 130 T.C. 79, 86 n.4 (2008); *Lunsford v. Comm'r*, 117 T.C. 183, 189 (2001); *Churchill v. Comm'r*, T.C. Memo. 2011-182).

113 *Seminole Nursing Home, Inc. v. Comm'r*, T.C. Memo. 2017-102 (citing *Takeh v. Comm'r*, T.C. Memo. 2015-103, at 13; *Kelby v. Comm'r*, 130 T.C. at 86).

114 *Cunningham v. Comm'r*, 716 F. App'x 182 (4th Cir. 2018), *aff'g* No. 16-014090 (T.C. Dec. 7, 2016) and *Duggan v. Comm'r*, 879 F.3d 1029 (9th Cir. 2018), *aff'g* No. 15-4100 (T.C. June 26, 2015).

of an appeal was prevented by some extraordinary circumstance. A taxpayer's innocent misreading or misunderstanding of the filing deadline falls short of that standard.

In the CDP context, the burden is on taxpayers, and not the IRS, to keep track of when the 30-day appeal filing period begins, namely, the requirement in IRC § 6330(d)(1) that the taxpayer petition the Tax Court within 30 days of the date of an IRS notice. As stated above, the consequence of not filing of a timely petition is dire. If a taxpayer misses the deadline, the Tax Court does not have jurisdiction to review the IRS's determination.<sup>115</sup> Unsophisticated taxpayers are more likely to misinterpret the current language in the IRS notice of determination that states: "If you want to dispute this determination in court, you must file a petition with the United States Tax Court within 30 days from the date of this letter,"<sup>116</sup> while a close reading of the applicable regulations reveals that "the taxpayer may appeal such determinations made by Appeals within the 30-day period commencing the day after the date of the Notice of Determination."<sup>117</sup> To strengthen CDP rights of taxpayers, the National Taxpayer Advocate proposed a legislative recommendation to require the IRS calculate and provide the last date for filing an appeal on all CDP notices of determination to make them consistent with the requirements for statutory notices of deficiency under IRC § 6213(a).<sup>118</sup> The proposed legislative change would also deem requests timely filed for a CDP hearing and petitions to the Tax Court to review CDP and innocent spouse determinations as long as they are filed<sup>119</sup> by the "last date" listed in the IRS notice.<sup>120</sup>

*McCree v. Commissioner* shows that taxpayers contacted by the IRS after being flagged by an IVO filter<sup>121</sup> can be very confused about whether the wage verification process is an audit. The National Taxpayer Advocate has previously written about the similarities between "real" vs "unreal" audits.<sup>122</sup> The IRS considers taxpayer compliance contacts through programs and procedures such as identity and

115 If the taxpayer does not request a hearing within the 30-day period, the taxpayer may still be entitled to an equivalent hearing with Appeals but will not have any appeal rights allowing the taxpayer to file for judicial review of the equivalency hearing determination. Treas. Reg. §§ 301.6320-1(i); 301.6330-1(i).

116 IRS, Letter 3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 or 6330 of The Internal Revenue Code* (July 2018).

117 See Treas. Reg. § 301.6320-1(f)(1) and 301.6330-1(f)(1); see also Most Serious Problem: *Collection Due Process Notices: Despite Recent Changes to Collection Due Process Notices, Taxpayers Are Still at Risk for Not Understanding Important Procedures and Deadlines, Thereby Missing Their Right to an Independent Hearing and Tax Court Review*, *supra*.

118 National Taxpayer Advocate 2017 Annual Report to Congress 299-306 (Legislative Recommendation: *Collection Due Process and Innocent Spouse Notices: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated As Timely*).

119 The "statutory mailbox rule" in IRC § 7502 provides that if a time-sensitive document or payment arrives late but is postmarked on or before the due date, the postmark date is treated as the date the document or payment was filed with the IRS. Further, IRC § 7502(c) provides that registered or certified mail, or methods deemed substantially equivalent by the Secretary of Treasury, is *prima facie* evidence of delivery. The rule applies to documents and payments sent through the U.S. Postal Service, designated private delivery services, and electronic return transmitters. IRC § 7502(e). See National Taxpayer Advocate 2017 Annual Report to Congress 278 (Legislative Recommendation: *Electronic Mailbox Rule: Revise the Mailbox Rule to Include All Time-Sensitive Documents and Payments Electronically Transmitted to the IRS*).

120 Under this legislative recommendation taxpayers are allowed the later of the date on the notice or the last statutory date, which provides an additional protection if the IRS miscalculates the date on the notice.

121 See National Taxpayer Advocate 2016 Annual Report to Congress 151-160 (Most Serious Problem: *Fraud Detection: The IRS's Failure to Establish Goals to Reduce High False Positive Rates for Its Fraud Detection Programs Increases Taxpayer Burden and Compromises Taxpayer Rights*) and National Taxpayer Advocate FY 2019 Objectives Report to Congress 160-166 (Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected by These Systems, Resulting in Refund Delays*).

122 See National Taxpayer Advocate 2017 Annual Report to Congress 49-63 (Most Serious Problem: *Audit Rates: The IRS Is Conducting Significant Types and Amounts of Compliance Activities That It Does Not Deem to Be Traditional Audits, Thereby Underreporting the Extent of Its Compliance Activity and Return on Investment, and Circumventing Taxpayer Protections*) and Nina Olson, "Real" vs. "Unreal" Audits and Why This Distinction Matters, NTA BLOG (July 6, 2018), <https://taxpayeradvocate.irs.gov/news/nta-blog-real-vs-unreal-audits-and-why-this-distinction-matters>.

wage verification are not “real” audits. Yet to taxpayers, the experience of receiving compliance contacts may feel like a “real” examination. This distinction between “real” and “unreal” audits has real-world consequences impacting taxpayer rights, including *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 finality, and the right to a fair and just tax system*. In *McCree*, the Tax Court reaffirmed the taxpayer’s *right to challenge the IRS’s position and be heard*, ruling that a taxpayer’s petition for review of a CDP determination should not lose in summary judgment, provided the taxpayer makes the necessary showing that there was a genuine issue of material fact for trial, and should be given an opportunity to contest the underlying liability, if the taxpayer had no prior opportunity to do so.

Finally, *Seminole Nursing Home, Inc. v. Commissioner* raises two important issues extensively discussed in prior reports to Congress. First, the case reemphasizes the importance of the CDP balancing test, whether the taxpayer is an individual or a business. It appears that even several years since the Tax Court decision in *Budish v. Commissioner*,<sup>123</sup> the IRS Office of Appeals continues to issue *pro forma* statements and boilerplate language (without proper analysis), in place of a proper balancing test, thereby violating the taxpayers’ *right to privacy*, which states that taxpayers have the right to expect that an IRS enforcement action will comply with the law and be no more intrusive than necessary. Appeals did not properly weigh the legitimate concerns of the taxpayer regarding the intrusiveness of the proposed collection action against the government’s interest in collecting the tax debt. By remanding the case back to Appeals the court reaffirmed the importance of a full balancing test analysis.<sup>124</sup> Educating IRS officers that conduct hearings and encouraging them to fully explain to the taxpayer and make a record of which factors they considered could go a long way in reducing future litigation.<sup>125</sup> By not giving proper attention to the balancing test, the IRS is missing opportunities to improve compliance, enhance taxpayer trust and confidence, and relieve undue burden on taxpayers.

The *Seminole* case also raised another important issue—the inability of a business taxpayer to claim economic hardship as a defense to an IRS collection action. IRC § 6343(a)(1)(D) requires the IRS to release a levy if “the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer.” However, defining economic hardship as the inability to pay reasonable basic living expenses means that only individuals (including sole proprietorship entities) can experience economic hardship.<sup>126</sup> As a result, it is more difficult for businesses to settle their tax debts with collection alternatives (rather than enforced collection). In essence, an otherwise viable business facing economic hardship may be forced to choose between terminating or laying off employees, and failing to meet its tax obligations. To mitigate these concerns, the National Taxpayer Advocate proposed a legislative change to amend IRC § 6343 to authorize the IRS to release a levy if it determines that the levy is creating an economic hardship due to the financial condition of the taxpayer’s viable trade

123 T.C. Memo. 2014-239.

124 IRC § 6330(c)(3)(C); IRM 8.22.4.2.2 (Sept. 25, 2014). See also H.R. REP. No. 105-599, at 263 (1998) (Conf. Rep.). 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 Notice of Federal Tax Lien (NFTL) for a tax period is filed. Thus, Treasury Regulations under IRC § 6320 require a Hearing Office to consider “whether 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), A-E1(vi).

125 See National Taxpayer Advocate 2014 Annual Report to Congress 185-196 (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).

126 Treas. Reg. § 301.6343-1(b)(4).

or business, and to require the IRS, in making the determination to release a levy against a business on economic hardship grounds, to consider the economic viability of the business, the nature and extent of the hardship (including whether the taxpayer exercised ordinary business care and prudence), and the potential harm to individuals if the business is liquidated.<sup>127</sup> These factors are already considered in bankruptcy proceedings, and address the IRS's concerns about advantaging non-viable businesses.<sup>128</sup>

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127 National Taxpayer Advocate 2017 Annual Report to Congress, Purple Book 34 (*Authorize the IRS to Release Levies That Cause Economic Hardship for Business Taxpayers*). See also Protecting Taxpayers Act, S. 3278, 115th Cong. § 303 (2018); Small Business Taxpayer Bill of Rights Act of 2018, S. 2689, 115th Cong. § 16 (2018); H.R. 4368, 112th Cong. § 1 (2012); Taxpayer Rights Act of 2015, H.R. 4128 114th Cong. § 304 (2015) and S. 2333, 114th Cong. § 304 (2015).

128 The United States Supreme Court has limited the application of the Trust Fund Recovery Penalty to help financially troubled companies maintain “minimum working capital .... to maintain operations and avoid liquidation of the business.” See *Slodov v. U.S.*, 436 U.S. 238 (1978) (holding that the individual's conduct was not willful when he used after-acquired funds for operating expenses of the business) and *In re Rossiter*, 167 B.R. 919 (C.D. Cal. 1994) (applying *Slodov* analysis).