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#4**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 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.<sup>2</sup>

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.<sup>3</sup> Generally, the IRS suspends levy actions during a levy hearing and any judicial review that may follow.<sup>4</sup>

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 85 opinions on CDP cases during the review period of June 1, 2016 through May 31, 2017, which is a decrease of 14 percent since last year's report.<sup>5</sup> Taxpayers prevailed in full in four of these cases (nearly five percent) and, in part, in three others (nearly four percent). The eight percent success rate (rounded) for the taxpayers is lower than last year's success rate of 16 percent, which was one of the highest success rates since the inception of CDP hearings. Of the seven opinions where taxpayers prevailed in whole or in part, four taxpayers appeared *pro se*<sup>6</sup> and three 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

- 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 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 4 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).

to the National Taxpayer Advocate's recommendations.<sup>7</sup> In particular, by providing an opportunity for a taxpayer to 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 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<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, 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.<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>
- 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

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

8 See TBOR, [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights).

9 IRC §§ 6320 and 6330. See RRA 98, Pub. L. No. 105-206, § 3401, 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).

- 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 (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.<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 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.<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,”

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 *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). For a detailed discussion of the Appeals policy, under which 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, see Most Serious Problem: *Appeals: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*, *supra*. See also 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>

### 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.<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 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.<sup>28</sup>

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> Courts have determined 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 unless the taxpayer requests a face-to-face conference.<sup>31</sup> The

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).

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. For a more detailed discussion of the Appeals policy of generally limiting in-person conferences, see Most Serious Problem: *Appeals: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*, *supra*.

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 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.”<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>

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

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). Effective October 2016, Appeals implemented a number of changes to its conference procedures. Among other things, the IRM allows Hearing Officers to invite Counsel and/or Compliance to participate in Appeals conferences regardless of whether taxpayers agree or object to their inclusion. IRM 8.6.1.4.4, *Participation in Conferences by IRS Employees* (Oct. 1, 2016). For a detailed discussion of the impact of this policy change on the Appeals’ effectiveness in resolving cases with taxpayers and taxpayers’ perceptions of the Appeals independence, see Most Serious Problem: *Appeals: The IRS’s Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*, *supra*.

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 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 185-96 (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).

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) 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 § 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 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

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 (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 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). For a further discussion of *Ryskamp*, see Issues Litigated, *infra*.

- 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 a Collection Due Process (CDP) Hearing

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.<sup>49</sup> The court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing.<sup>50</sup> An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present any evidence regarding that issue after being given a reasonable opportunity.<sup>51</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 and the trial.<sup>52</sup> When the case is remanded, the Tax Court retains jurisdiction.<sup>53</sup> 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.<sup>54</sup>

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>55</sup> basis.<sup>56</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>57</sup>

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 liability in a later CDP proceeding.<sup>58</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

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 185-96 (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 *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 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).

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. 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).

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

for a conference with Appeals that was offered either before or after the assessment of the liability.”<sup>59</sup> For example, an IRC § 6707A penalty<sup>60</sup> is an assessable penalty not subject to deficiency procedures.

In March 2017, in *Bitter v. Commissioner*,<sup>61</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 the past year’s circuit court decisions on the same issue, including the Fourth Circuit decision *Iames v. Commissioner*,<sup>62</sup> the Tenth Circuit decision in *Keller Tank Serv. II v. Commissioner*,<sup>63</sup> and the Seventh Circuit decision in *Our Country Home Enterprises, Inc. v. Commissioner*.<sup>64</sup>

### 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>65</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>66</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>67</sup> However, the

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

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

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

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

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

64 See *Our Country Home Enterprises, Inc. v. Commr.*, 855 F.3d 773 (7th Cir. 2017).

65 Pub. L. No. 114-113, Div. Q, Title IV, § 423(a), (b) (2015). See also IRS 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 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.

66 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 taxpayer under section IRC § 6234(c), (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.

67 740 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*).



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>68</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>69</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 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>70</sup> Congress made this precise legislative change.<sup>71</sup>

## ANALYSIS OF PUBLISHED OPINIONS

We identified and reviewed 85 CDP court opinions, a 14 percent decrease from the 99 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 93. 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 a notice of federal tax lien (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 2017, the number of notices had decreased by 56 percent from 2012. Second, we determined the number of CDP hearing requests has generally followed the same trend.<sup>72</sup> In 2011, the number of CDP hearing requests peaked at 36,755, up from 10,889 requests in 2003. However, between 2011 and 2017, the number of hearing requests has declined 29 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 2017, petitions dropped by 25 percent. These trends are depicted in Figure 3.4.1, Collection Due Process (CDP) Notices, Hearing Requests, Petitions, and Litigation and Figure 3.4.2, Supporting Data for Figure 3.4.1 below.

68 740 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.

69 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

70 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*).

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

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

FIGURE 3.4.1<sup>73</sup>

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

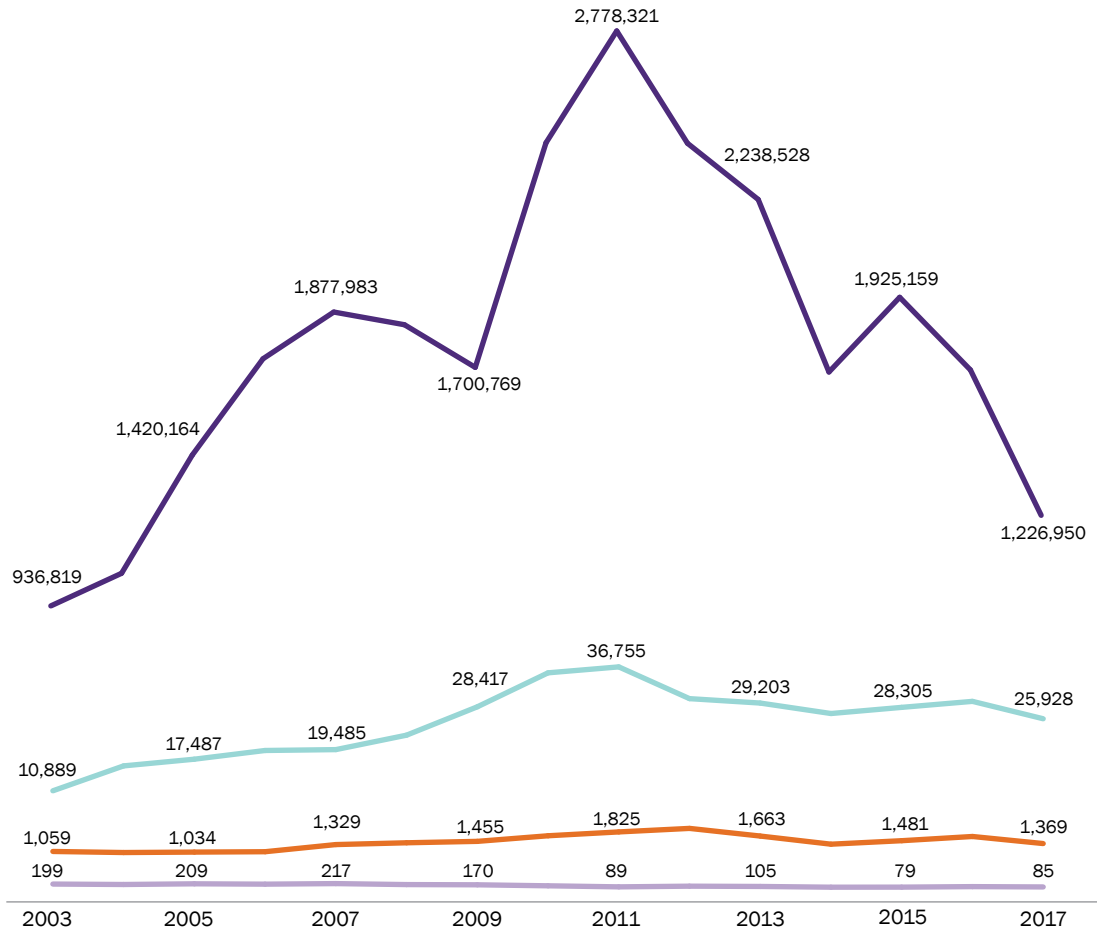
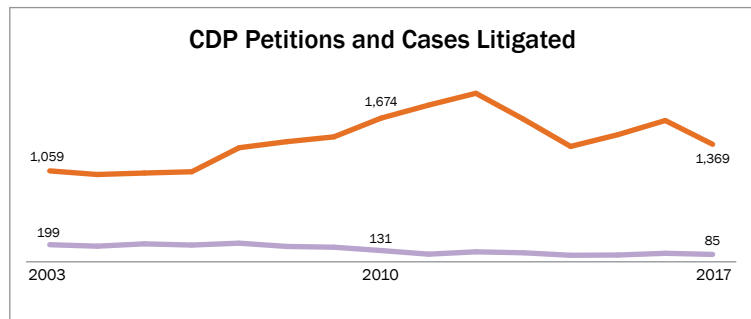


Chart is not to exact scale

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



73 This figure depicts the number of CDP notices, hearing requests, and petitions, as well as the number of CDP cases litigated from FY 2003 through FY 2017. The number of CDP notices, hearings, and petitions is from the Individual Master File.

**FIGURE 3.4.2, Supporting Data for Figure 3.4.1**

Year	CDP Notices Mailed	CDP Hearing Requests	CDP Petitions	CDP Cases Litigated
2003	936,819	10,889	1,059	199
2004	1,041,278	16,087	1,017	182
2005	1,420,164	17,487	1,034	209
2006	1,728,433	19,305	1,049	195
2007	1,877,983	19,485	1,329	217
2008	1,837,284	22,501	1,399	179
2009	1,700,769	28,417	1,455	170
2010	2,420,018	35,512	1,674	131
2011	2,778,321	36,755	1,825	89
2012	2,418,533	30,125	1,963	116
2013	2,238,528	29,203	1,663	105
2014	1,685,977	27,019	1,344	76
2015	1,925,159	28,305	1,481	79
2016	1,692,573	29,557	1,646	99
2017	1,226,950	25,928	1,369	85

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. These changes were in response to concerns from the National Taxpayer Advocate and the Internal Revenue Service Advisory Council (IRSAC), and are collectively known as the “Fresh Start” initiative.<sup>74</sup> The “Fresh Start” initiative has resulted in fewer NFTL filings during the past few years and a higher number of accepted OICs than in 2011 and 2012.<sup>75</sup> During FY 2017, thousands of financially struggling taxpayers have successfully obtained lien withdrawals to help regain their financial viability.<sup>76</sup> These factors likely had a positive impact on many taxpayers and revenue collection. Fewer NFTL filings has a direct impact on 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 2011, which likely had an impact on the number of enforced collection action it took. The decline in litigated cases in 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.

74 IRS, *IRS Fresh Start Program Helps Taxpayers Who Owe the IRS* (Apr. 17, 2013), <https://www.irs.gov/newsroom/irs-fresh-start-program-helps-taxpayers-who-owe-the-irs> (last visited Dec. 5, 2017).

75 For instance, in 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).

76 See IRS, *Collection Activity Report 5000-25* (Oct. 4, 2017).

The 85 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>77</sup> Some are resolved through settlements, and in other cases, taxpayers do not pursue litigation after filing a petition with the court. The Tax Court also disposes of some cases by issuing unpublished orders.<sup>78</sup> Table 4 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 four of the 85 published opinions issued during the year ending May 31, 2017 (nearly five percent). Taxpayers prevailed in part in three other cases (approximately four percent). Of the 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 three cases. The IRS prevailed fully in 78 cases (approximately 92 percent) of the published opinions, an increase from the 84 percent last year.<sup>79</sup> The eight percent success rate<sup>80</sup> for the taxpayer is a decrease from the previous year's 16 percent success rate, one of the highest success rates since the inception of CDP hearings.

**FIGURE 3.4.3, Success Rates In Collection Due Process (CDP) Opinions Identified<sup>81</sup>**

Court Decision	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Decided for IRS	95%	89%	90%	92%	90%	92%	89%	92%	86%	84%	89%	82%	84%	92%
Decided for Taxpayer	3%	8%	8%	5%	8%	4%	10%	3%	7%	8%	7%	14%	10%	5%
Split Decision	2%	3%	2%	3%	2%	4%	2%	3%	6%	9%	4%	4%	6%	4%
Neither	n/a	n/a	n/a	<1%	n/a	n/a	n/a	1%	<1%	n/a	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.

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

78 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).

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

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

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

### ***First Rock Baptist Church Child Development Center v. Commissioner***

In *First Rock Baptist Church Child Development Center*,<sup>82</sup> the IRS issued a *Notice of Federal Tax Lien (NFTL) and Your Right to a Hearing Under IRC 6320* to the First Rock Baptist Church Child Development Center.<sup>83</sup> The Center had become delinquent in its employment tax liabilities for ten calendar quarters during tax years (TYs) 2007 through 2010. In 2012, the IRS attempted to collect these unpaid liabilities by mailing a NFTL to the correct address with the correct taxpayer identification number (TIN). However, the notice incorrectly showed the addressee as “First Rock Baptist Church,” a separately incorporated church with which the Center was affiliated. The Center and the Church timely requested a CDP hearing and jointly filed a timely petition, chiefly contending that the NFTL should be withdrawn. Upon the Commissioner’s motion, the case was remanded to the IRS Office of Appeals.

On remand, the settlement officer (SO) determined that the lien documentation was ambiguous and that lien withdrawal was appropriate. The SO determined further that the Center’s request for an IA could not be granted because the Center was not in compliance with its ongoing tax return filing obligations. As such, the SO issued a supplemental notice of determination that contained the Center’s correct address and TIN but again incorrectly displayed the addressee as the Church. In response, the Center then sought to dispute its underlying tax liabilities and the rejection of its proposed IA.

The Tax Court held that it had jurisdiction to review the SO’s determination to the extent the SO denied relief requested by the Center for which the notice of determination was issued and which was the subject of the IRS collection action. The Court further held that it did not have jurisdiction over the Church because the Church was not the subject of IRS collection action and never received a notice of determination.

The Court also held that the case was not moot because, notwithstanding the withdrawal of the NFTL, there remained a live case or controversy between the Center and the IRS concerning the correctness of the SO’s determination. On the other hand, the Court held that it could not consider the Center’s challenge to its underlying tax liabilities because the Center did not raise that challenge at the original or supplemental CDP hearing. According to the Tax Court, the SO did not abuse his discretion in denying the Center’s request for an IA because the Center at that time was not in compliance with its ongoing tax return filing obligations.

This case is significant because it gave the Tax Court the opportunity to clarify which types of taxpayers the Tax Court holds jurisdiction over in a CDP case and the circumstances in which a CDP case becomes moot. Additionally, this case emphasizes the importance in raising all relevant issues at the administrative hearing, if the taxpayer desires judicial review of those issues.

### ***Weiss v. Commissioner***

In *Weiss v. Commissioner*, the taxpayer sought review, pursuant to IRC § 6330(d)(1), of the IRS’s determination to uphold a notice of intent to levy.<sup>84</sup> The IRS served the levy notice on the taxpayer, Mr. Weiss, in an effort to collect his unpaid Federal income tax liabilities for TYs 1986, 1987, 1988, 1989, 1990, and 1991.

82 *First Rock Baptist Church Child Development Center v. Comm’r*, 148 T.C. No. 17 (2017).

83 The notice is contained in Letter 3172 – *Notice of Federal Tax Lien Filing and Your Rights to a Hearing under IRC 6320* and notifies the taxpayer the IRS filed a notice of tax lien for unpaid taxes.

84 *Weiss v. Comm’r*, 147 T.C. 179 (2016).

The Revenue Officer (RO) attempted to hand-deliver the levy notice during a field call on February 11, 2009, but was deterred by Mr. Weiss's dog. Two days later, the RO mailed the levy notice by certified mail to the Mr. Weiss's last known address. In doing so, the RO did not generate a new levy notice dated February 13 and enclosed in the envelope the original levy notice dated February 11. Mr. Weiss received the levy notice on February 17, then completed Form 12153 requesting a CDP hearing for the tax years at issue and mailed it to the RO on either March 13 or 14. The RO received Mr. Weiss's Form 12153 on March 16, a Monday.

During the CDP hearing, Mr. Weiss argued that the period of limitations on collection of his tax liabilities had expired. Mr. Weiss asserted he had intentionally filed his request for a CDP hearing one day late, such that he was entitled only to an "equivalent hearing," which would not have suspended the period of limitations on collection. The RO contended that Weiss' request for a CDP hearing was in fact timely because it was filed within 30 days of the date on which the IRS mailed him the levy notice.

The Court found that the RO had looked at appropriate underlying evidence and agreed with the RO's determination as to the date of the mailing. The Court held that the time period for making a CDP request runs from the date the IRS mails the notice and not from the date of the notice. This case clarified for taxpayers that when there is a mismatch between a letter date and a mailing date, the 30-day period prescribed by IRC § 6330(a)(2) and (3)(B) is calculated by reference to the date of mailing.

Several cases discussed below ruled on what constitutes a "prior opportunity to dispute a liability."

### ***Keller Tank Serv. II, Inc. v. Commissioner***

In *Keller Tank Serv. II, Inc.*, the Court of Appeals for the Tenth Circuit upheld the Tax Court's determination of a "prior opportunity to dispute a liability."<sup>85</sup> The Tax Court, in turn, upheld the IRS determination of this phrase in the CDP regulations.

The relevant issue in *Keller* was whether a taxpayer can challenge an assessable tax penalty<sup>86</sup> in a CDP hearing after having previously challenged it in a hearing with the IRS Office of Appeals. The Court of Appeals for the Tenth Circuit held that (1) after protesting a tax penalty at the Appeals, a taxpayer was not permitted to raise the same issue in a CDP hearing; (2) IRC § 6330(c)(2)(B) precluded a taxpayer from challenging the liability at a CDP hearing when the taxpayer was afforded, but failed to take advantage of, a prior opportunity to dispute the liability, and when the Tax Court received an appeal from the CDP hearing, its review was limited to issues that were properly raised during the CDP hearing; and (3) the regulation was entitled to Chevron deference<sup>87</sup> because 6330(c)(2)(B)'s reference to "opportunity to dispute" was ambiguous, and the regulation was a reasonable interpretation of this provision.

Keller participated in an employee benefit plan called the Sterling Benefit Plan ("Plan"), but did not report its participation on its tax return. Because Keller did not report its participation, the IRS alleged

<sup>85</sup> *Keller Tank Serv. II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017).

<sup>86</sup> The taxpayer was assessed an IRC § 6707A penalty for the failure to report a listed transaction.

<sup>87</sup> "Chevron deference" is an important principle in administrative law, established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The case raised the issue of how courts should treat agency interpretations of statutes that mandated that agency to take some action. The Supreme Court held that courts should defer to agency interpretations of such statutes unless they are unreasonable.

Keller's failure to report violated IRC § 6707A.<sup>88</sup> The IRS also claimed that Keller took improper deductions on its income tax returns related to its participation in the Plan, resulting in a deficiency. As a result, Keller faced two parallel proceedings in which the IRS sought (1) a penalty under IRC § 6707A for Keller's failure to report its participation in the Plan, which the IRS considers a listed transaction ("penalty proceeding"); and (2) the income tax deficiency from and resulting penalty for Keller's alleged improper deduction of payments to the Plan ("deficiency proceeding"). This case concerned the first penalty proceeding and Keller's efforts to challenge its liability for the IRC § 6707A penalty.

The IRS sent Keller a final notice of its intent to levy and of Keller's right to a CDP hearing under IRC § 6330. Keller requested a CDP hearing, arguing the penalty was assessed without the opportunity to protest the determination of the underlying transaction. Keller's request was granted, and Keller participated in a phone conference during which Keller's counsel was informed that Keller was precluded from challenging its liability because Appeals had reviewed and sustained the liability. The IRS sent Keller a Notice of Determination, which specified that Keller's only arguments at the CDP hearing attempted to dispute its liability for the penalty despite the fact that Keller was unable to raise the liability within the hearing. Keller filed a petition with the Tax Court to challenge its liability for the penalty.

The Tax Court granted summary judgment to the IRS on June 16, 2015, determining that Keller had been precluded from challenging its underlying liability because Keller was afforded a prior opportunity to dispute its liability in its hearing before the IRS Office of Appeals. Keller then timely appealed the Tax Court's order to the Court of Appeals for the Tenth Circuit. The Court of Appeals applied the two-step Chevron test and concluded, as the Tax Court did in the past, that IRC § 6330(c)(2)(B)'s reference to a prior "opportunity to dispute" is ambiguous and that Treasury Regulation § 301.6330-1 is a reasonable interpretation of IRC § 6330(c)(2)(B). Thus, the decision of the Tax Court was affirmed.

*Keller* removes any opportunity for some taxpayers to obtain judicial review of an IRC § 6707A penalty determination by the IRS before paying the penalty and suing for a refund in district court or in the Court of Federal Claims under IRC § 7422. Those who cannot afford to pay are effectively denied any judicial review of the IRS's penalty determination.<sup>89</sup>

This case is an important precedent demonstrating what would be considered a "prior opportunity" for a conference with Appeals in a non-deficiency context that would preclude the taxpayer from challenging the underlying liability in a subsequent CDP hearing. The court's insistence in *Keller* that the Tax Court is unavailable as a prepayment forum to challenge asserted impositions of the IRC § 6707A penalty undoubtedly will be of continued significance.

88 The IRC § 6707A penalty is an assessable penalty and is not subject to a deficiency proceeding. The taxpayer would have to pay the penalty and file a suit for refund in a federal district court or the Court of Federal Claims.

89 Notably, there is no indication that Congress intended that IRC § 6707A penalties would not be subject to judicial review in a pre-payment forum. For further discussion of this issue, see, e.g., Elliot Pisem, *Tax Court Decisions on Section 6707A Penalty Deny Prepayment Forum and Extend Statute of Limitations* (Mar. 1, 2010), <http://www.robertsandholland.com/siteFiles/News/542article.pdf>. The National Taxpayer Advocate has highlighted the unfair and extreme results this penalty can produce and has recommended changes. See, e.g., National Taxpayer Advocate 2008 Annual Report to Congress, vol. 2, 21-24; National Taxpayer Advocate 2008 Annual Report to Congress 419, 422. Congress subsequently revised the penalty to be 75 percent of the decrease in tax resulting from the transaction, except that it could not be less than \$5,000 for individuals or \$10,000 for entities, or more than \$100,000 for individuals or \$200,000 for entities. See Small Business Jobs Act of 2010, Pub. L. No. 111-240, Title II, §2041(a), 124 Stat. 2506, 2560 (2010). The IRS cited the National Taxpayer Advocate's Annual Report to Congress in its regulations implementing these changes. See Internal Revenue Bulletin: 2015-37, *Notice of Proposed Rulemaking Reportable Transactions Penalties under Section 6707A* (Sep. 14, 2015).

### **James v. Commissioner**

The Court of Appeals for the Fourth Circuit, in *James v. Commissioner*,<sup>90</sup> reached the same conclusion as the Court of Appeals for the Tenth Circuit did in *Keller Tank Serv. II, Inc. v. Commissioner* in validating the Treasury regulation as a reasonable interpretation of the statute. The taxpayer, Mr. James, unsuccessfully challenged his liability in a preassessment hearing before Appeals, and then later sought to raise the same issue before the same administrative unit in his collection due process (CDP) hearing. The IRS Office of Appeals concluded that IRC § 6330 prohibited him from disputing his liability a second time, and the Tax Court agreed.

The court held that Mr. James was afforded a meaningful opportunity to challenge the imposition and amount of the reporting penalty<sup>91</sup> at the preassessment hearing before the Office of Appeals. The court determined that this was sufficient under IRC § 6330(c)(2)(B). The court also held that IRC § 6330(c)(4) barred the taxpayer from challenging his liability in the CDP context. Therefore, the court concluded that the IRS was entitled to judgment as a matter of law, and the court affirmed the Tax Court's judgment. Judge Wilkinson's decision not only supported the position of the IRS based on IRC § 6330(c)(2)(B), but also the government's secondary argument under IRC § 6330(c)(4) which the Circuit Court of Appeals for the 10th Circuit did not reach in *Keller*.<sup>92</sup>

This case is noteworthy, albeit reaching the same conclusion about what constitutes a "prior opportunity to dispute a liability," because it solidifies the interpretation of IRC § 6330(c)(2)(B) in the regulations.<sup>93</sup>

### **Bitter v. Commissioner**

In *Bitter v. Commissioner*,<sup>94</sup> Mr. Bitter sought review, pursuant to IRC § 6330(d)(1), of the determination by the IRS to uphold a notice of intent to levy. For TYs 2004, 2005, and 2006, the IRS assessed penalties under IRC § 6707A for failure to disclose his participation in a reportable transaction on his tax returns. In an effort to collect these unpaid liabilities, the IRS on July 3, 2014, sent Mr. Bitter a *Letter 1058, Notice of Intent to Levy and Your Right to a Hearing*. Mr. Bitter timely requested a CDP hearing.

Before the CDP hearing, Mr. Bitter's representative submitted a letter stating that Mr. Bitter wished to administratively contest the penalties in the hearing and urged that the penalties be abated in whole or in part. By doing so, he was repeating the arguments he had advanced at the prior Appeals conference. The sole issue for decision was whether Mr. Bitter was barred from raising at the CDP hearing his liability for these penalties because he had been provided and availed himself of, a prior opportunity to challenge the penalties at an earlier conference with Appeals.

A taxpayer may raise a CDP challenge to the existence or amount of his underlying tax liability only if he did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability. As discussed above, in determining whether the taxpayer had

90 *James v. Comm'r*, 850 F.3d 160 (4th Cir. 2017) (finding the regulation to be a straightforward interpretation of section 6330(c)(2)(B)).

91 The IRS assessed the IRC § 6707A penalty against the taxpayer.

92 IRC § 6330(c)(2)(B) concerns liability challenges that a taxpayer had a chance to raise while IRC § 6330(c)(4) applies to all issues that were actually disputed.

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

94 *Bitter v. Comm'r*, T.C. Memo. 2017-46.



a prior opportunity to dispute his liability, the regulations distinguish between liabilities that are subject to deficiency procedures and those that are not.<sup>95</sup>

As assessable penalties, IRC § 6707A penalties are not subject to deficiency procedures.<sup>96</sup>

Notwithstanding the absence of a notice of deficiency, a taxpayer may be able to dispute his liability for such penalties, without paying them first by resisting IRS collection efforts through the CDP process and then seeking review by the Tax Court. A taxpayer is entitled to challenge his underlying liability for IRC § 6707A only if he did not have a prior opportunity to dispute it. For these purposes, a prior opportunity includes “a prior opportunity for a conference with Appeals.”<sup>97</sup> However, there are certain issues and cases where Appeals may defer action or decline to settle.<sup>98</sup>

*Bitter* is a noteworthy case because it takes recent developments in circuit courts and consolidates them into a clarifying Tax Court opinion on CDP cases involving IRC § 6707A penalties. Citing the two recent and relevant Fourth and Tenth Circuit decisions *James v. Commissioner*<sup>99</sup> and *Keller Tank Servs. II, Inc. v. Commissioner*<sup>100</sup> on the same issue, the Tax Court sustained the validity of this regulation even though the taxpayer had no right to judicial review of the prior Appeals’ determination. The SO concluded that *Bitter* could not challenge his liability for the penalties because Mr. *Bitter* had had a prior opportunity to do so, an opportunity of which he had taken advantage by filing his July 2012 protest with the IRS Office of Appeals. The Tax Court agreed with the IRS and sustained the proposed collection action.

## 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.

95 Although the statute does not define the term, “opportunity to dispute,” the IRS has interpreted it to include “a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability.” Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330-1(e)(3), Q&A-E2. The National Taxpayer Advocate is concerned about the rule’s harmful effect on low income taxpayers. See, e.g., 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), [https://www.americanbar.org/content/dam/aba/publishing/tax\\_lawyer/633/2\\_Olson.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/tax_lawyer/633/2_Olson.authcheckdam.pdf). The National Taxpayer Advocate maintained “I remain unconvinced that there is no constitutionally protected interest in a pre-deprivation hearing in tax administration today, given that increasing automation heightens the risk that the government will make an erroneous determination and in light of the expansion of the tax filing population since *Bull v. United States*, or even *Bob Jones University v. Simon*, to include very low income taxpayers who do not have the means to challenge government error in post-deprivation hearings.” *Id.* at 233, n. 24.

96 An assessable penalty must be paid upon notice and demand and assessed and collected in the same manner as taxes. For further discussion about the distinction between assessable and non-assessable penalties, see Toni Robinson and Mary Ferrari, *Congress Eases a Penalty, but Squanders Reform Opportunity*, 2011 TNT 13-7 (Jan. 17, 2011).

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

98 See, e.g., IRM 8.1.1.2.1, *Some Exceptions to Appeals Authority*, (Feb. 10, 2012); IRM 8.1.1.3.1, *No Appeals Conference or Concession on Certain Arguments*, (Feb. 10, 2012).

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

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

The *First Rock Baptist Church Child Development Center* decision illustrates the importance of the taxpayer's *right to be informed* and *right to a fair and just tax system*.<sup>101</sup> The opinion provided the Tax Court the chance to clarify procedural issues regarding CDP hearings by holding that it does not have jurisdiction over those that were not the subject of an IRS collection action and that withdrawing the NFTL does not render the case moot as there still exists an underlying live case or controversy. Additionally, this case highlights the importance of taxpayers raising all relevant issues at the administrative hearing, assuming the taxpayer would like judicial review of those issues. With these clarifications, taxpayers are provided with a better opportunity and understanding of the procedure dictating CDP hearings.

The *Weiss* decision illustrates the importance of the taxpayer's *right to be informed*, *right to challenge the IRS's position and be heard*, and *right to a fair and just tax system*.<sup>102</sup> The decision once again clarifies for taxpayers that the time period for making a CDP request runs from the date the IRS mails the notice and not from the date of the notice. While the case's holding is not necessarily surprising, the Tax Court takes the opportunity to clarify what taxpayers should expect when the date on the CDP notice is earlier than the date on which the letter was mailed.<sup>103</sup>

In a series of decisions, several Circuit Courts of Appeals and the Tax Court addressed the issue of a prior opportunity to challenge the liabilities as applicable to assessable penalties, such as a IRC § 6707A penalty.<sup>104</sup> It is important to note that in all cases the courts upheld the relevant Treasury regulation and held that a prior opportunity to contest an assessable penalty with the IRS Office of Appeals precludes the taxpayers from challenging the liability during a subsequent CDP hearing.

This line of cases shows the problems with strict liability and assessable penalties. What makes the IRC § 6707A strict liability penalty particularly troubling is that in the absence of Tax Court jurisdiction in a deficiency proceeding, there is almost a total lack of judicial oversight in imposing the penalty. If taxpayers cannot afford to make these payments, they may not be able to obtain judicial review of the issues at all. These decisions are crucial to taxpayers' *right to be informed*, *right to challenge the IRS's position and be heard*, and *right to a fair and just tax system*.

In sum, the CDP hearing is a powerful tool for taxpayers. However, there is much room for improvement. Genuine two-way communication, rather than the IRS resorting to telephonic conferences and boilerplate letters, is crucial to a fair and just tax system. Until IRC § 6707A penalties can be litigated in Tax Court, taxpayers must raise all relevant issues at the administrative hearing, if the taxpayer wants judicial review of those issues. 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. However, restricting the ability of taxpayers in obtaining face-to-face conferences reduces Appeals' effectiveness and runs counter to its mission of achieving fair and equitable negotiated settlements. Appeals can reduce litigation in this area by making a commitment to deliver

101 *First Rock Baptist Church Child Development Center v. Comm'r*, 148 T.C. No. 17 (2017).

102 *Weiss v. Comm'r*, 147 T.C. 179 (2016).

103 The National Taxpayer Advocate is concerned the Tax Court's position on this issue perpetuates an IRS practice that creates confusion for many taxpayers. Accordingly, the National Taxpayer Advocate is proposing a legislative recommendation to mitigate this harm. See 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*, *supra*.

104 See *Our Country Home Enterprises, Inc. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017); *Keller Tank Serv. II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017); *James v. Comm'r*, 850 F.3d 160 (4th Cir. 2017); and *Bitter v. Comm'r*, T.C. Memo. 2017-46.

substantive determinations in CDP cases, to provide reasonable justifications for any actions that could be considered abuses of discretion, and to take better account of all facts and circumstances.

*Weiss* demonstrated that taxpayers may face unfair treatment in dealing with mailing dates in the CDP regime. The onus is on taxpayers, and not the IRS, to keep track of when the 30-day period begins, namely, the requirement in § 6330(a)(2) and (3)(B) that the taxpayer petition the Tax Court within 30 days of the IRS notice of levy. Because the Tax Court has held that the critical date is the date the notice of determination is mailed rather than when the letter is dated, taxpayers and practitioners are well-advised to be cognizant of these nuances and use opportunities to challenge these results. After the *Our Country Home*, *Keller, James*, and *Bitter* opinions, taxpayers are now on notice of what to expect if they want to litigate the merits of an IRC § 6707A penalty in a CDP case. The Tax Court has clarified that a preassessment hearing before the Office of Appeals will be considered a “prior opportunity to dispute a liability.” Taxpayers will indeed continue to argue that the regulation goes too far by preventing taxpayers, who can only obtain review from Appeals, from raising the merits of the underlying liability in a CDP case. As a strict liability penalty, the IRC § 6707A penalty does not have a reasonable cause provision to allow the IRS to rescind the penalty for taxpayers who mistakenly fail to file a transaction later deemed a listed transaction. Even if a court determines that the underlying transaction is not abusive, the penalty still applies. As these and other inequities are revealed, and the CDP rules continue to evolve, taxpayers are urged to stay abreast of changes within the CDP regime.