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

## SUMMARY

A Collection Due Process (CDP) hearing is an opportunity for a taxpayer to have an independent and meaningful review by the IRS Office of Appeals (Appeals) prior to the IRS's first levy or immediately after its first Notice of Federal Tax Lien (NFTL) filing to enforce a tax liability.<sup>1</sup> 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 that determination if the taxpayer timely requests a CDP hearing and timely petitions the U.S. Tax Court.<sup>3</sup> Generally, the IRS suspends levy actions during a levy hearing and any subsequent judicial review of the Appeals determination that follows the hearing.<sup>4</sup>

CDP has been one of the federal tax issues most frequently litigated in the federal courts since 2001; however, only a small fraction of eligible taxpayers exercise their right to an administrative hearing, and far fewer taxpayers petition the Tax Court to review their case. Between 2003 and 2019, only 1.44 percent of the taxpayers who received a CDP notice requested an administrative hearing (*i.e.*, 426,484 out of 29,614,768) and only 0.08 percent filed a petition in Tax Court (*i.e.*, 24,690 out of 30,726,471).

Our review of litigated issues found 80 opinions on CDP cases during the review period of June 1, 2018, through May 31, 2019, which is an increase of about eight percent since last year's report.<sup>5</sup> Taxpayers prevailed in full in four of these cases (five percent) and, in part, in two others (about three percent). The eight percent success rate for the taxpayers is lower than last year. Of the six 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 two were represented by an attorney or other court-approved professional. 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

1 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998). Prior to RRA 98, the U.S. Supreme Court had held that a post-deprivation hearing satisfied due process concerns in the tax collection arena. See *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 726-31 (1985); *Phillips v. Comm'r*, 283 U.S. 589, 595-601 (1931).

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 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 2 in Appendix 5, Most Litigated Issues Case Tables, *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).

suggest.<sup>7</sup> The IRS prevailed fully in 74 cases (about 93 percent) of the opinions, an increase from the 88 percent success rate last year.<sup>8</sup>

## TAXPAYER RIGHTS IMPACTED<sup>9</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 when the IRS proposes a levy action or after it files an NFTL.<sup>10</sup> 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>11</sup> The hearing allows taxpayers to raise issues related to collection of the liability, including:

- The appropriateness of collection actions;<sup>12</sup>
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), a bond posting, or substitution of other assets;<sup>13</sup>
- Appropriate spousal defenses;<sup>14</sup>
- A challenge of 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>15</sup> and
- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.<sup>16</sup>

A taxpayer cannot raise an issue already raised and considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.<sup>17</sup>

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

8 National Taxpayer Advocate 2018 Annual Report to Congress 488-508 (Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

9 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 also codified in the Internal Revenue Code. See IRC § 7803(a)(3).

10 IRC §§ 6320 and 6330.

11 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.

12 IRC § 6330(c)(2)(A)(ii).

13 IRC § 6330(c)(2)(A)(iii).

14 IRC § 6330(c)(2)(A)(i).

15 IRC § 6330(c)(2)(B).

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

17 IRC § 6330(c)(4).

### Procedural Collection Due Process Requirements

The IRS must provide a CDP notice to the taxpayer indicating the specific tax and tax period after filing the first NFTL and generally before the first intended levy is issued.<sup>18</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>19</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>20</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>21</sup>

### Requesting a Collection Due Process Hearing

Under both lien and levy procedures, the taxpayer must return a signed and dated written request for a CDP hearing, including the reasons for requesting a hearing, within the applicable period.<sup>22</sup> Taxpayers who fail to timely request a CDP hearing will be afforded an “equivalent hearing” that is similar to a CDP hearing, but there is no judicial review of an adverse determination.<sup>23</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>24</sup>

### How a Collection Due Process 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>25</sup> A taxpayer can request that the hearing be in-person; however, courts have ruled that a CDP hearing need not be in-person but can take place

18 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.”

19 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.

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

21 *Id.*

22 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). 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, Request for Collection Due Process or Equivalent Hearing (Dec. 2013); Internal Revenue Manual (IRM) 8.6.1.5.1, Conference Practice (Sept. 25, 2019).

23 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, 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).

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

25 IRC § 6320(b)(4).

by telephone or correspondence,<sup>26</sup> and Appeals will typically conduct the hearing by telephone unless the taxpayer requests an in-person conference and provides non-frivolous reasons for opposing the IRS collection action.<sup>27</sup>

The CDP hearing is to be held by an impartial officer from Appeals who has had “no prior involvement” and who is barred from engaging in *ex parte*<sup>28</sup> communications with IRS employees about the substance of the case.<sup>29</sup> In addition to addressing the issues raised by the taxpayer, the Appeals Officer (AO) must verify that the IRS has met the requirements of all applicable laws and administrative procedures.<sup>30</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>31</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>32</sup>

### Judicial Review of an IRS Determination After a Collection Due Process Hearing

Within 30 days of Appeals’ determination, the taxpayer may petition the Tax Court for judicial review;<sup>33</sup> however, if the petition is filed even one day late, the Tax Court will not have jurisdiction to review the IRS’s determination.<sup>34</sup> The court will only consider issues, including challenges to the

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- 26 *Katz v. Comm’r*, 115 T.C. 329, 337-38 (2000) (finding that telephone conversations between the taxpayer and the 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).
- 27 Under IRM 8.6.1.4.1, Conference Practice (Oct. 1, 2016), the default rule is to hold conferences by telephone, and to offer virtual conferences as an alternative to in-person conferences. Appeals may be able to accommodate a taxpayer’s request for an in-person hearing in a field office, however Appeals campus locations cannot accommodate in-person conferences. See IRS, Interim Guidance on Appeals Conference Procedures, AP-08-1017-0017 (Oct. 13, 2017). A taxpayer will not be granted an in-person conference concerning a collection alternative, such as an IA or OIC, unless other taxpayers would be eligible for the alternative under similar circumstances. For example, the IRS will not grant an in-person 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. See Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(8).
- 28 Rev. Proc. 2012-18, 2012-1 C.B. 455 § 2.01 defines *ex parte* communication as “a communication that takes place between any Appeals employee (e.g., Appeals Officers, Settlement Officers, Appeals Team Case Leaders, Appeals Tax Computation Specialists) and employees of other IRS functions, without the taxpayer/representative being given an opportunity to participate in the communication. The term includes all forms of communication, oral or written. Written communications include those that are manually or electronically generated.”
- 29 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.
- 30 IRC § 6330(c)(1); *Hoyle v. Comm’r*, 131 T.C. 197 (2008); *Talbot v. Comm’r*, T.C. Memo. 2016-191 (2016).
- 31 IRC § 6330(c)(3)(C); IRM 8.22.4.2.2, Summary of CDP Process (Aug. 9, 2017). 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. 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).
- 32 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).
- 33 IRC § 6330(d)(1).
- 34 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).

underlying liability, that were properly raised during the CDP hearing.<sup>35</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>36</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>37</sup> When the case is remanded to Appeals, the Tax Court retains jurisdiction.<sup>38</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>39</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>40</sup> basis, and the scope of its review extends to evidence introduced at the trial that was not a part of the administrative record.<sup>41</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>42</sup>

Special rules apply to the IRS's handling of hearing requests that raise frivolous issues. Internal Revenue Code (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>43</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>44</sup> A request is subject to a penalty if any part of it "(i) is based on a position that the Secretary has identified as frivolous ... or (ii) reflects a desire to delay or impede the administration of Federal tax laws."<sup>45</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

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

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

37 *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).

38 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 BLOG (Oct. 9, 2018), <http://procedurallytaxing.com/for-irs-appeals-office-an-epidemic-of-remands/>.

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

40 Under a *de novo* standard of review, the Tax Court will consider all relevant evidence introduced at trial. *Jordan v. Comm'r*, 134 T.C. 1, 8 (2010).

41 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).

42 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).

43 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 provided the first published list of frivolous positions. Notice 2010-33, 2010-17 C.B. 609, contains the current list.

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

45 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).

frivolous position under IRC § 6702(b)(2)(A) and issued a notice stating that Appeals will disregard the request.<sup>46</sup> If IRS Counsel's review reveals that a CDP hearing was properly denied under IRC § 6330(g), Counsel will file an appropriate motion with the Court to resolve the case through a dismissal or summary judgment. If the Tax Court determines that a hearing was improperly denied, IRS Counsel will request a remand to Appeals. Counsel will also consider filing a motion to permit levy so that the Service can immediately levy after the Tax Court's order.<sup>47</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>48</sup> However, in cases appealable to the other U.S. Courts of Appeals that have yet to address that precise issue in a precedential opinion, the court may consider new evidence not contained in the administrative record.<sup>49</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>50</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>51</sup> For example, an IRC § 6707A penalty<sup>52</sup> is an assessable penalty not subject to deficiency procedures.<sup>53</sup>

46 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 481, 489 (Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

47 IRS Chief Counsel Notice CC-2016-008, Disregarding Frivolous CDP Hearing Requests Under Section 6330(g) (Apr. 4, 2016).

48 See *Kasper v. Comm’r*, 150 T.C. No. 2 at 19 n.13 (2018); see also *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).

49 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.

50 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).

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

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

53 The Tax Court 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. See *Bitter v. Comm’r*, T.C. Memo. 2017-46. The *Bitter* determination was a culmination of similar developments in circuit court decisions on the same issue. See *Iames v. Comm’r*, 850 F.3d 160 (4th Cir. 2017); *Keller Tank Serv. II, Inc. v. Comm’r*, 854 F.3d 1178 (10th Cir. 2017); *Our Country Home Enterprises, Inc. v. Comm’r*, 855 F.3d 773 (7th Cir. 2017).



### Appellate Venue From Decisions of the Tax Court

Under the rule established in *Golsen v. Commissioner*,<sup>54</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. 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).<sup>55</sup>

## ANALYSIS OF LITIGATED CASES

We identified and reviewed 80 CDP court opinions, an increase of about eight percent from the 74 published opinions in last year's report. During 12 out of the last 16 years, the number of requests for IRS CDP hearings has risen and fallen consistent with the number of CDP notices the IRS mails to taxpayers each year. The number of petitions for judicial review in the Tax Court has followed a similar trend during ten out of the last 16 years. This year, the number of petitions decreased by five percent while the IRS issued 11 percent more notices than it did last year. Notably, only a small fraction of taxpayers exercise their right to request an administrative hearing or petition for judicial review. Fewer than one in 50 taxpayers who received a CDP notice requested an administrative hearing, and fewer than one in 800 filed a petition in Tax Court. This could be an indication that taxpayers aren't reading CDP notices or that they don't understand how to respond to them or exercise their rights as taxpayers. Figure 2.2.1 depicts these trends.

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

55 According to the ruling in *Byers v. Comm'r*, the correct venue for appeals from the Tax Court in cases filed before December 18, 2015 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. *Byers*, 740 F. 3d 668 (D.C. Cir. 2014). In 2015, Congress amended IRC § 7482 to overturn *Byers*. Pub. L. No. 114-113, Div. Q, Title IV, § 423(a), (b) (2015). The National Taxpayer Advocate recommended this precise legislative change. See 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*). 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*).

**FIGURE 2.2.1**

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

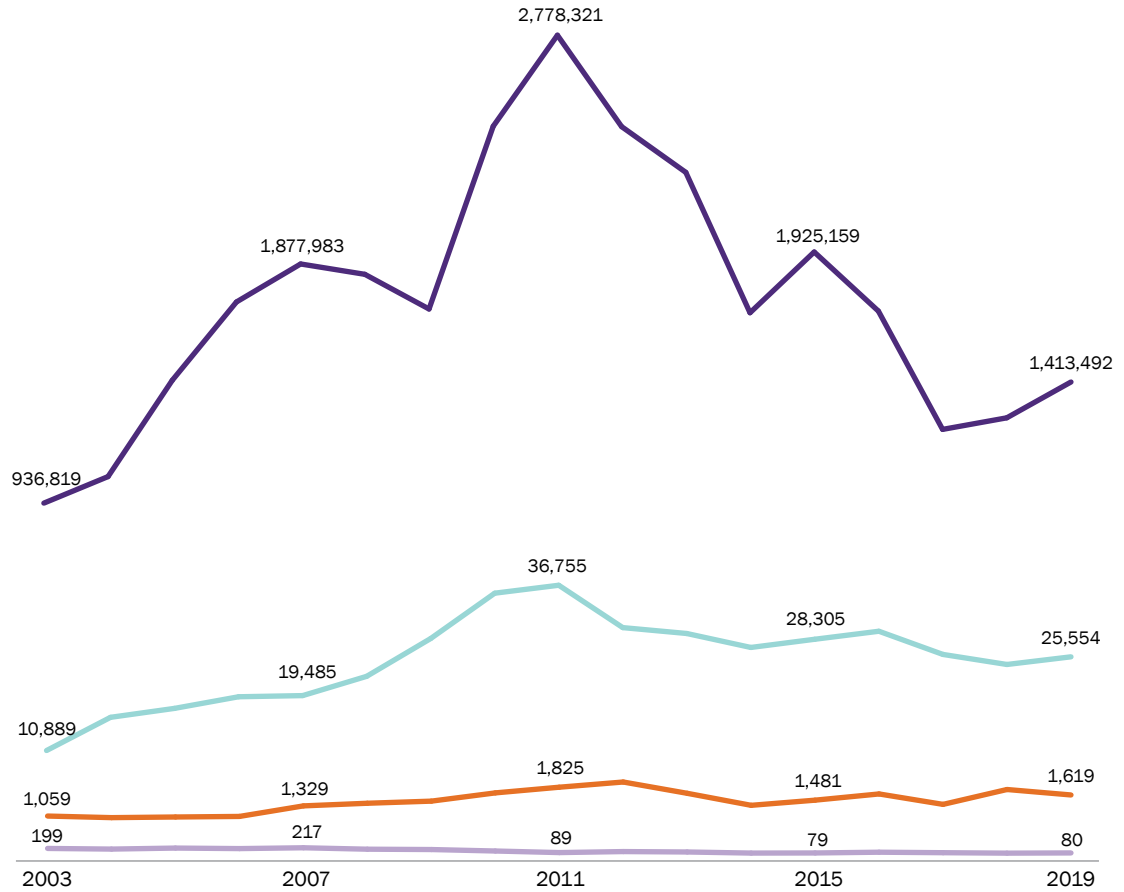
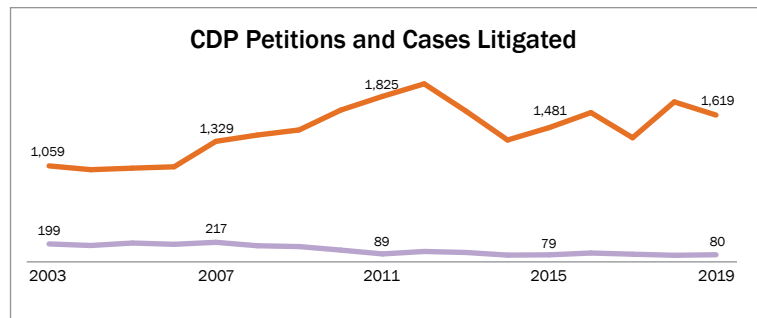


Figure is not to exact scale

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





The 80 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>56</sup> Some are resolved through settlements, and in other cases, taxpayers do not pursue litigation after filing a petition with the court.<sup>57</sup> The Tax Court also disposes of some cases by issuing unpublished orders.<sup>58</sup> Table 2 in Appendix 5 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.

### *Kearse v. Commissioner*

In *Kearse v. Commissioner*,<sup>59</sup> the taxpayer sought review, pursuant to IRC §§ 6320(c) and 6330(d)(1), of the IRS's determination to uphold an NFTL filing. Mr. Kearse is a retired professional athlete who played in the National Football League from 1999 to 2010. His liability stems from an IRS determination rejecting a \$1,359,000 deduction he claimed on his Form 1040, U.S. Individual Income Tax Return, in 2010 for a "business bad debt expense."<sup>60</sup> On May 11, 2012, the IRS issued a notice of deficiency to the Kearse's last known address. The taxpayer contended that the IRS failed to properly mail the notice of deficiency. Both parties stipulated that the IRS could not provide United States Postal Service (USPS) Form 3877 to prove the notice was properly mailed.

On November 4, 2012, the IRS filed an NFTL for the 2010 tax liability and sent Kearse a Letter 3172, Notice of Federal Tax Lien and Filing and Your Right to a Hearing.<sup>61</sup> In response, Kearse timely submitted a CDP hearing request, Form 12153, Request for a Collection Due Process or Equivalent Hearing, and an OIC request, Form 656-L, Offer in Compromise (Doubt as to Liability). In his OIC request, he offered to pay \$1 and attached a document disputing the proper mailing of the notice. At the CDP hearing, Kearse's authorized representative raised his underlying tax liability and alleged that the notice of deficiency was not properly mailed. The AO sent Kearse a Notice of Determination stating that the requirements of applicable law or administrative procedures had been met and the actions taken were appropriate under the circumstances and sustained the NFTL. Kearse timely filed a petition with the Tax Court for review of the notice of determination.

The Tax Court held that the AO failed to accurately verify that a properly mailed notice preceded the taxpayer's assessment as mandated by IRC § 6330(c).<sup>62</sup> If the defaulted notice of deficiency is the basis for the assessment, an AO must verify that the notice of deficiency was properly mailed to the taxpayer before the assessment.<sup>63</sup> The court rejected the AO's reliance on the IRS's Integrated Data Retrieval

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

57 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).

58 The statistics analyzing the number of litigated cases exclude Tax Court summary judgments and bench orders, which are unpublished; however, Appendix 5, Tables 11 and 12 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 IRC § 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*.

59 T.C. Memo. 2019-53.

60 During the CDP process and in Tax Court the taxpayer asserted that he had not suffered a business bad debt loss but rather a theft loss of \$1,679,500.

61 IRC § 6320.

62 IRC § 6320(c).

63 IRM 8.22.5.4.2, Legal and Administrative (L & A) Procedure Review (Mar. 29, 2012); 8.22.5.4.2.1.1, Statutory Notice of Deficiency (SNOD) (Nov. 8, 2013).

System to verify that the notice was issued per the IRS guidance.<sup>64</sup> When a taxpayer claims a notice was not properly mailed, the AO must review a copy of the notice of deficiency and the USPS Form 3877 or the equivalent IRS certified mail list bearing a USPS date stamp or the initials of a postal employee.<sup>65</sup> The AO acknowledged that she did not secure and review either of these documents before the notice of determination was issued.<sup>66</sup> The court concluded that the AO failed to verify that all procedural requirements were met before sustaining the NFTL and thus abused her discretion.

### *Gregory v. Commissioner*<sup>67</sup>

In *Gregory v. Commissioner*, the taxpayer also challenged the validity of the assessment during the CDP hearing, but the IRS did not make a stipulation as to proof of the mailing, and the Tax Court upheld the IRS AO's determination.<sup>68</sup> The IRS mailed the NFTL to the taxpayer on January 28, 2014, and the taxpayer requested a CDP hearing one month later. IRS Appeals issued a notice of determination sustaining the NFTL in December 2015. The taxpayer's argument challenging the validity of the assessment was four-fold.

First, the taxpayer claimed the IRS did not create a notice of deficiency because the administrative file did not contain a copy of the actual notice that was mailed. The Court rejected the claim holding that even if the reprint does not qualify as a duplicate, it can still serve as evidence that the IRS prepared a notice of deficiency.<sup>69</sup>

Second, regarding the taxpayer's challenge as to the mailing of the notice, the Court agreed that the IRS had provided a certified mail list it maintains that associates a certified mail number with the notice and thus provides evidence that the notice was not only created but also mailed.<sup>70</sup> The taxpayer also objected to the IRS's use of a certified mail list in place of USPS Form 3877, but the Tax Court held that it was equivalent evidence of proper mailing of a notice of deficiency for his 2009 taxable year because Gregory did not identify any information missing from the IRS's certified mail list that would be included on a USPS Form 3877.

Third, the taxpayer challenged the validity of the assessment claiming the reprint lacked some of the elements described in Internal Revenue Manual (IRM) 4.8.9.2. However, the Tax Court noted that it is immaterial that the IRM defines the term "notice of deficiency" to consist of elements beyond those required by case law. Specifically, a notice of deficiency is adequate if it notifies the taxpayer of the Commissioner's intent to assess a deficiency and gives him the opportunity to petition the Tax Court for redetermination.

64 IRC § 6330(c)(1); IRM 8.22.5.4.2.1.1 (Nov. 8, 2013).

65 IRM 8.22.5.4.2.1.1(6) (Nov. 8, 2013).

66 It should be noted that the IRS was eventually able to produce USPS Form 3877, verifying that the notice of deficiency was properly mailed to Kears. However, both parties had previously stipulated that the IRS could not produce the document. Stipulations are treated as conclusive admissions, which the Court will not allow a party to alter or contradict, unless in extraordinary circumstances. The IRS also did not challenge or ask to be released from the stipulation, so the Court maintained the stipulation. *Kearse v. Comm'r*, T.C. Memo. 2019-53 (citing *Winter v. Comm'r*, T.C. Memo. 2010-287, at 10).

67 *Gregory v. Comm'r*, T.C. Memo. 2018-192, *appeal dismissed*, 2019 WL 4184071 (9th Cir. June 21, 2019).

68 *Id.*

69 Because the information shown on the reprint was included in the IRS's database, the Court could infer that it was created in accordance with customary practice.

70 By the time of the taxpayer's CDP hearing in March 2015, however, that certified mail number could not have been used to track a notice of deficiency mailed on November 13, 2012, because the Postal Service stores tracking information on items sent by certified mail for no more than two years.

Lastly, the taxpayer challenged the validity of the assessment as lacking the signature of an authorized individual. The notice was signed by a technical services territory manager in the Small Business/Self-Employed (SB/SE) division of the IRS. The Tax Court followed the ruling in *Muncy v. Commissioner*<sup>71</sup> that accepted Delegation Order 4-8, IRM 1.2.43.9 (Sept. 4, 2012), as documentation that SB/SE technical services territory managers have authority to issue notices of deficiency.

Ultimately, having rejected each of the taxpayer's challenges to the validity of the assessment the Tax Court concluded that the AO properly sustained the NFTL.

### *Loveland v. Commissioner*<sup>72</sup>

In *Loveland v. Commissioner*, a married couple stopped paying their taxes after suffering a series of health issues and losing their home to foreclosure during a recession.<sup>73</sup> In 2015, the IRS issued a notice of intent to levy for their outstanding tax liabilities for taxable years 2011-2014 in an amount over \$60,000. During negotiations with a revenue officer, the taxpayers discussed an OIC based on doubt as to collectibility with "special circumstances." The IRS rejected the OIC stating that based on the financial information provided, the taxpayers could pay the full amount, and that their "special circumstances" did not warrant accepting the OIC.

The taxpayers tried to borrow money to make a large payment to bring their liability below \$50,000, qualifying them for a streamlined installment agreement processing. However, on the same day the taxpayers submitted their loan application, the IRS filed an NFTL. As a result, the taxpayers were unable to obtain a loan. The taxpayers timely requested a CDP hearing with the IRS Office of Appeals, asking for release of the lien and claiming that it derailed a mortgage refinance and caused economic hardship. The IRS AO sent the taxpayers a letter scheduling their hearing and informing them of the necessary documents to submit for a collection alternative to be considered. In response, the taxpayers sent a letter containing several documents, including Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and requested the AO revisit the OIC, consider an installment agreement, and consider their economic hardship and exceptional circumstances.

During the hearing, the AO rejected the taxpayers' proposed installment agreement and did not consider the taxpayers' financial information. The AO sent a notice of determination to the taxpayers and refused to release the lien, stating incorrectly that the couple had not provided the necessary financial documents.

The taxpayers filed a petition in the Tax Court for review of the decision to sustain the lien. They contended that the determination caused economic hardship and violated their due process rights, and that the AO did not genuinely consider their special circumstances. They provided the financial information that they had previously submitted and cited to regulations that allowed the IRS to present alternatives for taxpayers whose disabilities limit their ability to pay.

The Tax Court held that meeting with a revenue officer did not constitute a previous administrative proceeding under IRC § 6330(c)(4)(A)(i) and Treas. Reg. § 301.63201(e)(1) because the taxpayers only negotiated with the IRS revenue officer and did not have a CDP hearing regarding her rejection of their OIC. Thus, they could request consideration of the same OIC in a subsequent CDP hearing on the same

71 T.C. Memo. 2017-83.

72 *Loveland v. Comm'r*, 151 T.C. 78 (2018).

73 Mr. Loveland is a retired boilermaker, and Mrs. Loveland is a retired teacher.

tax liabilities for the same tax periods. The court held that the AO's refusal to consider the proposed OIC, failure to consider a proposed installment agreement on a false premise that taxpayers did not provide any financial information, and failure to consider taxpayers' claim of economic hardship was an abuse of discretion. The court remanded the case to Appeals for further consideration.

### *Romano-Murphy v. Commissioner*

In *Romano-Murphy v. Commissioner*, the IRS sent the Chief Operating Officer of a nurse-staffing company, Ms. Romano-Murphy, a Letter 1153, Trust Fund Penalty Recovery Letter, to propose a trust fund recovery penalty (TFRP) under IRC § 6672(a) for the failure to pay employment taxes withheld from employees' wages of Nurses PRN, LLC.<sup>74</sup> Ms. Romano-Murphy filed a timely protest of the proposed assessment and requested "a conference to discuss the supporting documents contained with her formal written protest." The IRS did not make a final administrative determination regarding her protest and instead assessed the TFRP and proceeded with collection actions such as issuing a notice of proposed levy and filing of an NFTL. The taxpayer timely requested a CDP hearing with the IRS Office of Appeals. At the hearing she challenged her liability for the penalty. The Office of Appeals determined that she was liable for the penalty and sustained the proposed levy and the filing of the notice of lien.

The Tax Court determined that the IRS was not required to make a final administrative determination regarding her protest before assessing the TFRP and upheld Appeals' determination.<sup>75</sup> The taxpayer appealed the Tax Court's decision to the U.S. Court of Appeals for the Eleventh Circuit arguing the IRS failed to provide her with a pre-assessment determination following her response to Letter 1153.<sup>76</sup> The IRS argued that IRC § 6672(b)(3) does not confer a right to a pre-assessment hearing or a pre-assessment final administrative determination; instead, it extends the period for the IRS to assess the penalty.<sup>77</sup> The Eleventh Circuit held that the IRS improperly assessed the penalty because IRC § 6672(b)(3)(B) and Treasury regulations required the IRS to make a final administrative determination before assessing the penalty, and that requirement was one of the "requirements of applicable law or administrative procedure," compliance with which had to be verified under IRC § 6330(c)(1).<sup>78</sup> The Eleventh Circuit remanded the case back to the Tax Court to determine what corrective action should be taken to remedy the IRS's violation of this requirement.<sup>79</sup>

On remand, the Tax Court held that the TFRP assessment was invalid and that the Office of Appeals abused its discretion in upholding the proposed levy and the filing of the NFTL to collect the assessment without first making a final decision on the protest.<sup>80</sup> The Tax Court also determined that its holding was consistent with general principles of law regarding harmless error.<sup>81</sup> The timing of the

74 2019 U.S. Tax Ct. LEXIS 17 (May 21, 2019).

75 T.C. Memo. 2012-330.

76 *Romano-Murphy v. Comm'r*, 816 F.3d 707 (11th Cir. 2016), *rev'g and remanding* T.C. Memo. 2012-330.

77 See IRC § 6672(b)(3)(B).

78 The Court of appeals states that even assuming IRC § 6672 were ambiguous, Treasury regulations require the IRS Office of Appeals to make a pre-assessment determination of § 6672 liability when a timely protest is filed. See Treas. Reg. §§ 301.7430-3(d), Ex. (5) and (7); 301.6320-1(e)(4), Ex. (3). This is also consistent with § 601.106(a)(1)(iv), Statement of Procedural Rules, which provides that the taxpayer may appeal certain penalties to the Office of Appeals after assessment. However, the TFRP is not such a penalty "because the taxpayer has the opportunity to appeal this penalty prior to assessment." *Id.*

79 *Romano-Murphy v. Comm'r*, 816 F.3d at 714.

80 2019 U.S. Tax Ct. LEXIS 17.

81 *Id.*

assessment determines when collection can legally begin and end, so the Court did not need to consider whether the taxpayer was specifically harmed by the timing error.

## 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.

These cases affirmed important rights for taxpayers, including the *rights to be informed, to challenge the IRS's position and be heard, and to appeal an IRS decision in an independent forum*.<sup>82</sup> A key to ensuring that these rights are protected is the IRS's communication with the taxpayer.<sup>83</sup> This year, the courts reemphasized the importance of IRS AOs verifying that the requirements of applicable law or administrative procedure are met before issuing determinations as required under IRC § 6330(c)(1). The IRS satisfying procedural requirements in the CDP process goes a long way to protect the taxpayer *rights to be informed, to appeal the IRS's decision in an independent forum, and to a fair and just tax system*.<sup>84</sup> Court decisions in *Kearse* and *Romano-Murphy* showed that courts would not tolerate AOs failing to verify that the IRS met all applicable legal and administrative procedure requirements when sustaining IRS collection actions. Although the burden is on the IRS during the court proceeding to produce documents that verify it followed procedural requirements, taxpayers should 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. The taxpayer may be at a disadvantage in this situation because the IRS is the party with the records in its custody. For example, in *Gregory*, the Tax Court did not find an abuse of discretion in the IRS AO sustaining the NFTL when the IRS's administrative record showed that the IRS met all procedural requirements for the assessment. For the reasons stated above, it is possible that this will be an issue of litigation in the future.

In a full Tax Court opinion in *Loveland*, the court reinforced the taxpayers' *rights to challenge the IRS's position and be heard and to fair and just tax system* by raising alternatives to the collection action during the CDP hearing. The court sent a clear message to the IRS that it is an abuse of discretion to neglect to consider all of the issues raised by a taxpayer and the appropriate financial information the taxpayers provided. A thorough and meaningful verification that all procedural requirements are met may reduce litigation and improve voluntary compliance.

82 On July 2, 2019, Congress passed the Taxpayer First Act. It codifies the independence of the Office of Appeals within the IRS. It will also give certain taxpayers the ability to access administrative case files referred to the Independent Appeals. S. 1, 116 Cong. H.R. 1957 (2019).

83 See National Taxpayer Advocate 2018 Annual Report to Congress 212-222 (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*).

84 See *Kearse v. Comm'r*, T.C. Memo. 2019-53; *Romano-Murphy v. Comm'r*, 2019 U.S. Tax Ct. LEXIS 17 (May 21, 2019).