

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

TAXPAYER RIGHTS IMPACTED¹

- *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 a Fair and Just Tax System*

OVERVIEW

Collection Due Process (CDP) is a procedural safeguard created by Congress as part of the IRS Restructuring and Reform Act of 1998 (RRA 98).² It requires the IRS to follow a set of procedures to ensure that taxpayers have due process protections when facing IRS levy and lien actions.³ Prior to RRA 98, taxpayers with federal tax debts did not have many protections against the government's authority to collect for those tax debts. Congress mandated CDP rights to curb potential IRS abuses.⁴ Treasury issued a robust set of regulations defining CDP procedures.⁵

A CDP hearing is an opportunity for a taxpayer to have an independent and meaningful review by the IRS Independent 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. 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.⁶ 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.⁷ Some of the collection alternatives include installment agreements, requests for currently not collectible status, and

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

2 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).

3 IRC §§ 6320, 6330.

4 See S. REP. 105-174 (1998), at 67 *et seq.* (noting that "taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor").

5 See Treas. Reg. §§ 301.6330-1 (pre-levy) and 301.6320-1 (post-filing Notice of Federal Tax Lien).

6 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, Request for a Collection Due Process or Equivalent Hearing, 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 (Feb. 2020).

7 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.

offers in compromise. CDP hearings also allow taxpayers to challenge the assessed liability if they received no prior opportunity to do so.⁸

Upon receiving the taxpayer's CDP hearing request, the IRS will assign the matter to a Settlement Officer (SO) within Appeals. If the taxpayer and the SO agree to a collection alternative, the parties will close the case and comply with the terms of the collection alternative. If the parties do not agree on a collection alternative, the SO will issue a Notice of Determination giving the taxpayer the right to a judicial review of that determination by the U.S. Tax Court. The taxpayer must file a petition in Tax Court within 30 days.⁹ 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.¹⁰

The standard of review the court applies 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*¹¹ basis, and the scope of its review extends to evidence introduced at the trial that was not a part of the administrative record.¹² 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, a high standard which necessarily provides deference to an IRS Appeals determination unless it is "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law."¹³ 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.¹⁴ 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.¹⁵ This means that taxpayers must be vigilant about developing their case fully at the administrative hearing, a requirement they may not be aware of based on the current CDP notices they receive from the IRS.

Appeals from CDP hearings have been one of the federal tax issues most frequently litigated in the federal courts since 2001. Our review of litigated issues for the period between June 1, 2019, and May 31, 2020, found 74 opinions on CDP cases. Each year, only a small fraction of taxpayers exercise their right to request an administrative hearing or petition for judicial review. Figure 2.1.1 depicts the filing trends for CDP cases.

⁸ IRC § 6330(c).

⁹ 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).

¹⁰ 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. Internal Revenue Manual (IRM) 5.19.8.4.3, Equivalent Hearing (EH) Requests and Timeliness of EH Requests (Nov. 1, 2007).

¹¹ 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).

¹² 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).

¹³ 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).

¹⁴ See *Kasper v. Comm'r*, 150 T.C. 8 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).

¹⁵ 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; *Robinette v. Comm'r*, 123 T.C. 85 at 103.

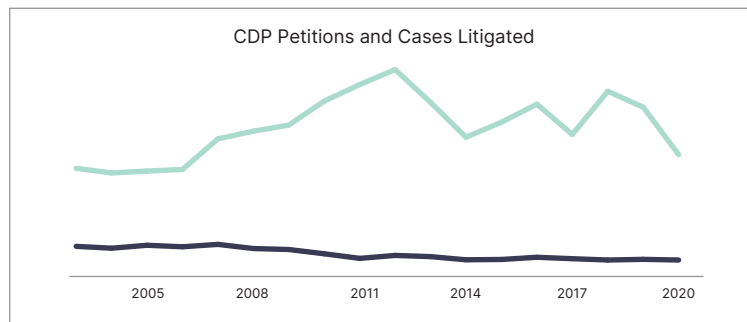
FIGURE 2.1.1¹⁶

Collection Due Process Notices, Hearing Requests, Petitions, and Litigation



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

Figure is not to exact scale



16 IRS, Counsel Automated Tracking System and IRS, Compliance Data Warehouse (CDW), Individual Master File (IMF) Transaction History table for the period June 1 to May 31 for 2010 to 2020.

One of the reasons for this may be that the CDP notice format is confusing for taxpayers. For instance, Letter 1058, Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing, is framed as a billing notice from the IRS.¹⁷ The notice begins by informing the taxpayer about the amount due and requests payment. It is not until halfway down the first page that the taxpayer is informed about CDP hearings. The notice consists of several pages, so the key CDP paragraph may get missed. In addition, where to send the form may also be confusing to taxpayers. The hearing request must be sent (or hand delivered if permitted) to the office and address as directed on the CDP notice.¹⁸ However, many CDP notices, such as Letter 1058, provide different addresses for responding with payment or a CDP hearing request. This is one source of confusion for taxpayers and led to missed filing deadlines.¹⁹ The IRS recently changed its policy and will now accept as timely any CDP request received at any address on the CDP notice as long as it is postmarked before the deadline.²⁰ Another criticism of the CDP notices is that they do not explain to a taxpayer why CDP rights are important. The notices do not explain what a CDP hearing is, why a taxpayer would want to request one, and does not adequately explain equivalent hearings.²¹

While the CDP provisions have been in place for over 20 years, a number of questions still remain regarding the Tax Court's authority and jurisdiction in CDP cases. For example, it is not clear whether IRS administrative and mailing processes provide adequate notice to identify when the 30-day period to petition the court following receipt of a Notice of Determination begins. The IRS Office of Chief Counsel Directives Manual (CCDM) provides guidance on the settlement of docketed CDP cases. It provides that settlements through acceptance of a collection alternative such as a new offer in compromise or installment agreement where there has been no abuse of discretion by Appeals may be appropriate when it is necessary for the fair treatment of a taxpayer or when a lack of settlement could result in unfavorable legal precedent. Otherwise, the determination should be defended and the taxpayer should be encouraged to submit a collection alternative after the litigation is concluded.²² However, the CCDM goes on to say that Counsel does not have the authority to directly accept collection alternatives from taxpayers on behalf of the IRS. If Counsel seeks to settle a docketed CDP case through a collection alternative, Counsel must request the assistance of the IRS to evaluate and accept or reject the proposed collection alternative.²³

¹⁷ IRS, Letter 1058, Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing (Dec. 2019).

¹⁸ Treas. Reg. § 301.6320-1(c)(2), Q & A (6). See also IRM 5.1.9.3.2(8), Request for CDP Hearing Rights (Aug. 30, 2018).

¹⁹ Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2020-10-054, *Review of the Independent Office of Appeals Collection Due Process Program* 6 (Aug. 21, 2020).

²⁰ Office of Chief Counsel, Treatment of Incorrectly-Addressed CDP Hearing Requests, POSTS-113081-18 (Dec. 12, 2019); SB/SE, Interim Guidance for Collection Due Process (CDP) Requests, SBSE-05-0720-0049 (July 6, 2020).

²¹ 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*).

²² CCDM § 35.5.2.19 (3) (Aug. 6, 2019).

²³ *Id.*

The IRS could be more selective with which taxpayers receive a CDP notice. TAS previously suggested that the IRS should adopt an algorithm that would compare its internal data on a taxpayer (assets and income) to the taxpayer's Allowable Living Expenses in order to detect if a taxpayer is at risk for economic hardship or could qualify for a collection alternative.²⁴ This approach could be used prior to deciding if a taxpayer should receive a CDP notice.

The low response rate will likely be complicated further by events related to the COVID-19 pandemic. On March 25, 2020, the IRS announced the People First Initiative, which provided much-needed relief to taxpayers, particularly by postponing compliance actions, which included the issuance of liens and levies.²⁵ In particular, the IRS directed that if the taxpayer's due date for requesting a CDP hearing fell on or after April 1, 2020, and before July 15, 2020, that due date was postponed to July 15, 2020.²⁶ Following the shelter-in-place order due to the COVID-19 pandemic, the IRS generated almost 20 million notices (including 47,497 CDP notices providing hearing rights for automated levies that already occurred), which were not mailed on time.²⁷ As a result, the notices mailed bore dates that passed, and some of the notices required taxpayers to respond by deadlines that also had passed.

TAS recommended the IRS communicate a revised deadline to request a CDP hearing that was 30 days after the IRS mailed out its backlogged CDP notices and include an insert to that effect. The IRS agreed to include Notice 1052-C, Important: You Have Additional Time to Appeal, with the backlogged CDP notices. However, 28,125 CDP notices were inadvertently sent without the insert providing the extended date, and so the IRS issued a subsequent letter to these taxpayers, providing 30 days from when the subsequent letter was sent.²⁸ As a result, we anticipate confusion for taxpayers who wonder whether their deadline to request a CDP hearing was based on the original CDP notice date, the date provided on the Notice 1052-C, or the date provided to some taxpayers in the subsequent letter; or if the taxpayer even understands the significance of this moving target, leaving some with the impression of a wrong date and not filing a CDP hearing request.²⁹

24 National Taxpayer Advocate 2018 Annual Report to Congress 228-239 (Most Serious Problem: *Economic Hardship: The IRS Does Not Proactively Use Internal Data to Identify Taxpayers at Risk of Economic Hardship Throughout the Collection Process*).

25 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

26 See IRS Notice 2020-23, 2020-18 I.R.B. 742.

27 IRS response to TAS information request (Nov. 24, 2020).

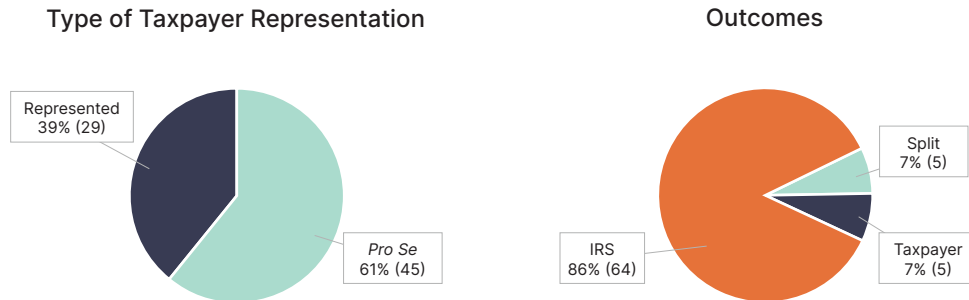
28 *Id.*

29 Some practitioners have already identified problems that could occur as a result of these backdated notices. For example, see Keith Fogg, *Sending Notices With Bad Dates*, PROCEDURALLY TAXING, <https://procedurallytaxing.com/sending-notices-with-bad-dates/> (June 30, 2020).

ANALYSIS OF LITIGATED CASES

Taxpayers most often are not represented in CDP litigation, and in most cases the IRS prevails. During this reporting period there were seven cases brought by business taxpayers and 67 by individual taxpayers.

FIGURE 2.1.2³⁰



We usually see a wide range of issues discussed in CDP hearings. This year's review is no different. For example, taxpayers used the CDP hearing process to contest penalties,³¹ request collection alternatives,³² and request interest abatement.³³

CONCLUSION

CDP hearings play an important role in overall tax administration by allowing taxpayers to contest a lien or levy before (or soon after) the IRS takes the action. Petitioning the Tax Court allows for judicial review of how the IRS and Appeals are applying the law and following procedures. Oftentimes, the taxpayer does not prevail in a CDP hearing. One reason for this is because many cases are reviewed under the abuse of discretion standard,³⁴ or taxpayers do not fully develop their cases.³⁵ However, the analysis that judicial review provides is an important protection for our tax system and ensuring taxpayer rights.

Recommendations to Mitigate Disputes

The National Taxpayer Advocate recommends that:

1. The IRS should use its internal data pertaining to a taxpayer's income and assets compared to his or her Allowable Living Expenses to determine if a taxpayer is in economic hardship or qualifies for

³⁰ Twenty-nine taxpayers appeared with representation and 45 had no representation. Of the 74 opinions issued, the taxpayers prevailed in five, the IRS prevailed in 64, and there was a split opinion in five cases, two of which were remanded.

³¹ *Kestin v. Comm'r*, 153 T.C. 14 (2019).

³² See *Gilmore v. Comm'r*, T.C. Memo. 2019-97.

³³ See *Goldberg v. Comm'r*, T.C. Memo. 2020-38.

³⁴ See *Brown v. Comm'r*, T.C. Memo. 2019-121.

³⁵ See *Rockafellor v. Comm'r*, T.C. Memo. 2019-160.

- a collection alternative, such as an offer in compromise, prior to issuing an intent to levy notice or NFTL.³⁶ Working with taxpayers ahead of time could negate the need for further collection action.
2. Revise CDP notices so that the CDP hearing aspect is a separate notice from the collection portion of the notice. Provide the taxpayer an understanding of what a CDP hearing is and why a taxpayer would want to request a CDP hearing.

36 See National Taxpayer Advocate 2018 Annual Report to Congress 228-239 (Most Serious Problem: *Economic Hardship: The IRS Does Not Proactively Use Internal Data to Identify Taxpayers at Risk of Economic Hardship Throughout the Collection Process*); National Taxpayer Advocate 2019 Annual Report to Congress 89-96 (Most Serious Problem: *Offer in Compromise: The IRS's Administration of the Offer in Compromise Program Falls Short of Congress's Expectations*).