
Collection Due Process Procedures

a. Overview

- i. Before the IRS can levy on T's property, it must give T an opportunity for administrative review of the IRS's collection actions by the IRS Appeals Division. After the Appeals Officer renders his decision in the form of a notice of determination, T has the right to appeal an adverse determination to the Tax Court

b. Administrative CDP Hearing Procedures

- i. Ts are entitled to CDP hearings in two situations:

1. After a notice of federal tax lien is filed, and
2. After compliance issues a notice of intent to levy

- ii. Notice of Tax Lien

1. The IRS may file a tax lien. The filing of the tax lien can be quite burdensome to T. Third parties dealing w/ T's property may find their positions subordinated to the position of the IRS. Moreover, the filing of the tax lien will be reported by credit agencies and may adversely affect T's credit
2. IRS must notify T in writing of the filing no later than 5 days after filing the tax lien. The notice must state in simple terms the amount of the tax and T's appeals rights

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3. T invokes his right to a "due process hearing" by filing a request

within 30 days after the expiration of the IRS's notice period after the filing (e.g., 5 days after the filing of the tax lien)

4. If T fails to request the CDP hearing in the 30-day period, he forfeits the right to the CDP hearing, but may obtain an "equivalent hearing" which is n/ subject to judicial review
5. At the conclusion of the hearing, the IRS may either file an appropriate document to reverse the filing of the lien or it may issue a Notice of Determination (a.k.a. Determination Letter) advising that it will n/ reverse the filing. The Notice of Determination serves the same purpose as a Notice of Deficiency in that it is T's ticket to an appropriate court for judicial review
6. T has the right to request judicial review of the Appeals determination

iii. Notice of Intent to Levy

1. The IRS may give T notice of intent to levy before the levy action is taken. The IRS must notify T of his right to a due process hearing on the levy action and other T rights w/ respect to levies
2. Exceptions to issuance of notice before the levy action is taken:
 - a. State income tax refunds, and
 - b. Situations where collection of the tax is determined to be in jeopardy
3. T must request the hearing within 30 days after the required notice is given or sent

4. If T does not request the hearing within 30 days, he forfeits the CDP hearing, but is entitled administratively to an equivalent hearing for which there is no judicial review
 5. At the conclusion of the hearing, the Appeals Office issues a Notice of Determination which, if T remains unsatisfied, is T's ticket to judicial review
 6. T has the right to request judicial review of the Appeals determination
- iv. How does T request a CDP hearing for Appeals consideration of the disputed collection action?
1. Request for a CDP hearing must be made in writing and include:
 - a. T's name,
 - b. Address,
 - c. Day time telephone,
 - d. Signature, and
 - e. Date
 2. Note: On the protest, T should indicate the alternative collection action(s) that he wants the IRS to take instead of levying on his property
- v. During appeals consideration, what happens with the collection action?

1. Since notice of federal tax lien has already been filed and T is notified of applicable CDP rights, request for such a hearing have no immediate effect on this collection action
2. Levy action is suspended during the period of time that Appeals is considering T's timely request for a CDP hearing relating to a notice of intent to levy. In equivalent hearing cases, collection can move forward on levy if IRS determines that collection of tax is in jeopardy

vi. Effect of CDP Hearing on Statute of Limitations and Collection Actions

1. A drawback for T associated w/ the CDP process is that the SOL on collection is suspended beginning on the date that the IRS receives the hearing request
2. The limitations period resumes when:
 - a. The IRS receives from T a written withdrawal of the hearing request, or
 - b. The determination resulting from the CDP hearing becomes final
3. The determination becomes final when:
 - a. The time for seeking judicial review expires (30 days after the date of the notice of determination), or
 - b. T exhausts his appeal rights following judicial review

c. But note: The limitations period will never expire before the 90th day after the date on which a final determination is made w/ respect to the hearing

4. Example: The SOL on collection w/ respect to A's tax period listed in the CDP notice expires on August 1, 2012. The IRS sent A the CDP notice on April 30 2012. A timely requested a CDP hearing, which the IRS received on May 15. The Appeals Officer sent A a notice of determination on June 15. A timely seeks Tax Court review of that determination. Analysis: The SOL on collection would be suspended from May 15, 2012 until the determination resulting from the CDP hearing becomes final, plus 90 days
5. If A had n/ sought judicial review of the notice of determination, the limitation period would be extended to October 13, 2012

vii. Conducting a CDP Hearing

1. Hearing must be conducted by an impartial Appeals Office employee w/ no prior involvement in the matter
2. Hearing must be at the Appeals office closest to T's residence
3. Hearing may be in person or by telephone
4. T has no right to subpoena or examine witnesses
5. Appeals Office employee must verify the validity of the assessment. This verification is just that the assessment was proper; not that the tax was due
6. Spousal defenses may be considered at the CDP hearing

7. T may record the hearing

viii. Matters that may be considered

1. Matters that may be considered at the meeting:

- a. The Appeals Officer must receive an IRS “verification” that applicable law and administrative procedures have been met. For example, in case of tax assessments requiring a predicate notice of deficiency, the Appeals Officer must verify that the notice has been properly mailed to T and that the assessment has been properly made
- b. T may raise any appropriate defense, including spousal defenses, the propriety of IRS collection measures, and alternatives to collection measures. The Appeals Officer will not, however, consider any issue previously disposed of in a CDP hearing or in a prior administrative or judicial proceeding in which T could have contested liability and participated meaningfully
- c. Whether the proposed collection action balances the need for efficient tax collection w/ the legitimate concern of T that collection action n/ be more intrusive than necessary

2. What types of issues can T raise?

- a. Any relevant issue relating to the unpaid tax or the proposed levy (including appropriate spousal defenses);
- b. Challenges to the appropriateness of the collection actions;

- c. Offers of collection alternatives (T must have filed all required tax returns prior to hearing); and
- d. Challenges to liability only if T has n/ received a notice of deficiency or had an earlier opportunity to dispute the liability before appeals

3. When can T challenge the Underlying Tax Liability?

- a. As to the underlying liability, T can only contest if he “did n/ receive any statutory notice of deficiency for such tax liability or did n/ otherwise have an opportunity to dispute such tax liability.” The notice of deficiency gives T the right to contest underlying liability in the Tax Court and is thus fatal to a review of the underlying tax liability in a CDP hearing. T will also be considered to have had a previous opportunity to contest if he waives the right to a notice of deficiency on Form 870 or Form 4549
- b. Issue: May T contest the merits of the self-reported tax liability in a CDP hearing?
- c. Held: Yes
- d. Facts: Taxpayers, husband and wife, filed their federal income tax reporting a substantial tax liability but did n/ remit full payment of that liability. The IRS accepted the return as filed and assessed the voluntarily reported tax liability. The IRS did n/ audit Ts’ return or issue a notice of deficiency. After collection efforts failed, the IRS issued a Notice of Intent to Levy and Ts responded by requesting a CDP hearing. The Appeals Officer issued a notice of determination allowing levy actions to proceed. Ts challenged the Appeals Officer’s determination and the amount of the underlying tax liability in Tax Court

- e. Analysis: The plain language of S 6330 entitles Ts to an opportunity to establish that they erred in their self-assessment b/c the IRS had n/ issued a notice of deficiency (which, of course, they were n/ required to do b/c there was no tax deficiency) and Ts did n/ have an opportunity to dispute their tax liability. This holding advances the policies of these sections and is consistent w/ Congressional intent that the IRS should collect the correct amount of tax
4. What can T do if the liability issues cannot be raised during the CDP hearing?
- a. Issue 1: Determine how the liability came to be
 - b. Example: If examination division completed an audit and issued a statutory notice of deficiency and T failed to petition the U.S. Tax Court, the tax on the notice will be assessed. T can follow procedures in 3598 to dispute the assessed tax liability (audit reconsideration process). If T makes such a request and examination does n/ accept T's position, T will have the opportunity to request the case be forwarded to appeals for consideration of the issues raised during the audit reconsideration process
 - c. Another alternative is for T to submit an offer in compromise based on doubt as to liability. Case will be forwarded to examination for consideration. If that Compliance function does n/ agree w/ T, T is entitled to have the offer considered by Appeals
 - d. In both situations, T has no further appeals rights beyond the administrative appeal

ix. Penalties for Abusing CDP Procedures

1. Many Ts use the CDP procedures to delay and obstruct the IRS's legitimate collection actions. Many Ts use the process to raise frivolous arguments that they previously asserted during the audit and appeals stages
2. S 6673 allows the court to penalize T up to \$25K, if it appears that T has instituted a proceeding primarily for delay or when T advances frivolous or groundless positions
3. To discourage Ts from requesting CDP hearings in the first place when they don't have legitimate concerns, 6702(b) imposes a \$5K penalty on any person who submits a "specified frivolous submission"
4. A request for a CDP hearing that includes a specified frivolous submission will be treated as if it were never submitted

x. What must appeals do after it holds the CDP or equivalent hearing?

1. If T and Appeals employee reach agreement about case, T will be asked to sign an agreement form – Form 12257
2. At the end of the hearing, Appeals issues a Notice of Determination or a Decision Letter
3. Results of the CDP hearing appear in the notice of determination
4. The notice of determination must describe what was considered in the hearing, confirm that all procedural requirements were met, and decide the merits of any issues raised by T during the hearing

c. Court Review in CDP Cases

i. What happens if T does n/ obtain a favorable result in the administrative CDP hearing?

1. Judicial review of the decision in Tax Court is available – from both post-lien and pre-levy administrative proceedings
2. Judicial review must be taken w/in 30 days of the Appeals Office Notice of Determination (although the Notice of Deficiency gives T 90 days to petition the Tax Court, the Notice of Determination gives T only 30 days to file a petition requesting review of a CDP hearing)
3. Exception: If T only seeks Tax Court review of Appeals' denial of relief in connection w/ an innocent spouse claim at a CDP hearing, then T has 90 days from the date of the notice of determination to request Tax Court review

ii. Forum Issues

1. Which Court has Jurisdiction over a CDP Appeal?

- a. Tax Court has exclusive jurisdiction over CDP appeals
- b. The provision allowing a grace period to refile after filing in the wrong court was removed
- c. T may pursue a CDP appeal as a small tax case, so long as the unpaid tax does n/ exceed \$50K

2. Can T obtain Dismissal without Prejudice?

- a. Facts from Wagner: Ts filed a CDP petition in Tax Court, but sought to have the case dismissed w/o prejudice in order to pursue litigation in district court regarding net operating losses that Ts sought to carry back to the year at issue in Tax Court
- b. Note: Tax Court does n/ permit voluntary dismissal of a tax deficiency action BUT...
- c. Held: Yes
- d. Test: Would Def. lose any substantial right by the dismissal? If not, then Ts' motion to dismiss should be granted. In making that determination, a Court must weigh the equities and do justice between the parties
- e. Analysis: The statutory period in which Ts could refile their lawsuit in Tax Court has expired. The IRS is n/ prejudiced in maintaining the collection action against Ts as if the instance proceeding had never been commenced

iii. Judicial Review of Administrative CDP Determinations

1. Standard of Review

- a. Code itself offers no guidance on the standard of review but the legislative history does
- b. The amount of the tax liability will be reviewed on a de novo basis, w/ T bearing the usual burden of proof, if:
 - i. The validity of the tax liability was properly at issue in the hearing, and

- ii. The determination w/ regard to the tax liability is part of the appeal
- c. If the validity of the tax liability is n/ properly part of the appeal, T may challenge the determination of the appeals officer for abuse of discretion
- d. The propriety of the collection activity is reviewed under an abuse of discretion standard
- e. Abuse of discretion: Arbitrary and capricious action, w/o a sound basis in law. In other words, unless the Appeals Officer has made a legal or factual mistake, the decision will be left alone

2. Should Judicial Review be Limited to the Administrative Record?

- a. Issue: When the Tax Court reviews a notice of determination in a CDP case, should the Tax Court limit its review to the administrative record or may it consider evidence not presented during the CDP hearing?
- b. Rule from Robinette (Eighth Circuit): Judicial review of the procedural aspects of a CDP determination is limited to the administrative record. However, if the record does n/ adequately describe the hearing process or there is a dispute over what happened during the process, the reviewing court is permitted to supplement the administrative record w/ other evidence outside the record
- c. Example from Robinette (Eighth Circuit): Where a record created in informal proceedings does n/ adequately disclose

the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings

- d. Facts in Robinette: T entered into an offer in compromise requiring him to timely file his returns. T claimed that his accountant mailed his '98 return and stamped it using a private postage meter. However, the IRS never received the return, so the IRS declared T in default of the agreement and began levy proceedings. At the CDP hearing, T offered alternative proof that he timely mailed the '98 return but the Appeals Officer rejected it, stating that he would only accept certified mail receipts as proof of mailing
- e. TC holding: TC may consider evidence presented at trial that was n/ in the administrative record of the CDP hearing. Although judge ruled that the new evidence provided unhelpful to T's case, he allowed T to present evidence that he had signed and delivered the returns to his accountant for mailing. This was n/ in the administrative record
- f. Eighth Circuit Decision: Reversed the Tax Court. Found that the administrative record was adequate and that the IRS did n/ abuse its discretion when it sustained the proposed levy

iv. Tax Court Jurisdiction and Remedies

- 1. General: Tax Court jurisdiction over a CDP appeal is premised on a notice of determination
- 2. Equivalent hearings
 - a. If T's appeal is n/ timely (outside of thirty day period), the IRS may still grant T an "equivalent hearing"

- b. The Appeals Office will provide the functional equivalent of a CDP hearing, but:
 - i. There will be no judicial review of the “equivalent hearing” except as to certain spousal defenses;
 - ii. The IRS is n/ prohibited by statute from further levies during the time the appeal is pending (but will generally forego such measures); and
 - iii. The SOL is not suspended

3. Looking Behind the Notice of Determination

- a. Issue: Must the Tax Court first look behind the notice of determination to see whether a proper hearing was offered in order to have jurisdiction to review the determination?
No.
- b. Rule in Lunsford: As w/ a notice of deficiency, in determining its jurisdiction, the Tax Court will n/ “look behind” the notice of determination to determine whether it was validly issued. The Tax Court will examine only the notice of deficiency, itself to determine whether it is valid for jurisdictional purposes
- c. Analysis: The Tax Court will no longer look behind the notice of determination to ensure that certain procedures were followed before exercising jurisdiction to review the determination. Such factors as whether there was an appropriate hearing opportunity, whether the hearing was conducted properly, whether the hearing was fair, or

whether it was held by an impartial Appeals Officer are now taken into consideration in deciding such cases. The failure of one or more of these factors no longer precludes the Tax Court from exercising their jurisdiction to review the determination

- d. Holding: There was nothing in the notice of determination to lead the court to conclude that it was invalid. Tax Court exercised jurisdiction to review the determination

4. Addressing an Inadequate Hearing

- a. Tax Court has upheld CDP determinations issued w/o a face-to-face CDP hearing. However, if T asks for a face-to-face hearing, appeals must give it to him at the closest appeals office to T's residence
- b. One: It's neither "necessary or productive" to send a case back for a hearing b/c the Appeals Officer's CDP determination was justified even though no hearing had occurred
- c. Two: The Tax Court refuses to consider whether a hearing even occurred or simply concludes that no hearing was held. The reason why the Tax Court is not concerned about whether a hearing occurred is b/c it has upheld CDP determinations issued w/o a CDP hearing.

- 5. Retained jurisdiction: The Appeals Office retains jurisdiction w/ respect to the matter even after its determination. Retained jurisdiction does n/ further suspend the SOL and does n/ bar IRS collection action

6. Collection actions suspended: Collection actions are normally suspended pending final determination of the hearings

7. Is there refund jurisdiction in CDP Cases?

v. Appealing Tax Court's Decision

1. To which Circuit does appeal from a Tax Court decision in a CDP case lie?

2. Doesn't say so the default venue is to the Court of Appeals for the District of Columbia.

3. But note: The IRS will n/ object to venue when T appeals a CDP decision to the circuit court of appeals of his residence or principal place of business