MLI #5 Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330

SUMMARY

The IRS Restructuring and Reform Act of 1998 (RRA 98)[1] created Collection Due Process (CDP) hearings to provide taxpayers with an independent review by the IRS Office of 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.[2]

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.[3] Generally, the IRS suspends levy actions during a levy hearing and any judicial review that may follow.[4]

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 79 opinions on CDP cases during the review period of June 1, 2014, through May 31, 2015.[5] Taxpayers prevailed in full in 11 of these cases (nearly 14 percent) and, in part, in three others (nearly four percent). Of the 14 opinions where taxpayers prevailed in whole or in part, five taxpayers appeared *pro se*[6] and nine 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 them 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, which was adopted by the IRS in 2014 in response to National Taxpayer Advocate recommendations.[7] 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 position and be heard*. If the taxpayer does

1 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 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 during judicial review upon a showing of "good cause," if the underlying tax liability is not at issue.

5 For a list of all cases reviewed, see Table 5 in Appendix 3, *infra*.

6 *Pro se* means "[f]or oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY (10th ed. 2014), *available at* http://westlaw.com.

7 IRS, Taxpayer Bill of Rights, *available at* http://www.irs.gov/Taxpayer-Bill-of-Rights. *See also* National Taxpayer Advocate 2013 Annual Report to Congress 5-19 (Most Serious Problem: *Taxpayer Rights: The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration*).

not agree with the 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 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[8]

- *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.[9] 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 them of property.[10] The hearing allows taxpayers to raise issues relating to collection of the liability, including:

- The appropriateness of collection actions;[11]
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), posting a bond, or substitution of other assets;[12]
- Appropriate spousal defenses;[13]
- 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;[14] and
- Any other relevant issue relating to the unpaid tax, the NFTL, or proposed levy.[15]

A taxpayer cannot raise an issue considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.[16]

8 See Taxpayer Bill of Rights, *available at* www.Taxpayer.Advocate.irs.gov/taxpayer-rights.

9 IRC §§ 6320 and 6330. See RRA 98, Pub. L. No. 105-206, § 1001(a), 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).

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

16 IRC § 6330(c)(4).

Procedural Collection Due Process Requirements

The IRS must provide a CDP notice to the taxpayer after filing the first NFTL or generally before its first intended levy for the particular tax and tax period.[17] 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.[18]

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.[19] 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.[20]

Requesting a CDP Hearing

Under both lien and levy procedures, the taxpayer must return a signed and dated written request for a CDP hearing within the applicable period.[21] The Code and regulations require taxpayers to provide their reasons for requesting a hearing. Failure to provide the basis may result in denial of a face-to-face hearing.[22] Taxpayers who fail to timely request a CDP hearing will be afforded an "equivalent hearing," which is similar to a CDP hearing but lacks judicial review.[23] 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.[24]

Conduct of a CDP Hearing

The IRS generally will suspend levy action throughout a CDP hearing involving a notice of intent to levy. However, the requirement to suspend 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.[25] These circumstances occur when the IRS determines that:

- The collection of tax is in jeopardy;

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).

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) to the taxpayer's last known address.

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

20 *Id*.

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

22 IRC §§ 6320(b)(1) and 6330(b)(1); Treas. Reg. §§ 301.6320-1(c)(2) A-C1, 301.6330-1(c)(2) A-C1, 301.6320-1(d)(2) A-D8 and 301.6330-1(d)(2) A-D8. The regulations require the IRS to provide the taxpayer an opportunity to "cure" any defect in a timely filed hearing request, including providing a reason for the hearing. Form 12153 includes space for the taxpayer to identify collection alternatives that he or she wants Appeals to consider, as well as examples of common reasons for requesting a hearing. *See* IRS Form 12153, *Requests for Collection Due Process or Equivalent Hearing* (Mar. 2011).

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; *Moorhous v. Comm'r*, 116 T.C. 263 (2001). A taxpayer can request an Equivalent Hearing by checking a box on Form 12153, *Request 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. Internal Revenue Manual (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) A-I7 and 301.6330-1(i)(2) A-I7.

25 *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.

- 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.[26]

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.[27]

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.[28] Courts have determined that a CDP hearing need not be face-to-face but can take place by telephone or correspondence,[29] and Appeals will conduct the hearing by telephone unless the taxpayer requests a face-to-face conference.[30] The CDP regulations state that taxpayers who provide non-frivolous reasons for opposing the IRS collection action will generally be offered but not guaranteed face-to-face conferences.[31] Taxpayers making frivolous arguments are not entitled to face-to-face conferences.[32] 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.[33] 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.[34]

The CDP hearing is to be held by an impartial officer from Appeals, who is barred from engaging in *ex parte* communication with IRS employees about the substance of the case and who has had "no prior

26 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)).

27 IRC § 6330(e)(1) and (e)(2).

28 IRC § 6320(b)(4).

29 *Katz v. Comm'r*, 115 T.C. 329, 337-38 (2000) (finding that telephone conversations between the taxpayer and the Appeals Officer constituted a hearing as provided in IRC § 6320(b)). Treas. Reg. §§ 301.6320-1(d)(2) A-D6, A-D8 and 301.6330-1(d)(2) A-D6, A-D8.

30 *See, e.g., Appeals Letter 4141* (rev. Aug. 2012) (acknowledging the taxpayer's request for a CDP hearing and providing information on the availability of face-to-face conference). The National Taxpayer Advocate has repeatedly raised concerns regarding the inadequacy of Appeals' communication to taxpayers on how to request a face-to-face hearing and where this information is included in the letter. *See* National Taxpayer Advocate 2005 Annual Report to Congress 136 (Most Serious Problem: *Appeals Campus Centralization*); National Taxpayer Advocate 2009 Annual Report to Congress 70 (Most Serious Problem: *Appeals' Efficiency Initiatives Have Not Improved Customer Satisfaction or Confidence in Appeals*); National Taxpayer Advocate 2010 Annual Report to Congress 128 (Most Serious Problem: *The IRS's Failure to Provide Timely and Adequate Collection Due Process Hearings May Deprive Taxpayers of an Opportunity to Have Their Cases Fully Considered*). For information regarding the availability of Virtual Service Delivery (VSD) teleconferencing, which provides virtual face-to-face meeting in remote locations, see National Taxpayer Advocate 2012 Annual Report to Congress 462 (Status Update: *The IRS Has Made Significant Progress in Delivering Virtual Face-to-Face Service and Should Expand Its Initiatives to Meet Taxpayer Needs and Improve Compliance*). *See also* Director, Policy, Quality and Case Support, *Implementation of Virtual Service Delivery (VSD)*, Memorandum AP-08-0714-0007 (July 24, 2014).

31 Treas. Reg. §§ 301.6320-1(d)(2) (Q&A-D7) and 301.6330-1(d)(2) (Q&A-D7).

32 *Id*.

33 *Id*.

34 *Id*.

involvement."[35] In addition to addressing the issues raised by the taxpayer, the Appeals Officer must verify that the IRS has met the requirements of all applicable laws and administrative procedures.[36] An integral component of the CDP analysis is the balancing test, which requires the IRS Appeals Officer 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."[37] The balancing test is central to a CDP hearing because it instills a genuine notion of fairness into the process from the perspective of the taxpayer.[38]

Special rules apply to the IRS's handling of hearing requests that raise frivolous issues. IRC § 6330(g) provides that the IRS may disregard any portion of a hearing request based on a position the IRS has identified as frivolous or that reflects a desire to delay or impede the administration of tax laws.[39] 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.[40] A request is subject to the 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."[41] In *Thornberry v. Commissioner*, the Tax Court held that if Appeals determines a request for an administrative hearing is based entirely on a frivolous position under IRC § 6702(b)(2)(A) and issues a notice stating that Appeals will disregard the request, the Tax Court does have jurisdiction to review Appeals' decision if the taxpayer timely petitions for review.[42] The court found

35 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).

36 IRC § 6330(c)(1); *Hoyle v. Comm'r*, 131 T.C. 197 (2008).

37 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) (Conf. Rep.). For simplicity, we use the term "proposed collection action" referring to both the actions taken and proposed. IRC § 6330 requires the IRS to notify the taxpayer of the right to request a CDP hearing not less than 30 days before issuing the first levy to collect a tax. Pursuant to IRC § 6320, the taxpayer is notified of the right to request a CDP hearing within five business days *after* the first NFTL for a tax period is filed. Thus, Treasury Regulations under IRC § 6320 require a Hearing Office 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) A-E1(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 under the Federal Payment Levy Program. *See* IRC § 6330(f); IRM 8.22.4.2.2, *Summary of CDP Process* (Sept. 25, 2014).

38 *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).

39 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. 883, 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.

40 The frivolous submission penalty applies to the following submissions: CDP hearing requests under IRC §§ 6320 and 6330, offers in compromise under IRC § 7122, installment agreements under IRC § 6159, and applications for a Taxpayer Assistance Order under IRC § 7811.

41 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 then has 30 days to withdraw the submission to avoid the penalty. IRC § 6702(b)(3).

42 *See Thornberry v. Comm'r*, 136 T.C. 356, 367 (2011). The Tax Court recently declined to overturn *Thornberry* in *Buczek v. Comm'r*, 143 T.C. No. 16 (2014), which will be discussed in the Analysis of Litigated Cases below.

Appeals' letter disregarding the hearing request was a determination conferring jurisdiction under IRC § 6330(d)(1), because it authorized the IRS to proceed with the disputed collection action.[43]

Judicial Review of CDP Hearing

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.[44] The court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing.[45] An issue is not properly raised if the taxpayer fails to request Appeals' consideration of the issue or requests consideration but fails to present any evidence regarding that issue after being given a reasonable opportunity.[46] 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.[47] When the case is remanded, the court retains jurisdiction.[48] 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.[49]

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*[50] basis.[51] 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.[52]

Appellate Venue from Decisions of the Tax Court

Generally, the correct venue for appeals from the Tax Court is the D.C. Circuit unless one of the rules specified in IRC § 7482(b)(1) or exceptions specified in IRC §§ 7482(b)(2) or (b)(3) applies. For instance, IRC § 7482(b)(1)(A) provides that in cases where a petitioner 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.[53] Pursuant to IRC § 7482(b)(2), the taxpayer and the IRS may stipulate the venue for an appeal in writing.

43 *Thornberry v. Comm'r*, 136 T.C. 356, 364 (2011). The Office of Chief Counsel disagrees with the *Thornberry* holding and will continue to file motions to dismiss for lack of jurisdiction if the taxpayer petitions for Tax Court review of a denial, under § 6330(g), of a CDP hearing request that was determined to be based on a frivolous position. See Chief Counsel Directives Manual (CCDM) 35.3.23.5.1, *Motion to Dismiss for Lack of Jurisdiction When CDP Hearing Request Denied Under Section 6330(g)* (July 25, 2012).

44 IRC § 6330(d)(1).

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

46 Treas. Reg. §§ 301.6320-1(f)(2) (Q&A-F3), 301.6330-1(f)(2) (Q&A-F3).

47 *Churchill v. Comm'r*, T.C. Memo. 2011-182; *see also* CCN-2013-002 (Nov. 30, 2012), which provides Counsel attorneys with instructions on when a remand based on changed circumstances might be appropriate.

48 *See, e.g., Pomeroy v. Comm'r*, T.C. Memo 2013-26 at 20.

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

50 *De novo* means "anew." Black's Law Dictionary (10th ed. 2014), *available at* http://westlaw.com.

51 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. Rep. No. 1059-99, at 266 (Conf. Rep.).

52 *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).

53 IRC § 7482(b)(1) also provides that the proper venue lies with the court of appeals for the circuit in which 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 petition under section IRC § 6234(c), (i) the legal residence of the petitioner if the petitioner is not a corporation, and (ii) the place or office applicable under subparagraph (B) if the petitioner is a corporation.

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 petitioner'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*,[54] 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 *Byers v. Commissioner*, the D.C. Circuit held that the D.C. Circuit will not transfer cases in non-liability CDP cases unless both parties stipulate to the transfer.[55] The D.C. Circuit did not answer the question of whether another Court of Appeals could hear an appeal of a non-liability CDP decision without stipulation.[56] The court acknowledged that in some CDP cases involving both challenges to the tax liability and collection issues, the venue presumably would be in the appropriate regional circuit.[57]

The IRS Office of Chief Counsel recently issued a notice that provides litigation guidelines to Chief Counsel attorneys about appellate venue for collection due process, innocent spouse, interest abatement, and other non-deficiency cases in light of the decision in *Byers*.[58] In litigating Tax Court cases, Chief Counsel attorneys are instructed to continue asserting the IRS's longstanding position that, for purposes of the *Golsen* rule, venue generally lies in the circuit of the taxpayer's legal residence, principal place of business, or principal office or agency, regardless of whether the issues in the case involve liability. In CDP cases in which liability is at issue, Chief Counsel attorneys are instructed to argue, in the alternative, that venue lies in the regional circuit, which is consistent with *Byers*. The notice further instructs Chief Counsel attorneys not to object to venue if a taxpayer appeals a non-liability case not enumerated in IRC § 7482(b) to the D.C. Circuit[59] or if a taxpayer appeals a non-liability case to the proper regional circuit.[60] To address the uncertainty and confusion among taxpayers and practitioners that impact *the right to be informed*, the National Taxpayer Advocate recommended that Congress amend IRC § 7482(b)(1)(A) to provide that proper appellate venue for all CDP cases lies with the circuit court of appeals based on the taxpayer's legal residency.[61]

ANALYSIS OF PUBLISHED OPINIONS

We identified and reviewed 79 CDP court opinions, a four percent increase from the 76 published opinions in last year's report. As shown in Figure 3.5.1, we have identified on average about 131 opinions per year since 2001.

From 2003 to 2007, the average number of published opinions was approximately 200. Since 2011, however, the average number of published opinions has dropped to 93. At first glance, this decline may be

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

55 *Byers*, 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*).

56 740 F.3d at 677. 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."

57 *Id*. at 676.

58 IRS Office of Chief Counsel, Notice CC-2015-006, *Venue for Appeals from Decisions of the Tax Court* (June 30, 2015).

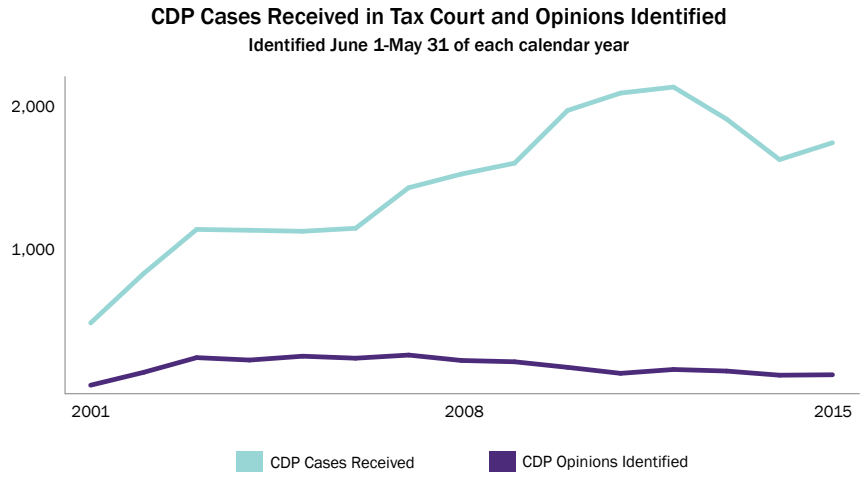
59 *Byers* is controlling in the D.C. Circuit.

60 This is consistent with the IRS Office of Chief Counsel longstanding position.

61 *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*).

attributed, in part, to a series of operational changes in fiscal years 2011 and 2012, collectively known as the "Fresh Start" initiative, which led to fewer NFTL filings and more accepted OICs in the past few years, and had a positive impact on many taxpayers and revenue collection.[62] However, it is not clear that the reduction in CDP published opinions is attributable to the reduced number of lien filings. Of the over 21,000 CDP cases petitioned to the Tax Court between June 1, 2000, and May 31, 2015, only 282 were classified as lien cases.[63] Furthermore, the number of CDP cases petitioned has actually increased over time.

FIGURE 3.5.1, CDP Cases Received in Tax Court and Opinions Identified



The increase in CDP cases received suggests that the reduced number of CDP opinions identified may not be the result of fewer taxpayers requesting a CDP hearing and then contesting the CDP determination by filing a Tax Court petition. Instead, it could be the result of more taxpayers deciding not to pursue litigation after filing a petition, more settlements, or more non-precedential CDP orders or bench opinions that do not result in a published opinion.[64] Moreover, the decline in litigated cases may be due to taxpayers litigating many issues of first impression in the years immediately following the enactment of IRC §§ 6320 and 6330, which now have been resolved by the courts.

62 For instance, in fiscal year (FY) 2014, the IRS filed about 49 percent fewer NFTLs than in FY 2011, including a corresponding 58 percent reduction in liens filed by the Automated Collection System. In FY 2011, the IRS filed 1,042,230 liens. *See* IRS, Collection Workload Indicators 5000-23 (Oct. 11, 2011). In FY 2014, the IRS filed 535,580 liens. *See* IRS, Collection Activity Report 5000-25 (Sept. 29, 2014). Additionally, the dollars collected increased from about $17 billion in FY 2011 to about $18.5 billion in FY 2014. *See* IRS, Collection Activity Report 5000-2 (Oct. 3, 2011), IRS, Collection Activity Report 5000-6 (Oct. 3, 2011), IRS, Collection Activity Report 5000-108 (Oct. 5, 2011); IRS, Collection Activity Report 5000-2 (Sept. 29, 2013), IRS, Collection Activity Report 5000-6 (Sept. 30, 2014), IRS, Collection Activity Report 5000-108 (Sept. 29, 2014). We also note that the IRS has accepted 38 percent more offers in compromise than during FY 2011, and that the actual number of accepted offers has almost doubled when compared to FY 2010. Considering FY 2014, the offer acceptance rate of 42 percent is the highest we have seen in many years. *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 (Sept. 29, 2014). During FY 2014, thousands of financially struggling taxpayers have successfully obtained lien withdrawals to help regain their financial viability. *See* IRS, *FY 2014 C-25 Report*.

63 IRS, Chief Counsel Reports, *CDP Cases with Specific UIL Codes Received Between 06/01/2000 To 05/31/2015* (Oct. 7, 2015); IRS, Chief Counsel Reports, *CDP Cases Received Between 06/01/2000 To 05/31/2015* (Oct. 7, 2015). CDP cases received refers to cases where the taxpayer petitioned Tax Court to contest a CDP determination.

64 For a discussion regarding the number of CDP unpublished opinions, see Carlton Smith, *Unpublished CDP Orders Dwarf Post-trial Bench Opinions in Uncounted Tax Court Rulings*, Procedurally Taxing (Jan. 29, 2015), *available at* http://www.proceduralltaxing.com/unpublished-cdp-orders-dwarf-post-trial-bench-opinions-in-uncounted-tax-court-rulings/.

Thus, the 79 published opinions identified this year do not reflect the full number of CDP cases. Table 5 in Appendix 3 provides a detailed list of the published CDP opinions, including specific information about the issues, the types of taxpayers involved, and the outcomes of the cases.

Litigation Success Rate

Taxpayers prevailed in full in 11 of the 79 published opinions issued during the year ending May 31, 2015 (nearly 14 percent).[65] Taxpayers prevailed, in part, in three other cases (nearly 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 five cases and were represented in nine others. The IRS prevailed fully in approximately 82 percent of published opinions reviewed, a decrease from the higher recorded success of 89 percent last year. The 18 percent success rate[66] for the taxpayer is the highest since the inception of CDP hearings and may be an indication that the IRS is not addressing collection alternatives adequately at the administrative hearing.

FIGURE 3.5.2, Success Rates in CDP Opinions Identified[67]

Court Decision	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Decided for IRS	95%	95%	89%	90%	92%	90%	92%	89%	92%	86%	84%	89%	82%
Decided for Taxpayer	1%	3%	8%	8%	5%	8%	4%	10%	3%	7%	8%	7%	14%
Split Decision	4%	2%	3%	2%	3%	2%	4%	2%	3%	6%	9%	4%	4%
Neither	n/a	n/a	n/a	n/a	<1%	n/a	n/a	n/a	1%	<1%	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. Equally important, all of the cases offer the IRS an opportunity to improve the CDP process and collection practices in both application and execution.

Buczek v. Commissioner

In *Buczek v. Commissioner*, the IRS sent the taxpayer a final notice of intent to levy for unpaid taxes for tax year (TY) 2009.[68] The taxpayer timely requested a CDP hearing with an additional seven pages attached to the request. Each additional page contained phrases such as "Pursuant to UCC 3-501," "Refused from the cause," "Consent not given," and "Permission DENIED." The taxpayer did not

65 *Budish v. Comm'r*, T.C. Memo. 2014-239; *Crosswhite v. Comm'r*, T.C. Memo. 2014-179; *Duarte v. Comm'r*, T.C. Memo. 2014-176; *Gurule v. Comm'r*, T.C. Memo. 2015-61; *Knudsen v. Comm'r*, T.C. Memo. 2015-69; *Lee v. Comm'r*, 144 T.C. 40 (2015); *Reinhart v. Comm'r*, T.C. Memo. 2014-218; *Yuska v. Comm'r*, T.C. Memo. 2015-77; *Ding v. Comm'r*, T.C. Memo. 2015-20; *Sanfilippo, Estate of v. Comm'r*, T.C. Memo. 2015-15; *Synergy Envtl., Inc. v. Comm'r*, T.C. Memo. 2014-148.

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

67 Numbers may not total to 100 percent due to rounding. A "split" decision refers to a case with multiple issues where both the IRS and the taxpayer prevail on one or more substantive issues. A "neither" decision refers to a case where the court's decision was not in favor of either party.

68 *Buczek v. Comm'r*, 143 T.C. 301 (2014).

request a collection alternative, did not assert he could not pay the underlying tax, and did not raise any other issue. The IRS sent a disregard letter stating that the taxpayer's request for a CDP hearing had been disregarded in its entirety due to the taxpayer raising frivolous arguments and that the IRS could proceed with collection.[69] The taxpayer then appealed the IRS's determination to the Tax Court.

The main issue was whether the Tax Court had the jurisdiction to review an Appeals determination that a CDP hearing request was frivolous in its entirety and would be disregarded. *Thornberry* held that while IRC § 6330(g) denied judicial review of the portions of CDP hearing requests identified as frivolous under IRC § 6702(b)(2)(A), it did not prohibit judicial review of the determination by the Appeals Office that the hearing request was frivolous in its entirety and that collection action could proceed.[70] The IRS requested the court overturn *Thornberry*, arguing that it undermined IRC § 6330(g), which precludes from judicial review any portion of a CDP request deemed frivolous.

Although the court found that IRC § 6330(g) applied to this case, it distinguished it and upheld *Thornberry*. The judge noted that the taxpayers in *Thornberry* had actually raised proper issues in their request but were still denied a hearing because the IRS deemed their issues frivolous. In contrast, the taxpayer in the present case did not challenge the collection action, offer any collection alternatives, challenge the underlying liability, or raise any spousal defenses.[71] The court concluded that since the taxpayer did not raise any issues that could have been considered in the CDP hearing, there were no issues that were deemed to be excluded from the portions of the request deemed frivolous. Because this resulted in the entire request being treated as if it were never made, the court found it lacked jurisdiction to review the Appeals determination, that collection action would proceed, and thus dismissed the case for lack of jurisdiction.

This opinion has two important ramifications. First, it upheld the *Thornberry* decision, providing an important protection for taxpayers and preventing the IRS from denying CDP hearings by simply labeling hearing requests as entirely frivolous. Second, the court adhered to IRC § 6330(g) by finding that if the taxpayer failed to raise any legitimate issues that could be excluded from the frivolous positions, the court did not have jurisdiction to review the Appeals determination that collection would proceed.[72]

Budish v. Commissioner

In *Budish v. Commissioner*,[73] the IRS issued a notice of intent to levy to the taxpayer, a sculptor who works in cast bronze and sells his artwork through a wholly owned S corporation. The taxpayer timely requested and received a CDP hearing. During the hearing, the taxpayer and Appeals Officer (AO) agreed on the payment amount for an IA that would full-pay the outstanding tax liability, but the AO insisted upon the filing of an NFTL as a condition to the IA, stating that it was in the government's best interest since the taxpayer's tax liability exceeded $200,000. The taxpayer's counsel provided a letter from the taxpayer's supplier substantiating that should the IRS file an NFTL, the taxpayer's longstanding business relationship with the foundry would be drastically altered. The taxpayer also argued that an NFTL would result in the buyers of sculptures not financing him by paying upfront for artwork they might never receive, because it may be encumbered by the tax lien. Finally, the taxpayer argued that the NFTL would

69 *Buczek v. Comm'r*, 143 T.C. 301 (2014) at 4.

70 *Thornberry v. Comm'r*, 136 T.C. 356 (2011).

71 *Buczek v. Comm'r*, 143 T.C. 301 (2014) at 12.

72 For further analysis of *Buczek*, see Howard A. Dawson, *Tax Court Won't Bite at IRS Request to Overturn CDP Opinion*, 2014 TNT 194-14 Tax Notes Today (Oct. 7, 2014). *See also* Stephen Olsen, *Summary Opinions for 10/03/14*, Procedurally Taxing (Oct. 13, 2014), *available at* http://www.procedurallytaxing.com/summary-opinions-for-100314/.

73 *Budish v. Comm'r*, T.C. Memo. 2014-239.

adversely affect his credit rating and, as a result, the taxpayer would be unable to pay the foundry using his credit card. Despite all these arguments, the AO insisted upon the filing of an NFTL as a condition to the IA, and the taxpayer declined to enter into the IA with those terms.

Not being able to secure a collection alternative, the AO then issued to the taxpayer a notice of determination sustaining the proposed levy action. In an attachment to the notice, the AO gave two specific reasons for insisting that a notice of lien be filed, both based on interpretations of the Internal Revenue Manual (IRM):

(1) The liability was over $200,000, so the lien must be filed to protect the government's interest;[74] and

(2) The installment agreement request did not meet streamlined, guaranteed, or in-business trust fund express criteria, so the lien was required to be filed as a condition of the installment agreement.[75]

The court determined that the AO misinterpreted and overstated the directives set forth in the IRM and erroneously concluded that the IRM required the NFTL filing. Importantly, the IRM uses the term "in general", which the court interprets to mean that there may be occasions when a lien does not have to be filed.[76] The court went on to state that IRM 5.12.2.4, relied upon by the AO, lists circumstances in which a lien *determination* must be made; it did not say these circumstances lead to a lien *filing*.[77] Furthermore, the court discussed how the IRM allows for revenue officers to defer filing a lien if it would impede the collection of tax. Thus, the court concluded that the IRM did not require the AO to file a lien.

Regarding the balancing test, the court was not persuaded by the AO's statement that the petitioner "failed to show how withholding the lien filing would be in the best interest of the government and facilitate collection," and found that this language "was, in effect, surplusage or boilerplate, included merely for the sake of completeness."[78] The AO did not explain how she came to her conclusion and did not show that she thoroughly considered the taxpayer's contention that the lien would severely impair his ability to pay off the underlying liability. The court found the AO's determination lacked any analysis of "what might have led [the AO] to conclude that levy action will balance the need for efficient collection of tax with petitioner's concern that it would be unnecessarily intrusive." The court further held that the AO failed to discuss balancing factors and thus did not properly balance the need for the efficient collection of the taxpayer's liability with the legitimate concern of the taxpayer that any collection be no more intrusive than necessary as required by IRC § 6330(c)(3)(C).[79]

By failing to perform proper balancing, the AO abused discretion in sustaining the levy. The court remanded the case to Appeals for a supplemental CDP hearing with directions to perform the balancing of factors before determining the appropriate collection action, including the impact of a proposed collection action (NFTL) on the taxpayer's ability to remain in business and generate sufficient income to not default on the proposed installment agreement; the value of the taxpayer's assets and the amount of cash flow; any

74 See IRM 5.12.2.4.1, *Integrated Collection System (ICS) Documentation When Deferring the Filing of an NFTL or Choosing Do Not File* (Oct. 14, 2013). The court assumed that the AO "felt constrained" to file an NFTL by this IRM.

75 The AO cited IRM 5.12.2.4.

76 *Budish*, T.C. Memo. 2014-239 at 18.

77 See IRM 5.12.2.4, *Determination Criteria for Do-Not-File or Deferring the NFTL Filing* (Oct. 30, 2009).

78 *Budish*, T.C. Memo. 2014-239 at 21. For a detailed discussion of the importance of specific procedures for performing the CDP Balancing test, 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*).

79 *Budish*, T.C. Memo. 2014-239.

reasonable alternatives to the proposed collection action (a bond in lieu of the NFTL) under the circumstances; and the validity and the priority of the lien and whether it will attach to the taxpayer's assets.[80]

Gurule v. Commissioner

Gurule v. Commissioner involved a husband (Mr. Gurule) and wife (Mrs. Gurule) who generated a 2009 tax liability as a result of Mr. Gurule taking distributions from a 401(k) retirement plan, which he intended to use for a down payment on a house after he was relocated for his job.[81] Subsequently, Mr. Gurule lost his job and was not able to buy the new house. Accordingly, the taxpayers moved back to their prior house, but it was foreclosed upon shortly thereafter. In 2013, Mr. Gurule took out three separate loans (in addition to two existing loans) from his 401(k) plan to pay expenses for foreclosure, moving, a security deposit, and the first month's rent on a new residence, in addition to substantial medical expenses for Mrs. Gurule and their son and the cost of their son's funeral in 2013. Mrs. Gurule had a severe neurological condition causing seizures, preventing her from working and requiring expenses for surgery, medication, and doctor visits. The Gurule's son, who suffered a brain injury as a child, had numerous medical problems until he passed away in August 2013.[82]

In 2011, the IRS sent the taxpayers a notice proposing adjustments to their 2009 income tax based on the 401(k) distributions; however, it is unclear whether the taxpayers ever received a statutory notice of deficiency. In response to a Notice of Intent to Levy issued on May 7, 2012, the taxpayers timely requested a CDP hearing, stating that collection would cause a hardship. The taxpayers submitted an OIC to the Settlement Officer (SO), proposing to settle their liability for $950, paid over five months, based on doubt as to collectibility. The Centralized OIC Unit preliminarily rejected the proposed OIC, finding the taxpayers could full pay based upon their net realizable equity and future income. The SO made a separate calculation as to the taxpayers' income and reasonable collection potential (RCP). The SO allowed the expense for the payment of the 401(k) loans shown on Mr. Gurule's pay stub, but allowed only one-half of the expense because she did not realize that Mr. Gurule was paid bi-weekly. Furthermore, the SO did not reduce the taxpayers' net realizable equity by the amount of the third and fourth 401(k) loans, explaining that these could be considered dissipated assets, because the taxpayers chose to take out the loans knowing they owed federal taxes.[83] The SO offered the taxpayers the choice of either increasing their OIC or accepting an installment agreement based on their net monthly income as calculated by the SO and the filing of an NFTL. The SO also determined that the taxpayers did not meet the requirements for currently not collectible status. After rejecting an additional OIC proposal from the taxpayers, the SO issued a notice of determination that did not address their claim of financial hardship.

The Tax Court remanded the case back to the IRS, finding the record from the CDP hearing was insufficient to allow the court to determine: (1) whether the IRS properly mailed a statutory notice of deficiency; (2) whether the SO abused her discretion by upholding the levy despite the economic hardship claim; (3) whether the SO properly calculated their RCP; and (4) whether the SO properly considered the taxpayers' special circumstances before rejecting the OIC.

Regarding the statutory notice of deficiency, the court found there was not a copy in the record and the notice of determination did not state whether the SO had verified the mailing of the notice of deficiency.

80 *Budish*, T.C. Memo. 2014-239.
81 T.C. Memo. 2015-61.
82 *Id*. at 3-4.
83 *Gurule*, T.C. Memo 2015-61 at 4.

The court was especially concerned because the notice of determination stated that the SO had verified each of the other statutory requirements.

Concerning the economic hardship claim, the court cited *Vinatieri v. Commissioner* for the principle that an SO in a CDP hearing cannot proceed with the proposed levy action when a taxpayer establishes that it would create an economic hardship because the levy would then have to be immediately released.[84] Further the court referenced an IRM provision that only allows levies of retirement accounts when the taxpayer's conduct has been flagrant and the taxpayer does not depend on the funds for necessary living expenses.[85] Because the notice of determination did not show that the SO considered the economic hardship claim and the administrative record showed no consideration of the IRM provision above, the court found it could not determine whether the SO abused her discretion.

Regarding the SO's calculation of the taxpayers' RCP, the court stated that the SO may have made a material error by not adjusting the taxpayers' net realizable equity of the retirement plan account after the third loan. The court found the SO's treatment of the loans as dissipated assets was not justified, based on the administrative record, which did not establish that Mr. Gurule took out the additional 401(k) loan with intent to disregard the outstanding tax liability. Furthermore, the court noted that the loans appeared to have been used for necessary living expenses.[86] The court also noted that a remand may be appropriate when a taxpayer has experienced a material change in circumstances between the time of the IRC § 6630 hearing and the trial that affects the RCP calculation. It then noted that the taxpayers' middle son passed away after the notice of determination was issued. That event caused taxpayers to take out an additional loan from the 401(k), which affected their RCP and ability to pay the tax liability, and they were still unable to afford to bury his ashes. Finally, the court found the administrative record suggested that the SO rejected the taxpayers' proposed OIC without giving any consideration to their special circumstances, such as Mrs. Gurule's neurological condition and the loans necessary to pay medical expenses for her and their now deceased son.

Ligman v. Commissioner

In *Ligman v. Commissioner*, the taxpayer timely requested a CDP hearing after receiving a levy notice from the IRS for the unpaid tax liabilities for TY 2008.[87] At the hearing, the taxpayer's representative stated that the taxpayer's only source of income was his Railroad Retirement Board benefits and offered a $25 per month partial payment IA. The AO concluded that the petitioner's disposable monthly income was $946 and counter-offered an IA of $765 per month.[88] After not hearing back from the taxpayer's representative, the AO closed the case and sustained the levy. The taxpayer then appealed the determination to the Tax Court.

The taxpayer argued that the AO abused his discretion by including his retirement benefits while calculating his ability to pay, contending that these benefits were partially levy proof. The IRS agreed that

84 *Gurule*, T.C. Memo 2015-61 at 8 (citing *Vinatieri v. Comm'r*, 133 T.C. 392, 400 (2009)). This principle, which supports a taxpayer's *right to a fair and just tax system*, was incorporated into the IRM as a result of TAS's advocacy efforts. See IRM 5.11.1.3.1, Pre-Levy Considerations (Aug. 1, 2014).

85 *Id.* (citing IRM 5.11.6.2 (Dec. 2, 2011)). For a detailed discussion of how the IRS's guidance regarding levies on retirement accounts is inadequate and infringes on taxpayer rights, see Most Serious Problem: *Levies on Assets in Retirement Accounts: Current IRS Guidance Regarding Levies on Retirement Accounts Does Not Adequately Protect Taxpayer Rights and Conflicts with Retirement Security Public Policy*, *supra*.

86 *Gurule,* T.C. Memo 2015-61 at 12.

87 *Ligman v. Comm'r*, T.C. Memo. 2015-79.

88 *Id.* at 9.

railroad retirement benefits were partially levy proof under IRC §§ 6334(a)(6) and 6331(h). However, the IRS argued that it is not barred from considering the benefits (in its determination of the taxpayer's income and ability to pay) for purposes of determining availability of a collection alternative.

The court agreed with the IRS's argument, acknowledging that the IRM does not specify whether railroad retirement benefits are included in income calculation.[89] The court stated that the railroad retirement benefits are similar to Social Security benefits, which are specifically included in the IRM's calculation of income, despite being partially levy proof. Thus, including the taxpayer's railroad retirement benefits when calculating his ability to pay was not an abuse of discretion by the AO.[90]

Sanfilippo v. Commissioner

This case involved the payment of estate taxes.[91] Martha E. Sanfilippo died testate and left Garrett Rajkovich (Rajkovich) interests in various properties. On receipt of the interests, Rajkovich's ownership in the Hacienda Shopping Center increased from 65.7 to 75.7 percent. In addition to the interests, the decedent's will forgave Rajkovich's debt of $21,268,186 that he owed to the estate.[92]

In March 2005, the estate filed for an extension to file an estate tax return. The IRS granted the extension, and the estate subsequently sent a completed estate tax return in October 2005. The return valued the gross estate at over $62 million, which included Rajkovich's discharged loan and assets from one of the estate's trusts, and reported an estate tax liability of about $15 million. Over the course of 2006 through 2010, the estate requested six additional extensions of time to pay the estate tax, due to liquidity problems of both the estate and Rajkovich. After all but the last extension was granted, the estate, Rajkovich, and the IRS entered into a three-way security agreement. The agreement gave the IRS a first priority security in an estate property, GMK Oakley (GMK), for as long as the liability was unpaid.[93]

On June 21, 2011, IRS sent the estate a notice of intent to levy and notice of the taxpayer's right to a CDP hearing. The estate timely requested a CDP hearing and indicated that it would like to submit an OIC. Rajkovich and his representative then met with SO Pobre to discuss the case. The taxpayer informed the SO that GMK had interest from a potential buyer and the sale funds would be used to satisfy the estate tax liability.[94] After the hearing, the estate submitted a proposal to compromise the liability for a payment of approximately $5 million, to be paid with the proceeds from the potential GMK sale. SO Pobre decided that the RCP of the estate would go up after the potential sale, so he decided to put the case on hold. He subsequently placed the estate in currently not collectible status, taking into account Rajkovich's obligations, independent of the estate, under the security agreement. Unfortunately, the sale of the property was delayed and SO Pobre transferred out of the Appeals Office shortly thereafter. Before SO Pobre transferred, the two sides agreed to meet again to come up with a "common plan" on how to move forward. SO Pobre was then replaced by SO Owyang.

SO Owyang emailed his team manager, stating that he did not feel comfortable working on an estate case, since he was not well versed in the subject area.[95] Even though the underlying liability was not at issue in

89 IRM 5.15.1 and 5.15.1.11(2)(e). Generally all household income will be used to determine the taxpayer's ability to pay. *See* IRM 5.15.1, *Financial Analysis Handbook*.

90 *Ligman v. Comm'r*, T.C. Memo. 2015-79 at 9.

91 *Sanfilippo v. Comm'r*, T.C. Memo. 2015-15.

92 *Id.* at 3.

93 *Id.* at 5.

94 *Id.* at 9.

95 *Sanfilippo v. Comm'r*, T.C. Memo. 2015-15 at 14.

the CDP hearing and the estate had been examined by the IRS, SO Owyang focused his analysis on the estate's transfer to Rajkovich of the Hacienda Shopping Center interest, valued at under $2 million, and the use of this interest by Rajkovich to obtain an almost $10 million loan. SO Owyang's analysis questioning the valuation of the interest ignored the facts that Rajkovich already held a 65.7 percent majority interest in the property before the estate transferred the additional ten percent interest to him and that the IRS had previously determined the interest's value during examination. SO Owyang closed the case and sustained the levy, citing the taxpayer's failure to provide a collection alternative to satisfy the liability. The estate appealed the case to the Tax Court.

The estate argued that SO Owyang abused his discretion when he sustained the levy. The IRS argued that SO Owyang committed a harmless error regarding analysis of the estate assets and that the estate did not submit a proper OIC.[96] The court disagreed with the IRS's harmless error argument because SO Owyang's miscalculation of Rajkovich's Hacienda Shopping Center interest was instrumental in his decision to sustain the levy. The court also found the estate did in fact propose an OIC, and SO Owyang did not give any consideration to the discussions between Rajkovich and SO Pobre regarding the collection alternative or to the three-way security agreement in place. The court held that the SO abused his discretion and remanded the case to Appeals to consider any collection alternatives proposed by the estate.[97]

Gyorgy v. Commissioner

In *Gyorgy v. Commissioner*,[98] the taxpayer did not file tax returns for 2001 through at least 2007. Relying on information reported on third-party information returns, the IRS prepared substitute for returns (SFRs) for the taxpayer for TYs 2001-2003. From 2004 through 2007, the IRS sent notices of deficiency for all three tax years to the address used on the taxpayer's most recently filed return, which was his address on file.[99] The IRS also sent a Form 2797 "R-U-There" letter to one of many possible addresses for the taxpayer that was reported on third-party information returns. The IRS received no responses to any of its correspondence, other than the postal service returning the letters as undeliverable. The IRS took no further steps to locate the taxpayer or reissue notices. Between the years of 2004 and 2007, the IRS assessed the liabilities for all three tax years in which SFRs had been prepared (2001, 2002, and 2003). Then, in 2009, the IRS moved forward with collection activities by filing an NFTL and sending to the taxpayer's current residence a notice of his right to request a CDP hearing. The taxpayer timely requested a CDP hearing, where he challenged the underlying liability and whether the IRS followed proper procedures. The AO sustained the NFTL, finding the IRS followed legal and administrative procedures during the assessment and collection process and the taxpayer did not challenge the IRS's calculation of his liability.[100] The taxpayer then petitioned the Tax Court.

Noting that the taxpayer did not notify the IRS of address changes and presented no evidence to contest the liabilities, the court found the IRS had mailed the statutory notices of deficiency to the taxpayer's last

96 An error is harmless if it does not cause prejudice or does not affect the ultimate determination in the case. *See, e.g.*, *Estate of Mangiardi v. Comm'r*, T.C. Memo. 2011–24, *aff'd*, 442 Fed. Appx. 526 (11th Cir. 2011).

97 *Sanfilippo v. Comm'r*, T.C. Memo. 2015-15 at 26.

98 779 F.3d 466 (7th Cir. 2015), *aff'g* T.C. Docket No. 19240-11 (Mar. 25, 2013).

99 "When a notice or document is sent to a taxpayer's 'last known address,' it is legally effective even if the taxpayer never receives it." Rev. Proc. 2010-16, I.R.B. 2010-19 (May 10, 2010). This revenue procedure explains the IRS's procedures for determining the last known address.

100 *Gyorgy v. Comm'r*, 779 F.3d 466, 470 (7th Cir. 2015), *aff'g* T.C. Docket No. 19240-11 (Mar. 25, 2013).

known address and sustained the lien for TYs 2002 and 2003.[101] The taxpayer appealed the Tax Court's decision to the Court of Appeals for the 7th Circuit.

Three interesting points of discussion were raised in this case. The first was whether judicial review of a CDP decision was limited to the administrative record. The 7th Circuit observed that the Tax Court looked beyond the record when it considered trial testimony. Instead of determining definitively if judicial review should be restricted to the administrative record, the 7th Circuit declined to rule on this issue because neither party raised it, and considered the administrative record as well as evidence presented at the Tax Court trial.[102]

Second, the 7th Circuit addressed what the proper standard of review is when considering whether the IRS followed proper procedures in assessing the liability. It is well established that a challenge to the underlying tax liability requires a *de novo* review, while the Appeal's Office's determination with regard to the collection action is reviewed under an abuse of discretion standard.[103] This case was unique because a standard had to be chosen to review the taxpayer's challenge to the IRS's mailing procedure, which in turn was a challenge to the IRS's assessment of the underlying liability. The 7th Circuit agreed with the Tax Court in applying an abuse of discretion standard for the mailing issue, since it was an administrative decision unrelated to the amount of the underlying liability.[104] Additionally, the Court found that the taxpayer presented no evidence or arguments to challenge the amount of the liability, further precluding applying a *de novo* standard.

The last significant issue was whether the IRS had used reasonable diligence in finding the taxpayer's correct address.[105] It agreed that the IRS had to take certain steps to determine the taxpayer's last known address. In the present case though, the court found that the taxpayer made that job difficult for the IRS by not filing tax returns for many years, moving frequently, and keeping the IRS "in the dark concerning his whereabouts."[106] It concluded that the IRS properly relied on the address listed on his most recently filed tax return and determined that the Appeals Office properly sustained the NFTL against the taxpayer.

CONCLUSION

CDP hearings provide an invaluable opportunity for taxpayers to meaningfully address the appropriateness of IRS collection actions. Given the important protection that CDP hearings offer, 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. They affirmed an important protection for the taxpayer, elaborated upon the Tax Court's test for abuse of discretion, and addressed procedural issues.

The *Buczek* case may have been the most important this year, in that it supported a taxpayer's *right to appeal an IRS decision in an independent forum*. In *Buczek*, the court reaffirmed its holding in Thornberry that the court has jurisdiction to review whether the Office of Appeals properly determined that the taxpayer's CDP hearing request was entirely frivolous or for purposes of delay and correctly treated as

101 The court vacated the lien notice for TY 2001 because the IRS could not produce a copy of the deficiency notice or other proof that a notice was mailed. *Gyorgy v. Comm'r*, 779 F.3d 466, 471 (7th Cir. 2015), *aff'g* T.C. Docket No. 19240-11 (Mar. 25, 2013).

102 *Gyorgy v. Comm'r*, 779 F.3d 466, 473 (7th Cir. 2015), *aff'g* T.C. Docket No. 19240-11 (Mar. 25, 2013).

103 *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006).

104 *Gyorgy v. Comm'r*, 779 F.3d 466, 472, 480-81 (7th Cir. 2015), *aff'g* T.C. Docket No. 19240-11 (Mar. 25, 2013).

105 *Id*.

106 *Id*.

if never submitted, and to review only legitimate issues properly raised in the hearing request. *Buczek* suggests that courts continue to value the protection provided to taxpayers in *Thornberry*. Although the taxpayers in *Buczek* had presented arguments to delay collection, the court understood that overturning *Thornberry* would have detrimental effects on taxpayers beyond just *Buczek*. If *Thornberry* were reversed, not only would a taxpayer's *right to appeal an IRS decision in an independent forum* be weakened, but such a decision would also compromise a taxpayer's *right to challenge an IRS decision and be heard*. This ruling protects taxpayers from the IRS erroneously labeling a request as frivolous to preclude it from judicial review, thus also upholding a taxpayer's *right to a fair and just tax system*.

Sanfilippo shows that there is value in assigning hearing officers to cases in which they have proper knowledge and expertise of the issues. The decision to keep the SO on the case after he complained of his difficulties resulted in needless administrative and judicial costs. To mitigate these costs in the future, the IRS should place hearing officers on cases where they have substantive expertise of issues being presented at a CDP hearing. Further, they should try to make sure that hearing officers see a case through to its completion.[107] This will reduce confusion and rework that occurs when a new hearing officer takes over a case before it is resolved and fully carry out a taxpayer's *right to challenge the IRS's position and be heard*, as well as the *right to appeal an IRS decision in an independent forum*.

The *Budish* decision provides an important development regarding the CDP balancing test. While the vast majority of cases discussing the balancing test have ruled in favor of the IRS over the years, the IRS often merely stated (without elaboration or proper analysis) in these cases it had performed the balancing test. Prior to *Budish*, there was little scrutiny or indepth review, if any, from most courts regarding Appeals' analysis of factors related to balancing the legitimate concerns of taxpayers regarding the intrusiveness of the proposed collection action with the government's interest to collect. The low number of remands may be largely due to the abuse of discretion judicial standard of review, not because Appeals conducted the balancing test properly or analyzed any balancing factors. Thus, the *Budish* decision is significant in describing balancing test factors Appeals should consider upon remand. Moving away from *pro forma* statements and boilerplate language (without proper analysis) and encouraging hearing officers to fully explain which balancing test factors they considered could go a long way in reducing future litigation. By not giving proper attention to the balancing test, the IRS is missing opportunities to improve compliance, enhance taxpayer trust and confidence, relieve undue burden on taxpayers, and support a taxpayer's *right to privacy*.[108]

Gurule was significant in its reaffirmation of *Vinatieri v. Commissioner*, which found an appeals officer in a CDP hearing cannot proceed with the proposed levy action when a taxpayer establishes that it would create an economic hardship, because the levy would then have to be immediately released.[109] Although TAS has advocated extensively on this issue and worked to incorporate this principle into the official explanation of a taxpayer's *right to a fair and just tax system* in the IRM, both TAS employees and tax practitioners have still seen too many cases where the IRS continues to issue levies on taxpayers it knows are experiencing economic hardship.[110]

107 For more information about the problems with Appeals Officers transferring cases, see Most Serious Problem: *Appeals: The Appeals Judicial Approach and Culture Project is Reducing the Quality and Extent of Substantive Administrative Appeals Available to Taxpayers*, *supra*.

108 *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).

109 *Gurule*, T.C. Memo 2015-61 at 8 (citing *Vinatieri v. Comm'r*, 133 T.C. 392, 400 (2009)).

110 *See* National Taxpayer Advocate 2013 Annual Report to Congress 84-93 (Most Serious Problem: *Hardship Levies: Four Years After the Tax Court's Holding in Vinatieri V. Commissioner, the IRS Continues to Levy on Taxpayers It Acknowledges Are in Economic Hardship and Then Fails to Release the Levies*).

In sum, the CDP hearing is a powerful tool for the taxpayer. Further education of taxpayers about the importance of a full and complete administrative records as well as assignment of hearing officers who have substantive knowledge of the area of tax law and are familiar with the facts and circumstances of a particular case will only strengthen protections for taxpayers intended by Congress. Clarifying the interpretation of IRC § 6330(g) in accord with the *Thornberry* decision would go a long way in reaffirming important due process protections afforded to taxpayers and further the taxpayer *rights to challenge the IRS position and be heard*, *to appeal an IRS decision in an independent forum*, and *to a fair and just tax system*.