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

SUMMARY

Collection Due Process (CDP) hearings were created by the IRS Restructuring and Reform Act of 1998 (RRA 98).[1] CDP hearings provide taxpayers with an independent review by the IRS Office of Appeals (Appeals) of the decision to file a Notice of Federal Tax Lien (NFTL) or the IRS's proposal to undertake a levy action. In other words, a CDP hearing gives taxpayers an opportunity for a meaningful hearing before the IRS issues its first levy or immediately after it files its first NFTL with respect to a particular tax liability. At the hearing, the taxpayer has the statutory right to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and under certain circumstances, the underlying tax liability.[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 76 opinions on CDP cases during the review period of June 1, 2013, through May 31, 2014.[5] Taxpayers prevailed in full in five of these cases (nearly seven percent) and in part in three others (nearly four percent). Of the eight opinions where taxpayers prevailed in whole or in part, two taxpayers appeared *pro se* and six were represented.

The cases discussed below demonstrate that CDP hearings serve an important function by providing taxpayers with a forum to raise legitimate issues before the IRS deprives them of property. Many of these decisions provide guidance on substantive issues. The Court imposed sanctions for inappropriate use of the CDP process in some of the 76 cases reviewed.

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 recently adopted by the IRS in response to National Taxpayer Advocate recommendations.[6] In particular, by providing an opportunity for a taxpayer to challenge the underlying liability and raise alternatives to the collection action, the CDP hearing enforces the taxpayer's *right to challenge the IRS position and be heard*. If the taxpayer does not agree with the Appeals determination, he may file a petition in Tax Court, which furthers the taxpayer's *right to*

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 Internal Revenue Code (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 III, *infra*.

6 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 (TAXPAYER RIGHTS: *The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration*).

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*.

PRESENT LAW

Current law provides taxpayers an opportunity for independent review of an NFTL filed by the IRS or of a proposed levy action.[7] As noted 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.[8] The hearing allows taxpayers to raise issues relating to collection of the liability, including:

- The appropriateness of collection actions;[9]
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), posting a bond, or substitution of other assets;[10]
- Appropriate spousal defenses;[11]
- 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;[12] and
- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.[13]

A taxpayer cannot raise an issue considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.[14]

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.[15] 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.[16]

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

7 IRC §§ 6320 and 6330. See RRA 98, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685 (1998).

8 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. National Bank of Commerce*, 472 U.S. 713, 719-722 (1985); *Phillips v. Comm'r*, 283 U.S. 589, 595-601 (1931).

9 IRC § 6330(c)(2)(A)(ii).

10 IRC § 6330(c)(2)(A)(iii).

11 IRC § 6330(c)(2)(A)(i).

12 IRC § 6330(c)(2)(B).

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

14 IRC § 6330(c)(4).

15 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).

16 IRC § 6320(a)(2) or § 6330(a)(2). The CDP notice can be provided to the taxpayer in person, left at the taxpayer's residence or dwelling, or sent by certified or registered mail (return receipt requested) to the taxpayer's last known address.

filing of the NFTL.[17] 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.[18]

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.[19] 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.[20] 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.[21] 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.[22]

Conduct of a CDP hearing

The IRS generally will suspend levy action throughout a CDP hearing involving a notice of intent to levy, unless it determines that:

- The collection of tax is in jeopardy;
- The collection resulted from a levy on a state tax refund;
- The IRS has served a disqualified employment tax levy; or
- The IRS has served a federal contractor levy.[23]

The IRS also suspends collection activity throughout any judicial review of Appeals' determination, except if an appeal is pending, the underlying tax liability is not at issue, and the IRS can demonstrate good cause to resume collection activity.[24]

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.[25] Courts have determined that a CDP hearing

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

18 IRC § 6330(a)(3)(B); Treas. Reg. § 301.6320-1(b)(1).

19 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).

20 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).

21 Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I16 and 301.6330-1(2) Q&A-I16; *Business Integration Services, Inc. v. Comm'r*, T.C. Memo. 2012-342; *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 5.19.8.4.3, *equivalent hearing (EH) Requests and timeliness of EH Requests* (Nov.1, 2007).

22 Treas. Reg. §§ 301.6320-1(i)(2)A-17 and 301.6330-1(i)(2)A-17.

23 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 *Dora v. Comm'r*, 119 T.C. 356 (2002)).

24 IRC §§ 6330(e)(1) and (e)(2).

25 IRC § 6320(b)(4).

need not be face-to-face but can take place by telephone or correspondence,[26] and Appeals will conduct the hearing by telephone unless the taxpayer requests a face-to-face conference.[27] 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.[28] Taxpayers making frivolous arguments are not entitled to face-to-face conferences.[29] A taxpayer will not be granted a face-to-face conference concerning a collection alternative, such as an installment agreement (IA) or offer in compromise (OIC), unless other taxpayers would be eligible for the alternative under similar circumstances.[30] 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 has failed to file all required returns and is therefore ineligible for an offer. However, Appeals may, at its discretion, grant a face-to-face conference to explain the eligibility requirements for a collection alternative.[31]

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 involvement."[32] 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.[33] Appeals must weigh the issues raised by the taxpayer and decide 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."[34]

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.[35]

26 *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.

27 *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).

28 Treas. Reg. § 301.6320-1(d)(2) A-D8.

29 Treas. Reg. §§ 301.6320-1(d)(2) A-D7 and 301.6330-1(d)(2) A-D8.

30 Treas. Reg. §§ 301.6320-1(d)(2) A-D8 and 301.6330-1(d)(2) A-D8.

31 *Id*.

32 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. 2006-93, *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).

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

34 IRC § 6330(c)(3)(C).

35 IRC § 6330(g). Section 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.

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.[36] 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 the Federal tax laws."[37] 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(c), 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. The court found 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.[38]

Judicial Review of CDP Determination

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.[39] The court will only consider issues, including challenges to the underlying liability, that were properly raised during the CDP hearing.[40] 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.[41] 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.[42] When the case is remanded, the court retains jurisdiction.[43] 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.[44]

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* basis.[45] 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.[46]

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

37 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.

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

39 IRC § 6330(d)(1).

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

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

42 *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.

43 *Pomeroy v. Comm'r*, T.C. Memo 2013-26.

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

45 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.). The term *de novo* means anew. *Black's Law Dictionary*, 447 (7th Ed. 1999).

46 *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).

ANALYSIS OF LITIGATED CASES

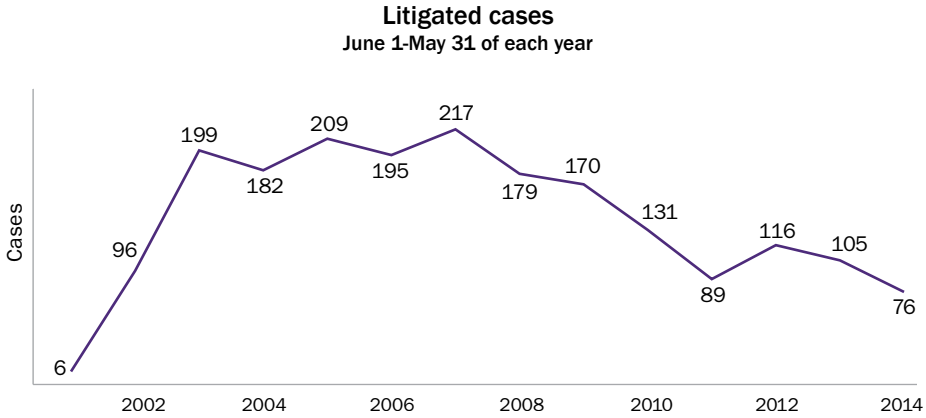
We identified and reviewed 76 CDP court opinions, a 28 percent decrease from the 105 cases in last year's report. As shown in the chart below, litigation of CDP cases considered by the court has been averaging about 141 cases per year since 2001.

This decline in the number of litigated cases may be associated with a series of significant operational changes in lien-filing policies and collection payment options (including offers in compromise and "streamlined" installment agreements) the IRS implemented in fiscal years (FYs) 2011 and 2012. These changes were in response to concerns from the National Taxpayer Advocate and the Internal Revenue Service Advisory Council (IRSAC), and are collectively known as the "Fresh Start" initiative.[47] The "Fresh Start" initiative has resulted in fewer NFTL filings and more accepted offers in compromise in the past few years, and had a positive impact on many taxpayers and revenue collection.[48]

47 *See* IRS, IR-2011-20, *IRS Announces New Effort to Help Struggling Taxpayers Get a Fresh Start; Major Changes Made to Lien Process* (Feb. 24, 2011); IR-2012-31, *IRS Offers New Penalty Relief and Expanded Installment Agreements to Taxpayers under Expanded Fresh Start Initiative* (Mar. 7, 2012); IR-2012-53, *IRS Announces More Flexible Offer-in-Compromise Terms to Help a Greater Number of Struggling Taxpayers Make a Fresh Start* (May 21, 2012). *See also* National Taxpayer Advocate 2012 Annual Report to Congress 348-351; National Taxpayer Advocate Fiscal Year 2013 Objectives Report to Congress 32-35.

48 For instance, in 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 (ACS). In FY 2011, the IRS filed 1,042,230 liens. *See* IRS, 5000-23 Collection Workload Indicators (Oct. 11, 2011). In FY 2014, the IRS filed 535,580 liens. *See* IRS, 5000-25 Collection Activity Report (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, 5000-2 (Oct. 3, 2011), IRS 5000-6 (Oct. 3, 2011), IRS 5000-108 (Oct. 5, 2011); IRS, 5000-2 (Sept. 29, 2013), IRS, 5000-6 (Sept. 30, 2014), IRS 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, 5000-108 *Collection Activity Report* (Oct. 5, 2010); IRS, 5000-108 *Collection Activity Report* (Oct. 5, 2011); IRS, 5000-108 *Collection Activity Report* (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*.

FIGURE 3.5.1[49]



The 76 opinions identified this year do not reflect the full number of CDP cases because the court does not issue an opinion in all cases. Some are resolved through settlements, and in other cases taxpayers do not pursue litigation after filing a petition with the court. The Tax Court also disposes of some cases by issuing unpublished orders. Table 5 in Appendix III 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 five of the 76 cases brought during the year ending May 31, 2014 (nearly seven percent).[50] Taxpayers prevailed in part in three other cases (nearly four percent). Of the cases in which the courts found for the taxpayer in whole or in part, the taxpayers appeared *pro se* in two cases and were represented in six others. The IRS prevailed fully in 89 percent of cases, an increase from the lowest recorded success rate of 84 percent last year.

49 *See* National Taxpayer Advocate 2013 Annual Report to Congress 371; National Taxpayer Advocate 2012 Annual Report to Congress 595; National Taxpayer Advocate 2011 Annual Report to Congress 619; National Taxpayer Advocate 2010 Annual Report to Congress 436; National Taxpayer Advocate 2009 Annual Report to Congress 418; National Taxpayer Advocate 2008 Annual Report to Congress 476; National Taxpayer Advocate 2007 Annual Report to Congress 569; National Taxpayer Advocate 2006 Annual Report to Congress 556; National Taxpayer Advocate 2005 Annual Report to Congress 477-478; National Taxpayer Advocate 2004 Annual Report to Congress 500; National Taxpayer Advocate 2003 Annual Report to Congress 318; National Taxpayer Advocate 2002 Annual Report to Congress 273; *See* National Taxpayer Advocate 2001 Annual Report to Congress 263. CDP cases did not appear as a most litigated issue in the National Taxpayer Advocate 2000 Annual Report to Congress.

50 *Bogart v. Comm'r*, T.C. Memo. 2014-46; *Dixon v. Comm'r*, 141 T.C. 173 (2013); *Dixon v. Comm'r*, T.C. Memo. 2013-207; *Moosally v. Comm'r*, 142 T.C. No. 10 (2014); *Szekely v. Comm'r*, T.C. Memo. 2013-227.

FIGURE 3.5.2, Success Rates in CDP Cases[51]

Court Decision	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Decided for IRS	95%	95%	89%	90%	92%	90%	92%	89%	92%	86%	84%	89%
Decided for Taxpayer	1%	3%	8%	8%	5%	8%	4%	10%	3%	7%	8%	7%
Split Decision	4%	2%	3%	2%	3%	2%	4%	2%	3%	6%	9%	4%
Neither	n/a	n/a	n/a	n/a	<1%	n/a	n/a	n/a	1%	<1%	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 general, in both application and execution.

Isley v. Commissioner

In *Isley v. Commissioner*,[52] the IRS issued four CDP notices (two involving the filing of an NFTL and two involving a proposed levy) to the taxpayer, Ronald Isley (Isley), a founding member of the Isley Brothers singing group. The CDP notices were for unpaid income taxes covering the years 1997–2004, and 2006. Isley had repeatedly failed to pay income taxes for over 30 years, filed for bankruptcy twice, and was convicted of tax evasion for the years 1997–2002 (conviction years). He was sentenced to 37 months in prison followed by a three-year probationary period. The terms of his probation required that he make full payment of taxes owed for his conviction years during his probationary period. While the court did not include exact dates in its decision, Isley entered prison around December 1, 2006 and was released in late 2009 or early 2010. The court noted that the probationary period would not have ended until December 2010 at the earliest.

Isley received the CDP notices while serving his sentence, and in response, he requested a CDP hearing in 2007 for each of the NFTLs and levy notices. During the CDP hearing, Isley submitted an OIC covering both his conviction years and non-conviction years, proposing to pay $1,047,216 and providing the required 20 percent down payment.[53] The Appeals Officer (AO) assigned to the case recommended acceptance and the OIC was sent to attorney Ronald Chun (Chun) in the Office of Chief Counsel for review as required under IRC § 7122(b).[54]

51 Numbers have been rounded to nearest percentage and may not add to 100% 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.

52 141 T.C. 349 (2013).

53 An OIC is an agreement between a taxpayer and the government that settles a tax liability for payment of less that the full amount the IRS believes is owed. IRC § 7122. There are several grounds for an OIC, doubt as to collectibility, doubt as to liability, and effective tax administration. Doubt as to collectibility exists when the taxpayer's assets and income are less than the liability. Treas. Reg. § 301.7122-1(b).

54 If an OIC is submitted in a case where the unpaid amount of the tax assessed is $50,000 or more, the IRS Office of Counsel is required to review the OIC for legal sufficiency so as to ensure that all legal requirements for compromise have been met. *See also* IRM 5.8.8.12, (Aug. 8, 2014). Following the conclusion of the CDP hearing, Isley owed over $9 million in tax liability, including penalties.

Chun, who had been involved with Isley's second bankruptcy, recommended that the IRS reject the OIC because he determined that the IRS lacked settlement authority. Isley's case had already been referred to the Department of Justice (DOJ) for criminal prosecution and therefore was subject to IRC § 7122(a) (discussed below). On a related note, Chun found that the OIC was inconsistent with Isley's terms of probation. Lastly, Chun recommended rejecting the offer on the alternative grounds that Isley's collection potential exceeded the offer, that he provided incomplete or inaccurate information, and that he was not in current compliance with his tax obligations. Based on Mr. Chun's recommendation and his own further examination, the AO issued a determination rejecting the OIC and sustaining the proposed levies and NFTL filings. Isley appealed the AO's determination to the Tax Court.

The Commissioner argued that IRC § 7122(a) prohibits the IRS from compromising Isley's liabilities.[55] Since the DOJ prosecuted Isley for criminal tax evasion, the Commissioner reasoned that the IRS had no authority to accept or even process the OIC. Isley countered that IRC § 6330 gave him the right to raise all relevant issues during his CDP hearing. Additionally, he argued that IRC § 7122(a) only applied to pending criminal prosecutions and that his criminal case was complete as of his sentencing in September of 2006.

Neither party's arguments persuaded the court. Instead, the Tax Court ruled that IRC § 7122(a) did not bar the AO from negotiating the OIC, but that the AO could not unilaterally approve the OIC—he would need to seek approval from DOJ. The court came to this determination for several reasons. First, the court found that IRC § 6330(c) does not supersede IRC § 7122(a). Second, the court found that DOJ's approval continued to be necessary until the terms of the settlement in his criminal case had been met. In particular, the court found that an OIC in this instance would have violated Isley's terms of probation. However, the court did note that Isley (either on his own or along with the AO) could have requested that the terms of his probation be modified. No such request had been made. Lastly, since Isley was behind on his current tax obligations, the Tax Court held the AO had not abused his discretion in rejecting the offer.

Isley contended that Chun's involvement in reviewing the OIC effectively made him a "*de facto*" AO and because of Chun's involvement in Isley's bankruptcy case, Chun's involvement in the CDP hearing violated the impartial officer requirement of IRC § 6330(b)(3). However, the court rejected that argument because Chun was involved in the case as an IRS Office of Chief Counsel attorney pursuant to IRC § 7122(b), and thus the impartial officer requirement did not apply to him. Additionally, the Tax Court noted that the bankruptcy proceedings concerned different tax years so Chun's actions in the bankruptcy proceeding could not have constituted prior involvement.

Isley also alleged that Chun's participation violated the prohibition against *ex parte* communication between AOs and other IRS employees.[56] The Tax Court disagreed, finding that the *ex parte* prohibition

55 IRC § 7122(a) provides: "The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense." The regulations provide further guidance by prohibiting the IRS from accepting "for processing any offer to compromise a liability following reference of a case involving such liability to the Department of Justice for prosecution or defense." Treas. Reg. 301.7122-1(d)(2).

56 Section 1001(a)(4) of RRA 98 directed the Commissioner to "ensure an independent appeals function within the Internal Revenue Service, including the prohibition … of *ex parte* communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers." In accordance with that directive, the IRS initially issued guidance in Rev. Proc. 2000-43, 2000-2 C.B. 404 which was then superseded by Rev. Proc. 2012-18, 2012-1 C.B. 455.

rules only apply to IRS employees working in the Office of Appeals. Since Chun was an employee of the IRS Office of Chief Counsel, this rule did not apply.

Isley also argued that his tax liabilities were overstated because the IRS did not properly apply certain payments received after his first bankruptcy proceeding to his tax debt. Isley had previously raised this issue in a refund suit. The Tax Court found that Isley was precluded from raising this issue in the CDP case because Isley had been given a prior opportunity to raise it in his second bankruptcy proceeding and also because it was barred by *res judicata* since Isley had raised this issue in his previous refund suit.

Isley submitted a 20 percent down payment with his OIC, which he argued that the IRS should refund as fraudulently induced because he was told that his offer would be evaluated on collectibility and it was rejected on other grounds. The court concluded that the IRS properly retained the payment since there was no evidence of fraud or false representations and there were in fact collectibility issues raised by the AO in rejecting the OIC.

Finally, the court addressed the AO's decision to sustain the proposed levies (Isley did not challenge the NFTL filings). The court noted that Chun's memo suggested gathering more information related to Isley's assets and future income potential. This indicated to the court that Chun believed continuing negotiations could be productive and that Isley could have submitted another OIC or an installment agreement. As a result, the court concluded that Appeals acted prematurely in sustaining the proposed levies and that such action might be more intrusive than necessary. The court also noted that Isley's tax compliance problems for 2009 and 2010 were inadvertent and curable. Based on that information, the court remanded the case to Appeals for further consideration. The court instructed Appeals to reexamine Isley's financial position to see if submission of another OIC or an installment agreement might be a viable alternative. The Tax Court noted that DOJ would need to approve any OIC or installment agreement before such agreement could be processed or accepted.[57]

Dixon v. Commissioner

In *Dixon v. Commissioner*, James and Sharon Dixon, (the Dixons) were the owners of Tryco Corporation, a temporary employment company that failed to pay its withholding and employment taxes from 1992 to 1995.[58] The Dixons also neglected to pay a substantial part of their individual income tax liabilities during that period. After they were charged with criminal failure to file, they hired an accounting firm that uncovered the tax issues at Tryco. The Dixons reached a plea agreement under which they were to pay restitution for their unpaid taxes in the amount of $61,021.

In order to make those payments and start paying Tryco's withholding liability, the Dixons' tax attorney advised them to give the money to Tryco, which in turn would pay the IRS. In December 1999, Tryco transferred $61,021 to the IRS. A cover letter from the Dixons' attorney accompanied the payment, designating the payment as "'payment of [Form] 941 taxes of the corporation' that was 'to be applied to the withheld income taxes' of [the Dixons] for specified calendar quarters of 1992–95."[59] In early 2000, the Dixons' accountant discovered that the couple actually owed $30,202 more in individual income tax for 1992-1995. In June 2000, Tryco paid this money to the IRS with a cover letter stipulating that this was

57 The Court noted that the probationary period would have ended in late 2012 or early 2013. If Isley had fully complied with the terms of his probation or the liabilities had been discharged by a settlement with DOJ, the OIC issues and IRC § 7122(a) would be considered moot. However, the Court noted that it had not been notified by either party that this occurred and therefore, DOJ approval would be necessary.

58 141 T.C. 173 (2013).

59 *Id*. at 1.

a pre-assessment payment of Form 941 taxes of the corporation, which represented the withheld income taxes for the Dixons for the fourth quarter of 1995.

The IRS initially honored those designations. However, it eventually decided to disregard the designations, applying the restitution funds to Tryco's outstanding general unpaid employment tax liabilities instead. The IRS then issued the Dixons a CDP levy notice seeking to collect the Dixons' unpaid individual income taxes for 1992–1995.

The Dixons requested a CDP hearing. The AO sustained the proposed levy on the basis that the payments were not withheld at the source and that the payments could not be designated to specific employees. The Dixons filed a petition with the Tax Court, arguing on two alternative bases that their payments through Tryco satisfied their individual income tax liabilities.

First, the Dixons argued that the Tryco payments designated for their individual liabilities entitled them to a withholding credit under IRC § 31. Section 31(a)(2) states employees are entitled to a credit against their income taxes equivalent to the amount their employer withholds from their income. However, the regulations governing IRC § 31 state that the taxes must be actually withheld by the employer.[60] To be considered "actually withheld," the withholding must be done contemporaneously in the correct amount or corrected within the prescribed time. The court determined that the restitution payments were not withheld contemporaneously at the source. The payments were also made outside of the window for allowable adjustments under IRC § 31(a). As a result, the court found that the Dixons were not entitled to an IRC § 31 credit.

Alternatively, the Dixons argued that the Commissioner must respect Tryco's designation of the payments to their individual income tax liabilities. IRS policy allows taxpayers to designate where and how voluntary payments should be credited. However, the Commissioner argued that taxpayers are only allowed to designate between a particular tax period or particular type of tax (*i.e.*, trust fund"[61] liabilities versus corporate income tax liabilities), so corporate taxpayers like Tryco could not designate which particular employee within the withholding liabilities would receive credit. The Tax Court rejected this argument, finding that employers are commonly allowed to designate withholding taxes to specific employees for refund suits, which allows employers to do test cases without paying all of the taxes for a class of employees.[62] The court further reasoned that allowing designations was necessary to uphold the policy against double collection of tax. The IRS had already collected the tax from Tryco, and collecting it again from the Dixons would require them to pay the same liability twice.

For these reasons, the Tax Court held that Appeals abused its discretion in failing to honor the Dixons' payment designations. The $91,223 in payments fully discharged the Dixons' individual income tax liabilities for 1992–1995 and therefore, the IRS could not take further levy action for this debt. However, since the court found the payments were valid at the time they were paid through Tryco in 1999 and 2000, and not as IRC § 31 credits, which would have been counted as paid in April 1996, the Dixons owed penalties and interest dating from the original periods the tax was due up to the time when they

60 Treas. Reg. § 1.31-1.

61 Employers are often responsible for collecting and paying employment taxes on behalf of their employees. The employer is to hold the money as a "special fund in trust for the United States." *See* IRC § 7501. Failure to collect, truthfully account for, and pay over any such tax can result in a trust fund recovery penalty under IRC § 6672.

62 Employers are required to withhold and deduct taxes on wages as they are paid to the employee, minus applicable exemptions. *See* IRC § 3402.

paid the liabilities. The court determined that the IRS could collect the penalties and interest through levy action.

Moosally v. Commissioner

In *Moosally v. Commissioner*, the taxpayer had been assessed trust fund recovery penalties for several quarters in 2000 and individual income tax liabilities for 2008.[63] The taxpayer submitted an OIC seeking to compromise these liabilities. The Centralized Offer in Compromise (COIC) unit rejected the offer because the amount was below the reasonable collection potential (RCP). The taxpayer appealed the decision. Appeals informed the taxpayer that Settlement Officer (SO) Smeck would be assigned to the case. Shortly after requesting her OIC Appeal, the IRS sent the taxpayer a CDP NFTL notice concerning the same tax liabilities covered in the OIC.[64] In response, the taxpayer requested a timely CDP hearing, which SO Kane was initially assigned to conduct.

While the CDP hearing was pending, SO Smeck reviewed the OIC rejection. Prior to SO Smeck's final determination regarding the rejection, SO Kane informed the taxpayer that her CDP hearing had been reassigned to SO Smeck. After conducting the CDP hearing, which included reviewing the taxpayer's information, SO Smeck sustained the NFTL filing and the rejection of the OIC. The taxpayer timely petitioned the Tax Court, arguing that Smeck was not an impartial officer because she reviewed the taxpayer's appeal of the rejected offer before she was assigned to the CDP hearing.

IRC § 6320(b)(3) requires that a CDP hearing must be conducted by an impartial AO, which means that the officer has had no prior involvement with the liability in question. The IRS argued that SO Smeck's review of the rejected OIC was current involvement rather than prior, since she had not issued a determination on her review of the OIC. But the Tax Court read the statute and regulations to mean that prior involvement constituted any involvement with the liabilities at issue outside of the CDP hearing context. Therefore, it found that SO Smeck's review of the OIC before the commencement of the CDP hearing constituted prior involvement and remanded the case to give the taxpayer a new CDP hearing with an impartial officer.

Byers v. Commissioner

In *Byers v. Commissioner*, the IRS sent a CDP levy notice to the taxpayer.[65] The taxpayer timely requested a CDP hearing. The proposed levy action was sustained by the AO at the CDP hearing, and the taxpayer appealed to the Tax Court, which granted summary judgment to the Commissioner. The taxpayer appealed the grant of summary judgment to the Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

The first question on appeal was whether the proper venue for the taxpayer's appeal was in the D.C. Circuit. The IRS argued that venue was only proper in the Eighth Circuit, where the taxpayer resided. IRC § 7482(b)(1) states that appeals from the Tax Court are to be reviewed in the D.C. Circuit unless one

63 142 T.C. No. 10 (2014).

64 The National Taxpayer Advocate has long argued against the practice of filing a lien once an offer has been submitted. Such filings, absent jeopardy or abuse of the system, harm taxpayers at a critical time when they are trying to resolve their tax debts. For instance, a lien could jeopardize a taxpayer's ability to obtain credit or maintain employment. *See* National Taxpayer Advocate 2009 Annual Report to Congress 17-40; National Taxpayer Advocate 2009 Annual Report to Congress, vol. 2, 1-18. For a discussion of the impact liens have on taxpayer compliance generally, *see* National Taxpayer Advocate 2011 Annual Report to Congress, vol. 2, 91-112; National Taxpayer Advocate 2012 Annual Report to Congress, vol. 2, 105-125.

65 740 F.3d 668 (D.C. 2014), *aff'g* T.C. Memo. 2012-27. The taxpayer filed a petition for *certiorari*, which the Supreme Court denied. *See Byers v. Comm'r*, 740 F. 3d 668 (D.C. 2014), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-74).

of the specified exceptions applies. IRC § 7482(b)(1)(A) sets forth a general exception which 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 is based upon the taxpayer's legal residence. The IRS argued that since CDP hearings often include challenges to the underlying liabilities, venue is properly placed in the circuit where the taxpayer resides under IRC § 7482(b)(1)(A). However, the court determined this provision was not applicable since the taxpayer was not challenging the underlying liability. Thus, the proper venue was in the D.C. Circuit. This decision is important because it holds that the D.C. Circuit will not transfer cases to another circuit in non-liability CDP cases unless both parties stipulate to transfer the case.

The *Byers* decision will have several ramifications. For instance, the court does not answer the question of whether another court of appeals could hear an appeal of a non-liability CDP decision without stipulation.[66] This issue will likely be addressed by other circuit courts.[67]

Byers will also create complications for how the Tax Court hears its cases. Under the *Golsen* rule, the Tax Court follows its own precedent unless the court of appeals to which the case would be appealable has ruled to the contrary.[68] How will the Tax Court know where the case is going to be appealed if the taxpayer has a choice in venue? In a Tax Court case subsequent to *Byers*, also involving a non-liability CDP hearing, the Tax Court applied the rules of the appellate court based on the residence of the taxpayer (in this instance the Ninth circuit), stating:

> In light of *Byers*, we are mindful of the uncertainty of appellate venue and the controlling law in this case. We further note, however, that we have not found a case wherein the Court of Appeals for the District of Columbia Circuit has either adopted or rejected the administrative record rule in a collection case under sec. 6320 or sec. 6330.[69]

The changes in practice brought by *Byers* mean that taxpayers and practitioners appealing a non-liability CDP case must now understand the type of case they have and whether it involves redetermination, so that they obtain the appropriate venue. The court in *Byers* was not concerned with taxpayer confusion over types of CDP cases, explaining instead:

> [j]ust as we see in this case, it normally will be obvious from the taxpayer's statement of the issues whether an appeal involves a challenge to a redetermination decision, a CDP decision on a collection method, or both. Therefore, it will not be difficult for this court to distinguish between the two types of cases to determine whether venue is proper in the D.C. Circuit.[70]

66 The court notes "we have no occasion to decide in this case 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." *Byers*, 740 F.3d at 677. This language leaves it open for interpretation whether venue would be proper in another circuit court when neither party addresses it, such as the appellate cases decided prior to *Byers*.

67 Legislation has also been proposed to address this issue. Joint Committee On Taxation, *Technical Explanation Of The Senate Committee On Finance Chairman's Staff Discussion Draft Of Provisions To Reform Tax Administration*, JCX-16-13,39-40 (November 20, 2013). The legislation provides that cases under IRC §§ 6015, 6320, and 6330 will be appealable to the circuit in which is located the petitioner's legal residence (in the case of an individual). While this provision has appeared in several bills, it has gained little traction. The National Taxpayer Advocate has also made a legislative recommendation to address this issue. *See* 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*, *supra*.

68 *Golsen v. Comm'r*, 54 T.C. 742 (1970).

69 *Boulware v. Commr*, T.C. Memo 2014-80 at 19. On appeal No. 14-1147 (D.C. Cir. Aug. 4, 2014).

70 *Byers*, 740 F.3d at 676.

In practice, making the distinction between liability and non-liability CDP hearings could prove difficult for taxpayers, especially *pro se* taxpayers. This is an area that could benefit from IRS guidance to taxpayers and practitioners, pending judicial or legislative clarification. Taxpayers should also be prepared for litigation over the meaning of "redetermination."

Additionally, "stand alone" innocent spouse cases brought under IRC § 6015(e), may be impacted by *Byers* because the IRS may argue in these cases that they do not involve a redetermination of the underlying liability, but rather seek relief from an existing joint liability.[71] As such, under *Byers*, appeals of these cases from the Tax Court could go to the D.C. Circuit if there is no stipulation otherwise.

Despite these unanswered questions, *Byers* could be beneficial for taxpayers in certain situations. With this ruling, taxpayers may now be able to "forum shop." Taxpayers may consider how their regional circuit would handle their non-liability CDP case in comparison to the D.C. Circuit. For instance, in *Robinette v. Comm'r*, the Tax Court held that it could consider evidence that was not part of the administrative record when it reviews an AO's determination for abuse of discretion.[72] This decision was overturned by the Eighth Circuit, which held that evidence is limited to what is in the administrative record.[73] It is possible that the D.C. Circuit could rule in a way opposite to the Eighth Circuit in regards to evidence at trial. If that happens, taxpayers wishing to submit new evidence during a trial may benefit from having their non-liability CDP appeal heard by the D.C. Circuit. Of course, if the taxpayer is not local to the District of Columbia and chooses not to stipulate to the Court of Appeals based on their residence, they will have to incur the travel costs associated with having their case tried in the D.C. Circuit.

After dealing with the venue issue, the court moved to the substance of the taxpayer's appeal. The taxpayer accused the SO of engaging in improper *ex parte* communications with other IRS employees, but the court denied relief on this issue, finding no credible evidence to support this claim. The court noted that the fact the SO had emailed the Office of Chief Counsel to obtain a copy of the Notice of Deficiency that the SO needed to conduct the hearing was not an improper *ex parte* communication. The taxpayer also argued that Senior Judge Swift was not properly appointed under the Appointments Clause. However, this argument was not raised until Judge Swift had already issued his judgment and was thus deemed untimely. Further, the Court determined that Judge Swift was properly recalled under IRC § 7447(c) and that such a recall is constitutional.[74]

Last, the taxpayer challenged the Tax Court's decision to dismiss as moot the claim relating to the proposed levy on the taxpayer's 2003 tax liability. Previously the IRS abated the liability and indicated that it was no longer pursuing a levy. The taxpayer argued the 2003 issues were still relevant to the case, but the D.C. Circuit affirmed the Tax Court's dismissal of those issues based on the abatement of the 2003 liabilities. The taxpayer then argued that the Tax Court erred in upholding the SO's proposed levy determination after removing the 2003 liability, contending that the SO might not have found that the proposed levy was proper if the 2003 liability had not been at issue when she made her initial determination. The court rejected the argument as untimely since the taxpayer failed to raise the issue in the lower court. The D.C. Circuit therefore upheld the Tax Court's determination sustaining the levy.

71 The filing of a Tax Court petition in response to the final notice of determination or after the IRC § 6015 claim is pending for six months is often referred to as a "stand-alone" proceeding, because jurisdiction is predicated on IRC § 6015(e) and not deficiency jurisdiction under IRC § 6213.

72 *Robinette v. Comm'r*, 123 T.C. 85 (2004).

73 *Robinette v. Comm'r*, 439 F.3d 459 (8th Cir. 2006).

74 *See Byers v. Comm'r*, 740 F.3d 679 (citing *Shoemaker v. United States*, 147 U.S. 282, 301 (1893)).

Reed v. Commissioner

In *Reed v. Commissioner*, the taxpayer requested a CDP hearing after receiving a CDP levy notice covering tax years 1987–2001.[75] The taxpayer failed to file timely income tax returns in the years at issue, and after eventually filing late returns, he submitted two OICs to settle the resulting liabilities. In the first offer, the taxpayer offered to pay only a fraction of the liability (less than five percent) based on doubt as to collectibility. The IRS rejected the offer, and Appeals sustained the rejection, finding the taxpayer had generated significant income from a real estate sale and subsequently dissipated those funds. Appeals included the dissipated proceeds in its estimate of collection potential.

The taxpayer submitted a second OIC in 2008, where he again sought to settle his outstanding tax liabilities for a small fraction of the outstanding liability, but the SO returned the offer after discovering that the taxpayer was not in compliance with his income tax obligations.[76] The IRS subsequently issued a final notice of intent to levy to the taxpayer. The taxpayer then filed a CDP hearing request.

During the subsequent CDP hearing, the taxpayer contested the manner in which the IRS handled the 2004 and 2008 offers. In particular, he requested that the SO reopen and evaluate the OIC that the taxpayer had submitted in 2008. The SO declined to reopen the 2008 OIC and ultimately issued a notice of determination sustaining the proposed levy. The taxpayer then filed a petition to the Tax Court.

The IRS challenged the Tax Court's jurisdiction over the case, arguing that there was nothing to review since the taxpayer had not offered a new OIC for consideration during the CDP hearing. The IRS also argued that the taxpayer did not have a right to judicial review of the rejected offer in 2004 or the returned offer in 2008. The court rejected this argument since the SO issued a notice of determination and the taxpayer filed a timely petition, the two prerequisites for Tax Court jurisdiction.

Since the taxpayer did not contest the tax liability, the Tax Court reviewed the proposed levy action for abuse of discretion. First, the taxpayer challenged the SO's refusal to reopen the 2008 OIC during the CDP hearing.[77] The SO determined that she did not have authority to reopen the offer, while the taxpayer argued that the IRS could be required to reopen the offer. The Tax Court applied IRC §§ 7122 and 6330 and rejected the taxpayer's argument. Doing otherwise would mean that the Appeals Office in 2011 would be required to consider an offer submitted in 2008, which contained stale financial information. Taxpayers must submit current financial information with offers based on doubt as to collectibility.[78] Requiring Appeals to consider an old offer during the CDP process would expand administrative and judicial review of offers beyond what Congress intended.[79] Thus, the proposed collection action was sustained.

75 141 T.C. 248 (2013), *opinion supplemented on denial of reconsideration by* T.C. Memo. 2014-41.

76 Under IRC § 7122(e), taxpayers may seek review of *rejected* offers. There is no such right for *returned* offers. The National Taxpayer Advocate has pointed out that the IRS can harm taxpayers by expanding the definition of "returned" offers, which do not provide appeal rights. For a discussion on this, *see* National Taxpayer Advocate 2007 Report to Congress 374-87; National Taxpayer Advocate 2006 Report to Congress 83-109; National Taxpayer Advocate 2004 Annual Report to Congress 311-41; National Taxpayer Advocate 2003 Annual Report to Congress 99-112; National Taxpayer Advocate 2002 Annual Report to Congress 15-24.

77 Following the return of his 2008 offer, the taxpayer exchanged several letters with the offer unit in an attempt to have the offer unit reconsider its decision to return his offer. The taxpayer continued to make payments during the exchange of letters. The Court notes that the taxpayer wanted the 2008 offer reopened on the belief that these payments would be treated as meeting the payment terms of his offer.

78 *See Reed v. Comm'r*, 141 T.C. 248 at 13 (citing *Sullivan v. Comm'r*, T.C. Memo 2009-4; *Goodwin v. Comm'r*, T.C. Memo 2003-289).

79 As noted above, taxpayers may only seek review of rejected offers, and not offers that are returned. IRC § 7122(e).

Imposition of Sanctions

IRC § 6673(a)(1) authorizes the Tax Court to impose sanctions when it appears the taxpayer instituted or maintained proceedings primarily for delay or when the taxpayer's position is frivolous or groundless.[80] As we found in last year's analysis, the court imposed these penalties in only a few CDP cases. Of the 76 cases reviewed this year, the court imposed sanctions in only two cases, or approximately three percent.[81] Last year, with 105 CDP cases decided, the court imposed sanctions in three cases, or three percent.[82] This low number may be attributable to IRC § 6330(g), which allows the IRS to disregard a frivolous hearing request.

Pro Se Analysis

Pro se taxpayers (those without the benefit of counsel) litigated 48 (or 63 percent) of the 76 cases brought before the Tax Court, a decrease from the previous year. Table 3.5.3 shows the breakdown of *pro se* and represented cases and the decisions rendered by the court indicating that eight taxpayers, represented or unrepresented (or about 11 percent of the 76 cases), received some relief on judicial review.

FIGURE 3.5.3, *Pro Se* and Represented Taxpayer Cases and Decisions

Court Decisions	*Pro Se* Taxpayers		Represented Taxpayers	
	Volume	% of Total	Volume	% of Total
Decided for IRS	46	96%	22	79%
Decided for Taxpayer	1	2%	4	14%
Split Decisions	1	2%	2	7%
Totals	**48**	**100%**	**28**	**100%**

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. In fact, despite a decline in the number of CDP cases being litigated, there are several important cases that may impact CDP litigation in the future.

As described in the *Moosally* case, the IRS's desire to consolidate work may interfere with taxpayer rights.[83] The recently adopted Taxpayer Bill of Rights increases taxpayers' awareness of their rights, including the right to appeal an IRS decision in an independent forum, under which the Appeals employee conducting the CDP hearing must have had no prior involvement with the taxpayer's case.[84] Similarly, as discussed in *Isley*, in cases involving criminal convictions, taxpayers may need to consider requesting modification of probation terms by the sentencing court with the consent of the Attorney General in order to resolve tax liabilities with the IRS.

80 See Most Litigated Issue: *Frivolous Issues Penalty Under Internal Revenue Code Section 6673 and Related Appellate-Level Sanctions*, *infra*.

81 *Best v. Comm'r*, T.C. Memo. 2014-72; *Golub v. Comm'r*, T.C. Memo. 2013-196.

82 National Taxpayer Advocate 2013 Annual Report to Congress 381.

83 See IRS, Publication 1, *Your Rights as a Taxpayer* (June 2014).

84 *See, e.g.*, IRC § 6330(b)(3).

The opinions reviewed this year suggest the communication process between the taxpayer and the Appeals Officers occasionally breaks down. For example, in many cases the taxpayer did not provide the requested documentation.[85] Taxpayers also frequently challenged the denial of a face-to-face hearing, an issue that most often resulted from a failure to provide documentation.[86] When the facts of the case are not sufficiently developed, the taxpayer may not obtain the collection alternative or liability determination that he or she would be eligible for if all the facts were known. Appeals Officers and Settlement Officers may need to make special efforts to ensure that taxpayers know what documentation to provide, are given an opportunity to provide the documentation, and encourage them to do so.

The Office of Chief Counsel recently reiterated its position that when Appeals makes a determination under IRC § 6330(c)(1) that the IRS has complied with all applicable legal and administrative requirements, this determination should be reviewed using an abuse of discretion standard.[87] The notice also clarified that when assessing whether all legal and administrative requirements have been met, issues related to payments, overpayment credits, validity of the assessment, and the statute of limitations must be addressed as part of that inquiry. These types of issues are not challenges to the underlying liability, which would require the taxpayer to raise them. Because the abuse of discretion standard applies to these verification requirements, if the administrative record supports Appeals' determination, the IRS Office of Chief Counsel will rely on the administrative record and object to the taxpayer submitting additional evidence at trial. If the administrative record is insufficient, Counsel attorneys are instructed that a motion to remand may be appropriate. This notice serves as a reminder to taxpayers to provide complete information and supporting documentation to the AO during the hearing process as it will not only increase the chance of resolution during the CDP hearing but will also provide the court with a more complete record if the taxpayer appeals the AO's determination.

In all cases, the AO must review the case to ensure that all legal and administrative requirements have been met. If the taxpayer believes that this review has been inadequate, the taxpayer should formally challenge the AO's determination that the IRS has complied with all legal and administrative requirements. Taxpayers should make sure that this challenge, as well as any evidence to support it, is properly documented in the administrative record. The taxpayer may be at a disadvantage in this situation because the IRS is the party with the records in its custody. For the above reasons, it is possible that this will be an issue of litigation in the future.

Lastly, the *Byers* decision may impact future litigation of non-liability CDP cases from the perspective of potential forum-shopping. When considering an appeal from a non-liability CDP case, taxpayers may decide to file in either the Circuit Court of Appeals based on their place of residence or in the D.C. Circuit based on what forum's case law is more advantageous. However, *pro se* taxpayers may have difficulty understanding the distinction between issues involving redetermination of liability and non-liability issues raised at a CDP hearing.

85 *See, e.g.*, *Adighibe v. Comm'r*, T.C. Memo 2013-296; *Arede v. Comm'r*, T.C. Memo. 2014-29; *Cheli v. Comm'r*, T.C. Memo. 2013-200; *Lyons v. Comm'r*, T.C. Memo. 2014-32; *Mayhugh v. Comm'r*, T.C. Memo. 2014-98.

86 *See, e.g.*, *LaForge v. Comm'r*, T.C. Memo. 2013-183; *Shirley v. Comm'r*, T.C. Memo. 2014-10 (holding that denial of a face-to-face hearing as part of a supplemental CDP hearing on remand was appropriate when the taxpayer failed to provide amended returns, a completed Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*, substantiating documentation, and a reasonable cause explanation).

87 IRS Office of Chief Counsel, Notice CC-2014-002 (May 5, 2014).

In sum, the CDP hearing is a powerful tool for taxpayers. Communication between the IRS and the taxpayer is crucial for this process to work properly. If taxpayers provide full documentation to prove their cases, the IRS can make determinations on collection cases that better take into account the taxpayer's facts and circumstances.