



Collection Due Process Appeals: Right Place, Right Time for Successful Negotiations with the IRS

By Howard Levy, JD

When your client comes to you with an IRS collection problem, it is no longer enough to simply be armed with knowledge of the usual and well-promoted remedies the IRS offers, such as an offer in compromise (OIC) or an installment agreement. You need to be right on the remedy, but you also need to understand how to use the IRS collection process to best achieve it. Negotiating in the right place and at the right time increases the likelihood of success and a fair and impartial review of the solution you have crafted.

Collection due process appeals, which began as a way to rein in the IRS collection machinery, have evolved into potentially powerful tools of negotiation. Collection due process (CDP) appeals can:

- give you the power and confidence of negotiating without the threat of an IRS levy;
- change the tone of your negotiations from an IRS employee with an enforcement mindset to one whose job is to resolve cases;
- bring automated collection service (ACS) cases down to size and move the case file to your area for a face-to-face, personalized meeting with an IRS settlement officer;
- allow your client time to breathe, get current on estimated tax payments, prepare and file missing returns, and regroup for negotiations; and

- provide the right to take the final IRS collection decision to an independent Tax Court for review, including the denial of an (OIC).

It has now been almost fifteen years since collection due process laws went into effect, and much has happened in that timeframe. IRS levies on real and personal property have dropped from over 10,000 annually before the law went into effect to roughly 600 per year now. The appeals officers who handled the CDP hearings are no longer known as appeals officers; the IRS now prefers to refer to them as settlement officers. And Treasury regulations were issued that allowed taxpayers to file their appeals late, further expanding their right to be heard.

At the same time, some of the provisions of the law have been stripped away, with allowances for levies on pyramiding employment tax liabilities. The Tax Court underwent a change from a court that primarily reviewed IRS audit decisions to one that now regularly has to determine whether the IRS “abused its discretion” in collecting unpaid taxes. (If there is an abuse, the Tax Court will issue a remand back to the IRS for reconsideration; the Tax Court’s approach is not to tell the Treasury how to act, just whether they have acted properly.)

This is the first of two articles on the current state of CDP appeals. The focus of both articles will be on the pragmatic aspects of using a CDP to achieve the best result for your clients.

This article will cover how to file and handle a CDP appeal, requests for face-to-face conferences, equivalent hearings (late-filed appeals), CDP case resolutions; negotiation strategies for using CDP appeals with revenue officers; submitting an OIC in a CDP; and piggybacking non-CDP liabilities onto the appeal.

The second article will focus on the standards of review in CDP cases, how to preserve

the administrative record for further Tax Court appeal; what a winning Tax Court case looks like; bringing new evidence into court; Tax Court remands back to appeals; innocent spouse claims in CDP hearings; and the continuing jurisdiction of appeals.

Collection Due Process Appeals: A Primer

Collection due process appeals are statutory, a creature of Internal Revenue Code 6330. IRC 6330 was enacted in 1998 in response to testimony before Congress of IRS agents running amok, taking advantage of taxpayers, and seizing property at will. At the time, taxpayers had minimal rights of due process when IRS collectors came calling. They were not entitled to notice or the right to a hearing and review before the IRS acted.

Sec. 6330 changed all that, requiring the IRS to provide notice and the right to a hearing before it could levy on property. When a hearing is requested, the IRS is barred from levying while the hearing (and further Tax Court appeal) is pending. If the taxpayer does not agree with IRS’s administrative decision, a petition to the Tax Court can be filed, bringing IRS collection decisions under the purview of federal judges.

There are a few types of levies that can be made without prior notice and due process, including when the collection of tax is in jeopardy under IRC 6331(a). They are: state income tax refunds, disqualified employment tax levies, and money owed to a federal contractor. In these situations, the opportunity for the CDP hearing is provided after the levy is made. (IRC 6330(f))

How to File and Handle a Collection Due Process Appeal

A request for a CDP hearing is predicated on the IRS sending a Final Notice of Intent to Levy (Letter 1058/Letter 11) to a taxpayer. The Final Notice must be sent regardless of the type of tax owed—income taxes, trust

fund recovery penalties, employment taxes, etc. If the liability is joint, the IRS will issue two separate notices—one to each taxpayer—although the appeals can be consolidated and filed together.

Once the Final Notice has been sent, IRC 6330(a) requires that an appeal must be filed within thirty days to be considered timely. Best practice is to file the appeal on Form 12153 (Request for a Collection Due Process or Equivalent Hearing) and mail with proof of timely mailing. Form 12153 is included with the Final Notice but can also be found in fill-in format on the IRS website at www.irs.gov/pub/irs-pdf/f12153.pdf.

As the request for the CDP hearing establishes the basis for a Tax Court petition, the appeal must be in writing. A tax liability is entitled to only one hearing for each year or period that is owed. Precluded from CDP hearings is any issue that has previously been raised or heard in a prior hearing under IRC 6320 (relating to CDP appeals for federal tax liens) or in any other administrative or judicial proceeding where there was meaningful participation in the hearing.

It is noteworthy that the underlying liability can be a subject for a collection due process case provided that a notice of deficiency was not received or the taxpayer did not have a prior opportunity to dispute the liability. (IRC 6330(c)(2)(B)) In that regard, CDP appeals are not limited to collection issues, and in limited situations can permit liability to be reviewed.

Once filed, the appeal stops all IRS levy action while it is pending, including while a Tax Court petition is pending.

The basis for the appeal can include a request for an installment agreement, OIC, innocent spouse claim, penalty or interest abatement, innocent spouse relief, or a determination of financial hardship (uncollectible). The basis for the appeal must be set forth in writing or an issue could otherwise be barred from consideration. The language can be short

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and to the point, for example:

“Taxpayer is currently uncollectible, or in the alternative, may qualify for an installment agreement or other collection alternatives, including but not limited to uncollectible or offer in compromise. Any enforced collection by levy would impose a financial hardship and the taxpayer would be unable to pay basic monthly living expenses.”

Once the appeal is filed, the IRS will process it and forward to one of its centralized appeals centers located in campuses including Holtsville (Brookhaven), NY; Fresno, CA; and Philadelphia, PA. Expect a confirmation letter to be sent by appeals approximately 60–90 days after the appeal was filed, acknowledging that the case has been transferred to an IRS appeals campus.

The appeal will then be assigned to an IRS settlement officer from a centralized campus location who will issue a letter setting a day and time for a telephonic appeals hearing and requesting supporting documentation. The letter can be identified with the heading “Appeals Received Your Request for a Collection Due Process Hearing.” The settlement officer is required to be impartial, with no prior involvement in the collection of the taxes at issue. (IRC 6330(b)(3))

Up to the point when the day and time of the hearing are set, as much as four to six months will likely have passed from the time the IRS first sent the Final Notice of Intent to Levy. This is valuable time and a primary benefit of CDP appeals, providing time for the self-employed to get current on estimated tax deposits, for businesses to correct prior bad acts and start making federal employment tax deposits, to prepare and file past-due returns, and, of course, pull together financial statements and supporting documentation to present to appeals in support of the case. In CDP appeals, this can all be done without the threat of IRS levy action.

The documentation requested will include a completed financial statement, Form 433A (Collection Information Statement for Wage Earners and Self-Employed Individuals) or Form 433B (Collection Information Statement for Businesses).

Be prepared to provide supporting information for the 433A or 433B, including:

- verification that the taxpayer is now current on estimated tax payments and/or federal tax deposits;
- three months’ worth of bank statements;
- three months’ worth of paystubs for wage earners or a current profit and loss for business owners;
- statement verifying mortgage and car loan;
- copy of the most recent tax return or any unfiled returns; and
- verification of any expense that is not within IRS collection standard allowances.

The documents requested vary from settlement officer to settlement officer, but generally are within these guidelines. At this time, an OIC can be submitted as part of the appeal process.

Be prepared ahead of time. There should be minimal surprises in preparing the documenta-

tions distant and impersonal. However, within fourteen days of receiving the settlement officer’s letter setting the day and time of the hearing, a request may be made to transfer the case to the appeals office closest to the taxpayer’s residence or place of business for a face-to-face meeting. Absent the request and transfer of the file for a face-to-face appeals conference, the hearing would be held by telephone with the IRS campus employee.

Strategically, if the Final Notice of Intent to Levy was issued by ACS, the face-to-face conference request permits a taxpayer to turn the difficulties and frustrations of achieving resolution with ACS into a one-on-one meeting with a local settlement officer. This can be especially beneficial in high-dollar ACS cases.

For the face-to-face conference to be granted, the taxpayer must provide all the documents requested by the appeals campus within the timeframe allotted (fourteen days) and demonstrate compliance with filing and payment requirements. (Treas. Reg.

If the appeals campus agrees to a face-to-face case transfer, expect approximately four additional months for the file to arrive in your locale and for a new hearing date to be set.

tion necessary to move forward in CDP hearings, a benefit over the limited timeframes that might be required by ACS or a revenue officer (RO).

The documents will be requested to be sent within fourteen days of the settlement officer’s letter making the request. The hearing date will usually be a few weeks thereafter. The hearing date is set without advance consultation as to availability; if it poses a conflict, a letter should be sent to the settlement officer respectfully requesting a new date.

Requests for Face-to-Face Conferences

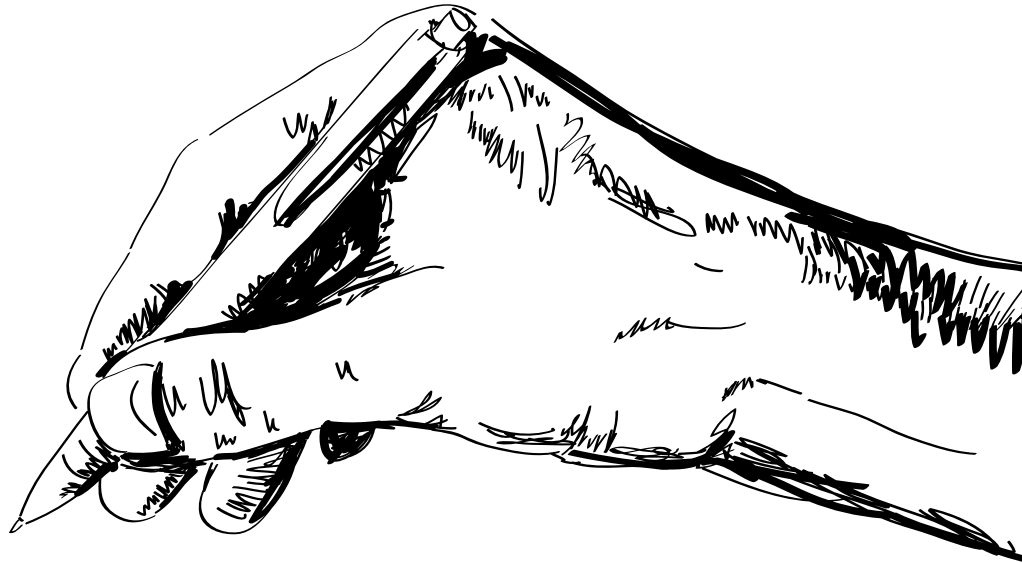
At this point, the hearing is set to be held at an IRS campus by telephone, making the negotia-

301.6330-1(d)(2), Q&A D-7)

If the appeals campus agrees to a face-to-face case transfer, expect approximately four additional months for the file to arrive in your locale and for a new hearing date to be set. The local settlement officer, after review of the case file, may request additional or updated supporting documentation. Note that the taxpayer is not required to participate and attend a collection due process hearing, and it is usually beneficial for the representative to handle the negotiations on the taxpayer’s behalf.

Concluding the Hearing

After the documents are provided, resolution is negotiated, and the hearing is concluded, a



Determination Letter will be issued in timely filed cases and a Decision Letter for those cases that were filed late (Equivalent Hearings). The Determination Letter provides a 30-day right for further judicial review in Tax Court. The Decision Letter is final and does not have any additional rights of review.

The Determination and Decision Letters should address three primary issues that the settlement officer is required to take into consideration:

- verification that the requirements of any applicable law or administrative procedure have been met;
- decision on the issues raised in the appeal (e.g., installment agreement as an alternative to levy); and
- whether the proposed collection action (e.g., levy) balances the need for efficient collection of taxes with the taxpayer's legitimate concern that the collection action be no more intrusive than necessary. (See IRC 6330(c)(3))

In cases where the underlying liability is not being challenged and the focus is on collection alternatives, the standard of review for the settlement officer is whether there was an abuse of discretion in the decisionmaking process. (*Goza v. Commissioner*, 114 T.C. 176 (2000)) Abuse of discretion is generally given a liberal interpretation by the Tax Court. The Court has a strong reluctance to impose its judgment over IRS's as to the best method to collect taxes for the Treasury. Even with that, the standard of review in CDP hearings requires the IRS to pay attention and give more consideration to the decisionmaking process than it would if dealings were directly with ACS or an RO.

As an alternative to case closure, a waiver can be signed as to the issuance of either a Determination or Decision Letter. The waiver would include a description of the resolution of the case. The waiver speeds the closing process and saves the settlement officer the need to draft the more comprehensive letters.

Equivalent Hearings – Filing Late Can Be Okay

As CDP appeals provide essential rights of

negotiation, it is important to determine if, and when, your client has received a Final Notice of Intent to Levy. As a starter, ask your clients to bring all their notices to you. Supplement that with an IRS account transcript that will show if a Final Notice has been issued, and when.

What if the account transcripts reveal the Final Notice was issued more than thirty days ago, which seemingly deprives your client of a collection due process appeal?

Treasury Regulation 301.6330(i) permits late-filed appeals. These hearings are known as Equivalent Hearings because they give the taxpayer an opportunity for resolution that is equivalent to a collection due process hearing, with the same issues considered as in a timely-filed appeal. See also Internal Revenue Manual 5.1.9.3.5. On Form 11253 (Request for a Collection Due Process Hearing), make sure that the box for Equivalent Hearings is checked.

The IRS will accept late-filed CDP appeals up to one year after the Final Notice of Intent to Levy was sent.

An Equivalent Hearing also puts a hold on IRS levy action like a timely filed appeal, although it is by IRS administrative grace rather than compelled by law. The suspension of enforced collection is determined on a case-by-case basis, but experience shows the IRS will process a late-filed appeal in the same manner as a timely filed appeal provided that collection is not at risk, assets are not being dissipated, additional liabilities are not being pyramided, tax deposits are current, and the filing is not solely to delay the collection process.

As the factors for processing a late-filed appeal are subjective and require some cur-

rent knowledge about the case, ACS may be more likely to process late-filed appeals than ROs, although experience shows that ROs are open to adhering to a late-filed appeal provided the taxpayer is in good standing. It helps to know your RO when filing a late CDP appeal. All things considered, experience shows that the IRS tends to be liberal in processing late-filed appeals.

There are some real and substantial benefits to Equivalent Hearings. To begin with, Equivalent Hearings do not suspend the 10-year statute of limitations on collection (whereas a timely filed appeal tolls the statute from running). This provides a hold on enforcement without giving up time.

In certain circumstances, even when a timely appeal can be filed, there are advantages to holding the Final Notice and filing a few days late. For example, timely filed appeals can toll bankruptcy timing rules; late-filed appeals do not.

Only timely filed appeals provide the right to Tax Court review; Equivalent Hearings end when the appeal ends—there is no Tax Court, but only a small portion of collection cases have IRS appeal errors significant enough to justify Tax Court.

A decision to file late when timely filing is available entails an analysis of several factors, including:

- the good faith the taxpayer has shown in staying current on filings, payments, and communicating with the IRS;
- relevance of the statute of limitations;
- whether the case is in ACS or with an RO; and
- a projection of the ultimate need to petition to Tax Court.

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Ultimately, a late-filed collection due process appeal provides the negotiating benefits of a timely filed appeal, which in most cases is too important to overlook.

Collection Due Process Appeals and the Revenue Officer

Experience shows that IRS ROs are programmed to issue the Final Notice of Intent to Levy pretty quickly after the case is assigned to them, usually upon first contact. The RO's goal is to ready the case for levy if cooperation and resolution do not occur later rather than wait for the fallout and then not be able to levy because the Final Notice was not sent.

This creates a situation where the RO is making aggressive overtures before the taxpayer is even given a chance to comply and resolve the case. The result has to be the filing of a CDP appeal with the RO, even if resolution would have been possible. Otherwise, if it takes more than thirty days to resolve the case, negotiations will be had with the risk of levy, a chance too great to take for your client, even with the most evenhanded of ROs.

A request can be made for the RO to withdraw the Final Notice of Intent to Levy so that everyone is on equal footing to negotiate without the hammer of levy hanging over resolution. The RO can also hold the case file and continue to work toward resolution even though a CDP appeal was filed. (See Treas. Reg. 301.6330-1(c)(2), Q&A C-9, and Internal Revenue Manual 5.1.9.3.3) In most cases, the RO will hold the case up to forty-five days after the filing of the CDP. If progress is made, the concurrence of a group manager is necessary to hold and work the file for an additional forty-five days. If the RO cannot achieve case resolution within ninety days, then the case is expected to be sent on to appeals for a hearing. Either way, it is important to preserve rights and protect

property when a Final Notice of Intent to Levy is sent out.

Collection Due Process Appeals and Offers in Compromise

A CDP can include an OIC as the requested relief. Strategically, that means that the final word on an OIC does not belong to the Centralized Offer in Compromise (COIC) Unit, but rather to a settlement officer, making a decision that not only involves face-to-face contact, but should also incorporate CDP appeal standards of abuse of discretion.

This does not guarantee an OIC will be accepted, but the more sophisticated standard of evaluation, along with the face-to-face nature of the review, should only help work through the common bottlenecks of the IRS COIC units that make success in a compromise much harder than advertised.

Internal Revenue Manual 5.1.8.3.9.1 provides that an offer submitted as part of a CDP or Equivalent Hearing will generally be worked by appeals internally, particularly when the offer is not complex and does not require field verification.

Make sure to ask if the settlement officer will review the offer or send it out first to the COIC unit. Either way, the settlement officer has final review on an OIC submitted, with standards that exceed that of the COIC.

It should also be noted that the same review holds true for innocent spouse claims, which can also be bogged down in centralized IRS processing centers. They can be submitted via the CDP appeal process, giving the settlement officer the final say.

CDP Appeals and Piggybacking

Standard IRS policy is that closure of a collection case involves resolution of all accounts that are owed, meaning if a taxpayer owes income taxes and the trust fund recovery penalty, an installment agreement or uncollectible determination will cover both.



The same concept holds true for CDP cases. What if there are multiple account balances, some for years where a Final Notice was issued more than a year ago (no appeal can be filed), and some for which a Final Notice was more recently issued and an appeal can still be filed?

The years where no appeal can be filed will tag along with the tax liabilities that can be made part of an appeal. Although the appeal will only be for some of the taxes owed, it will conclude with a resolution of all liabilities. Whatever the settlement officer decides for the tax liabilities made part of the appeal—com-

promise, installment agreement, uncollectible—will attach to the other years.

The collection hold will only be on the tax liabilities made part of the appeal, but the piggyback strategy can provide, for some taxpayers, an opportunity to route offers, innocent spouse claims, and tough cases to a settlement officer for a local face-to-face conference that will include all liabilities. Although consideration of the risk of levy on the non-CDP periods must be taken into account, odds are that personal negotiations under due process standards are better than

nameless, faceless dealings, especially in IRS campus cases, such as OIC, high-dollar cases, and innocent spouse claims. **EA**

About the Author:

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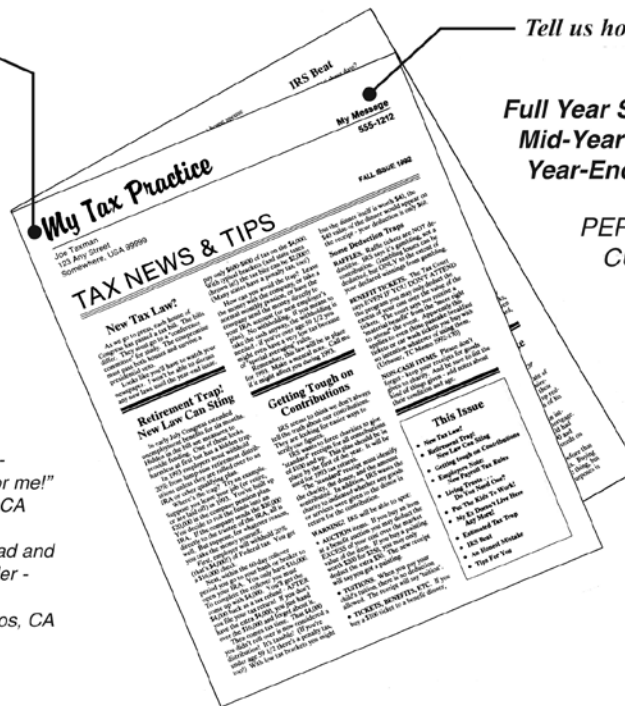
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