

COLLECTION DUE PROCESS (CDP) HEARINGS

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I. INTRODUCTION

- A. History – Enacted as part of the 1998 IRS Restructuring and Reform Act
- B. Effective Date – January 19, 1999
- C. Parallel Statutes – I.R.C. Sections 6320 (liens) and 6330 (levies)

II. NOTICE OF LIEN FILINGS

A. General Notice Requirements

- A taxpayer has to be notified any time there is a lien notice filed at the courthouse. This notice (by certified mail) has to be sent out within five business days of the notice filing. This is a statutory requirement. See I.R.C. § 6320(a)(1). Unfortunately the lien is not rendered invalid if proper notice is not given.

B. Delivery of Notice

- Must be hand-delivered or sent certified mail w/in 5 business days of the FTL filing.
- IRS uses Form 3172 for this notice.

C. Information to be Included

- Right to a hearing, etc. Hearings are to be offered in the IRS Office of Appeals.

D. Appeals Hearing Request

- Use Form 12153 (see Exhibit A). Also use an attachment. (See Exhibit B). CDP hearings on lien notices are usually not successful because of IRS' broad power to file them. However, you can use the hearings to buy time or negotiate an installment agreement. But that won't get rid of the lien.

E. Multiple NFTL's

- Only one hearing allowed per period, regardless of the number of liens filed. But multiple years can be combined in a single hearing.

III. NOTICE BEFORE LEVY

A. General Notice Rules

- See Letter 1058 (Exhibit C). Also use an attachment (Exhibit D) to your 12153 request. Before-the-fact notice is a statutory requirement. Letter 1058 must

notify the taxpayer of the right to a hearing. Note that CP504 letters do not confer appeal rights.

B. Methods of Levy Notice

- Certified mail, etc.

C. Information to be Included

- Right to a hearing, explanation of the process, etc.

D. Time Limit for Submitting Request

- 30 days after receiving notice. This date can't be extended. If it's after 30 days, use "equivalent hearing" procedures.

IV. APPEALS HEARINGS PROCEDURES

A. Matters Considered

- Generally the same for both lien and levy hearings. You can raise the same type of issues. Generally you will raise collection alternatives, such as: (1) offers in compromise, (2) installment agreement (the most common), and (3) currently not collectible (CNC) status.
- You can also raise underlying liability issues, if you don't agree that you owe the tax. If a TP didn't receive a notice of deficiency, he can challenge the validity of the assessment in a CDP hearing
- A taxpayer can challenge the accuracy of a tax assessment in a CDP hearing.

B. Precluded Issues

- Issues previously raised in a CDP hearing.
- Liability issues, if prior deficiency notice was issued and ignored.
- A taxpayer can't challenge a TFRP liability in a CDP hearing if he received, but ignored the 60-day letter (Letter 1153).
- A taxpayer CAN raise the underlying liability as an issue, even if the liability is shown on an originally filed return.
- Can't raise frivolous issues (like protestor-type issues).

C. One Hearing per Period, and Impartiality

- Only one hearing per tax period permitted
- Settlement officers (SO) may not communicate w/ revenue officers.
- The SO must balance the need for efficient collection of tax with the legitimate concern that collection action be no more intrusive than necessary.

D. Investigation

- SO is required to verify that all laws and procedures have been complied with. RO's never fully comply, although the determinations usually say that they did.

E. Suspension of Enforcement and Collection Statute of Limitations

- If a CDP hearing request is filed, all levy actions are stayed and the statute of limitations is suspended. Note that these two things are generally coupled.
- However, IRS can continue to levy after a CDP hearing request if only frivolous arguments are made.

F. Hearings Procedures

- Hearings are conducted by IRS settlement officers (SO), not appeals officers (AO). This is an important distinction because SO's are all former collection employees (revenue officers), whereas AO's are all former examination agents.
- There is no right to subpoena and examine witnesses in a CDP hearing.
- Taxpayers now have the right to make an audio (not video) recording under the Keene case. It is good practice always to make a recording if the hearing is expected to be contentious or if you are confident that the adverse determination will be judicially appealed. Otherwise there is no need. There is an open question whether telephonic hearings may be audio recorded. See conflicting cases.
- Expect the SO to always ask for 433-A or 433-B financial information.
- IRC 6230 hearings can be held simultaneously with IRC 6330 hearings.
- FACE-TO-FACE ISSUES:
 1. See, generally, Reg 301.6330-1(d).
 2. Face-to-face is preferable to telephonic hearings. Easier for them to say "no" on the telephone.
 3. No face-to-face will be granted if TP isn't compliant, i.e. hasn't filed or paid in current period.
 4. SO will require 433 form before transferring to Houston.
 5. A taxpayer will generally be offered a face-to-face conference at a location closest to his home.
 6. A taxpayer is not guaranteed a fac-to-face hearing; mandamus will be denied.

G. Innocent Spouse Defenses

- Normally you won't see these defenses raised in a CDP hearing because the taxpayer will already have filed an innocent spouse request for relief under I.R.C. § 6015 with a Form 8856 filed in the Cincinnati IRS office.

H. Assessment Validity

- SO may rely on Form 4340 to establish validity of an assessment.

I. Determination Letter

- Shortly after the CDP hearing, the SO will issue a determination letter. (See Exhibit E).

- An SO cannot issue a notice of determination while the taxpayer is in bankruptcy; otherwise it would violate the automatic stay provision of 11 U.S.C. 362(a).

J. Retained Jurisdiction

- After the SO issues a determination letter, he/she retains jurisdiction w/ respect to that taxpayer for all subsequent periods.

K. Litigation Hazards

- Appeals can consider hazards of litigation if TFRP merits are considered, even where the 60-day notice was given. SO can also consider as a hazard, the destruction of the TFRP administrative file.

V. LATE-FILED REQUESTS

A. Equivalent Hearings

- You ask for one of these if you are past the 30 days.
- S/L not suspended; collection enforcement not stayed.
- But it still may be worthwhile to ask for a hearing.
- The same issues are heard in an equivalent hearing as in a CDP hearing.
- If the 12153 is submitted as a “regular” request, but is late, it will be treated as an equivalent hearing.

B. Timeliness Rules

- See IRC 7502 and 9503.

VI. JUDICIAL REVIEW

A. General Rules, and Choice of Forum

- US Tax Court has exclusive jurisdiction to hear these appeals. This is so even if the liability has to do with employment tax.
- See Exhibit F for sample Tax Court petition.

B. Appeal Period Rules

- Strictly construed; no exceptions.

C. De Novo Versus Abuse of Discretion Standard

- Liability validity is *de novo*; all other issues are abuse of discretion.
- Example of abuse of discretion is AO’s refusal to subordinate a lien.
- It was an abuse of discretion for the AO to consider two telephone calls as a hearing without notifying the taxpayer of that.

- It's an abuse of discretion for the AO to refuse to consider a taxpayer's challenge to the underlying liability.
- The Tax Court is limited in its review to the administrative record.

D. Precluded Liability and/or Jurisdiction Issues

- Tax Court won't consider underlying liability issue if taxpayer has had an opportunity to dispute it.
- No TC petition is permitted if the taxpayer is in bankruptcy after the CDP determination is issued.

E. New and/or Affirmative Issues

- Not permitted in Tax Court.

F. Interest Abatement

- § 6404 abatement issued can be considered by the Tax Court.

G. Lack of Notice

- Refusal of certified mail delivery of a deficiency notice will not confer judicial rights regarding underlying liability.

H. Post-petition Motion to Dismiss

- Taxpayers are permitted to file these.

VII. MISCELLANEOUS TOPICS

A. Jeopardy Determinations

- Pre-levy CDP hearings are NA where there has been a jeopardy assessment.

B. Nominee Liens

- Unfortunately, CDP hearings are not available where there has been a nominee lien filed.

C. Forms Used, Mailing Address

- Send 12153 form directly to the RO handling the case.

D. Time Limit for IRS Appeals to Act on a Request

- There is no set time frame, but they will act as expeditiously as possible.

E. Bankruptcy Issues

- IRS' issuing a CDP notice after a bankruptcy filing violates the automatic stay.

VIII. FINAL OBSERVATIONS AND RECOMMENDATIONS

- A. Note that lien notices are always after the fact whereas levy notices are before the fact.
- B. The IRS Appeals Office and the Tax Court have been inundated with these cases and have had to staff up to handle them. Because of staffing problems, IRS prefers to conduct telephonic hearings rather than in-person, face-to-face hearings. You always want to request a face-to-face because it's much easier for the IRS to say "no" over the telephone than in person.
- C. Not requesting a CDP hearing can be tantamount to malpractice. So, seriously consider them.
- D. CDP hearing requests are far less frequently filed for liens than for levies. There are a couple of reasons for this: (1) as the notice is always after the fact, there is rarely anything that a CDP hearing can accomplish and (2) there are very few ways to attack a lien filing, as the IRS has statutory authority to do it at any time following assessment.
- E. Go to the hearing with a plan of action! (something you want the IRS to do or not to do). You can ask for OIC, IA, or CNC status. Or you can ask for innocent spouse relief.
- F. Use a checklist every time you do a request for CDP hearing. (See Exhibit G)