Collection Due Process Procedures

Michael DeBlis III, Esq.
Partner
DeBlis Law

Michael DeBlis III, Esq.

- Trial Lawyer
- Actor
- Author
- NCDC Graduate
- Marathon runner



Background

- If you owe the IRS but do not pay your tax liability in full, the IRS will send you a tax bill demanding payment in full. If you do not pay in full or make other payment arrangements, the IRS will pursue collection of the taxes through *liens, levies, or garnishments*.

Tax Liens

- A tax lien establishes the government's right to seize your assets and use the proceeds to pay your tax liability. The filing of a tax lien can be quite *burdensome*.
- Third parties dealing with your property may find their positions subordinated to the position of the IRS. Moreover, the filing of a tax lien will be reported to *credit agencies* and may *adversely affect your credit*.

Tax Liens

- If the IRS places a lien on your property, they must send you a notice of the lien within five days of the lien being filed. If you want to appeal the placement of the lien, you must request a collection due process hearing with the Office of Appeals *within thirty days after the fifth day the lien was filed*.

Tax Liens

- If you fail to request a CDP hearing within the thirty-day period, you forfeit your right to the hearing. However, you may obtain an equivalent hearing but your right to appeal an adverse ruling will be lost.

Avoid Liens

- The Internal Revenue Code and the IRS's own procedures give properly informed taxpayers the opportunity to prevent the filing of tax lien notices, but you must be proactive and work with the IRS in a timely and effective manner. Failure to do so will result in the filing of tax lien notices in the public record, after which it is very difficult to get the lien removed.

Removing Liens

- After a lien has been filed, it is very important to have the lien released, or to have certain assets removed from the attachment of the lien, so that property can be sold or refinanced, or so the taxpayer can obtain a new loan to resolve his tax problems.
- In these cases, the IRS can issue several kinds of “certificates” with respect to previously filed liens.

Tax Levies

- A levy is often the IRS's way of getting your attention. A tax levy is the actual seizure of your wages or commissions (often called a garnishment) or whatever other assets the IRS can find to pay off your tax debt.
- This may include bank accounts, IRAs, automobiles, stocks, and bonds – anything that isn't nailed down, and some things that are (like your house).

Tax Levies

- You have only 30 days from the date of a final notice of intent to levy to either pay the tax in full or find another answer. Ignoring the notice will only make matters worse.
- Once the 30 days has passed, the IRS does not have to give any further notice before seizing your assets or wages.

Overview

- Before the IRS can levy on TP's property, it must allow the TP an opportunity for administrative review of the IRS's collection actions by the IRS Appeals Division. After the Appeals Officer renders his decision in the form of a notice of determination, the TP has the right to appeal an adverse determination to the Tax Court

Administrative CDP Hearing Procedures

- TPs are entitled to CDP hearings in two situations:
  - After a notice of federal tax lien is filed, and
  - After compliance issues a notice of intent to levy

Administrative CDP Hearing Procedures

- Notice of Tax Lien
  - The IRS may file a tax lien. The filing of the tax lien can be quite burdensome to TP. Third parties dealing w/ TP's property may find their positions *subordinated* to the position of the IRS.
  - Moreover, the filing of the tax lien will be *reported* by credit agencies and may adversely affect TP's credit

Notice of Tax Lien

- IRS must notify TP in writing of the filing no later than 5 days after filing the tax lien. The notice must state in simple terms the amount of the tax and TP's appeals rights
- TP invokes his right to a "due process hearing" by filing a request within 30 days after the expiration of the IRS's notice period after the filing (i.e., 5 days after the filing of the tax lien)

Notice of Tax Lien

- What happens if the TP *fails* to request the CDP hearing in the 30-day period? He forfeits the right to the CDP hearing, but may obtain an “equivalent hearing” which is n/ subject to judicial review

Notice of Tax Lien

- What happens at the conclusion of the hearing? The IRS may either file an appropriate document to *reverse the filing of the lien* or it may *issue a Notice of Determination* (a.k.a. Determination Letter) informing the TP that it will n/ reverse the filing.
- The Notice of Determination serves the same purpose as a Notice of Deficiency in that it is TP's ticket to an appropriate court for judicial review
- TP has the right to request judicial review of the Appeals determination

Notice of Intent to Levy

- Subject to a few exceptions, the IRS must give TP notice of intent to levy *before* the levy action is taken. The IRS must notify TP of his right to a due process hearing on the levy action and other TP rights w/ respect to levies

Notice of Intent to Levy

- Exceptions to issuance of notice before the levy action is taken:
  - State income tax refunds, and
  - Situations where collection of the tax is determined to be in jeopardy

Notice of Intent to Levy

- TP must request the hearing *within 30 days after the required notice is given or sent*
- If TP does n/ request the hearing w/in 30 days, he forfeits the CDP hearing, but is entitled administratively to an *equivalent hearing* for which there is *no judicial review*

Notice of Intent to Levy

- At the conclusion of the hearing, the Appeals Officer issues a Notice of Determination which, if TP remains unsatisfied, is TP's ticket to judicial review
- TP has the right to request judicial review of the Appeals determination

Administrative CDP Hearing Procedures

- How does TP request a CDP hearing for Appeals consideration of the disputed collection action?
  - Request for a CDP hearing must be made in writing and include:
    - TP's name,
    - Address,
    - Day time telephone,
    - Signature, and
    - Date
  - Note: On the protest, TP should indicate the alternative collection action(s) that he wants the IRS to take instead of levying on his property

Administrative CDP Hearing Procedures

- During appeals consideration, what happens w/ the collection action?
  - Federal tax liens: Since notice of federal tax lien has already been filed and TP is notified of applicable CDP rights, request for such a hearing has no immediate effect on this collection action
  - Levies: Levy action is suspended during the period of time that Appeals is considering TP's timely request for a CDP hearing relating to a notice of intent to levy. In equivalent hearing cases, collection can move forward on levy if IRS determines that collection of tax is in jeopardy

Administrative CDP Hearing Procedures

- What effect does a CDP hearing have on the SOL and collection actions?
  - A drawback for TPs involved w/ the CDP process is that the SOL on collection is suspended beginning on the date that the IRS receives the hearing request

Administrative CDP Hearing Procedures

- When does the limitations period resume?
  - When the IRS receives a written withdrawal of the hearing request from the TP, or
  - When the determination resulting from the CDP hearing becomes final
- When does the determination become final?
  - When the time for seeking judicial review expires (30 days after the date of the notice of determination), or
  - When the TP exhausts his appeal rights following judicial review

Administrative CDP Hearing Procedures

- Note well: The limitations period will *never* expire before the 90th day *after the date* on which a final determination is made w/ respect to the hearing
- Example: The SOL on collection w/ respect to Alex's tax period listed in the CDP notice expires on August 1, 2012. The IRS sent Alex the CDP notice on April 30, 2012. Alex timely requested a CDP hearing, which the IRS received on May 15. The Appeals Officer sent Alex a notice of determination on June 15. Alex timely sought Tax Court review of that determination.

Administrative CDP Hearing Procedures

- Analysis: The SOL on collection would be *suspended* from May 15, 2012, the date Alex requested a CDP hearing until the determination resulting from the CDP hearing becomes final, plus 90 days.

Administrative CDP Hearing Procedures

- How is a CDP Hearing Conducted?
  - Hearing must be conducted by an impartial Appeals Office employee w/ no prior involvement in the matter
  - Hearing must be at the Appeals office closest to TP's residence
  - Hearing may be in person or by telephone
  - TP has no right to subpoena or examine witnesses

Administrative CDP Hearing Procedures

- Appeals Office employee must verify the validity of the assessment. This verification is just that the assessment was proper; not that the tax was due
- Spousal defenses may be considered at the CDP hearing
- TP may record the hearing

Administrative CDP Hearing Procedures

- What matters may be considered at the meeting?
  - (1) The Appeals Officer must receive an IRS "verification" that applicable law and administrative procedures have been met. For example, in cases of tax assessments requiring a predicate notice of deficiency, the Appeals Officer must verify that the notice has been properly mailed to TP and that the assessment has been properly made

Administrative CDP Hearing Procedures

- (2) TP may raise any appropriate defense, including spousal defenses, the propriety of IRS collection measures, and alternatives to collection measures. The Appeals Officer will not, however, consider any issue previously disposed of in a CDP hearing or in a prior administrative or judicial proceeding in which TP could have contested liability and participated meaningfully

Administrative CDP Hearing Procedures

- (3) Whether the proposed collection action balances the need for efficient tax collection w/ the legitimate concern of TP that collection action n/ be more intrusive than necessary

Administrative CDP Hearing Procedures

- What issues can the TP raise?
  - Any relevant issue relating to the unpaid tax or the proposed levy (including appropriate spousal defenses);
  - Challenges to the appropriateness of the collection actions;
  - Offers of collection alternatives (TP must have filed all required tax returns prior to hearing); and
  - Challenges to liability only if TP has n/ received a notice of deficiency or had an earlier opportunity to dispute the liability before appeals

Administrative CDP Hearing Procedures

- When can the TP challenge the underlying tax liability?
  - As to the underlying liability, TP can only contest if he "did n/ receive any statutory notice of deficiency for such tax liability or did n/ otherwise have an opportunity to dispute such tax liability."
  - The notice of deficiency gives TP the right to contest underlying liability in the Tax Court and is thus fatal to a review of the underlying tax liability in a CDP hearing.
  - TP will also be considered to have had a previous opportunity to contest if he waives the right to a notice of deficiency on Form 870 or Form 4549

Administrative CDP Hearing Procedures

- Issue: May TP contest the merits of the self-reported tax liability in a CDP hearing?
- Held: Yes

Administrative CDP Hearing Procedures

- Facts: Taxpayers, husband and wife, filed their federal income tax reporting a substantial tax liability but did n/ remit full payment of that liability. The IRS accepted the return as filed and assessed the voluntarily reported tax liability. The IRS did n/ audit TPs' return or issue a notice of deficiency. After collection efforts failed, the IRS issued a Notice of Intent to Levy and TPs responded by requesting a CDP hearing. The Appeals Officer issued a notice of determination allowing levy actions to proceed. TPs challenged the Appeals Officer's determination and the amount of the underlying tax liability in Tax Court

Administrative CDP Hearing Procedures

- Analysis: The plain language of S 6330 entitles TPs to an opportunity to establish that they erred in their self-assessment b/c the IRS had n/ issued a notice of deficiency (which, of course, they were n/ required to do b/c there was no tax deficiency) and TPs did n/ have an opportunity to dispute their tax liability. This holding advances the policies of these sections and is consistent w/ Congressional intent that the IRS should collect the correct amount of tax

Administrative CDP Hearing Procedures

- What can the TP do if liability issues cannot be raised during the CDP hearing?
  - Option 1: Determine *how* the liability came to be
    - Example: If examination division completed an audit and issued a statutory notice of deficiency and TP failed to petition the U.S. Tax Court, the tax on the notice will be assessed. TP can follow procedures in 3598 to dispute the assessed tax liability (audit reconsideration process).
    - If TP makes such a request and examination does n/ accept TP's position, TP will have the opportunity to request that the case be forwarded to appeals for consideration of the issues raised during the audit reconsideration process

Administrative CDP Hearing Procedures

- Option 2: Another alternative is for TP to submit an offer in compromise based on doubt as to liability. The case will be forwarded to examination for consideration. If that compliance function does n/ agree w/ TP, TP is entitled to have the offer considered by Appeals

Administrative CDP Hearing Procedures

- Note well: In both situations, TP has no further appeals rights beyond the administrative appeal

Administrative CDP Hearing Procedures

- Penalties for Abusing CDP Procedures
  - Many TPs use the CDP procedures to delay and obstruct the IRS's legitimate collection actions. Many TPs use the process to raise frivolous arguments that they previously asserted during the audit and appeals stages
  - S 6673 allows the court to penalize TP up to $25K, it if appears that TP has instituted a proceeding primarily for delay or when TP advances frivolous or groundless positions

Administrative CDP Hearing Procedures

- To discourage TPs from requesting CDP hearings in the first place when they don't have legitimate concerns, 6702(b) imposes a $5K penalty on any person who submits a "specified frivolous submission"
- A request for a CDP hearing that includes a specified frivolous submission will be treated as if it were *never* submitted

Administrative CDP Hearing Procedures

- What must appeals do after it holds the CDP or equivalent hearing?
  - If TP and Appeals employee reach agreement about case, TP will be asked to sign an agreement form – Form 12257
  - At the end of the hearing, Appeals issues a Notice of Determination or a Decision Letter
  - Results of the CDP hearing appear in the notice of determination
  - The notice of determination must describe what was considered in the hearing, confirm that all procedural requirements were met, and decide the merits of any issues raised by TP during the hearing

Court Review in CDP Cases

- What happens if TP does n/ obtain a favorable result in the administrative CDP hearing?
  - Judicial review of the decision in Tax Court is available – from both post-lien and pre-levy administrative proceedings

Court Review in CDP Cases

- Judicial review must be taken w/in 30 days of the Appeals Office Notice of Determination (although the Notice of Deficiency gives TP 90 days to petition the Tax Court, the Notice of Determination gives TP only 30 days to file a petition requesting review of a CDP hearing)
- Exception: If TP only seeks Tax Court review of Appeals' denial of relief in connection w/ an innocent spouse claim at a CDP hearing, then TP has 90 days from the date of the notice of determination to request Tax Court review

Court Review in CDP Cases

- Forum Issues
  - Which Court has Jurisdiction over a CDP Appeal?
    - Tax Court has exclusive jurisdiction over CDP appeals
    - The provision allowing a grace period to re-file after filing in the wrong court was removed
    - TP may pursue a CDP appeal as a small tax case, so long as the unpaid tax does n/ exceed $50K

Court Review in CDP Cases

- Can TP obtain a dismissal without prejudice?
  - Facts from *Wagner*: TPs filed a CDP petition in Tax Court, but sought to have the case dismissed w/o prejudice in order to pursue litigation in district court regarding net operating losses that TPs sought to carry back to the year at issue in Tax Court
  - Note: Tax Court does n/ permit voluntary dismissal of a tax deficiency action BUT…
  - Held: Yes

Court Review in CDP Cases

- Test: Would IRS lose any substantial right by the dismissal? If not, then TP's motion to dismiss should be granted. In making that determination, a Court must weigh the equities and do justice between the parties
- Analysis: The statutory period in which TPs could re-file their lawsuit in Tax Court has expired. The IRS is n/ prejudiced in maintaining the collection action against TPs as if the instant proceeding had never been commenced

Court Review in CDP Cases

- Judicial Review of Administrative CDP Determinations
  - Standard of Review
    - Code itself offers no guidance on the standard of review but the legislative history does

Court Review in CDP Cases

- The amount of the tax liability will be reviewed on a de novo basis, w/ TP bearing the usual burden of proof, if:
  - The validity of the tax liability was properly at issue in the hearing, and
  - The determination w/ regard to the tax liability is part of the appeal
- If the validity of the tax liability is n/ properly part of the appeal, TP may challenge the determination of the appeals officer for *abuse of discretion*

Court Review in CDP Cases

- The propriety of the collection activity is reviewed under an *abuse of discretion* standard
- Abuse of discretion: Arbitrary and capricious action, without a sound basis in law. In other words, unless the Appeals Officer has made a legal or factual mistake, the decision will be left alone

Court Review in CDP Cases

- Should Judicial Review be Limited to the Administrative Record?
  - Issue: When the Tax Court reviews a notice of determination in a CDP case, should the Tax Court limit its review to the administrative record or may it consider evidence *not* presented during the CDP hearing?

Court Review in CDP Cases

- Rule from *Robinette* (Eighth Circuit): Judicial review of the procedural aspects of a CDP determination is *limited* to the administrative record. However, if the record does n/ adequately describe the hearing process or there is a dispute over what happened during the process, the reviewing court is permitted to supplement the administrative record w/ other evidence *outside the record*

Court Review in CDP Cases

- Facts in *Robinette*: TP entered into an offer in compromise requiring him to timely file his returns. TP claimed that his accountant mailed his ’98 return and stamped it using a private postage meter. However, the IRS never received the return, so the IRS declared TP in default of the agreement and began levy proceedings. At the CDP hearing, TP offered alternative proof that he timely mailed the ’98 return but the Appeals Officer rejected it, stating that he would only accept certified mail receipts as proof of mailing

Court Review in CDP Cases

- TC holding: TC may consider evidence presented at trial that was n/ in the administrative record of the CDP hearing. Although judge ruled that the new evidence provided unhelpful to TP's case, he allowed TP to present evidence that he had signed and delivered the returns to his accountant for mailing. This was n/ in the administrative record
- Eighth Circuit Decision: Reversed the Tax Court. Found that the administrative record was *adequate* and that the IRS did n/ abuse its discretion when it sustained the proposed levy

Court Review in CDP Cases

- Tax Court Jurisdiction & Remedies
  - General: Tax Court jurisdiction over a CDP appeal is premised on a notice of determination

Court Review in CDP Cases

- Equivalent hearings
  - If TP's appeal is n/ timely (outside of thirty day period), the IRS may still grant TP an "equivalent hearing"

Court Review in CDP Cases

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

Court Review in CDP Cases

- Looking Behind the Notice of Determination
  - Issue: Must the Tax Court first look behind the notice of determination to see whether a proper hearing was offered in order to have jurisdiction to review the determination? No.
  - Rule in *Lunsford*: As w/ a notice of deficiency, in determining its jurisdiction, the Tax Court will n/ "look behind" the notice of determination to determine whether it was validly issued. The Tax Court will examine only the notice of deficiency, itself to determine whether it is valid for jurisdictional purposes

Court Review in CDP Cases

- Analysis: The Tax Court will no longer look behind the notice of determination to ensure that certain procedures were followed before exercising jurisdiction to review the determination. Such factors as whether there was an appropriate hearing opportunity, whether the hearing was conducted properly, whether the hearing was fair, or whether it was held by an impartial Appeals Officer are now taken into consideration in deciding such cases. The failure of one or more of these factors no longer precludes the Tax Court from exercising their jurisdiction to review the determination

Court Review in CDP Cases

- Addressing an Inadequate Hearing
  - Tax Court has upheld CDP determinations issued w/o a face-to-face CDP hearing. However, if TP asks for a face-to-face hearing, appeals must give it to him at the closest appeals office to TP's residence

Court Review in CDP Cases

- Rationale:
  - First, it's neither "necessary or productive" to send a case back for a hearing b/c the Appeals Officer's CDP determination was justified even though no hearing had occurred
  - Second, the Tax Court refuses to consider whether a hearing even occurred or simply concludes that no hearing was held. The reason why the Tax Court is not concerned about whether a hearing occurred is b/c it has upheld CDP determinations issued w/o a CDP hearing in the past.

Court Review in CDP Cases

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

Court Review in CDP Cases

- Collection actions suspended
  - Collection actions are normally suspended pending final determination of the hearings

Court Review in CDP Cases

- Appealing Tax Court's Decision
  - To which Circuit does appeal from a Tax Court decision in a CDP case lie?
  - Doesn't say so the default venue is to the Court of Appeals for the District of Columbia.
  - But note: The IRS will n/ object to venue when TP appeals a CDP decision to the circuit court of appeals of his residence or principal place of business



Tel. 973.783.7000

MJDeBlis@DeBlisLaw.com

www.DeBlisLaw.com

