

taxpayers should be afforded flexible options for disclosure, all of which may apply with respect to any single transaction. The choice of approach should be up to the taxpayer.

Codification of the economic substance doctrine has left taxpayers and tax practitioners with many unanswered questions and significant anxiety about how to protect against possible unwarranted challenges based on these provisions. Although adequate disclosure is only one of these questions, guidance on this topic is an excellent opportunity for the government to demonstrate its commitment to fair and reasonable implementation of the doctrine and the new penalty. Adoption of the suggestions in this article would go a long way toward moderating the severity of this potential 40 percent strict liability penalty.

Collection Issues? Taxpayers Take The Fast Track to Tax Court

By Nancy Ortmeier Kuhn

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In this article, Kuhn points out that taxpayers now have the right to due process before seizure of property in tax collection matters. However, the procedures are complex and judicial review is limited, so there is still room for improvement.

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IRS Collections Procedures

The IRS has a long history of aggressive tax collection actions. Revenue officers were known to show up at a taxpayer's residence, wait for the taxpayer (or family member) to drive home, and then confiscate the keys to the car while handing the taxpayer a copy of the notice of federal tax levy. The taxpayer was legally entitled to receive a copy of the notice 30 days prior, but there were no real guarantees and no practical options for the taxpayer during that 30 days other than to pay the amount the IRS alleged was due. The revenue officer then drove away in the taxpayer's car, generally auctioning it off at a fraction of its fair market value for the purpose of partial satisfaction of an alleged civil tax debt. Bank accounts were routinely seized, leaving families with few options. The taxpayer had no opportunity for an appeal before the seizure of property. In short, the taxpayer had no right to due process before losing the property. The Supreme Court regularly affirmed that a postdeprivation hearing was sufficient to satisfy due process concerns in the tax collection arena.¹

Through enactment of the Internal Revenue Service Restructuring and Reform Act of 1998, Congress provided taxpayers with additional rights of due process *before* seizure of property. The enactment of sections 6320 and 6330 established formal procedures designed to ensure due process when the IRS seeks to collect taxes by lien or levy.² These statutory provisions were enacted

¹See *United States v. National Bank of Commerce*, 472 U.S. 713, 721 (1985); *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). ("Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate," citing *Springer v. United States*, 102 U.S. 586, 593 (1880).)

²Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98), P.L. 105-206, section 3401(b), 112 Stat. 747; S.

(Footnote continued on next page.)

following more than a year of congressional investigations and hearings, which included highly publicized criticisms of the collection methods used by the IRS.³

Under current law, when the IRS issues a notice of intent to levy or a notice of federal tax lien, the taxpayer has 30 days to file a request for a collection due process hearing. A CDP notice properly sent by certified or registered mail to the taxpayer's last known address is sufficient to start the 30-day period. Actual receipt by the taxpayer is not a prerequisite to the validity of the CDP notice.⁴ If the taxpayer fails to timely request a CDP hearing within 30 days, she may then request an equivalency hearing within one year of the date of the CDP notice; however, there are no judicial rights beyond the administrative equivalency hearing.⁵ If the taxpayer does not request a CDP hearing, the notice of tax lien or notice of intent to levy is effective and collection activities will proceed without further ado.

To take the fast track to the Tax Court, the taxpayer must timely request a CDP hearing. At that time, in most situations, all civil collection activities cease.⁶ The IRS offers a conference call as the format for the CDP hearing, but if a face-to-face meeting is requested by the taxpayer, the request should be granted and a meeting is generally scheduled at an IRS office convenient to the taxpayer. CDP hearings provide taxpayers with an independent review by an impartial IRS Appeals officer. In this manner, the CDP hearing provides due process rights to a taxpayer before the collection action; however, no official transcript or record is kept of the hearing. At the CDP hearing the taxpayer has the statutory right to raise any relevant issues regarding the underlying tax liability if she has not previously been issued a statutory notice of deficiency or otherwise been given the opportunity to contest the liability. Also, the taxpayer may raise one or more of the following issues at the hearing:

- appropriate spousal defenses;
- challenges to the appropriateness of collection actions; and
- offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer in compromise.⁷

Rep. 105-174, at 67 (1998), 1998-3 C.B. 537, 603; *Montgomery v. Commissioner*, 122 T.C. 1, 22 (2004), *Doc 2004-1409*, 2004 TNT 15-9.

³See William V. Roth Jr. and William H. Nixon, *The Power to Destroy* (1999) (book by former chair of Senate Finance Committee containing anecdotes describing aggressive IRS collection actions contributing to the personal ruin, and even suicide, of taxpayers). See also *Mesa Oil, Inc. v. United States*, 86 AFTR 2d 2000-7312 (D. Colo. 2000), *Doc 2001-115*, 2000 TNT 248-76; *Montgomery*, 122 T.C. at 12-15 (Laro, J., concurring) for discussions of the legislative hearings and history.

⁴Reg. section 301.6320-1(a), Q&A-11; reg. section 301.6330-1(a), Q&A-9.

⁵Reg. section 301-6330(i).

⁶Section 6330(e) (exceptions for jeopardy collections, state tax refunds, and disqualified employment tax levies discussed *infra*).

⁷Section 6330(c)(2)(A).

If IRS Appeals and the taxpayer are unable to come to an agreement, the taxpayer is issued a "Notice of Determination Concerning Collection Action Under Section 6320 and/or 6330." The taxpayer's options are to pay the amount at issue as stated in the notice or to take it directly to the Tax Court and request judicial review. The petition must be filed in the Tax Court within 30 days of a determination.⁸

Before October 17, 2006, the taxpayer had the option of filing a petition in federal district court if the Tax Court did not have jurisdiction over the underlying tax liability, for example, employment taxes. However, because of jurisdictional confusion and inefficiencies, Congress passed legislation granting the Tax Court jurisdiction over the review of all CDP hearing matters. Section 6330(d)(1) was amended to provide for judicial review of the CDP hearing exclusively by the Tax Court.⁹ During judicial review, collection actions by the IRS will not resume until a final decision is reached, whether by settlement or published opinion, unless the underlying tax liability is not at issue in the appeal and the court determines that the IRS has shown good cause not to suspend the levy.¹⁰

Section 6330(f) was amended and section 6330(h) added in 2007.¹¹ Together they provide that the IRS can immediately proceed with a levy for employment taxes, without providing due process to the taxpayer, if the levy is a "disqualified employment tax levy," that is, if the taxpayer previously requested a CDP hearing for any unpaid employment taxes arising in the most recent two-year period before the beginning of the tax period that is subject to the levy at issue. Thus, there is no right to another CDP hearing before the levy action.¹² Similarly, there is no right to the CDP hearing if collection of the tax is in jeopardy.¹³ Whether those actions by the IRS violate an individual's constitutional right to due process is a matter of some debate. However, whether the IRS's mandate to collect taxes has been unduly hindered by the CDP hearing system is also a matter of debate.

The Tax Court's review of the notice of determination is limited to issues that were properly raised in the taxpayer's CDP hearing, including challenges to the underlying tax liability.¹⁴ In some situations, for example,

⁸Section 6330(c); section 6330(d).

⁹Pension Protection Act of 2006, P.L. 109-280, section 855(a), 120 Stat. 1019; see *Lewis v. Commissioner*, 128 T.C. 48, n.3 (2007), *Doc 2007-7925*, 2007 TNT 61-15.

¹⁰Section 6330(e).

¹¹P.L. 110-28, section 8243(a) and (b), effective for levies served on or after September 22, 2007.

¹²See section 6330(h) for the definition of "disqualified employment tax levy."

¹³Section 6330(f).

¹⁴Reg. section 301.6330-1(f)(2), Q&A-F3; reg. section 301.6320-1(f)(2), Q&A-F3. Note that reg. section 301.6320-1(f)(2), Q&A-F3, indicates that a notice of determination can be challenged in either the Tax Court or a federal district court. However, the statute was amended by P.L. 109-432 in 2006 to limit jurisdiction of most cases to the Tax Court. This regulation section has not yet been amended to reflect the revised statutory language.

| Published Court Decisions | 2003 ^a | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 |
|---------------------------|-------------------|------|------|------|------|------|------|
| Decided for IRS | 96% | 95% | 89% | 90% | 92% | 90% | 92% |
| Decided for Taxpayer | 1% | 4% | 8% | 8% | 5% | 8% | 4% |
| Split Decision | 3% | 1% | 3% | 2% | 3% | 2% | 4% |

^aThe fiscal years are from June 1 through May 31, with the year-end designated. This chart is taken from the national taxpayer advocate's "2009 Annual Report to Congress," vol. 1, p. 423, available at http://www.irs.gov/pub/irs-utl/3_09_tas_arc_vol_1_mli.pdf

if the taxpayer has been provided with a notice of deficiency, IRS Appeals will not consider the underlying tax liability in the CDP hearing, but rather only collection alternatives and some spousal issues. When the underlying tax liability is not raised as an issue in the CDP hearing, the Tax Court does not have jurisdiction to consider the underlying tax issues, but rather only the issues of collection and spousal defenses. The Tax Court may review only issues that were originally raised in the CDP hearing.¹⁵

Taxpayer Advocate Service: Report to Congress

The Taxpayer Advocate Service submits an annual report to Congress, in part documenting the published tax cases that are issued each year by the federal courts. Year after year, the annual "Top Ten Most Litigated Issues List" has CDP hearings as the No. 1 or No. 2 item. There were 96 published CDP opinions in 2002, with growing numbers through 2009.¹⁶ In 2007 the courts issued a record 217 opinions on these issues. In 2009 the courts issued at least 170 opinions, approximately 113 of which were issued by the Tax Court. The appellate courts also issued a large number, affirming many of the Tax Court cases on appeal. The national taxpayer advocate has concluded that this activity demonstrates "that the CDP process serves an important function by providing taxpayers with a forum to raise legitimate issues before the IRS deprives them of property."¹⁷ Moreover, the published opinions represent only the tip of the iceberg. Many cases are resolved through negotiated settlements, and other taxpayers do not pursue their case after filing a petition with the court, resulting in dismissal of the action.

Litigation Success Rate: A Misleading Number

Due in part to procedural complexity, the IRS prevails approximately 90 percent of the time, based on published cases, as indicated in the chart and as prominently analyzed by the annual Taxpayer Advocate Service reports. However, those numbers reflect only the small number of cases that actually result in published opinions. For example, from June 1, 2004, to May 31, 2005, taxpayers filed 1,098 CDP cases in the Tax Court and 114

cases in U.S. district courts.¹⁸ During that same period, there were 209 published opinions from the federal courts, which means that approximately 83 percent of the docketed cases were settled. Presumably, because the settlement of a case indicates the taxpayer has agreed to a resolution of the matter, a large percentage of taxpayers' rights to due process have been satisfied and any IRS mistakes or abuses have been corrected.

It is incumbent on taxpayers to carefully adhere to the specific procedures set forth in the statutes,¹⁹ the extensive Treasury regulations,²⁰ and the even more extensive case law that has developed because of these relatively new due process rights and procedures. As indicated in the chart above, if a case is not settled, the taxpayers have little chance of prevailing.

However, the statistics reflected above must be qualified by the much greater number of cases that are settled before the need for a published written opinion. If the settled cases are added to the case total, it puts the percentage of cases decided in a published opinion for the IRS at 15 percent instead of 89 percent. Admittedly, these numbers are approximate since most cases are in the judicial pipeline for more than 12 months, so the cases decided by the courts in fiscal 2005 are likely cases that were filed in prior years. Also, it is unknown how many of the settled cases are split decisions or are settled in favor of one of the parties to the case. Of the 1,212 cases docketed in court in 2005, 185 cases (15.26 percent) resulted in published opinions finding in favor of the IRS. Of those 185 opinions, 22 were appellate decisions affirming the lower court opinion. Eighteen opinions (1.5 percent) were issued finding in favor of the taxpayer, with one of those an appellate opinion. Six opinions (0.5 percent) resulted in a split decision between the IRS and the taxpayer. Of the 1,212 cases, 1,003 (82.7 percent) were settled outside of court, so there is no public record of the resolution of the settled cases. Anecdotally, it is reported that some cases are abandoned and not prosecuted by the taxpayers, some cases are more traditional compromises of liability, some cases are conceded by the government when administrative error has resulted in the liabilities, and some cases are eventually conceded by the taxpayer.

¹⁵See reg. section 301.6330-1(f)(2), Q&A-F5; *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005), *Doc 2005-12102*, 2005 TNT 106-15.

¹⁶National Taxpayer Advocate, "2009 Annual Report to Congress," 403 (Dec. 31, 2009), *Doc 2010-174*, 2010 TNT 4-19. (This list tracks only cases in which the court issued an opinion.)

¹⁷*Id.* at 418.

¹⁸Statistics were provided to the national taxpayer advocate by the IRS Office of Chief Counsel. National Taxpayer Advocate, "2005 Annual Report to Congress," 478 (Jan. 10, 2006), *Doc 2006-556*, 2006 TNT 9-26.

¹⁹Section 6330; section 6320.

²⁰Reg. section 301.6320-1 et seq.; reg. section 301.6330-1 et seq.

Although taxpayers have the option of paying the tax liability and suing for a refund in district court or the Court of Federal Claims,²¹ it is logical that most cases are filed in the Tax Court before payment and before any seizure of the taxpayer's property. Unfortunately, a portion of those cases involve tax protesters. Critics of the system have been in favor of imposing more onerous penalties to discourage the frivolous actions. Thus, in 2006 section 6702 was amended to impose a civil penalty of \$5,000 for some frivolous submissions, including a frivolous request for a CDP hearing under sections 6320 and 6330.²² Section 6673 also applies to frivolous actions brought in the Tax Court, and it imposes a penalty not to exceed \$25,000. In 2005, 35 published opinions involved frivolous arguments made by taxpayers.²³ In 2009 the number of published cases in which taxpayers made frivolous arguments dropped to 23, with most subject to assertion of the section 6673 penalty.²⁴

If the taxpayer's request for a CDP hearing is timely, the IRS is required to suspend collection actions through the date of the CDP hearing and any subsequent appeals, until 90 days following a final determination. However, if the underlying tax liability is not at issue in the appeal and the court determines that the IRS has shown good cause not to suspend the levy, collection activities may proceed.²⁵ Also, if the request for a hearing is frivolous, the IRS may treat the request as if it was not submitted, and proceed with collection actions.²⁶ Thus, any tax protesters, assuming they are quickly identified as such, would not have the benefit of the suspension of collection actions.

Tax Court Jurisdiction Severely Limited

One frustration with these legislatively created rights to due process is that the Tax Court has been granted only limited jurisdiction through the enactment of sections 6320 and 6330, and only rarely can it review the underlying tax liability. In *Montgomery v. Commissioner*,²⁷ the Tax Court exhaustively reviewed its jurisdictional limits and analyzed whether it can consider the underlying tax liability when the taxpayers filed their joint return in which they listed an amount of tax liability but did not pay the self-assessed tax. In *Montgomery*, the IRS issued a notice of intent to levy, and the taxpayers timely requested a CDP hearing. The CDP hearing was held by telephone. Although the taxpayers stated to the Appeals officer that they would be filing an amended Form 1040 reflecting a

refund rather than a tax liability, the Appeals officer issued a notice of determination reflecting the deficiency in tax as stated on the originally filed return, without regard to the delayed amended return. The amended return was filed after the notice was received by the taxpayers. The Tax Court analyzed whether a self-assessed tax liability voluntarily reported on a tax return by a taxpayer can nonetheless be considered by the court and further, whether the court has jurisdiction to review the tax liability, as reported on the amended return, to determine which return correctly stated the tax liability. The court cited section 6330(c)(2)(B), which provides the circumstances in which a taxpayer may challenge the existence or amount of his underlying tax liability:

(B) Underlying liability: The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

The majority Tax Court opinion considered the definition of "underlying tax liability," in part by looking to the definition of "deficiency" in section 6211, which states:

the term deficiency means the amount by which the tax imposed . . . exceeds the excess of the sum of the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus the amounts previously assessed (or collected without assessment) as a deficiency, over the amount of rebates made.

The court ultimately found that the taxpayers were able to challenge the amount of the tax liability reported on their original tax return, because they had not received a notice of deficiency and had not otherwise had an opportunity to dispute the tax liability at issue.

*Hoyle v. Commissioner*²⁸ is another rare case in which the Tax Court decided that it did have jurisdiction to consider whether IRS administrative procedures were followed, even though the taxpayer did not raise that issue during the CDP hearing. The underlying issue was whether IRS Appeals had mailed the notice of deficiency to the taxpayer's last known address in compliance with section 6330(c)(1). The taxpayer challenged the tax deficiencies during the CDP hearing, but the Appeals officer refused to consider those issues, alleging that the taxpayer had "received" a prior notice of deficiency and thus previously had an opportunity to dispute the tax deficiencies. The Tax Court held that the IRS had not used the taxpayer's last known address and had not produced a mail receipt that could establish the presumption of official regularity. Thus, the court remanded the case back to IRS Appeals so that the underlying tax deficiencies could be reviewed by IRS Appeals. Although not stated in the opinion, the taxpayer would then have an opportunity for Tax Court review if a valid notice of deficiency was ultimately issued to the taxpayer.

²¹The Court of Federal Claims and federal district courts have concurrent jurisdiction over tax matters in which the tax has been assessed and paid and the taxpayer has filed an administrative claim for refund. Section 7422(a); 28 U.S.C. section 1346(a)(1). See *Flora v. United States*, 362 U.S. 145 (1960).

²²P.L. 109-432, section 407(a) amended by section 6702 to include requests for hearings under sections 6320 and 6330. The amendment also increased the penalty from \$500 to \$5,000.

²³National Taxpayer Advocate, "2005 Report to Congress," *supra* note 18, at 572-576 (Appendix 3, section 5).

²⁴National Taxpayer Advocate, "2009 Report to Congress," *supra* note 16, at 531-536 (Appendix 3).

²⁵Section 6330(e)(1) and (2).

²⁶Section 6330(g).

²⁷122 T.C. 1 (2004), *Doc 2004-1409, 2004 TNT 15-9*.

²⁸131 T.C. 197 (2008), *Doc 2008-25463, 2008 TNT 234-9*.

Montgomery and *Hoyle* were the exception. In other areas, the Tax Court's jurisdiction is much more limited. In *Cleveland v. Commissioner*,²⁹ the courts reviewed jurisdictional issues involving a taxpayer who filed Forms W-4 claiming exempt status. The IRS filed a lock-in letter with the employer to require withholding of tax. The taxpayer filed a petition in Tax Court to initiate a CDP hearing alleging that the IRS improperly increased the withholding rate on his wages. The Tax Court dismissed the petition for lack of subject matter jurisdiction, holding that the lock-in letter was not an appealable notice of determination and was not issued in conjunction with an attempt to collect by levy. The Seventh Circuit affirmed, holding that the jurisdiction of the Tax Court is limited under section 7422. The appellate court held that the lock-in letter was not a notice of determination, so the Tax Court did not have jurisdiction to consider the case.³⁰

In *Lewis v. Commissioner*,³¹ the taxpayer filed his return late; however, he paid the tax reported on his late-filed return. The IRS assessed penalties for the late filing and late payment, which the taxpayer contested. He was given the opportunity for an Appeals conference, at which time he requested that the penalties be abated. His request was denied, and the IRS turned the matter over to collections. IRS collections issued a notice of intent to levy, and the taxpayer timely filed Form 12153, "Request for a Collection Due Process Hearing." The IRS determined that IRS Appeals had already considered the issues, and so denied him a CDP hearing by issuance of a notice of determination. The taxpayer then timely filed a petition in the Tax Court contesting the underlying tax penalty liability. The court held that because the taxpayer was given the opportunity for an Appeals conference before the issuance of the notice of intent to levy, he did not have a second opportunity for IRS Appeals to consider the underlying tax liability. This is so even though the taxpayer was not given the option of appealing the initial IRS Appeals' decision to a federal court.

The Tax Court reviewed the applicable Treasury regulations and held that the language: "An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability" is valid.³² The court specified, however, that a taxpayer who has had neither a conference with Appeals nor an

opportunity for a conference with Appeals before receipt of the lien or levy notice can raise the underlying liability as a valid issue in a collection review proceeding before IRS Appeals and the Tax Court. Because the taxpayer had not raised any other issues regarding collection practices, the Tax Court held that it did not have jurisdiction and so granted the IRS's summary judgment motion.

Standard of Review

As summarized by the national taxpayer advocate: "Where the validity of the tax liability is properly at issue in the CDP hearing, the court will review the amount of the tax liability on a *de novo* basis.³³ When the appropriateness of the collection action is at issue, the court will review the IRS's administrative determination for abuse of discretion."³⁴ Thus, if the underlying tax liability is not properly before the court, the abuse of discretion standard provides a difficult burden for the taxpayer to bear. At the same time, the court has been granted some equitable authority to review the collection actions of the IRS to ensure that the "proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."³⁵ This is unique in the code, and it provides the Tax Court with a rare opportunity to consider the equitable issues confronting the taxpayer, as well as to interpret the code and the taxpayer's statutory tax liability.

In *Living Care Alternatives of Utica Inc. v. United States*,³⁶ the Sixth Circuit discussed the equitable standards and the balancing of rights that the Appeals officer, and thus the court, is required to consider. The proposed collection action must balance the IRS's goal of the efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. However, the lower courts and appellate court found that a nonprofit nursing home, limited by Medicare and Medicaid regulations, was liable for the penalties imposed by the IRS for failure to timely pay certain employment taxes. The appellate court held it could not review the underlying tax deficiency, since it was not properly raised at the CDP hearing. Thus, the courts used the abuse of discretion standard and found that the IRS had not abused its discretion in filing liens and levies to collect the employment taxes, even though doing so

²⁹600 F.3d 739 (7th Cir. 2010), *Doc 2010-7090*, 2010 TNT 62-10, *aff'g* Tax Ct. Dkt. No. 31367-08 (Apr. 30, 2009) (order of dismissal for lack of jurisdiction).

³⁰See *Offiler v. Commissioner*, 114 T.C. 492, 498 (2000), *Doc 2000-17008*, 2000 TNT 119-18 (Tax Court jurisdiction in cases arising from challenges to liens and levies is dependent on the issuance of a valid notice of determination from the IRS Office of Appeals); *Landes v. Commissioner*, 105 AFTR2d 1777 (8th Cir. 2010), *Doc 2010-7545*, 2010 TNT 66-11, *aff'g* Tax Ct. Dkt. No. 26029-08 (Jul. 2, 2009) (order of dismissal for lack of jurisdiction).

³¹*Supra* note 9.

³²Reg. section 301.6330-1(e)(3), Q&A-E2. This regulation was amended in 2006 with the addition of a sentence clarifying that an opportunity for a conference with Appeals before assessment, if the tax is subject to notice of deficiency procedures, is

(Footnote continued in next column.)

not a "prior opportunity" for these purposes. (Applicable to requests for hearings on or after November 16, 2006.) See *Lewis*, 128 T.C. at n.5.

³³The legislative history of the RRA '98 addresses the standard of review courts should apply in reviewing the IRS's administrative CDP determinations. H.R. Rep. No. 105-99, at 266 (conf. report). The term *de novo* means anew. *Black's Law Dictionary*, 447 (7th ed. 1999). Thus, *de novo* review ensures that a court will take a fresh look at the facts and the law, without regard to agency determinations.

³⁴National Taxpayer Advocate, "2008 Annual Report to Congress," 480-481 (Dec. 31, 2008), *Doc 2009-241*, 2009 TNT 4-21. See *Davis v. Commissioner*, 115 T.C. 35 (2000), *Doc 2000-20408*, 2000 TNT 148-6; *Murphy v. Commissioner*, 469 F.3d 27 (1st Cir. 2006), *Doc 2006-23555*, 2006 TNT 224-11.

³⁵Section 6330(c)(3).

³⁶411 F.3d 621 (6th Cir. 2005).

would put the nursing home out of business and fail to collect the taxes, since the resale value for the levied assets was minimal.³⁷ Although the balancing test was discussed and used, the appellate court and lower courts agreed that the IRS did not abuse its discretion. The Sixth Circuit held:

the notion of due process in tax collection is not the same as in other areas of the law. The IRS has historically had broad discretion and the right to levy on property without any pre-seizure process. The 1998 reform did provide for additional procedural protections, but it still does not require the creation of a formal record and conventional administrative review. Admittedly, this makes application of the abuse of discretion standard quite difficult, but at the very least, in order to overturn the IRS decisions, we must be convinced that the type of taxpayer abuse that Congress sought to remedy has occurred in the case.

Courts Need Added Jurisdictional Authority

A taxpayer must navigate a quagmire of procedural issues to successfully challenge the IRS before seizure of property. While the CDP hearing system is a welcome tool for taxpayers, it is essential that the parties be fully aware of the process and the consequences of going down the CDP path. In the interest of providing taxpayers with their due process rights before seizure of property and to allow for meaningful review by the Tax Court, these procedures — including the limited jurisdiction of the Tax Court and appellate courts regarding the underlying liability — need to be better communicated. Without this educational component, the fast track to Tax Court becomes a waste of valuable resources for both the taxpayer and the government. The only benefit to the taxpayer may be the immediate gratification of suspended collection activities, but the benefit is temporary because interest continues to run and the liabilities only increase over time. For tax protesters, this can become especially costly, since the Tax Court does not hesitate to

find the protesting taxpayers liable for the applicable penalties in addition to the original liabilities. However, it is apparent that a large percentage of taxpayers are using the CDP system to come to an agreement with the IRS regarding the outcome of their tax liability, after the case has been docketed in the Tax Court and assigned to an IRS attorney for purposes of litigation. If there is any abuse by an IRS revenue officer or other IRS agent, the CDP system will expose that abuse and act as a deterrent. Although imperfect, the system has provided taxpayers with a safety net while at the same time ensuring that tax protesters will not gain as much as they have to lose by using this fast track to the Tax Court.

However, the resources of the judicial branch and of taxpayers would be better used if the courts were given more latitude to review the underlying tax liability of the taxpayers, and if the CDP hearing system were better documented and an administrative file created. Without those reforms, the due process granted to taxpayers is ineffective to address whether the liens and levies should have been filed in the first instance. Also, a study should be done to determine whether the vast number of cases that are settled out of court are providing the due process to taxpayers that Congress intended. The IRS is very good at conceding or settling the cases that it would otherwise lose. The statistics cited above illustrate that expertise. However, without acknowledgement of the number of cases settled in the taxpayers' favor, it is misleading for the national taxpayer advocate to highlight the overwhelming percentage of cases in which the IRS prevails when just counting written judicial opinions. More accurate statistics should reflect that well over 80 percent of the petitions filed in court are settled by agreement of the parties. Sections 6320 and 6330 are certainly a step forward in ensuring due process to taxpayers in civil tax collection proceedings, but there is still room for improvement.

³⁷Section 6330(c)(3).