

## **SURVEY OF 2013 CDP CASES**

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**(112 cases reviewed)--**

**FRANCES D. SHEEHY, ESQ.**

Law Office of Frances D. Sheehy

5481 Wiles Road, Suite 502

Coconut Creek, FL 33073

Telephone: 954-449-9880

Facsimile: 954-449-9758

Email: [fsheehy@att.net](mailto:fsheehy@att.net)

### **I. CHALLENGING THE UNDERLYING LIABILITY IN CDP**

#### **A. - Cannot Challenge Liability:**

1. *Campbell v. Commissioner*, TC Memo 2013-57

Prior statutory notice issued. IRS met burden of proof with USPS Form 3877 and testimony of Post Office employees re: 90 day letter being refused by TP. TP did not testify that he did not receive the post office notice. Cannot challenge liability in CDP, and TP provided no collection alternatives or documentation.(pro se). Also see, *Janshen v. Commr.*, TC Summ.Op. 2013-73; *Chambers v. Commr.*, TC Memo 2013-252; *Mfum v. Commr.*, 112 AFTR 2d 5025 (3d Cir. 2013);

2. *Kalil v. Commissioner*, TC Summ.Op. 2013-29

A CDP request challenged the liability based on the statute of limitations, that the tax was paid and that it had been settled. Appeals did not consider the underlying liability because there was 90 day letter, the assessment was thus timely, and a TP letter about a settlement and the IRS cashing the check is not a settlement. (Pro se).

3.

*Boyd v. Commissioner*, TC Memo 2013-100

TP husband was not on the L1058 and was dismissed for lack of jurisdiction. TP wife could not dispute the liability she failed to timely petition Tax Court after 90 day letter. The TP was not entitled to a face to face hearing, and even though the Appeals Officer refused to continue the case, it was not abuse of discretion because the TP requested it too late. (Pro se).

4. *Thompson v. Commissioner*, TC Memo 2013-61

Can't dispute liability if 90 day letter. The IRS suggested audit reconsideration, and the court urged the IRS to do an audit reconsideration. (Sympathetic TP????)(Pro se).

5. *Arroyo v. Commr.*, TC Memo 2013-112

The 90 day letter was sent to the last known address but the TP did not receive it. The Court considered the liability issue even though the TP had no proof of changing his address with the post office. The Court did not sustain the failure to pay penalty because the IRS had the burden of proof and did not meet it. (Pro se).

6. *Giaquinto v. Commr.*, TC Memo 2013-150

TP cannot dispute TF liability if he did not make any effort to claim the 60 day letter.

7. *Gentile v. Commr.*, TC Memo 2013-175

TP disputed liability for SFR returns but provided no corrected tax liability and therefore did not properly raise the liability issue with Appeals. TP did not select a hearing date, did not propose collection alternatives. Tax Court would not remand because it was not necessary or productive. (Pro se). See also, *Sstevenson v. Commr.*, TC Memo 2013-284.

8. *Trivedi v. Commr.*, 111 AFTR 2d 2110 (9<sup>th</sup> Cir. 2013)

TP could not dispute liability because prior CDP notice for which no hearing was requested and there is no Tax Court jurisdiction for a CAP. (Pro se). See also, *Cohen v. Commr.*, TC Memo 2013-86 (TP can't raise same issue in 2 CDP's even if first was equivalent hearing.).

9. *US v. Latos*, 111 AFTR2d 2333

CDP's determining liability are collateral estoppel in suit to reduce lien to judgment and sell house. (Pro se).

10. *Hall v. Commr.*, TC Memo 2013-93

TP can't dispute liability in CDP if agreed to liability as part of criminal plea. Duress is not imposed when there are legal actions that limit choices. (Pro se).

11. *Precision Prosthetic v. Commr.*, TC Memo 2013-110

The TP loses if the refund period is not within the CDP jurisdiction of the Court and there was no timely claim for refund.

12. *Burt v. Commr.*, TC Memo 2013-140

The TP had a criminal conviction with no overpayment for the criminal years and prior frivolous penalties. SJ for IRS because appeals determined the tax to be currently uncollectible. (Pro se).

13. *Solucorp v. Commr.*, TC Memo 2013-118

The IRS can pursue TF collection against the parent corporation even if the sub is in Tax Court. See also, *Hellman v. Commr.*, TC Memo 2013-190; *Trainor v. Commr.*, TC Memo 2013-14 (Seized assets by IRS does not stop collection.)

#### B. YES- Dispute Liability in CDP

14. *Nerlinger v. Commissioner*, 2013 US App. LEXIS 23995 (DC Cir. 2013)

TP who wins in tax court cannot appeal to get an order that states there was an abuse of discretion. (Pro se)

15. *Thompson v. Commissioner*, TC Memo 0213-260

TP can't get second CDP when lien release was revoked, but can challenge the FTP penalty even if it is an early request before the L1058.

16. *Adams v. Commissioner*, TC Memo 2013-92

The TP can dispute the underlying tax because his Tax Court petition was dismissed as untimely. (Pro se). (The IRS still won because the TP has no records to support deductions.)

17. *Cutler v. Commissioner*, TC Memo 2013-119

The Court granted innocent spouse relief but would not require the monies levied from her children to be returned.

18. *Santa v. Commissioner*, TC Memo 2013-178

The TP gets a second chance at innocent spouse relief because he was not eligible for 6015(c) at his first trial. The court granted him relief and determined that the IRS could not rely on hearsay evidence of the wife in the administrative

record, and that the IRS waived knowledge of unreported wages by not arguing it on brief.

19. *Karogozian v. Commissioner*, T.C. Memo 2013-164

TP was reclassified as an employee, but could not credit overpayment of tax in prior year to current liability. Equitable recoupment did not apply. (Pro se)

20. *Meyer v. Commr.*, TC Memo 2013-268

The appeals officer relied on two forms for proof of mailing that were dubious and the law changed. The case was remanded for the appeals officer to clarify whether there was a valid 90 day letter. (Pro se).

21. *Dixon v. Commr.*, TC Memo 2013-207 and

*Dixon v. Commr.*, 141 T.C. No. 3 (2013)

TP's were criminally prosecuted for failure to file 941's and IRS took all records. TP's and IRS agreed on withheld amounts from wages and bonuses. On advise of counsel the TP's paid monies to corporation, who then designated payments to the IRS as withholding of TP. The records were lost. The court used the best evidence rule, the checks, and the amounts agreed upon and found that the corporation can designate employment tax payments for specific employees and the TP got credit for the withheld taxes. (TP's get amounts credited as of April 15<sup>th</sup> of year following tax year, not when paid by the corporation.) The court commented on the good reputation of TP counsel.

22, AOD 2013-12

The IRS position on *Zapara v. Comm v. Commr.*, 652 F3d 1042 (9<sup>th</sup> Cir. 2011)

IRS agrees that a TP can raise issued re: levied assets at a CDP hearing. It does not agree that the Tax Court can order a credit to the TP account for the value of the assets, but will follow this case in the 9<sup>th</sup> Circuit.

## II. GOOD, BAD AND WORSE

### A. CDP and Statute of Limitations:

23. *City Wide Transit Inc. v. Commr.*, 709 F. 3d 102 (2<sup>nd</sup> Cir. 2013)

The accountant for the TP embezzled money and filed false 941's. The IRS prosecuted the accountant. The fraud of the accountant (even though he did it for

his own benefit) kept the statute of limitations open. The Second Circuit reversed the Tax Court.

## B. CDP and Offers in Compromise

### 24. *Szekely v. Commr.*, TC Memo 2013-227

Remand of rejected OIC because it was neither fair nor rational for Appeals to close a case 1 day after a deadline was not met, when TP had been cooperative, and IRS had delayed 6 months and 1 day. TP was ordered to revise OIC and 433. (Pro se).

### 25. *Anderson v. Commissioner*, TC Memo 2013-261

Remand of rejected OIC of 74 year old TP with prostate cancer and heart problems. The Court remanded because the AO ignored the medical evidence and must analyze an ETA OIC, and must clarify findings re: dissipation of assets and voidable transfer of assets.

### 26. *Pomeroy v. Commr.*, TC Memo 2013-26

The taxpayers had a history of non-compliance, and wife had civil penalty for frivolous returns. The Court remanded the case to reconsider the rejected OIC's because the record was insufficient as to the consideration of the TP husband's stroke.

### 27. *Lane v. Commr.*, TC Memo 2013-12

The court remanded the case for Appeals to reconsider a rejected OIC of a sole proprietor because the AP disregarded the mechanics, lien, personal income and expenses, mortgage payments, economic hardship and should have used 3 month average of income.

### 28. *Fatehi v. Commr.*, TC Memo 2013-101

After remand for reconsideration of an OIC, the TP rejected an offer for \$125/mo for 24 months, then failed to provide new financials to a third appeals officer. The court sustained rejection of the TP \$625 OIC for failure to provide financials and found that the TP is not entitled to lien withdrawal just because he can't afford to pay. (Pro se.)

29. *Matick v. Commr.*, TC Summ. Op. 2013-72

OK to reject OIC when TP has equity in property. AO determined that the TP could full pay, and if the TP can earn money they are not sick enough for an ETA OIC. (Practitioner in this case did not want appeals to consider the OIC and continually requested it be sent back to OIC specialist even though in CDP.) (Pro se.) See also, *Stotts v. Commr.*, TC Summ. Op. 2013-46 (Court won't review settlement negotiations.)

30. *Ramdas v. Commr.*, TC Memo 2013-104

OIC rejected because the TP had rental properties, life ins., did not propose IA, and did not argue ETA hardship at trial.

31. *Reed v. Commr.*, 141 TC 7 (2013)

TP filed two prior OIC's that were rejected for dissipation of assets and non-compliance. TP wanted OIC's reopened, accepted and all payments made subsequently would full pay the OIC's. Appeals analyzed prior rejections, determined them to be proper. Court found for IRS because can't evaluate prior OIC's using old financials.

32. *Johnson v. Commissioner*, 111 AFTR2d 1998 (DC Cir. 2013)

OIC rejected because TP dissipated \$200,000 assets. See also, *Taggart v. Commr.*, TC Memo 2013-113 (OK to file lien while OIC pending and dissipation). (pro se); *Glossop v. Commr.*, TC Memo 2013-208 (dissipation, non-compliant and low ball OIC). (Query: do these cases apply new OIC rules on dissipation in IRM?)

33. *Fincourt B. Shelton PC v. Commissioner*, TC Memo 2013-273

TP attorney OIC rejected, then TP paid \$120,000 to RO. The Court would not apply equitable estoppel because OIC is the only way to compromise tax. The TP continued to operate the PC after he said it was closed. (Pro se).

34. *Isley v. Commr.*, 141 TC 11 (2013)

OIC accepted by appeals was rejected by counsel. The Court determined that an OIC must be approved by DOJ if it includes criminal tax years. The case was remanded for a new OIC or IA with DOJ approval. denied because unfiled returns and no 433B.

### C. CDP and Installment Agreements:

35. *Antioco v. Commr.*, TC Memo 2013-35

Tax Court remands for THIRD time: IA rejected for 71 yr old TP with 90 yr old mother. Court found AO incredible testimony, wrong on fraud, no insolvency analysis, erroneous statements by AO, mistake of law, erroneous and inconsistent findings, arbitrary. Court cited Chenery doctrine and remanded again.

36. *McCarthy v. Commr.*, TC Memo 2013-214

OK to reject IA if TP has assets (motorcycle, truck, boat, cars, etc.) and won't try to borrow or sell. (Pro se). See also, *Holland v. Commr.*, TC Memo 2013-205 (AO required sale of house and car); *J & S Auto Painting Inc. v. Commr.*, TC Memo 2013-232 (OK to reject IA if lower than bank statements show and non-compliance.); *Grant v. Commr.*, TC Summ. Op. 2013-83 (OK to reject low ball IA); *Lengua v. Commr.*, TC Memo 2013-197 (TP not try to get loan even though no income.).

37. *Moore v. Commr.*, TC Memo 2013-78

Court considered that TP conceded IA issue because it was not in the stipulation or the evidence even though it was argued in pretrial memo.

38. *Bibby v. Commr.*, TC Memo 2013-281

Jeopardy levy was OK because the TP spent an erroneous refund and transferred assets and failed to cooperate with AO.

39. *Friedman v. Commr.*, TC Memo 2013-44

OK for AO to reject collection alternatives because the TP had large income, history of non-compliance, was non-compliant, even though TP has medical issues. Would not delay collection until bonus. (Pro se).

40. *Link v. Commr.* TC Memo 2013-53

Elderly taxpayer cared for by grandson was no allowed expense for second old car. IRS used national standards and determined no hardship. (Pro se). See also, *Thompson v. Commr.*, 140 TC No. 4 (2013) (partial pay IA not allow tithe to church).

41. *Zumo v. Commr.*, TC Summ. Op. 2013-66

TP rejected appeals offer of 72 month IA. OK not to deviate from national standards without support. IRS discretion re: lien withdrawal. (Pro se).

42. *Barrett v. Commr.*, TC Memo 2013-256

The TP had been granted currently not collectible for TF and relied on res judicata for income tax CDP, and rejected streamlined IA of \$340 per month. The Court found that it was neither res judicata nor collateral estoppel because it was a different tax and had not been litigated, but was settled.

#### **D. CDP - Other**

43. *Walker v. Commissioner*, 111 AFTR2d 939 (M.D. N.C. 2013)

TP suit against social security levy instead of filing CDP. Case dismissed.

44. *Creditron Financial Corp. v. Commr.*, TC Memo 2013-17

TP filed untimely CDP's, an untimely Tax Court petition and a CAP. All were dismissed for lack of jurisdiction. (Pro se corp. officer). See also, *Gray v. Commr.*, 112 AFTR2d 5328 (7<sup>th</sup> Cir. 2013) (Tax court petition filed 32 days - dismissed no jurisdiction.)

45. *Michael Leathers v. Ronald Leathers*, 111 AFTR2d 1890 (D.KS. 2013)

Malpractice????? CDP was not processed because it was signed by the attorney who did not have a 2848 on file.

46. *Keho v. Commr.*, TC Memo 2013-63

Court would not remand where the issue was IRS refusal to withdraw tax lien because it is discretionary, even though the TP was compliant with a good history. (Pro se). See also, *Blackman v. Commr.*, TC Memo 2013-194.

47. *Moreland v. IRS*, 2013-2 USTC 50,515 (D. KS. 2013)

TP cannot get declaratory relief re: liens because of the Anti-Injunction Act, could have a CDP hearing.

48. *Law Office of Rossi, PLLC v. US*, 111 AFTR2d 1859 (E.D. Mich. 2013)

IRS levied after CDP because the RO thought it was a Disqualified Employment Tax Levy. The Court determined that the IRS mistake was not

reckless or intentional even though it may have been negligent. Checking the IA box on a CDP request is not an offer of an IA. IRS returned the levied funds.

### III. Bankruptcy Issues.

49. *O'Donnell v. Commissioner*, TC Memo 2013-247

Doctor filed CDP, offer lowball IA. The attorney provided appeals backup documentation, including his invoice that said: "delay IRS to file bankruptcy." The TP filed bankruptcy during the Tax Court case. The AO determined that the CDP was for delay and asset transfers and sustained the levy. (Query??? Malpractice, disclosure of attorney client privilege?)

50. *Myers v. US*, 2013 -2 USTC 50,552 (D. KS 2013)

TP's ex-husband filed separate return and IRS gave him credit for all joint estimated tax payments. TP filed bankruptcy, IRS filed claim. Case was dismissed because it was not a collection matter, and did not exhaust administrative remedies. Court did not give pro se attorney same leeway as other pro se.

51. *Son Gee Wine & Liquors Inc. v. Commissioner*, T.C. Memo 2013-62

If the IRS files an estimated claim in the bankruptcy and it is not disputed, the liability cannot be subsequently disputed in a CDP.

52. *Beeler v. Commissioner*, TC Memo 2013-130

CDP was remanded by the Second Circuit to reduce the trust fund by \$80,860 because the IRS did not meet its burden of proof to show the application of payments made in bankruptcy. The Court noted the IRS conduct including general failure to maintain records, and erroneous entries in TP records.

### IV. Delay in CDP (No face to face CDP's if unfiled returns, no financials, or frivolous arguments)

53. *Williams v. Commissioner*, 111 AFTR2d 2025 (2<sup>nd</sup> Cir. 2013)

TP is not entitled to face to face hearing if frivolous arguments, unfiled returns, and no financials.

54. *Laforge v. Commr.*, TC Memo 2013-183

OK to deny face to face if AO deadline missed.

55. *Osband v. Commr.*, TC Memo 2013-188

CDP can review frivolous return penalty, which was upheld. OK to deny IA without 433.

56. *Matton v. Commr.*, 111 AFTR2d 839 (9<sup>th</sup> Cir. 2013)

9<sup>th</sup> Circuit upheld sanctions by the Tax court because the TP failed to attend a face to face hearing, failed to provide financials, and did not tell the court why the tax was invalid. See also, *Harper v. Commr.*, TC Memo 2013-79 (next time penalty.)

57. *Golub v. Commr.*, TC Memo 2013-196

The court granted SJ to the IRS and fined the TP \$15,000 penalty for trying to litigate an issue that had been lost multiple times. (Pro se).

58. *Zook v. Commr.*, TC Memo 2013-128

Frivolous arguments resulted in \$2000 penalty for delay. (Same argument in TP husband's case netted similar penalty. ) (pro se)

59. *Satkiewicz v. Commr.*, TC Memo 2013-73

Tax protestor lost job and appeals determined him currently not collectible. Tax court warned of future penalties. (Pro se), see also, *Pohl v. Commr.*, TC Memo 2013-291.