

SURVEY OF 2009 CDP CASES
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I. CHALLENGING THE UNDERLYING LIABILITY IN CDP

A. - Cannot Challenge Liability:

1. *Cyman v. Commissioner*, TC Memo 2009-144

6020(b) tax could not be considered in CDP because TP refused the 90 day ltr and thus had prior opportunity to dispute the tax.

2. *Freije v. Commissioner*, 325 Fed Appx. 448 (7th Cir. 2009)

No challenge to tax liability after receipt of 90 day letter and failure to petition Tax Court. Taxpayer relied on prior court decision for 1st assessment that was disallowed by Court.

3. *Olesen v. Commissioner*, TC Memo 2009-307

In Lien CDP appeal to Tax Court the court did not allow evidence of an IRS settlement because there was a prior opportunity to dispute the tax when the 90 day letter was received.

4. *Smarkman v. Commissioner*, TC Memo 2009-308

Taxpayer could not dispute either the income tax or trust fund recovery penalty in CDP because he had received a 90 day letter and 60 day letter - prior opportunity to dispute.

5. *Cessna v. Commissioner*, TC Memo 2009-301

The taxpayer had disputed the tax on lottery winnings in the Tax Court and lost, filed a lien CDP claiming innocent spouse and that CPA had received 90 day

letter. The Court did not allow a second opportunity to dispute the tax and the TP did not plead innocent spouse at the hearing.

6. *Daniel v. Commissioner*, TC Memo 2009-28

A loss carryback could not be considered in levy CDP because TP failed to dispute in previously issued levy CDP notice.

7. *Tufft v. Commissioner*, TC Memo 2009-59

Cannot consider underlying tax dispute in CDP lien because TP failed to dispute in prior CDP levy. Court noted that Appeals could consider if wanted to.

B. YES- Dispute Liability in CDP

8. *Szulczewski v. Commissioner*, TC Summary Opinion 2009-136

The Tax Court found that there was no valid assessment because there was no proof provided by the IRS that the IRS had mailed the 90 day letter, and no copy of the 90 day letter, even though the certificate of assessments and payments reflected an SND. 6020(b) assessment was invalid.

9. *Mason v. Commissioner*, 132 TC 34

The TP could dispute the underlying trust fund liability if he did not receive the 60 day letter and the Tax Court reviews the liability de novo.

10. *Medical Practice Solutions v. Commissioner*, 2009 USTC LeXIS 6, 132 TC No. 7

In a CDP, the court found that a single member LLC, the single member was responsible personally for all of the employment taxes (pre 2009 case). The Court found that the check the box regulations were valid and the LLC was disregarded for tax purposes. (After 2009, Reg 301.7701-2(c)(2)(iv) not anymore)

11. *Medical Practice Solutions v. Commissioner*, TC Memo 2009-214

In another CDP for different periods the court found that the appeals officer had failed to verify whether the legal criteria were met, the case was remanded. (Same single member llc)

12. *Harry v. Commissioner*, TC Memo 2009-206

The Tax Court has jurisdiction to determine the validity of a 6700 penalty in a CDP procedure. The TP failed to provide evidence to dispute the penalty.

13. *Comensoli v. Commissioner*, TC Memo 2009-242

The Court upheld the IRS determination that the TP's business was a single member LLC, thus holding the TP liable for all employment taxes because the Form 1065 and K-1's that were filed were not credible - naming "anyone" as the second member.

II. GOOD, BAD AND WORSE

A. CDP and Statute of Limitations:

14. *US v. Ingold, Smith and Brattleboro S&L*, 2009 Dist US LEXIS 16379 (VT. 2009)

It is OK for the IRS to file a suit to foreclose on a tax lien during the 30 days after issuing the final notice and before a CDP is filed. The court noted that the IRS would no longer have jurisdiction over the case once it went to DOJ, but that nothing would stop the court from honoring the CDP decision.

B. CDP and Offers in Compromise

15. *Schwartz v. Commissioner*, 2009-2 USTC Para. 50,679 (3rd Cir. 2009)

It was not an abuse of discretion to reject an OIC in the course of a lien CDP. (Even though there were 4 different appeals officers and an offer had been agreed up and rejected by IRS counsel because of the value of the house.) (Subpoena IRS counsel as a witness.)

C. CDP and Installment Agreements:

None

D. CDP - Other

16. *Huntress v. Commissioner*, TC Memo 2009-61

It was not an abuse of discretion to refuse a face to face hearing because the TP had not filed all his returns, and was thus not eligible for any collection alternative.

17. *Navarre v. Commissioner*, TC Summary Opinion 2009-62

The TP was not successful in getting the court to order the withdrawal of a tax lien because it “did not feel like she owned the house” with the lien, in a CDP appeal.

18. *Aldridge v. Commissioner*, TC Memo 2009-276

In a CDP, the IRS can use national standards instead of actual expenses and it is not an abuse of discretion. Also, the AO did not allow an expense for retirement contributions.

19. *Brandon v. Commissioner*, 2009 USTC LEXIS 22, 133 tC No. 4 (2009)

The estate filed a CDP request alleging that a tax lien filed post-death attached to nothing because the property no longer belonged to the deceased. The court found the lien arose when the TF was assessed, regardless of the filing.

20. *911 Management, LLC v. US*, 2009 US D CT LEXIS 83549 (Or. 2009)

The Court noted that a nominee has no CDP rights because the nominee never refused to pay the tax owing.

21. *Zigmont v. Commissioner*, TC Memo 2009-48

The court has no jurisdiction in a CDP lien/levy case to enjoin the IRS from backup withholding because it is not collection of a past due tax.

III. Bankruptcy Issues.

22. *Ferguson v. Commissioner*, 568 F. 3d 498 (5th Cir. 2009)

The Tax Court cannot determine whether a tax was discharged in a prior bankruptcy during a Tax Court appeal, it can make that determination in a CDP context.

23. *Santini Stone LLC V. Commissioner*, TC Memo 2009-64

In a CDP involving a defaulted bankruptcy plan the court found that the IRS could only enforce the plan payments and nothing more. They were stuck with the proof of claim and the provisions of the plan.

IV. Delay in CDP

24. *Dinino v. Commissioner*, TC Memo 2009-284

Denial by appeals of the 6th extension of time for a CDP was not an abuse of discretion.

25. *Vuckovich v. Commissioner*, TC Memo 2009-7

The court found for the IRS in a CDP appeal, and fined the TP a penalty of \$2500 under 6673 because the CDP was done for delay.