

SURVEY OF 2011 CDP CASES

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I. CHALLENGING THE UNDERLYING LIABILITY IN CDP

A. - Cannot Challenge Liability:

Tree-Tech, Inc. v. Commissioner, TC Memo 2011-162

Cannot challenge liability in a CDP case after taxpayer signed a Closing Agreement, Form 906 (even though wrong EIN and “coerced”).

Barnes v. Commissioner, TC Memo 2011-168

Liability challenge failed even though 6020(b) return because taxpayer didn't provide information or show up at trial.

Johnson v. Commissioner, TC Summ. Op. 2011-100

Cannot challenge liability after OIC with doubt as to liability - prior opportunity. Taxpayer has to pay accrued interest on trust fund even if corporation pays all tax.

Ciafre v. Commissioner, TC Summ. Op. 2011-124

In CDP Lien case, taxpayer could not challenge liability based on statute of limitations because there was a prior CDP. The court would not even analyze the statute of limitations.

Bartlett v. US, 108 AFTR 2nd ¶ 5319 (D.Mont. 2011)

CDP issued while Tax Court deficiency case pending. IRS motion to dismiss for lack of jurisdiction granted because taxpayer did not respond.

Kanofsky v. Commissioner, 2011-1 USTC ¶50,354 (3rd Cir. 2011)

Cannot challenge liability in CDP even though appeal on Tax Court deficiency case is pending because no bond was filed. There is no stay of collection.

Pretschler v. Commissioner, 2011-1 USTC ¶50,542 (9th Cir. 2011)

Taxpayer failed to raise dispute of material fact therefore, summary judgment was affirmed and taxpayer was not entitled to face to face hearing.

Chief Counsel Notice CC-2011-021

There is no jurisdiction over non-CDP years for refund claims. The taxpayer must file an administrative claim for refund and file refund suit. The taxpayer can raise a non-CDP overpayment and the statute of limitations can be reviewed if applied to CDP year.

Haag v. Commissioner, TC Memo 2011-87

Innocent spouse claim denial in CDP because of 2 year rule was res judicata even though the law changed.

Kamps v. Commissioner, TC Memo 2011-287

Taxpayer cannot dispute liability even though IRS did not have copy of notice of deficiency because IRS had proof of mailing and taxpayer did not rebut. Taxpayer failed to provide financials or propose collection alternatives.

Talaska v. Commissioner, TC Summ. Op. 2011-33

Taxpayer could not dispute COD income from 1099 because there was prior notice of deficiency and he did not show he was insolvent at the point in time the debt was forgiven.

Gossage v. Commissioner, 2011-2 USTC ¶50,529 (11th Cir. 2011)

Taxpayer could not dispute 6020(b) assessment because there was a prior notice of deficiency, the taxpayer would not file a correct return with appeals, nor provide a collection alternative or financials. A CDP "hearing" can be one or more written or oral communications with the taxpayer.

Ahmad v. Commissioner, TC Memo 2011-269

Taxpayer could not dispute the liability because there was a prior notice of deficiency. However, appeals allowed audit reconsideration and a reduction of the tax.

Klingenberg v. Commissioner, TC Memo 2011-247

Taxpayer wanted a face to face hearing to challenge the liability after a notice of deficiency. Appeals did not abuse discretion in refusing a face to face hearing or collection alternatives because there were unfiled returns.

Waring v. Commissioner, TC Memo 2011-270

Taxpayer could not challenge the liability because there was a prior notice of deficiency, did not file unfiled returns, submit financials or submit an OIC.

Kurtz v. Commissioner, TC Memo 2011-170 (169 and 171 as well)

Taxpayer got a face to face hearing but did not submit collection alternative and could not challenge liability because prior notices of deficiency.

B. YES- Dispute Liability in CDP

Zapara v. Commissioner, 652 F3d 1042 (9th Cir. 2011)

CDP after levy of stock and taxpayer asked IRS to sell stock and take proceeds. The Tax Court has jurisdiction to review the jeopardy levy and to order the value of the stock after request to sell to be credited even though stock decreased in value. IRC 6335(f).

Semen v. Commissioner, TC Memo 2011-120

Taxpayer can dispute failure to pay penalty in CDP after Tax Court deficiency case. The court found that the taxpayer was unable to pay and subject to undue hardship was reasonable cause to abate the penalty.

Hawaii v. Commissioner, TC Memo 2011-134

Taxpayer filed 1040X claiming theft loss with appeals for investment. Appeals had jurisdiction to review liability but denied loss. Also denied IA because did not qualify for streamline even though elderly taxpayer.

Custom Stairs & Trim Ltd., Inc. v. Commissioner, TC Memo 2011-155

Lien CDP for business appeals denied abatement of cascading penalties based on IRS application of payments. The court found reasonable cause due to a hurricane, the economy and the application of payments by the IRS which maximized the penalties.

City Wide Transit , Inc. v. Commissioner, TC Memo 2011-279

CDP levy challenge to payroll tax liability. Accountant embezzled and filed replacement fraudulent returns. IRS assessed additional tax after 3 years from filing of returns based on fraud. The court found that there was no proof that the accountant intended to evade tax rather than just hide his embezzlement.

Schlaback v. US, 2011 US Claims LEXIS 2368 (Claims Ct 2011)

6702 penalty can be challenged in CDP without incurring second 6702 penalty because the IRS destroyed the amended return filed by the taxpayer to replace the frivolous return.

(Is the “action center for frivolous returns” labelling taxpayers like the “tax protestor” and “potentially dangerous taxpayer” labels of the past?)

Carlson v. US, 2011 US Dist. LEXIS 142607 (D. Ct. MD FL 2011)

Appeals removed and reduced penalties in CDP, then re-instated them because the taxpayer sued for a refund during the CDP and that case was pending. Forcing the taxpayer to go to District Court. The District Court found that there were no penalties for the conceded years and the court would not grant the motion for summary judgement as there was an issue of fact with respect to preparer penalties.

Conn v. Commissioner, TC Memo 2011-166

Appeals did not abuse discretion with respect to unsigned amended returns overpayments because the years were not part of the CDP and were beyond the time for refunds. The taxpayer’s mitigation argument did not win.

Hogan v. Commissioner, TC Memo 2011-176

The request for attorneys fees for filed 1040X with NOLS failed because the taxpayer delayed filing the 1040X’s.

Delano v. Commissioner, 2011 Tax Court Summ. LEXIS 101 (2011)

Taxpayer was allowed de novo review of liability for unapplied payments.

Scheafnocker v. Commissioner, 2011-1 USTC ¶50,344 (3rd Cir. 2011)

Divorced taxpayer did not receive notice of joint levied funds and sued for wrongful levy. The Circuit Court vacated the District Court dismissal based on statute of limitations and remanded because the taxpayer is entitled to due process even though there was no CDP. (Upending the IRS argument that only the taxpayer has due process rights.)

Beeler v. Commissioner, 2011-2USTC ¶50,667 (2nd Cir. 2011)

The taxpayer disputed liability of trust fund based on the statute of limitations in CDP. The Tax Court sustained the levy determination without stating the reasons for determining that the liability was not satisfied. The Circuit Court vacated and remanded, commenting on IRS bad conduct for erroneous filing of liens, sending notices of levy 5 years after release of liens and having an IRM provision that factually contradicts Section 6525(f)(2), among other things.

Bang v. Commissioner, TC Summ Op. 2011-1

The taxpayer can dispute tax shelter penalties in a CDP.

Malone v. Commissioner, TC Summ. Op. 2011-24

In a CDP, the Court ordered that an additional assessment be abated because the IRS failed to issue a statutory notice, claiming it was a math error, and failed to properly explain the “math” error.

Chenault v. Commissioner, TC Memo 2011-56

Taxpayer challenged liability in CDP based on bankruptcy discharge. 3 year rule and 2 year rule = not dischargeable. (Malpractice?)

Sanchez v. Commissioner, TC Memo 2011-149

The taxpayer disputed liability in CDP saying they never received the statutory notice of deficiency, but had no proof. The court suggested the parties proceed to audit reconsideration.

Blumenthal v. Commissioner, TC Summ Op. 2011-81

There was no abuse of discretion because the refund claim was untimely and the pro se taxpayer provided no financials.

EJ Harrison & Sons, Inc., TC Memo 2011-157

The IRS was not precluded from assessing a failure to pay penalty because the taxpayer did not post a bond while his appeal to the circuit court was pending.

Reyes v. Commissioner, 2011 US App. LEXIS 24118 (6th Cir. 2011)

Summary judgment for the IRS was sustained because a CDP telephone hearing was offered but the taxpayer did not show up or provide financials or unfiled returns. Pro se.

Hartman v. Commissioner, 2011-1 USTC ¶150,293 (3rd Cir. 2011)

Tax Court summary judgment was sustained because TP failed to submit financials.

Amesquita v. Commissioner, 108 AFTR 2d 5288 (10th Cir. 2011)

Tax Court summary judgment was sustained because TP failed to show why the IRS allowable expenses did not apply.

Concert Staging Services, Inc., TC Memo 2011-231

The CDP -penalty abatement and application of payments case was fully stipulated and decided against the taxpayer without a trial. The Court ruled for the IRS because it could not judge the credibility of the taxpayer from the stipulation. (Practice tip: if you need sympathy have a trial)

II. GOOD, BAD AND WORSE

A. CDP and Statute of Limitations/Jurisdiction:

Thornberry .v Commissioner, 136 T.C. 356 (2011)

The taxpayer used a form from a tax protestor website as part of CDP request. The IRS sent a letter saying they were disregarding the CDP as frivolous. The taxpayer filed a CDP Tax Court petition. The Court held that there is jurisdiction to determine if it is frivolous and that the “disregard” letter was a “determination” by the IRS granting that jurisdiction.

IRS Chief Counsel Notice - CC-2012-003 (Dec. 2, 2011)

In response to *Thornberry*, the IRS is taking the position that the Tax Court has no jurisdiction in cases where appeals disregards a frivolous CDP, unless the

Service imposes a penalty. This issue is being coordinated and will be raised in Tax Court and on appeals.

Springer v. Commissioner, 2011-1 USTC ¶50,283 (10th Cir. 2011)

Tax Court dismissal for lack of jurisdiction of untimely CDP was affirmed because there was no determination letter.

Joy v. Commissioner, 2011-1 USTC ¶50,430 (9th Cir. 2011)

OK to dismiss for lack of jurisdiction if: years not included in CDP, and untimely CDP. (See also, *Tuttle v. Commissioner*, 107 AFTR 2d 2288 (9th Cir. 2011))

US v. Reardon, 2011-2 USTC ¶50,624 (E.D. Mich. 2011)

In a suit to reduce a tax lien to judgment, the statute of limitations extensions were analyzed for offers in compromise, bankruptcy and CDP. The Court extended the statute of limitations for a second timely CDP even though the taxpayer had no right to a hearing. (Practice tip: only one right to hearing per period, but watch the SOL when notices are sent at the end of the 10 years.)

US v. Denton, 2011 US Dist. LEXIS 126202 (N.D. TX 2011)

Suit to reduce tax lien to judgment was timely because the statute of limitations was extended by CDP even though it was withdrawn.

Dingman v. Commissioner, TC Memo 2011-116

A taxpayer who filed returns with CI. The IRS failed to assess the late filing penalty within three years. The Court held the penalties invalid because of the statute of limitations.

Rosenbloom v. Commissioner, TC Memo 2011-140

The taxpayer was an attorney with a drinking problem. The RO was heavy handed and coerced waivers of the statute of limitations when TP was drunk. The court found that the waivers were invalid and that the IRS abused discretion in determining there was no IA in place when the waivers were signed.

B. CDP and Offers in Compromise:

Veneziano v. Commissioner, TC Memo 2011-160

Taxpayer proposed an offer in compromise which was rejected by appeals because of transfers of property to trusts and liquidated an IRA to buy property instead of pay taxes. No abuse of discretion and no IA because no specific terms.

Johnston v. Commissioner, 136 TC No. 23 (2011)

Rejection of Offer in compromise in CDP was not abuse of discretion because the taxpayer failed to show that he used the assets for necessary living expenses.

Tucker v. Commissioner, TC Memo 2011-67

Rejection of Offer in compromise in CDP was not an abuse of discretion because the taxpayer was deemed to have dissipated his assets up to the amount of tax owed at the time he day traded and lost.

Kreit Mechanical Associates, Inc. v. Commissioner, 137 TC No. 9 (2011)

There was no abuse of discretion in rejecting an offer in compromise, even though the appeals officer did not discount the accounts receivable.

Currier v. Commissioner, TC Memo 2011-113

TP OIC was rejected, IRS said collection potential was \$59,413. TP sent \$60,000 with CDP and IRS applied to tax, then IRS rejected \$60,000 OIC. Tax Court said it is ok to take the money and reject the OIC.

Gravette v. Commissioner, TC Memo 2011-138

IRS rejected OIC and TP failed to dispute IRS computation of expenses. The Court sustained the levy determination.

Allivato v. Commissioner, TC Summ.Op. 2011-3

CDP OIC rejected, case remanded. The TP failed to provide non-liable spouse's financials - community property state. The Court found no abuse of discretion.

Mangiardi v. Commissioner, TC Memo 2011-24

CDP with OIC rejected because IRS included value of assets of beneficiaries in collection potential. No abuse of discretion.

Dalton v. Commissioner, TC Memo 0211-136

Court awarded 7430 attorneys fees because the IRS CDP determination and denial of an OIC was substantially unjustified with respect to their nominee determination.

Lampf v. Commissioner, TC Memo 2011-282

No abuse of discretion for appeals not to consider an OIC when no bank statements or expense verification provided.

Nasir v. Commissioner, TC Memo 2011-283

There was no abuse of discretion in rejecting a deferred payment OIC when the TP stopped making payments, and provided no proof of reasonable cause to abate penalties.

C. CDP and Installment Agreements:

Churchill v. Commissioner, TC Memo 2011-182

The Court remanded the case to appeals due to changed circumstances. (A most entertaining opinion to read.)

Simone's Butterfly v. Commissioner, TC Memo 2011-187

Motion for summary judgment granted because TP offered an IA without specifics and was not current with estimated taxes. IRM 5.15.1.4.1(19)

Azzari v. Commissioner, 136 TC 178 (2011)

TP requested an IA and subordination of lien for accounts receivable. Abuse of discretion because IRS was wrong on the law re: accounts receivable and caused the additional liability by refusing the subordination. Case was remanded.

Marascalco v. Commissioner, 2011-1 USTC ¶50,315 (5th Cir. 2011)

CDP IA rejected because IRS determined a “pattern of non-payment” and refused a 10 year payment plan because there was sufficient disposable income for a higher amount. No abuse of discretion.

Law Office of Cushman, LLC v. Commissioner, TC Summ.Op. 2011-37

Appeals denied IA because the TP filed late 941's and there was uncertainty whether the TP would not default besides there were no financials in the file. No abuse of discretion.

Black v. Commissioner, TC Summ. Op. 2011-69

Lien withdrawal denied because no evidence that it impaired earning ability. No abuse of discretion.

Zelden v. Commissioner, TC Memo 2011-13

TP had history of late filing, late estimated taxes. It is OK for appeals to reject IA if “pattern of non-compliance.”

Perlman v. Commissioner, TC Summ. Op. 2011-34

Levy upheld because TP failed to request specific IA or OIC and provided incomplete financials.

Dominguez v. Commissioner, TC Memo 2011-281

Summary judgment for IRS granted because TP failed to respond to the motion even though there was a discrepancy in financial analysis.

Busche v. Commissioner, TC Memo 2011-285

No abuse of discretion to deny a face to face hearing when the TP doesn't provide proof of withheld taxes and no specific IA proposed.

Morgan v. Commissioner, TC Memo 2011-290

OK to sustain levy when TP doesn't propose a collection alternative.

D. CDP - Other

Don Johnson Motors, Inc. v. US, 2011 US App.LEXIS 25023 (5th Cir. 2011)

TP not entitled to damages under Section 7432(b) because did not show damages were the result of the failure to release the lien.

535 Ramona Inc. v. Commissioner, 2011 US App. LEXIS 24604 (9th Cir. 2011)

The TP has the burden of proof by a preponderance of the evidence with respect to liability determinations in CDP cases.

Delgado v. Commissioner, TC Memo 2011-240

No abuse of discretion when TP failed to file amended returns.

Adair v. Commissioner, TC Memo 2011-75

No abuse of discretion for appeals to refuse to withdraw a tax lien so the TP could re-finance, subordination would have allowed refinance.

Brady v. Commissioner, 136 TC 422 (2011)

CDP levy was sustained because a claim for refund was untimely to offset the unpaid liability.

Smith v. US, 2011-1 USTC ¶50,276 (D. Conn. 2011)

The court awarded attorney fees to TP of \$78,167 because the IRS ignored a refund claims even in CDP.

Iantosca v. Benistar, 2011-2 USTC ¶50,547 (S.D. In. 2011)

OK for IRS to issue subpoena while CDP is pending.

US v. Zurn, 2011-1 USTC ¶50,396 (9th Cir. 2011)

Pending CDP did not affect a suite to reduce a tax lien to judgment.

Galvez v. IRS, 2011-2 USTC ¶50,634 (11th Cir. 2011)

TP sent multiple written requests but failed to address any of them to the District Director (non-existent) so the Court found that the TP had failed to exhaust his administrative remedies.

Chief Counsel Notice - CC-2011-18 (August 26, 2011)

TP is entitled to CDP rights under Sections 6320 and 6330 for assessment and collection of criminal restitution. But TP cannot contest the liability and no IA or OIC in an amount less than the court ordered amount.

Schwendeman v. Commissioner, TC Memo 2011-70

Appeals refused to consider liability in TF case where TP had filed a refund suit. There was no abuse of discretion to sustain the lien, but levy was suspended during the refund case.

Ex Parte Communications with Appeals Notice 2011-62 (July 19, 2011)

This proposal will update Rev. Proc. 2000-43. Easy to cure violation and only penalty for breach is remand.

Berkery v. Commissioner, TC Memo 2011-57

Appeals refused to withdraw a tax lien to allow the TP to refinance, even though the TP was in an IA because he had a bad payment history and no evidence that the TP can't refinance because of the lien.

Thompson v. Commissioner, TC Summ. Op. 2011-31

Telephone tag CDP hearing and the IRS used TP telephone records to show TP was not quick to return calls.

Hughes v. Commissioner, TC Memo 2011-294

TP was 70 years old and sick. No abuse of discretion for appeals to ignore his request for currently uncollectible and sustain the lien.

Conway v. Commissioner, 137 TC No. 16 (2011)

IRS issued lien and levy CDP notices before CP504's. The levy notice did not violate the Internal Revenue Code. The lien filed before the notice was invalid.

Budike v. Commissioner, 2011 US Dist. LEXIS 137844(E.D. PA. 2011)

This was a CDP run amok. Nonetheless, sovereign immunity protects the IRS for tort claims act.

III. Bankruptcy Issues.

Marcinek v. Commissioner, 2011-1 USTC ¶50,320 (3rd Cir. 2011)

CDP Tax Court decision was void because there was a pending bankruptcy stay.

IV. Delay in CDP

Grunsted v. Commissioner, 136 TC 21 (2011)

CDP filed to dispute the frivolous penalties. Summary judgment for IRS and admonished TP sanctions in future.

US v. Castle, 107 AFTR 2d 1918 (E.D. Ca. 2011)

Permanent injunction against TP for filing UCC's and liens against IRS employees.

Carroll v. US, 2011 US Dist. LEXIS 95800 (E.D. WI. 2011)

Tax protestor sued IRS because he did not get a CDP - dismissed.

Deems v. Commissioner, 2011-1 USTC ¶50,401 (11th Cir. 2011)

Tax Court summary judgment and sanctions were affirmed because the TP presented no non-frivolous arguments and was not entitled to a face to face hearing.

Williams v. Commissioner, 2011-1 USTC ¶50,390 (9th Cir. 2011)

It is OK for appeals to close CDP case before a deficiency assessment.

Barry v. Commissioner, TC Memo 2011-127

Tax protestor was denied face to face hearing and assessed 6673 penalties totalling \$40,000.00.

Kubon v. Commissioner, TC Memo 2011-41

TP used CDP for delay and refused to cooperate resulting in summary judgment and \$20,000 penalty.

Byrd v. Commissioner, TC Memo 2011-146

6673 penalty of \$2000 for delay, TP did not submit financials.

McNeil v. Commissioner, TC Memo 2011-150

Tax protestor filed frivolous returns and was assessed a 6702 penalty.