

**SURVEY OF 2011 CDP CASES**

**Updated January 1, 2013 (review of 101 cases)**

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

**A. - Cannot Challenge Liability (13 of these cases were pro se):**

*Business Integration Services, Inc. v. Commissioner*, TC Memo 2012-342

Cannot challenge liability in Tax Court if you do not raise it during a CDP hearing. Taxpayer did not provide support to challenge the amounts or the loss carryback..

*Dreamco Development Corp v. Commissioner*, TC Memo 2012-67

Taxpayer omitted the penalty abatement issue from the Tax Court petition and the Court would not consider it, even though it was discussed at the CDP hearing. Also, TP failed to respond to IRS Summary Judgment.

*Diamond v. Commissioner*, TC Memo 2012-90

Cannot challenge liability for 6020(b) assessment unless the TP rebuts receipt of the statutory notice of deficiency. "I don't recall" is insufficient

*Rivas v. Commissioner*, TC Memo 2012-20

Cannot challenge liability if the IRS proves that the statutory notice of deficiency was sent to the last known address and unclaimed by the taxpayer. The IRS had a USPS witness to show that the notice was unclaimed.

*Byers v. Commissioner*, TC Memo 2012-27

The TP cannot challenge the liability in a CDP hearing while the Tax Court decision in the statutory notice case is on appeal. The Court further determined

that it was not ex parte communication for the ASO to get information from the prior case (IRS counsel).

*Hernandez v. Commissioner*, TC Summ. Op. 2012-56

Taxpayer filed a 1040X. The Court found that the TP could not dispute the liability because he failed to provide supporting documentation for the 1040X to appeals. (See also, *Cantrell v. Commissioner*, TC Memo 2012-257)

*Bland v. Commissioner*, TC Memo 2012-84

Taxpayer cannot dispute trust fund liabilities when it was considered in prior CDP.

*Tomasello v. Commissioner*, TC Summ. Op. 2012-29

Summary Judgment for IRS because the taxpayer cannot dispute trust fund liability after failing to file protest when the penalty was proposed.

*Stanley v. Commissioner*, 2012 USTC 50,627

Summary judgment for the IRS because the taxpayer cannot dispute the liability which was assessed after a statutory notice of deficiency. (Even if the TP sends a payment receipt and a fake money order to pay the amount in full.)

Similar cases denying review of liability after statutory notices are:

*Delon v. Commissioner*, TC Memo 2012-33

*Gowen v. Commissioner*, TC Memo 2012-40

*Bartosovsky v. Commissioner*, 2012 Tx Ct Summ. LEXIS 97

*Harris v. Commissioner*, TC Memo 2012-275

*Holt v. Commissioner*, TC Memo 2012-271

*Leibold v. Commissioner*, TC Memo 2012-210

B. YES- Dispute Liability in CDP (8 of these cases were pro se)

*Diehl v. Commissioner*, TC Memo 2012-176

Taxpayer was granted partial innocent spouse relief under IRC Section 6015 ( c ) for allocation of liability, but not full relief under 6015(f) because the Court found neither her or her son's testimony credible regarding abuse.

*Stanwyck v. Commissioner*, TC Memo 2012-180

Disbarred attorney did not get innocent spouse relief for charitable deduction disallowance. And because of his failure to comply with document requests and frivolous discovery requests the court warned that there would be penalties next time.

*Child Adult Intervention Services Inc. v. Commissioner*, TC Memo 2012-94

Taxpayer/psychologist worked for his own 501(c)(3) organization and failed to file timely Forms 990. The court rejected the Taxpayer's reasonable cause argument that his volunteer was sick and didn't timely file the returns. The volunteer was his wife.

*Wilson v. Commissioner*, TC Memo 2012-229

The Taxpayer failed to show reasonable cause as to the failure to pay penalty - being a single mother in NY isn't enough. The Court did not sustain the failure to pay a deficiency penalty nor the estimated tax penalty. As to the first, there was no deficiency. As to the second, the IRS failed to have proof of the prior years income and did not provide adequate notice for the penalty. The appeals officer offered an installment agreement, but the representative neither accepted nor provided a counter monthly payment. (See also, *Kiretski v. Commissioner*, TC Memo 2012-262 for similar penalty abatement.)

*Obrien v. Commissioner*, TC Memo 2012-326

The Taxpayer challenged a frivolous return penalty for "zero" returns, arguing that the penalty was assessed beyond the 3 year statute of limitations. The Court found that the penalty was not based on the original return statute of limitations and upheld the levy.

*Alexander v. Commissioner*, TC Memo 2012-75

The Taxpayer filed "zero" amended returns, claiming he had no income. The IRS agreed that he could dispute the penalty in the CDP, however, he failed to include detailed listing of errors by appeals in his petition and therefore waived them.

*Campbell v. Commissioner*, TC Memo 2012-82

IRS Motion for summary judgment denied because there was an issue of fact as to whether the taxpayer had intentionally refused the statutory notice of deficiency and had a right to dispute the liability.

*Devlin c. Commissioner*, TC Memo 2012-145

Taxpayer avoided the frivolous penalty because the liability was at issue - the IRS had not sent the statutory notice to the last known address. However, the levy was sustained because the taxpayer failed to provide any substantive arguments, and did not file a brief.

*Raifman v. Commissioner*, TC Memo 2012-228

The IRS failed to consider the taxpayer's theft loss, and did not move to remand. The Court denied the IRS summary judgment motion and continued the case.

*Fielder v. Commissioner*, TC Memo 2012-284

Taxpayer had a right to dispute the liability even though it was not included on his 12153 Request because he discussed at the CDP hearing and in Court. IRS offered currently not collectible instead of reviewing the liability issues.

*Bridgmon v. Commissioner*, TC Memo 2012-322

The taxpayer was a good witness and the Court did not believe that Appeals called the taxpayer, nor that the taxpayer was uncooperative. The Court found that Appeals abused their discretion because the ASO should have tried harder to contact the taxpayer. The case was remanded.

*Banderson v. Commissioner*, TC Memo 2012-46

The taxpayer was allowed to dispute the penalty but the levy was sustained and the Court found that the IRS can apply refunds even if a CDP is pending.

## II. GOOD, BAD AND WORSE

### A. CDP and Statute of Limitations/Jurisdiction:

*Minemyer v. Commissioner*, TC Memo 2012-325

The taxpayer filed an untimely CDP for levy. The Court treated the "Decision Letter" as a Notice of Determination and found that the levy notice was

invalid because it was not sent to the last known address. The IRS knew the taxpayer was in federal prison for tax evasion and did not use the prison address. The CDP lien was sustained by the Court.

*Weber v. Commissioner*, 138 T.C. 18(2012)

The Tax Court did not have jurisdiction over a trust fund overpayment that was applied to the CDP tax year.

*Hughes v. Commissioner*, TC Memo 2012-42

Tax Court dismissal for lack of jurisdiction because the taxpayer appealed a CAP decision, but failed to timely appeal the CDP determination. (This taxpayer was represented by counsel).

#### B. CDP and Offers in Compromise:

*Azzari Inc. v. Commissioner*, TC Memo 2012-310

Taxpayer lost ability to borrow on line of credit because Appeals erroneously determined the lender had priority and did not need subordination and rejected an IA. The taxpayer “sold” accounts receivable to a creditor of the taxpayer (with same owners) and wound down their construction company. The Court remanded. Appeals rejected an OIC claiming that the OIC should include the successor company’s assets. The Court remanded a second time to allow the taxpayer to amend the offer including the assets. (These companies were not successor companies but operated at the same time. Nonetheless - caution: can’t use corporate assets that belong to someone else.)

*Jones v. Commissioner*, TC Memo 2012-274

74 year old taxpayer lost his home in a fire. The Court remanded because Appeals failed to take into account the taxpayer’s age, health, income changes, property disrepair, and did not explain why dissipated assets were considered. There were numerous errors in the Notice of Determination

*Fatehi v. Commissioner*, TC Memo 2012-26

The case was initially remanded because Appeals included a credit card limit and past income rather than current in its calculations and didn’t give the taxpayer time to comply with financial request. The supplemental determination Rejection of OIC was also an abuse of discretion because denial of the OIC was

based solely on a bald assertion from a Revenue Agent that “thought the taxpayer was paid in cash.” The case was remanded - third time’s a charm?

*Leago v. Commissioner*, TC Memo 2012-39

The Court remanded the case three times for consideration of an OIC. The taxpayer had a brain tumor, no insurance, lost his business, was unemployable and homeless. The Court determined that Appeals failed to look at special circumstances and an ETA offer.

*Titsworth v. Commissioner*, TC Memo 2012-12

TP \$500 OIC was rejected, IRS said collection potential included 112 months of income and dissipated assets - suspect mortgages. There is no abuse of discretion if reasonable collection potential is greater than the offer.

*Vanmali v. Commissioner*, TC Memo 2012-100

Summary judgment for IRS. OK to reject OIC, even based on error if the errors did not affect the outcome. Practice point: Raise 6330 compliance in the petition to avoid summary judgment.

*A-Valley Engineers, Inc. v. Commissioner*, TC Memo 2012-199

CDP OIC rejected by appeals because of shareholder loans on the balance sheet of the company. Practice point: accounting as shareholder loans instead of distributions will torpedo an OIC.

*Brombach v. Commissioner*, TC Memo 2012-265

Taxpayer failed to show special circumstances and had 2 motorcycles. There was no abuse of discretion in rejecting the OIC.

*Clarke v. Commissioner*, TC Memo 2012-238

Appeals rejection of an OIC was sustained because the taxpayer failed to prove that he needed a housing expense larger than the standard to produce income.

Neither was the state tax IA allowed by Appeals. (This was before the rules on state tax IA’s changed.)

*Hinerfeld v. Commissioner*, 139 T.C. 10 (2012)

The Court found no ex parte communication even though appeals approved an OIC, but then it was rejected by IRS counsel because they found a pending

lawsuit that alleged the taxpayer sold corporate assets to a company owned by his children. The Court determined that Appeals manager made an independent determination to reject the OIC.

*Hirsch v. Commissioner*, TC Memo 2012-89

IRS summary judgment motion granted because the taxpayer's representative did not respond to either Appeals of the Motion.

*Watchman v. Commissioner*, TC Memo 2012-113

Rejection of an OIC with doubt as to liability was harmless error because the taxpayer failed to provide financials.

### C. CDP and Installment Agreements:

*Salahuddin v. Commissioner*, TC Memo 2012-141

IRS summary judgment denied. The taxpayer filed a CDP requesting in IA, then sent the 433 to ACS who determined an IA of \$980 per month. The taxpayer confirmed with Appeals manager by telephone and a follow up letter that the documentation was sufficient and that an IA of \$900-1000 was ok. Appeals issued a determination 4 months later rejecting the IA. The Notice of Determination had multiple errors. The Court determined that there was an issue of fact because the taxpayer was led to believe that the information was sufficient and the IA was ok.

*Payne v. Commissioner*, TC Summ. Op. 2012-43

IRS motion for summary judgment was denied because Appeals gave the taxpayer only 7 days to provide financials. The case was dismissed for lack of prosecution because the taxpayer then failed to provide financials after the court it.

*Lipson v. Commissioner*, TC Memo 2012-252

The case was fully stipulated. The Court determined that the IRS is not required to accept an IA if the taxpayer has previously defaulted on IA's, has not made estimated tax payments and has no ability to pay. (Query - why not get in compliance and determine the TP to be uncollectible?)

*Starkman v. Commissioner*, TC Memo 2012-236

OK to deny IA if the taxpayer is not in current compliance. (Unfiled return and no estimated tax payments.)

*Galyean v. Commissioner*, TC Memo 2012-242

Taxpayer lost his job, filed bankruptcy, lost his home and earned only social security. The taxpayer requested currently uncollectible and rejected IA's because there was no allowance for pet care. The court found no abuse of discretion to deny a deviation from the allowable expenses for dogs.

(See also, *Sanchez v. Commissioner*, TC Memo 2012-216- the court declined to re-figure the amount of the IA offered by Appeals.)

*Miss Laras Dominion Inc. v. Commissioner*, TC Memo 2012-203

The taxpayer requested a \$1000 per month IA, which was rejected by Appeals because of negative cashflow. The court found no abuse of discretion. (Query: why not currently uncollectible?)

*Drakes v. Commissioner*, TC Memo 2012-189

The Court remanded the case because there was a hardship issue. Appeals offered an IA, then after the hearing the taxpayer entered into an IA with the IRS. The Court determined that Appeals did not abuse their discretion because the IA was accepted after the hearing. (Why did this go to trial?)

*Pace v. Commissioner*, TC Memo 2012-211

The taxpayer failed to provide 433b's for dormant companies. There is no abuse of discretion if the taxpayer fails to provide information. (See also, *Wright v. Commissioner*, TC Memo 2012-24; *Yoel v. Commissioner*, TC Memo 2012-22; *Klika v. Commissioner*, TC Memo 2012-225)

*Akonji v. Commissioner*, TC Memo 2012-56

Summary judgment for IRS granted because TP failed to show up twice for the hearing and not respond to the motion.

*Curran v. Commissioner*, TC Memo 2012-234

No abuse of discretion to deny currently uncollectible if there are available assets.



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

*Specialty Staff Inc. V. Commissioner*, TC Memo 2012-52

No abuse of discretion in denying lien withdrawal because the TP is not in compliance. Court found that since the 12153 mentioned requiring a 433, even if Appeals failed to do so, it was OK. Summary judgment for IRS.

*Specialty Staff Inc. V. Commissioner*, TC Memo 2012-253 (round 2)

No abuse of discretion in denying lien withdrawal because of history of non-compliance and no current compliance.

*Kyereme v. Commissioner*, TC Memo 2012-174

Summary judgment for IRS in rejecting request for lien withdrawal because the TP was not specific with respect to need to borrow, disadvantages of lien, likelihood of IRS priority would be compromised. The TP failed to include an affidavit with his SJ response.

*Sawyer v. Commissioner*, TC Memo 2012-201

It is OK to file a tax lien during the appeal of an IRS audit.

*Skidmore v. Commissioner*, TC Memo 2012-328

The taxpayer is divorced, homeless and has no access to his records to prepare returns because his ex-wife destroyed everything. Nonetheless, Appeals requested an enormous amount of information from the taxpayer and he had no ability to pay. Although the taxpayer was clearly on the skids, he got short shrift in a telephonic CDP hearing. Summary judgement for the IRS. No mercy for unfiled returns.

*Duplicki v. Commissioner*, TC Memo 2012-117

CDP lien was sustained because the taxpayer did not file a change of address with the Post Office. Receipt of the notice is not required. The IRS was entitled to rely on the last known address, Post office box. The taxpayer had unfiled returns for 16 years which probably didn't curry too much sympathy.

*Van Camp v. Commissioner*, TC Memo 2012-336

After the CDP hearing the taxpayer/attorney was disbarred. He tried to get new consideration based on changed circumstances post notice of determination.

The IRS says - the Court has no remand authority unless there is an abuse of discretion or a defective and incomplete record. The Court did not address the legal issue but sustained the levy.

*Winters v. Commissioner*, TC Memo 2012-183

Appeals closed the case even though the taxpayer submitted an OIC (untimely). The OIC was rejected because the taxpayer did not provide financials for the roommate. The levy was sustained because the OIC was not timely.

*Worthan v. Commissioner*, TC Memo 2012-263

The taxpayer was not allowed a claim for attorney's fees under Section 7430 because CDP is in connection with collection action and before any administrative proceeding. Even though the IRS had misapplied payments in error.

*Cooley v. Commissioner*, TC Memo 2012-164

Attorneys fees under Section 7430 were denied because the attorney was the TP's husband and the taxpayer did not provide the back of the check which would have cleared up the IRS error much earlier. Also, the Court pondered why anyone would spend \$30,000 in attorney's fees for a \$2000 tax case.

### **III. Bankruptcy Issues**

*Lewis v. Commissioner*, TC Memo 2012-138

The CDP levy was not sustained because the Appeals officer never scheduled a CDP hearing. The taxpayer talked to the ASO and indicated that there were Chapter 11 bankruptcy issues. The taxpayer says he sent requested information, which the ASO denies receiving. The court found abuse of discretion because the taxpayer requested a face to face hearing, got no hearing, and the ASO did not follow up with a scheduled hearing. The levy was not sustained.

*Everett Associates, Inc. v. Commissioner*, TC Memo 2012-143

The taxpayer confirmed a Chapter 11 plan for which the IRS filed a proof of claim. The taxpayer defaulted in the plan, and requested penalty and interest abatement because of the bankruptcy. The Court discussed the effects of a Chapter 11 Plan on post bankruptcy penalties and interest. The Court sustained collection of the IRS proof of claim amounts, but ruled that there was no post confirmation

interest on priority or post confirmation penalties. (Will this decision affect the IRS position that a defaulted plan negates all affects of bankruptcy?)

*Moore v. Commissioner*, TC Summ. Op. 2012-116

The IRS cannot levy on post Chapter 13 tax when the IRS claim is full paid in the Chapter 13 before conversion to a Chapter 7. In addition, the IRS did not get interest that accrued during the Chapter 13 because they did not prove the amount due and the Appeals officer failed to verify that all law and procedure was followed.

*In re Mead, Jr.*, 2013 W.L. 64758 (Bankr. E.D.N.C. 2013)

The IRS accepted on OIC prior to the filing of a Chapter 13. The Bankruptcy Court allowed the IRS claim in the amount of the OIC, based on 11 U.S.C. Section 525(a) which precludes discrimination against a debtor because of a bankruptcy filing. The IRS's policy not to deal with OIC's when a bankruptcy is filed was discriminatory. (Query - did the IRS file a contingent claim in case the OIC payments were not made?)

*Lastra v. U.S.*, 2012 Bankr LEXIS 5885 (Bankr. N.M. 2012)

The taxes were not dischargeable because the taxpayer's CDP suspended the 3 year rule during the time the CDP was pending plus 90 days. 11 U.S.C. Section 507(a)(8) hanging paragraph. The bankruptcy was filed 5 months early.

#### IV. Delay in CDP

*Carlson v. Commissioner*, TC Memo 2012-76

It is OK for appeals to hang up and terminate the CDP hearing when the taxpayer makes only frivolous arguments and is not in current compliance. (See also, *Seaver v. Commissioner*, TC Memo 2012-55)

*Crites v. Commissioner*, TC Memo 2012-267

Similarly tax protestor arguments but the Court did not assert penalties because it was the taxpayer's first time, and the proceeding was under Rule 122 so there was not wasted trial time.

*Klingenberg v. Commissioner*, TC Memo 2012-292

The Court sanctioned a taxpayer/plumber because he had been there before, failed to file returns for 6020(b) years, and did not provide financials to Appeals.

*Jackson v. Commissioner*, TC Memo 2012-58

The taxpayer filed multiple frivolous motions, made frivolous arguments and wasted the Court's time. The court ordered a penalty of \$15000 on motion of the IRS.