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CHAPTER 4

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IRS Appeals in Collection Matters

The most underutilized arm of the Internal Revenue Service with respect to Taxpayer collection issues is the IRS Office of Appeals ("Appeals"). This office can be used to appeal threatened levies and liens, denials of installment agreements, and denied offers to compromise one's tax. Understanding the processes and tools available is critical to a practitioner's success in this specialty.

Generally, Appeals functions are divided into two categories: i) assessment issues and ii) collection issues. Appeals' officers have become specialized and most officers deal with either assessment issues or collection issues, but not both. Appeals of examination findings, trust fund assessments, and denials of claims for refund all fall within the area of assessment issues. Appeals' officers working on collection issues are often referred to as Settlement Officers.

Other than appeals of Offers in Compromise ("OICs"), there are two primary procedures to appeal a Tax Collection matter:

- Collection Due Process ("CDP") Appeals (form 12153)
- The Collection Appeals Program ("CAP"; form 9423)

CAP is the only methodology that can be used to head off the filing of a Notice of Federal Tax Lien ("NFTL"). The CDP Appeal can only be filed in response to the filing of the NFTL or when a Levy is threatened by the IRS. That threat of levy often comes in the form of the Letter 1058 which states prominently, "NOTICE OF INTENT TO LEVY AND NOTICE OF YOUR RIGHT TO A HEARING." Providing advance notice of levy is required by Internal Revenue Code ("IRC") §6330. Such notices are always sent via Certified Mail. OICs are appealed through a process clearly delineated on OIC rejection letters and will not be discussed in this article.

CDP Hearings

The biggest mistake made by taxpayers and practitioners alike is not responding to the IRC §6330 notice within the 30 days required to fully protect the taxpayer's rights. In such hearings, Appeals is empowered to consider ALL collection alternatives. Responding to the §6330 notice is relatively simple. One need only complete the form 12153. The most recent revision (March of 2011) provides comprehensive guidance. Considerations when dealing with a §6330 notice and submitting form 12153 are set forth below, some of which will be more fully discussed in the next edition of this column.

1. **Determine whether or not to respond within 30 days.** The IRS has developed a process to consider untimely-filed requests for CDP hearings. Such hearings are administrative, not statutory. Therefore:

   a.) The statute of limitations for the IRS to collect the tax continues to run; and

   b.) The Taxpayer does not have the right to pursue the matter in the U.S. Tax Court.

   IRS policies are that such administrative hearings should be equivalent to the CDP hearing and, as do CDP hearings, should consider all collection alternatives. Accordingly, such administrative hearings have been named "Equivalent Hearings," which can be requested at item #7 of form 12153 up to 1 year after the taxpayer is provided the §6330 Notice.

   So, if a client is not willing to take the matter to Tax Court, would there be any reason to file within 30 days and suspend the running of the statute of limitations? One could argue (correctly, I believe), that the possibility of a U.S. Tax Court appeal from the CDP hearing puts added pressure on Appeals to resolve the matter.

   Often, the 30-day period is gone before the practitioner gets involved. So, it is important for a practitioner to obtain IRS account transcripts to see when the §6330 notice was issued so that the time to file an Equivalent Hearing does not pass by without consideration of action.

   When one is deep into the 10-year IRS limitations period to collect the tax, filing for a CDP hearing may be considered risky as the statute may expire without the hearing request. This has become rare, as the IRS has become more consistent about issuing notices of intent to levy early in the collection process.

   Be careful about missing deadlines. Sometimes practitioners will call the Revenue Officer and/or their manager upon the receipt of a Letter 1058 or other notice of intent to levy. While negotiating or playing telephone tag, the deadline to appeal could go by and weaken your negotiating position significantly.

2. **Consider requesting a face-to-face/in-person conference at a local Appeals office.** Generally, our office requests a face-to-face hearing on all form 12153 filings (also referred to as "CDP requests"). Why not? Our

experience is that we secure better results when meeting in person. Our office is located in central New Jersey. Accordingly, we find any of three offices (Newark, New York City, or Philadelphia) relatively convenient. I believe our flexibility regarding location makes it easier for the IRS to grant our requests.

More information on face-to-face conferences for CDP hearing requests, and the IRS reluctance to grant requests for such hearings, will be found in the next edition of this column.

3. **Seek Penalty Abatements.** Whenever there is money due to the IRS, the abatement of penalties should be a consideration. Even if you cannot elaborate on the detail of reasonable cause within the form 12153 attachment, you should request abatement and provide an overview of the reasonable causes and state clearly that you are willing to provide additional substantiation.

4. **Clearly State the Desired Results** You want to make clear what you want the Appeals Officer to do. Accordingly, your attachment should state the desired results. That attachment should also indicate why you were not able to resolve the problem (i.e. The Revenue Officer sent the threat to levy without ever calling the taxpayer or his/her representative), provide all pertinent facts, and identify the potential issues for consideration.

5. **Consider requesting that the hearing be recorded.** To preserve a record for the Tax Court, you may wish to consider requesting that the hearing be re corded. You have the right to do so. By making this request, you will be assured that the Appeals manager will be in attendance. I have not used this tool personally, but I do know it is being used regularly by practitioners, particularly in larger, more complex cases.

6. **Other technicalities.** Include statements in your attachment that make it clear that:
   - You reserve the right to amend the request;
   - You reserve the right to supplement the CDP request
   - There shall be no ex-parte communications (communication to influence a decision-making official off the record) between Appeals and other IRS employees working on the case, without your express written permission
   - Don't forget to include your power of attorney for the client, form 2848

7. **Who attends?** As with nearly all of my representation before the IRS, I will attend alone or with a member of my staff. In the rare instances that my client attends an IRS conference/hearing, I make the decision. I have had situations wherein my clients insisted on attending. In such instances, consideration should be given to whether or not to retain the client. My purpose in bringing staff is to either provide training, have someone along with me who is more knowledgeable of the factual nuances and intricacies of the case, and/or someone whose personality will assist in the resolution of the matter.

CAP Appeals

CAP Appeals enable a taxpayer/practitioner to Appeal a specific action or proposed action of the IRS. Some considerations with respect to CAP Appeals:

1. **Only the specific action or proposed action** is evaluated by the Settlement Officer. The Settlement Officer will not consider all collection alternatives. However, some Settlement Officers will tell you that they are only doing an "administrative review" to determine whether the IRS followed the requisite procedures in deciding to take or threaten the action being appealed. Under the Internal Revenue Manual ("IRM"), this is simply not true in my opinion. The Settlement Officer is to put himself/herself in the position of the IRS employee and determine whether the action is the appropriate action to be taken considering all facts and circumstances.

2. **CAP is an expedited** procedure in which the Settlement Officer is required to have the hearing within five days of his/her receipt. However, one never knows when the officer will actually "receive" the case. The five-day rule brings on unfair and extraordinary results, often under the pretense of doing the Taxpayer a 'favor' by expediting the case. For example, you could receive a call from a Settlement Officer, have what you believe is a preliminary conversation to the hearing, and then be told that the Settlement Officer is finding in favor of the IRS action. Effectively, you may not have realized that you had the hearing during that conversation! Accordingly, you need to clarify from the beginning in all conversations whether you are having the hearing or just trying to set up a mutually convenient time for one. Also, if you are planning to be away from the office for an extended period, you may want to contact Appeals to make sure that the hearing is not scheduled while you are unavailable. The IRS will consider your unavailability for more than five days, effectively, a forfeiture of your hearing rights.

3. **Normally, face-to-face** hearings will be permitted in local IRS offices. However, it is very rare that a Service Center CAP will be transferred for a face-to-face hearing.

4. **The CAP Program** is used to appeal rejections of installment agreements (IRC §7122(e)) and proposed terminations of installment agreements (IRC 6159(e)).

The details of IRS procedures and practices relating to Appeals change frequently. For that reason, you should regularly refer to Section 8 of the IRM, which covers the Appeals function of the IRS and can be found online at: http://www.irs.gov/irm/part8/index.html. See also IRS Publications 594 and 1660.

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