



(108,018,532)

(404,460)

(1,920)

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—

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(68)

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120,000,000

(120,000,000)

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(67,410,000)

A  
CLOSER  
LOOK

at the  
DISQUALIFIED EMPLOYMENT

*Tax Levy*

A Significant Change  
to Collection Due Process  
Hearing Rights



By David F. Miles, EA

**Internal Revenue Service enforcement action**—the forcible seizure of property or rights—must be considered as a potential risk any time a taxpayer owes federal taxes. This is especially true in the case of in-business taxpayers who fail to remain current with their employment tax obligations.

**T**his article discusses a recent addition to the statutory arsenal of the IRS, including its current impact on collection due process (CDP) hearing rights, and offers suggestions on how to manage the changes. The new Disqualified Employment Tax Levy (DETL), along with its effect on taxpayers and practitioners, is a major component of these changes.




Generally, the IRS must advise taxpayers of its intent to levy or seize property before doing so. Taxpayers, in turn, have the right to appeal IRS' intent to levy through a request for a collection due process hearing. Both of these subjects are treated in Internal Revenue Code (IRC) Sections 6320 and 6330. Over the years this type of appeal has become a popular tool for both taxpayers and practitioners; so popular, in fact, that the due process system is now mired in requests it does not have the resources to hear in a reasonable period of time.

#### **Background**

Many in the practitioner community are sure to remember the era of the IRS taking action first and asking questions later. Much changed when CDP rights were officially defined in the IRS Restructuring and Reform Act of 1998 (RRA 98). This is often referred to as the beginning of the "kinder and gentler IRS." And while many of the provisions in the act did help remove some of the inconsistencies in how collection cases are treated, RRA 98 also created new problems surrounding the timely collection of valid debt.

Specifically, due process hearings were implemented by RRA 98 with the intent of giving every taxpayer a systemic right to an independent review by the IRS Office of Appeals prior to the IRS taking levy and/or seizure action against any period of liability. At the CDP hearing a taxpayer has the statutory right to raise any relevant issues related to the debt or the action proposed by IRS Collections. This was an enviable goal in the late nineties as Congress determined that cases were being accorded vastly different treatment depending on any number of factors. Congress sought to level the playing field so that



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every taxpayer had the same advantages and disadvantages when dealing with the Collection Division of the IRS. Unfortunately, over the last ten years the CDP hearing has evolved into a system buried by the opportunity it affords to each taxpayer.

In response to some of IRS' concerns with how the CDP hearing system had developed, Congress amended the popular IRC Sec. 6330 to give the IRS the opportunity to continue with enforced collection action against repeat employment tax offenders without a pre-levy hearing. This was done through Sec. 8243(a) of the Small Business and Work Opportunity Tax Act of 2007 (2007 Act). The 2007 Act introduced a new levy called the Disqualified Employment Tax Levy (DETL) which seeks to accomplish two goals for the IRS: (1) help counter the overwhelming appellate caseload and (2) allow the IRS to enforce collection against repeat or pyramiding in-business employment tax offenders without a lengthy appeal process.

A DETL, as described in IRC Sec. 6330(h), is a levy served to collect the employment tax liability of a taxpayer if that taxpayer or a predecessor requested a CDP hearing under IRC Sec. 6330 for unpaid employment taxes arising in the two-year period prior to the beginning of the taxable period to be collected by levy. If a DETL is served, a taxpayer is given an opportunity for the CDP "hearing described in

this section within a reasonable period of time after the levy." Similar to the traditional CDP hearing, a taxpayer may seek judicial review in Tax Court of the determination resulting from the IRC 6330(f) post-levy hearing.

Many in the representation field disagreed with the amendment on the theory that a law that affords due process cannot then be limited in scope. Others were troubled by the manner in which the amendment was unveiled to the practitioner community. It was given almost no formal announcement and was largely known, until recently, only by those familiar with the 2007 Act. And even more concerns seem to be arising following the recently published National Taxpayer Advocate 2009 Annual Report to Congress in which the national advocate, Nina Olson, states that the CDP "has been one of the tax issues most frequently litigated in the federal courts." Ms. Olson's study seems to illustrate that although the IRS has concerns with the use of the CDP, the CDP process "serves to provide taxpayers with a forum to raise

legitimate issues before the IRS deprives them of property."

To successfully evaluate the effect on due process hearings resulting from the 2007 statutory change, one must look carefully at the systemic failures that led to the amendment and such a dramatic shift in IRS collection rules. For years it has been a commonly accepted practice by taxpayer representatives to file a request for a hearing under the 1998 CDP laws when faced with the threat of enforcement. In general, filing such an appeal stays collection action against one's client, presenting an invaluable time to work on establishing compliance or addressing issues such as unfiled tax returns. That time can be critical because both compliance with ongoing taxes and the filing of all returns are necessary for any formal resolution with the IRS to be agreed upon.

Unfortunately, and despite Ms. Olson's assessment of the CDP hearing, it is impossible to contend that the due process appeal hearing has not been manipulated, especially as it became clear to taxpayers and represen-

tatives alike that Appeals could not contend with the volume of requests being made. As a result of the allure of the automatic stay of enforcement, the due process hearing evolved for many into less of an opportunity to resolve a situation than to put off enforcement, especially for those still accruing additional tax debt. The hearing can prove successful in delaying enforcement action for up to six months or even more in some cases.

As the popularity of requesting due process hearings has increased and the number of delinquencies has remained as high as ever, the collection system has become swamped with an almost unfathomable number of hearing requests. If one considers the fact that each revenue officer can carry an inventory of forty to eighty cases and the IRS cannot deny a due process hearing request, one can start to imagine the caseload facing the regional Appeals Division representatives who hear each of the due process hearings. The caseload problem is exacerbated by the fact that

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Appeals does much more than hear due process hearings. Furthermore, the fact that due process hearings are not the first work priority of Appeals makes significant delays inevitable.

The problem of backlog has become so immense that even today, nearly two years after the IRS issued internal instructions on how to employ the new DETL, Appeals is still requesting that taxpayers not request a face-to-face hearing unless it is vital. In a recent Colorado stakeholder liaison meeting, Appeals informed practitioners that there are currently delays of six months or more nationally for a hearing to take place. In the Colorado region the problem is worse, as Appeals officers who traditionally work a case inventory of fifty cases have 100 to 120 cases.

In addition to the DETL, Appeals has combated the CDP backlog by disqualifying pyramiding taxpayer's from face-to-face hearings and the implementation of a pilot program from November 2009 through November 2010 called the Rapid Response Appeals Hearing. This program's mandate is to have CDPs filed by pyramiding taxpayers forwarded to Appeals within five days of the request with a conclusion to the appeal to follow within fourteen days.

While the total number of CDP hearing requests is a significant contributing factor to the problems facing the CDP system, the IRS seems to have singled out pyramiding employment taxes as debt that will no longer be guaranteed a pre-levy hearing. As a result, pyramiding taxpayers became the focus of the DETL in the 2007 Act. Under the amendment the IRS will no longer be required to wait until each period of debt has gone through a due process hearing before it can take enforcement action, although these taxpayers will still be afforded a hearing in each post-levy case and pre-levy situations every two years. In fact, Collections is not even required to wait until the original CDP hearing has taken place. A DETL situation can exist after a hearing has been requested—but not yet heard—if subsequent employment tax accruals have taken place.

The intent of focusing on this group seems to be to emphasize the significance of trust taxes, to speed the collection of employment tax debt, and to unclog the CDP system by making taxpayers and their practitioners more carefully evaluate the filing of an initial CDP hearing request.

The IRS issued a memorandum to its field offices about the implementation of the DETL in February of 2008, but it was not for roughly another eighteen months that the levies began to be seen by practitioners. This may be because procedural change takes time to put into service. It may also be due, however, to the fact that the IRS gave the power of determining the need for the new levy to its revenue officers on a case-by-case basis rather than mandating that the DETL be issued

in every applicable situation. As a result, revenue officers appear hesitant thus far to use the DETL except in the most egregious situations.

### ○ Recommendations and Prognosis

For practitioners who are not dealing with resolving IRS debt on a regular basis, the amendment to CDP hearing rights may still come as quite a surprise. Some may even think the IRS has made a procedural mistake when they first encounter one of these levies. Regardless of your exposure to the DETL, it is necessary to be clear on its authority and its ramifications when representing taxpayers.

The DETL has its most powerful impact within two years of a taxpayer's last CDP hearing request. This makes it important for representatives to think carefully about submitting each hearing request. As soon as a CDP hearing request is made, an in-business taxpayer may not qualify for another pre-levy CDP hearing request on employment taxes unless given the opportunity by the IRS. The taxpayer should not count on that being the case. Gone are the days of filing a hearing request on each period of liability just to stay collection or as a matter of practice.

It is also important to remember that there are many ways to accomplish your goals with the Collection Division. Be proactive by making a formal request for

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a repayment plan. If a taxpayer requires time to file returns or submit additional information, consider simply requesting the time from the IRS rather than relying on the automatic stay that comes with the traditional CDP hearing. Be sure to meet the deadlines established by Collections and always follow up on those deadlines despite what materials you may or may not have to meet the deadline. The Offer in Compromise program, although not a likely solution for in-business taxpayers, remains an option, as does the part-pay installment agreement.

If a DETL situation presents itself, bear in mind that the right to a post-levy hearing still exists. The taxpayer must be timely notified of the DETL and the subsequent hearing rights. Thus far, the IRS has determined that timeframe to be within ten (10) days of the levy being issued. If legitimate issues exist to argue the levy, Appeals is likely the best course of action. The IRS presumably will carefully consider any resolution that is

in the best interests of the government, but it has made clear it will no longer tolerate the continued accrual of trust fund employment taxes by allowing repeated appeals that delay enforcement.

Absent any specific directive from the commissioner of the IRS, it is hard to know how prevalent the use of the DETL will become in the years ahead. It will also be interesting to see the extent to which this law change is challenged at the judicial level. For the time being, it is clear that the new DETL levy must be considered when weighing the benefits and costs to exercising a taxpayer's initial appeal rights.

One can only assume Congress is attempting to send a message that, despite a kinder and gentler IRS, employment taxes are going to be strictly scrutinized and enforced in the years to come. IRS enforcement action must be careful not to stifle the entrepreneurial nature of the U.S. economy by punishing too severely those willing to take the risk to go in business.

After all, those ventures serve as the backbone of our national economy. On the other hand, the high costs associated with use of the CDP appeals program and today's growing U.S. deficit make it imperative for the IRS to limit new tax accruals as well as to collect as much tax as efficiently as possible. Through the 2007 Act, Congress has made it clear that these goals cannot be stifled by the overuse of appeal rights. Regardless of how IRS Collections uses the DETL, I think it is safe to assume that enforcement action against pyramiding taxpayers will remain a powerful and regular tool in the IRS collection arsenal. **EA**

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#### About the author:

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