January 24, 2011

Tax Court Collection Due Process Cases Take Too Long

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The collection appeals process (CAP) served as the model for collection due process in 1998 when Congress decided to give statutory administrative and judicial rights to taxpayers seeking to contest the collection of federal taxes. While neither the legislative history nor the statute itself explicitly stated that CDP was an expedited process, the shortened time frames for taxpayer action and the overall context of this statute made clear that Congress thought it was creating an expedited process for contesting collection matters — a formalized CAP with judicial rights. The result has been that the process moves more slowly than other cases not designed with speed in mind. CDP cases take longer to reach completion in the Tax Court than non-CDP cases.

This report documents through Tax Court records the time it takes to complete CDP cases versus non-CDP cases and then offers solutions to what the authors perceive as a problem with the system. Because of the nature of CDP cases, the solutions focus on the administrative record preceding litigation. They do not stop with early introduction of the administrative record during the Tax Court proceeding, but also concern summary judgment in situations when the administrative record reveals no factual conflict. Delays in collection hurt the IRS's ability to collect while decreasing the taxpayer's ability to climb out of the financial hole as interest and penalties mount. A solution that expedites these cases benefits everyone involved except those who benefit from delay.

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In November 2009 we published an article in *Tax Notes* highlighting the problem of delays at the IRS Office of Appeals in many collection due process proceedings. We proposed that to possibly reduce these delays and provide greater fairness to taxpayers, Congress amend the law to provide that, after six months, the accrual of interest and penalties be suspended and the collections statute of limitations be restarted.[1] In the prior article we told readers that we also planned an article on delays in Tax Court CDP "appeals" — the post-administrative phase of CDP. To that end, we recently completed an extensive study of both regular and CDP dockets arising from petitions filed in the Tax Court in the first six weeks of 2008 (about 11 percent of all petitions filed in 2008). We made some surprising discoveries. The most notable finding was that the average CDP case in the Tax Court takes about a third longer to resolve than a non-CDP case. Because CDP was intended to be an expedited process, this is disheartening. To reverse this situation, we call for changes in how both the IRS and the Tax Court handle CDP cases and for amendments to the CDP statutory provisions — all with a view toward more expeditious resolution of CDP cases in the Tax Court.

[1]Carlton M. Smith and T. Keith Fogg, "Collection Due Process Hearings Should Be Expedited," *Tax Notes*, Nov. 23, 2009, p. 919, *Doc 2009-23633, 2009 TNT 225-8.*

I. Background on CDP

Before discussing the findings of our research, we set the stage with a review of the CDP process and our prior suggestions to speed its administrative phase.

Although it did not say so in any committee report,[2] when Congress passed the CDP provisions in 1998, it clearly envisioned an expedited process in which taxpayers could resolve collection issues with the IRS by quickly seeking review of critical collection division actions first in Appeals and then, if necessary, in court.

CDP is clearly patterned on the collection appeals program (CAP), which was and is an expedited process.[3] One of CDP's main differences from CAP, however, is the taxpayer's option to obtain judicial review of an adverse Appeals ruling. Before the adoption of CDP, Michael Saltzman, a noted expert in tax procedure,[4] testified before the Senate Finance Committee calling for a process analogous to CAP with judicial review analogous to section 7429. Section 7429 provides for the secretary to quickly review termination or jeopardy assessments at the taxpayer's request. The taxpayer may bring suit in district court to review the secretary's termination or jeopardy assessment ruling (or lack thereof) within 90 days after the earlier of the date the secretary issues his review determination or 16 days after the taxpayer's request for the secretary's review. Under section 7429(b)(3), the court is required to rule on the matter within a mere 20 days.[5] In 1998 Saltzman testified: "I believe that threatened liens and levies should be reviewed by an Appeals officer. Unlike the jeopardy levy review procedures, I recommend that judicial review be conducted by special trial judges of the Tax Court, who will hear the case *on an expedited basis*"[6] (emphasis added).

From the congressional viewpoint, the expedited nature of the CDP, as enacted, consists primarily of shorter time frames than usual for taxpayers to act to seek judicial relief. First, taxpayers have only 30 days after notice from the IRS collection function to request an administrative hearing with Appeals to review a notice of lien filing, or a proposed levy.[7] This time frame parallels the period taxpayers under examination have to request an opportunity to meet with an Appeals officer before the issuance of a deficiency notice.[8] However, a taxpayer's failure to make that request at the end of an examination does not terminate any statutory rights to petition the Tax Court under section 6213(a), whereas regarding CDP, making a hearing request within this 30-day period is a necessary predicate to any judicial review.[9]

Second, for taxpayers who act quickly enough to make the initial CDP hearing request within 30 days, Congress allows only 30 days to petition the Tax Court once Appeals makes an adverse determination.[10] This 30-day period is only a third as long as the 90 days allowed to petition the Tax Court following (1) the issuance of a notice of deficiency proposing additional tax liabilities,[11] (2) a notice of determination following an administrative decision on innocent spouse status,[12] or (3) a notice of determination concerning worker classification.[13] While imposing tight time frames on taxpayer actions in CDP to expedite the process, in contrast to section 7429, Congress put no time limits on actions by Appeals, IRS counsel, or the Tax Court in CDP. In fact, Congress's decision to suspend the collection statute of limitations during CDP appears to condone the opposite result of time pressure on the administrative and judicial processes affecting these taxpayers.[14]

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[2]S. Rep. 105-174, at 67-69 (1998), 1998-3 C.B. 537, 603-605; H.R. Conf. Rep. 105-599, at 263-266 (1998), 1998-3 C.B. 747, 1017-1020; Joint Committee on Taxation, "Technical Explanation of H.R. 4, the 'Pension Protection Act of 2006,'" JCX-38-06 (Aug. 3, 2006), *Doc 2006-14717, 2006 TNT 151-43*, which amended CDP.

[3]Internal Revenue Manual section 5.1.9.4, "Collection Appeals Program" (rev. Jan. 1, 2007), provides, in part:

> 1. In addition to the Collection Due Process (CDP) hearing rights . . . taxpayers can also appeal certain collection actions under the Collection Appeals Program (CAP). . . . A CAP appeal can provide an expedited review of a specific collection action that may satisfactorily address the taxpayer's concern. The CDP hearing provides for further judicial review and retained jurisdiction.
> 2. Taxpayers can appeal under CAP when they are told by an IRS employee that a lien, levy or seizure action will be or has been taken, or that an installment agreement is rejected or terminated.

[4]*See* Michael Saltzman, *IRS Practice & Procedure* (2d ed. 1991).

[5]The 20 days may be extended by up to another 40 days at the taxpayer's request, but only if the taxpayer shows the court good cause for the extension. Section 7429(c).

[6]Prepared statement of Michael Saltzman (Feb. 5, 1998), S. Hrg. 105-529, Hearings Before the Senate Finance Committee on H.R. 2676, at 376, *Doc 98-5215, 98 TNT 25-34*.

[7]Section 6330(a); reg. section 301.6330-1(b). If a taxpayer misses the 30-day deadline, she may instead get an "equivalent hearing" at Appeals — that is, one similar to a CDP hearing in all respects, except that no judicial review is possible. Reg. section 301.6330-1(i).

[8]The letter containing this notification is conveniently called the 30-day letter. *See generally* IRM section 4.8.9, "Statutory Notices of Deficiency Issued by Area Offices."

[9]Reg. section 301.6330-1(b)(2), Q&A B-2.

[10]Section 6330(d).

[11]Section 6213(a).

[12]Section 6015.

[13]Section 7436.

[14]Section 6330(e) provides for the suspension of the statute of limitations on collection. It contains no language explicitly or implicitly condoning slow movement of CDP cases through the

(Footnote continued on next page.)

After observing the manner in which the administrative process of CDP cases unfolded, in 2009 we suggested legislative changes that would provide incentives for Appeals to act more quickly. We recommended statutory elimination of penalty and interest accruals and elimination of the suspended collections statute of limitations if no ruling was forthcoming six months after the request for the CDP hearing.[15] In our proposal, we acknowledged that one concern in incentivizing Appeals to expedite the process was a mechanical response by Appeals to quickly push the cases through the system, whether or not adequate consideration had been given to the collection alternatives proposed by the taxpayer. We still thought that six months was more than adequate for most CDP hearings. And fundamental fairness to taxpayers suggested that interest and penalties be tolled and that the collection statute of limitations be restarted. After all, most of what goes on in a CDP hearing is review of collections function actions that usually took only a few days or weeks to decide at that level.

II. The Judicial Phase of CDP

As we turn to evaluating the judicial phase of the CDP process, we first provide some essential background information.

In 1998 Congress initially split the judicial review of CDP cases along traditional deficiency versus non-deficiency lines. Under CDP, a taxpayer with a liability originally determined under the deficiency process of section 6213 (such as an income tax liability) had to petition the Tax Court within 30 days of an adverse Appeals determination, while a taxpayer with a liability originally determined outside the deficiency process (such as an employment tax liability) had to file a complaint in district court.[16] To resolve the confusion caused by this split jurisdiction, Congress in 2006 placed the initial judicial review of all CDP Appeals rulings in the Tax Court.[17] However, as noted above, neither the 1998 legislative history nor the 2006 legislative history address the time frames within which a judicial body considering a CDP case should or must act.

For both CDP and non-CDP cases, the Tax Court clerk's office schedules cases for trial at some point after they are "at issue." A case is usually at issue in the Tax Court on the filing of the IRS's answer.[18] To facilitate possible settlement of a case after it is at issue and to allow a suitable period for discovery, the clerk's office will generally schedule the trial to take place approximately one year after the petition is filed. This one-year rule is only a rule of thumb and can vary considerably when a city hosts few calendars each year. The practice of the clerk's office has been to issue a notice of trial five months in advance of the trial session. The clerk's office sends out these notices in groups of 100 to 120 dockets, which comprise a trial session calendar for a single week. The clerk's office assembles a calendar primarily by scheduling the oldest 100 to 120 dockets at issue that requested trial in that particular city and adding a few dockets with a special reason to be put on that calendar.

The clerk's office usually places small tax cases requesting to be tried under section 7463 on special calendars composed only of those cases. The small tax cases are unappealable,[19] and small case status must be requested by the taxpayer before trial.[20] When a request is granted, the Tax Court will place an "S" at the end of the year in the docket number. For example, 25000-08S would be a section 7463 case filed late in 2008.[21] A CDP case will qualify for

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administrative or judicial process, but its existence removes time pressure on the government in these matters. This report is not suggesting that suspension of the statute of limitations on collection should not occur; it is simply observing the consequence of this suspension.

[15]*See* Smith and Fogg, *supra* note 1, at 923.

[16]Act of July 22, 1998, P.L. 105-206, section 3401(b), 1998 U.S.C.C.A.N. (112 Stat.) 747, Rule 12.6, enacted section 6330(d) that read: "The person may, within 30 days of a determination under this section, appeal such determination — (A) to the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States."

[17]Pension Protection Act of 2006, P.L. 109-280, section 855(a), 120 Stat. 780, 1019, amended section 6330(d)(1) to accomplish this result. That section now reads: "The person may, within 30

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days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)."

[18]Tax Court rules 38 and 334.

[19]Section 7463(b).

[20]Tax Court Rule 171.

[21]The manner in which the Tax Court designates cases deserves mention because of its effect on our research for this report. Identifying the "regular" CDP cases was straightforward because the court places the "L" designation after the docket number. The search for CDP cases electing under section 7463 was not so straightforward. The court places the "S" designation after all cases electing under section 7463, making it impossible to determine which of those cases involve CDP without further inquiry. We initially made that further inquiry by searching the court's website for each docket. For every docket with an S, we pulled up the dispositive document in the case. This was usually a decision document. We then reviewed the decision document to determine whether the case involved a proposed deficiency, a collection determination, or some other type of determination. We found 48 S cases within the first 3,455 dockets in 2008 in which the decision document or other dispositive document identified the case as one involving a collection determination — a CDP case. We also found 130 S case dockets in which the dispositive document (or other documents if the case had not yet reached disposition) did not

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section 7463 treatment only if it involves a notice of determination in which the unpaid tax does not exceed $50,000.[22] On S case calendars, CDP cases end up interspersed with non-CDP cases. There is no priority given to either CDP or non-CDP cases in putting together an S case calendar. Thus, if the IRS files answers in an S non-CDP case and an S CDP case on the same date and the taxpayers in those cases both request the same city for trial, those two dockets will likely appear on the same S case calendar for that city.

A slightly different procedure applies to non-S case calendars. These are called regular case calendars. CDP cases that do not request to be tried under section 7463 are given an "L" after the docket year of filing (for "lien or levy"). L cases appear on regular calendars in a listing at the back of the calendars. This segregation to the end of the calendars is only for purposes of when the cases will be called at the calendar call at the beginning of the week. In fact, similar to S case calendars, there is no priority given to either L cases or non-L cases in putting together a regular case calendar.

III. Our Study

Several considerations led us to study petitions filed in the first six weeks of 2008.

First, the timing of the 2006 change that made the Tax Court the sole judicial forum for CDP cases fit aptly with that period, because by 2008 all CDP judicial review should have begun in the Tax Court.

Second, we wanted to allow sufficient time for more than 90 percent of all dockets created to be resolved. When we looked at these dockets more than 2½ years later — at September 30, 2010 — between 93 and 100 percent of cases in the categories we studied had been concluded. So we could make complete case comparisons (excluding the inevitable few outliers). If we had chosen more recent dockets to study, it was likely that too many would still be open and unresolved to make adequate comparisons between CDP and non-CDP cases.

Another consideration for our choice of the studied period involved the administrative record created at the CDP Appeals hearing and the role that record plays in the outcome of the judicial review proceeding. The IRS early on adopted the position that, with slight exceptions,[23] the courts were limited to considering only the administrative record created before the IRS when deciding CDP cases[24] (when CDP was created in 1998) and innocent spouse cases (when a new stand-alone Tax Court

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clearly identify whether the docket involved a deficiency determination, a collection determination, or some other type of determination.

For those 130 cases, it was necessary to go to the Tax Court's docket room and go through the physical files — since the online data did not provide the answer. We are thankful to Chief Judge John O. Colvin and members of the Tax Court's docket room for their assistance in making our physical review as easy as possible. The result of the physical review was that 6 of the 130 S cases were determined to be CDP cases. Generally, these were cases in which the petition was dismissed for lack of jurisdiction, although some involved a bankruptcy filing that extended the proceeding. In a few of the dockets, it was impossible to determine the basis for filing the Tax Court petition. We did not consider those to be CDP dockets.

While we are thanking people, we wish to also thank our schools for providing us with research assistants to help us scan through thousands of docket sheets and compile relevant data. And at Cardozo, we wish to thank the James B. Lewis Fund for supporting Prof. Smith's work on this report. Lewis was the original director of the Cardozo Tax Clinic in the 1980s, after he retired from a distinguished career at Paul Weiss.

[22]Section 7463(f)(2). The jurisdictional limit applies to the total tax, penalty, and interest set out in the notice of determination, combining all years together. *Schwartz v. Commissioner*, 128 T.C. 6 (2007), *Doc 2007-3852, 2007 TNT 32-20.*

[23]In *Murphy v. Commissioner*, 125 T.C. 301, 319 (2005), *Doc 2005-25995, 2005 TNT 250-9, aff'd*, 469 F.3d 27 (1st Cir. 2006), *Doc 2006-23555, 2006 TNT 224-11*, the Tax Court allowed — not as an exception to the administrative record rule — introduction of settlement officer testimony explaining the notations and abbreviations she made in her case activity report, but the court excluded the remainder of the settlement officer's testimony (sought by the taxpayer) about why she ruled the way she did. Similarly, the IRS has long introduced in the Tax Court record transcripts of account that were not part of the administrative record — often over taxpayer objections. *See Nestor v. Commissioner*, 118 T.C. 162 (2002), *Doc 2002-22315, 2002 TNT 191-7* (approving the IRS giving the taxpayer a Form 4340 transcript during the Tax Court proceeding and before the trial); *Holliday v. Commissioner*, T.C. Memo. 2002-67, *Doc 2002-6862, 2002 TNT 54-19, aff'd*, 57 Fed. Appx. 774 (9th Cir. 2003), *Doc 2003-8968, 2003 TNT 70-7.* The Eighth Circuit in *Robinette v. Commissioner*, 439 F.3d 455 (2006), *Doc 2006-4491, 2006 TNT 46-11*, concluded that the Tax Court CDP proceeding was, for the most part, limited to the administrative record, but it condoned the Tax Court's taking testimony from the settlement officer to supplement the record as to the reasoning underlying the notice of determination:

> Of course, where a record created in informal proceedings does not adequately disclose the basis for the agency's decision, then it may be appropriate for the reviewing court to receive evidence concerning what happened during the agency proceedings. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 401 (1971). The evidentiary proceeding in those circumstances, however, is not a *de novo* trial, but rather is limited to the receipt of testimony or evidence explaining the reasoning behind the agency's decision. *Camp v. Pitts*, 411 U.S. 138 (1973) at 143.

439 F.3d at 461.

[24]CC-2004-031, *Doc 2004-17586, 2004 TNT 171-14* ("In *Robinette*, the Tax Court concluded that, when reviewing issues in a Collection Due Process case for an abuse of discretion, it need not limit its review to the administrative record. . . . The Office of Chief Counsel disagrees with the court's conclusion."). The IRS not only took this position in the Tax Court, but successfully took it in district courts before 2006 while they had CDP review jurisdiction. *See Olsen v. United States*, 414 F.3d 144, 154-156 (1st

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proceeding was also created in 1998).[25] In both types of cases, taxpayers have since sought to supplement the administrative record with testimony and additional documentary evidence introduced in the Tax Court. In *Robinette v. Commissioner*[26] and *Porter v. Commissioner*,[27] the Tax Court decided that parties in both types of proceedings can supplement the administrative record in Tax Court trials that are *de novo*. The only limitation in the CDP context is that the testimony and documents presented in the Tax Court must relate to issues raised in the CDP hearing at Appeals.[28] However, the question whether the administrative record created within the IRS may be supplemented in Tax Court CDP and innocent spouse cases is not yet settled.

If the Tax Court in *Robinette* had instead decided that the parties generally could not supplement the CDP administrative record, filing motions for summary judgment in CDP cases might be easier. However, even before the Tax Court's decision in *Robinette*, the IRS Office of Chief Counsel was recommending that its attorneys file motions for summary judgment in CDP cases based almost exclusively on the administrative record.[29] Chief counsel currently recommends that many CDP cases be resolved by pretrial motion without trial.[30] Thus, the effect of the Tax Court's holding in *Robinette* on the IRS's filing of summary judgment motions in CDP cases is difficult to measure but unlikely to significantly affect our study of cases filed in the Tax Court in 2008.

In addition to the factors mentioned above, chief counsel's practice of filing motions for summary judgment deserves mention because it affects the length of time CDP cases spend in Tax Court. As will be discussed further, several of the CDP cases in our survey contained motions for summary judgment filed by the IRS, while none of the non-CDP randomly selected control cases we studied contained such a motion. In 2004 chief counsel issued a notice to its attorneys recommending that motions for summary judgment be filed in CDP cases.[31] This conflicts with the general instruction given to IRS attorneys — for all cases — to avoid filing motions for summary judgment and preferring consensual submission of a case as fully stipulated under Tax Court Rule 122.[32] In 2001 when

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Cir. 2005), *Doc 2005-14765, 2005 TNT 132-12*; *Living Care Alternatives of Utica Inc. v. United States*, 411 F.3d 621 (6th Cir. 2005), *Doc 2005-12102, 2005 TNT 106-15*.

[25]At section 6015(e).

[26]The full Tax Court first considered this issue in *Robinette v. Commissioner*, 123 T.C. 85 (2004). The court determined that a taxpayer may bring evidence before it that was not included in the administrative record developed before Appeals. The Eighth Circuit reversed at 439 F.3d 455 (2006), determining that in CDP cases, taxpayers are for the most part limited to the administrative record. Two other circuits agree with the Eighth Circuit — *Murphy v. Commissioner*, 469 F.3d 27, 31 (1st Cir. 2006), and *Keller v. Commissioner*, 568 F.3d 710, 718 (9th Cir. 2009), *Doc 2009-4282, 2009 TNT 37-17* — but no other circuit has ruled on the issue. The Tax Court has declined to adopt the view of the Eighth Circuit and has permitted taxpayers outside the First, Eighth, and Ninth circuits to introduce in the Tax Court additional testimony and documents not in the administrative CDP record. *Oropeza v. Commissioner*, T.C. Memo. 2008-94, *Doc 2008-8274, 2008 TNT 73-19*.

[27]The Tax Court first addressed the issue of the administrative record in innocent spouse cases in *Ewing v. Commissioner*, 122 T.C. 32 (2004), *Doc 2004-1771, 2004 TNT 19-20, vacated on unrelated jurisdictional grounds*, 439 F.3d 109 (9th Cir. 2006), *Doc 2006-3915, 2006 TNT 40-8*, in which the Tax Court held that its innocent spouse determination review proceeding was a trial *de novo*. In 2008 the Tax Court revisited the issue and reaffirmed that innocent spouse proceedings in the Tax Court are trials *de novo* as to evidence introduced. *Porter v. Commissioner*, 130 T.C. 115 (2008), *Doc 2008-10827, 2008 TNT 96-12*. The Eleventh Circuit has agreed with the *Porter* ruling as to the scope of the Tax Court innocent spouse proceeding. *Commissioner v. Neal*, 557 F.3d 1262, 1270-1276 (11th Cir. 2009), *Doc 2009-2978, 2009 TNT 26-14*. Although the IRS did not appeal *Porter*, it has said that it disagrees with *Porter* and will litigate the issue in other cases. CC-2009-021, *Doc 2009-15026, 2009 TNT 125-5*. No other circuit court has ruled on this issue.

[28]*Magana v. Commissioner*, 118 T.C. 488, 493 (2002), *Doc 2002-13178, 2002 TNT 106-11*; *Giamelli v. Commissioner*, 129 T.C. 107, 115 (2007), *Doc 2007-24182, 2007 TNT 211-7*.

[29]*See* CC-2004-031, *Doc 2004-17586, 2004 TNT 171-14* ("In general, a summary judgment motion continues to be the preferred method of disposing of CDP cases in the Tax Court in cases in which there is no dispute of material fact. Summary judgment motions should be filed as soon as possible after the end of the 30-day period that follows the close of the pleadings, and not later than 30 days before the trial date.").

[30]CC-2009-010, *Doc 2009-3733, 2009 TNT 32-6*. A motion for summary judgment should be filed if, for example, the taxpayer is raising frivolous arguments and the respondent has to go outside the pleadings; the only issues raised by the taxpayer are precluded by either liability or by prior proceedings and there is no dispute on material facts; the petitioner raises an issue not raised in the administrative hearing; and in cases involving non-frivolous issues, there are no genuine issues of material fact.

[31]*See* CC-2004-031, *supra* note 29.

[32]IRM section 35.3.5.3(1), "Motion for Summary Judgment," states:

> The primary purpose of the summary judgment procedure is to pierce the allegations of the pleadings and show that there is no genuine issue of material fact, although it appears that an issue is raised by the pleadings. Summary judgment may be utilized to resolve all or part of the issues in a case. Where the parties are disposed to stipulate the case and submit it under T.C. Rule 122 (Submission Without Trial), summary judgment should not be used as a substitute for that procedure. The submission of a case without trial (under T.C. Rule 122) is preferable since the respondent will be better able to set forth the facts with clarity and completeness. The submission of a case on stipulation will promote opinions which will tend to have more precedent value because of the clarity and completeness of the facts.

CDP cases in the Tax Court were new, the chief counsel manual further required that all motions for summary judgment in those cases go first to the National Office for review.[33] In 2003 that requirement was lifted.[34] So in 2008, at the time of the petitions in our sample of cases, the requirement to send CDP summary judgment motions through the National Office for review did not exist and cannot be seen either as an impediment to filing summary judgment motions in CDP cases or as a factor for the delay in their filing.

Although not a factor in our choice of period to study, it should be noted that Tax Court CDP cases operate without a referral to Appeals from chief counsel for attempted settlement after the petitions in the cases are answered. In most non-CDP Tax Court cases, the IRS Examination Division issues a notice of deficiency.[35] Rev. Proc. 87-24[36] requires that on answer in those cases, they be referred to Appeals to give it an opportunity to settle. By contrast, CDP cases rest solely with the IRS Office of Chief Counsel on the filing of the Tax Court petition. Thus, no aspect of the delay (or speed) in resolving CDP cases in the Tax Court can result from Appeals. Because Appeals considers all CDP cases pre-petition and issues the notice of determination on which those cases are predicated, chief counsel attorneys are solely responsible for Tax Court CDP cases from the first day they get the files to prepare the answer. In non-CDP cases sent to Appeals during the Tax Court case, the chief counsel attorney typically places the case back in his file drawer until the Appeals officer settles the case or gives up and sends it back to counsel for trial preparation. By contrast, in a CDP case there is no impediment to the chief counsel attorney immediately working on resolving the case.[37] Despite the procedural ability to act immediately in CDP cases, immediate action almost never happens, as we will demonstrate below.

IV. Our Method

We set out to analyze how, in practice, CDP appeals are handled in the Tax Court and whether they present any unusual issues. So we decided to conduct a study comparing CDP Tax Court cases to non-CDP Tax Court cases. Any such study must take into account the distinctions between unappealable small tax cases under section 7463 and regular cases. It must also represent a significant sample of all cases and cover a period in which nearly all the cases could be resolved — either by a stipulated decision or court ruling. We chose to start by finding the first 100 dockets in calendar year 2008 that were L dockets — that is, regular cases involving CDP. We followed those cases for more than 2½ years, through September 30, 2010.

To find L cases, we methodically looked through consecutive docket numbers beginning with the first docket number of 2008 — 101-08. Docket number 107-08L was the first L case. It took us until docket number 3555-08L to find the 100th L case docket. The petition in docket number 3555-08L was filed on February 11, 2008 — the 42nd day of a 366-day year. This 42-day period represents the first 11.5 percent of 2008, and we think it is a sufficient sample to be both representative and random.

According to the Tax Court's website, the last docket number assigned in 2008 was 31423-08, so there were a total of 31,323 Tax Court petitions filed in 2008.[38] The 3,455 dockets we surveyed thus represented just over 11 percent of all Tax Court petitions filed in 2008. Because the first 42 days of 2008 represent 11.5 percent of 2008, it appears that Tax Court petitions are filed at a fairly constant

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[33]In 2001 the Office of Chief Counsel demanded that "all pleadings, motions, trial memoranda, briefs, and any other documents submitted to the Tax Court in a CDP case must be referred to TSS for assignment and review." CC-2001-008, *Doc 2001-3522, 2001 TNT 25-15.*

[34]*See* CC-2003-017, *Doc 2003-13376, 2003 TNT 105-13* ("motions for Summary Judgment and Trial Memoranda are no longer required to be pre-reviewed unless they involve a novel or significant issue").

[35]Page 11 of the tables of statistics handed out by the Office of Chief Counsel at the American Bar Association Section of Taxation meeting in Toronto on September 24, 2010 (chief counsel tables) (on file with authors), shows that 32,193 petitions were filed in the Tax Court in the fiscal year ended September 30, 2008 — a period that includes the months studied by us. For those 32,193 dockets, Appeals issued only 2,374 of the notices giving rise to Tax Court jurisdiction. Included in this number are CDP cases, which constitute almost two-thirds of the 2,374 cases. The Examination Division (excluding the service centers) issued 6,820 of those notices, the service center portion of the Examination Division issued 22,321 of the notices, and in 678 cases, the source of the notice could not be identified.

[36]Rev. Proc. 87-24, 1987-1 C.B. 720.

[37]Of course, the chief counsel attorney has cases other than CDP cases. This comment is not meant to suggest that the chief counsel attorney is sitting and waiting with nothing to do, but it is intended to contrast this situation with the almost mandatory delay, on the part of the chief counsel attorney, present in deficiency cases.

[38]*See* "Tax Court: Tax Court Improving Electronic Access Program to Petitioners, Practitioners, Daily Tax Court," 003 DTR S-42 (Jan. 7, 2009), in which Judge Colvin gives a slightly different statistic for the number of Tax Court cases filed in 2008 ("Among the 2008 cases, 14,685 were 'regular' cases, 15,723 were small tax cases [involving less than $50,000] or S cases, 923 were lien/levy cases [bearing an L], and 26 were declaratory cases. Twenty-nine percent of the cases had counsel representing the petitioners, while 71 percent of the cases were pro se cases."). This number is also slightly different from the chief counsel fiscal year number discussed in the following paragraph of text. The numerical differences are sufficiently slight that we have adopted the number from the Tax Court records.

pace. Extrapolating from the 100 L cases we found in the first 11.5 percent of 2008, we estimate that a total of 870 L cases were filed in 2008. This makes L cases a tiny fraction of the Tax Court dockets filed in 2008. Eight hundred seventy divided by 31,323 total dockets in calendar year 2008 makes L cases slightly less than 2.8 percent of all dockets.

As an aside here, statistics kept by the chief counsel are consistent with what we found, at least if those statistics combine L cases with the S cases that are CDP. Chief counsel statistics show that for the fiscal year ended September 30, 2008, total CDP filings in the Tax Court were 1,463 out of the 32,193 total petitions filed (4.5 percent of petitions filed), and for the fiscal year ended September 30, 2009, CDP filings in the Tax Court were 1,629 out of 30,696 total petitions filed (5.3 percent of petitions filed).[39]

However, the impact of CDP on the Tax Court is far greater than these small percentages suggest, because CDP cases result in far more published opinions than non-CDP cases. Other statistics show this. According to the Tax Court's website, in calendar year 2008 the court issued 37 Tax Court opinions (in volumes 130 and 131), exactly 300 memorandum opinions, and 165 summary opinions — a total of 502 opinions. Of those, 118 opinions (23.5 percent) arose from CDP cases.[40] Thus, CDP cases (which make up about 5 percent of the Tax Court docket) are around five times as likely to be litigated to published opinion (whether by trial or summary judgment motion) than non-CDP Tax Court cases.[41]

Returning to our method, we wanted to compare our 100 L cases to 100 non-CDP regular cases over the same period, so we divided 3,455 dockets looked at by 100 to find that L cases appeared, on average, every 34.55 cases. We therefore found 100 non-CDP regular cases by looking at every 34th docket. If the docket was an S case or an L case, we moved on to the next regular docket that we could find numerically. This should have produced a fairly random 100 regular dockets.

Finally, we searched through all the S cases in the same period — that is, January 1 through February 11, 2008 (docket numbers 101-08 through 3555-08L) — to find all S cases that were CDP cases. We found 54. Chief counsel statistics for the fiscal year ended September 30, 2009, show that 41.8 percent of the Tax Court's inventory on that date consisted of S cases.[42] Assuming 41.8 percent of the 3,455 dockets we studied were S cases[43] and the rest (58.2 percent) were regular cases, and assuming similar proportions of each type of case involved CDP, we would have expected to find 72 S CDP cases.[44] That we found far fewer leads to the conclusion that the proportion of S CDP cases to total S cases is significantly smaller than the proportion of L cases to regular cases. Here is a theory of why this occurs: First, taxpayers who are appealing a CDP ruling to the Tax Court may be less likely to elect to forgo an appeal to a circuit court by electing S status, because they have already felt the need to appeal to a court. Second, by aggregating all years' liabilities together and adding interest and penalties to tax for purposes of the $50,000 S CDP case limit, far fewer CDP cases may qualify for S status.[45] Note that for income tax cases, the $50,000 limit under section 7463(a)(1) is an annual limit and applies only to the tax portion.[46]

Because there were only 54 S CDP cases from docket numbers 101-08 through 3555-08L, we divided that number into 3,455 total cases to find that S CDP cases occurred, on average, once every 64 dockets. We took this figure and found S non-CDP cases spaced over the same 3,455 dockets to get a set of S non-CDP cases for comparison purposes. Of the 3,455 cases, we closely examined 100 L cases, 100 regular cases, 54 S CDP cases, and 54 S Non-CDP

[39]Chief counsel tables, *supra* note 35, at 11 and 17.

[40]We identified the Tax Court CDP opinions by using tables provided in the national taxpayer advocate's annual reports to Congress dated December 31, 2008 (vol. I at 588-594), and December 31, 2009 (vol. I at 531-536). For many years now, Nina Olson has reported that CDP is the first- or second-most "litigated issue," by which she means that the issue resulted in an opinion from some court — not just the Tax Court — in a civil tax matter. As a result, she listed the name of each CDP case in tables in her reports. We went through those tables to find only the Tax Court CDP opinions, which were a subset of the total opinions listed. CDP also has a huge impact on opinions in other courts. According to the national taxpayer advocate's annual report to Congress dated December 31, 2009 (vol. I, at 405, Table 3.0.1), if one looks at all courts — including the Tax Court, district courts, and the courts of appeals — there were 170 CDP case opinions out of 970 total opinions in civil tax cases in the period June 1, 2008, through May 31, 2009. In other words, 18.4 percent of all court civil tax opinions involved CDP in that 12-month period.

[41]These numbers do not take into account bench opinions, which are unpublished. *See infra* text accompanying note 48. Based on our experience, we believe CDP cases would make up a similar percentage, if not higher, of the bench opinions delivered.

[42]Chief counsel tables, *supra* note 35, at 4.

[43]This is something we did not count. It would have been too cumbersome to list each of the 3,455 dockets in tables.

[44]100 L cases x 41.8/58.2 = 71.8 S CDP cases.

[45]*Schwartz v. Commissioner*, 128 T.C. 6 (2007).

[46]CC-2009-10, section V.B. This notice produces a document that Chief Counsel calls the CDP handbook. This is the current handbook. It has antecedents going back to 2002.

Table 1. Timing of Resolution				
	L Cases	Regular Non-L Cases	S CDP Cases	S Non-CDP Cases
Total dockets	100	100	54	54
Dockets resolved by 12 months	33	54	28	41
Dockets resolved by September 30, 2010	93	94	50	54
Average days pending for cases resolved by September 30, 2010	431	319	340	287
Dockets unresolved at September 30, 2010	7	6	4	0

Table 2. Method of Resolution				
	L Cases	Regular Non-L Cases	S CDP Cases	S Non-CDP Cases
Stipulated decision	57	72	29	49
IRS motion for summary judgment granted	13	0	3	0
Dismissed for lack of jurisdiction	4	15	9	3
Dismissed for lack of prosecution	8	3	3	1
Dismissed as moot	6	0	5	0
Ruled on after trial	2	3	1	1
Closed as duplicate	3	1	0	0
Total	93	94	50	54

cases — the details of each case being set out in tables 4, 5, 6, and 7 attached at the back of this report.

Using the above method to compare CDP to non-CDP dockets, Table 1 above summarizes how long, on average, CDP and other cases are pending in the Tax Court more than 2½ years after the cases were filed (limiting the comparison to cases resolved by September 30, 2010). There will always be a few cases that are pending for extremely long periods, and we did not want to let those outliers skew the results. So we did not consider cases still pending on September 30, 2010, in calculating the average number of days in which the cases were pending. In calculating that average, we did, however, include cases dismissed for lack of jurisdiction, mootness, or lack of prosecution, and the few dockets closed as duplicates. Counting those types of cases in the group tended to skew the S case results toward a shorter number of days than would have resulted had we left them out. However, it should not have skewed the results between the L cases and the control group of regular cases, since it had a relatively equal impact on the L and regular cases we studied. After more than 2½ years, at September 30, 2010, between 93 and 100 percent of CDP and non-CDP cases were over.

Table 2 breaks out by category how the various cases were closed. It also shows considerable difference between CDP and non-CDP cases:

A word of caution in using Table 2 is that the cases pending as of September 30, 2010, are likely pending because there has been a trial or remand or the parties are reporting to the court every few months. These cases are likely to increase the "ruling after trial" category over time. Combining the L and S CDP cases and combining all the non-CDP cases above, there were still 11 CDP cases pending on September 30, 2010, but only six non-CDP cases pending.

V. Remands and Continuances

We discovered remands to Appeals in six of the L dockets and seven of the S CDP dockets — brought on either by the IRS's motion or by a joint motion. Remands to Appeals can occur only in CDP cases. They cannot happen in non-CDP cases. Thus, remands can be part of the cause of CDP cases taking longer to resolve in the Tax Court than non-CDP cases.

More common than remands, however, were continuances. Continuances can happen in CDP and non-CDP cases. We found the following number of dockets with at least one continuance:

Table 3. Continuances	
L cases	25
Regular non-L cases	13
S CDP cases	7
S non-CDP cases	3

There was considerable overlap between cases involving a formal remand and cases in which continuances were granted. Four L cases and six S CDP cases had both remands and continuances. Clearly, the larger number of continuances in the CDP cases affects the comparison of time before resolution for the average CDP case versus the average non-CDP case. To make that comparison, however, remember that we excluded from our average-time-pending computations any case still pending on September 30, 2010. Four of the L cases and two of the regular non-L cases that had continuances were among those still pending on September 30, 2010, so we did not include them in our average-time-pending computations. But because of overlapping factors, we do not think there is a way to fairly quantify how much CDP case continuances lengthened the time to resolve the average CDP case resolved by September 30, 2010, compared with the average non-CDP case resolved by that date. We speculate, however, that many of these continuances in CDP could have been avoided had the taxpayer and IRS counsel begun working the cases earlier. Most continued cases eventually settled. Had they been worked earlier, there might have been no need for either party to seek and be granted a continuance.

VI. Published Opinions

Motions for summary judgment can be granted without published opinions. Most of the summary judgment motions in our sample were granted or denied without a published opinion. However, in three L cases, the Tax Court published an opinion when it granted the IRS's motion for summary judgment.[47] When cases are ruled on after trial, the Tax Court usually publishes an opinion. Indeed, it is required to do so. The court can *not* publish an opinion only if it makes a bench ruling.[48] Although two of the L cases generated opinions when they were ruled on after trial,[49] one generated an opinion when it was dismissed for lack of jurisdiction.[50] By contrast, while three of the regular cases were ruled on after trial, because one was a bench ruling,[51] only two generated published opinions.[52] So there were in fact six published L case opinions and two published regular case opinions in the sample we studied.

The S CDP cases in which the court ruled on a motion for summary judgment did not result in any published opinions or bench opinions. One S CDP case[53] was tried, and it resulted in a bench opinion. No S CDP cases resulted in a published opinion. Of the S non-CDP cases, there were no published opinions and no bench opinions.

In sum, combining all CDP cases (L and S), there were six published opinions. Combining all non-CDP cases (regular and S), there were two published opinions. This is fewer opinions in either kind of case than one would expect. Because there were 118 published CDP opinions in 2008, we would have expected about 13 published CDP opinions in our sample. But, as previously noted, we believe the significant number of cases still pending on September 30, 2010 (11 CDP and 6 non-CDP), are likely to generate more published opinions, which may eventually bring our surveyed sample dockets more in line with the 2008 annual statistics on published opinions.

VII. Motions for Summary Judgment

There were no motions for summary judgment filed in any of the non-CDP cases, either regular or S, but summary judgment motions were filed by the IRS in many CDP cases. Of course, motions for summary judgment are sometimes filed in non-CDP cases, but they are rare. This is not the situation with CDP. In the 100 L cases we studied, the IRS filed motions for summary judgment in 20 cases. In the 54 S CDP cases, the IRS filed motions for summary judgment in 6 cases.[54] If we were to exclude all CDP cases that were dismissed or closed as duplicate, there would be 79 L cases and 37 S CDP cases that we studied — 116 cases in all in which motions for summary judgment could have been filed. The filing of summary judgment motions by the IRS in 26 of those 116 cases shows that

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[47]*Schneller v. Commissioner*, T.C. Memo. 2008-196, *Doc 2008-18183, 2008 TNT 164-7*; *Krol v. Commissioner*, T.C. Memo. 2008-242, *Doc 2008-23012, 2008 TNT 211-15*; and *Shanley v. Commissioner*, T.C. Memo. 2009-17, *Doc 2009-1855, 2009 TNT 17-8*.

[48]Sections 7459(b) and 7460(a).

[49]*Aldridge v. Commissioner*, T.C. Memo. 2009-276, *Doc 2009-26243, 2009 TNT 228-9*; and *Shaw v. Commissioner*, T.C. Memo. 2010-210, *Doc 2010-21109, 2010 TNT 187-14*.

[50]*Space v. Commissioner*, T.C. Memo. 2009-230, *Doc 2009-22092, 2009 TNT 192-10*.

[51]*Trojanowski v. Commissioner*, Tax Ct. Dkt. No. 171-08.

[52]*Hill v. Commissioner*, T.C. Memo. 2009-39, *Doc 2009-3629, 2009 TNT 31-10*; and *Virginia Historic Tax Credit Fund v. Commissioner*, T.C. Memo. 2009-295, *Doc 2009-28093, 2009 TNT 244-23*.

[53]*Drazich v. Commissioner*, Tax Ct. Dkt. No. 2433-08S.

[54]Nothing prohibits a taxpayer from filing a motion for summary judgment in a CDP or non-CDP case. We found two such motions filed by taxpayers in the L cases we studied, but each was filed as a cross-motion for summary judgment in response to the IRS's motion for summary judgment. Neither taxpayer motion was granted. *See* Tax Ct. Dkt. Nos. 1382-08L and 3468-08L.

22.4 percent of the time, the motions are filed in cases that could be tried. That is a very high proportion.

Thirteen of the 20 IRS motions for summary judgment in the L cases we studied were granted. Seven were not granted or were not yet granted. In those seven dockets, two motions became moot because the parties entered into stipulated decisions, two motions are pending, and in three dockets the summary judgment motions were denied. Of those three cases in which motions for summary judgment were denied, one case later settled through a stipulated decision, another was later decided on the merits, and the third case is still pending.

Three of the six IRS motions for summary judgment in S cases were granted. Three were denied. In the three S cases in which the summary judgment motions were not granted, two of the cases resulted in a stipulated decision, and the third case was dismissed as moot.

We next studied the 20 motions for summary judgment in L cases to find out when they were filed. Our findings were disturbing. Tax Court Rule 121(a) provides that motions for summary judgment "may be made at any time commencing [30] days after the pleadings are closed but within such time as not to delay the trial." The 2004 chief counsel notice recommends filing any motion for summary judgment in a CDP case shortly after the case is at issue.[55]

Motions for summary judgment should not be brought while discovery against the moving party is ongoing.[56] As noted above, in CDP appeals, the IRS's position is that it will not add to the administrative record — other than adding clarifying testimony from the Appeals settlement officer and a current transcript of account. Thus, the IRS conducts no discovery.[57] Taxpayer discovery of the IRS beyond the administrative record is rare. There is no evidence in any of the 20 dockets that the taxpayer sought discovery from the IRS after the answer was filed.[58]

In theory, therefore, the IRS could have moved for summary judgment 30 days after filing the answer by merely attaching a recent transcript of account and an affidavit from the settlement officer at Appeals that enclosed the administrative record created during the CDP hearing. But the IRS substantially delayed filing motions for summary judgment in nearly all the CDP cases that we studied.

In 15 of the 20 L cases in which the IRS moved for summary judgment, it filed its motion after the notice of trial was issued. In those 15 cases, the IRS essentially waited until the eve of trial to file its summary judgment motion. That is something discouraged by the Tax Court's rules, since a motion filed on the eve of trial usually causes the court to suspend the trial while it considers the motion. Thus, a motion filed on the eve of trial effectively delays any trial — in violation of Tax Court Rule 121(a). Notices of trial are issued five months before the calendar call. For 12 of the 15 dockets, the average number of days between issuance of the trial notice and filing of the summary judgment motion was 92 days, so these motions were filed, on average, two months before the calendar call. Typically, these motions were scheduled to be heard at the calendar call — leaving both the taxpayer and the IRS attorney uncertain about whether there would be a trial and necessitating trial preparation in any event. We did not include 3 of these 15 dockets in this time calculation (docket numbers 447-08L, 1069-08L, and 1722-08L) because multiple trial notices for different calendars were issued in those cases and it would therefore be difficult to compare them with the other 12 cases, in which only one trial notice was issued.

In the 15 L cases in which summary judgment motions were filed after at least one trial notice was issued, we compared the date the motion was filed with the first date that it could have been filed if no discovery were needed — that is, 30 days after the answer. We know of no reason the motions were not filed 30 days after the answer in these 15 cases. However, we found that the motion was filed an average of 221 days after that date — more than seven months after the motions could have been filed. For 13 of those cases (2 of the 15 are still pending), the average time from petition to disposition was 467 days.

We also looked at the five L cases in which the IRS filed summary judgment motions before any

[55]*See* CC-2004-031, *supra* note 29.

[56]*Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984); *Brunwasser v. Commissioner*, T.C. Memo. 1986-196, *aff'd without opinion*, 833 F.2d 303 (3d Cir. 1987).

[57]Our research led us to find only one exception to the general rule that the IRS does not do discovery in CDP cases. In Tax Ct. Dkt. No. 1240-08L, the IRS resorted to motions to compel responses to interrogatories and a request for production of documents.

[58]Of course, if informal or formal discovery went smoothly, it would happen just between the parties, and there would be no evidence of this on the docket sheet. Only if a party moved to enforce formal discovery would the docket sheets show any entry. We found no such entries, however. We did find two

(Footnote continued in next column.)

dockets in which a party filed a request for admission before a motion for summary judgment was filed (one request filed by a taxpayer and one request filed by the IRS), but these requests did not much further delay the filing of the motions for summary judgment in those cases. *See* Tax Ct. Dkt. Nos. 795-08L and 1382-08L.

notice of trial. There was great variation in when the motions were filed. None of the motions were filed 30 days after the answer was filed. Rather, they were filed the following number of days beyond that point: 19, 24, 69, 179, and 227. Although the latter two motions were not filed promptly, at least in these five cases the motions were not filed on the eve of a scheduled trial. For the three cases in which the motions were filed promptly, the motions were ruled on and the cases were over in the period September through November 2008 — about nine months from the petition filing date. The two later summary judgment motions were filed so late because of delays caused by other motions filed in the cases.

A similar pattern emerged for the few S cases in which a motion for summary judgment was filed. While 20 percent of the L cases had a motion for summary judgment, only 10 percent of the S cases had such a motion. The IRS moved for summary judgment in three cases before the notice of trial calendar was issued. In those three cases, the motions were filed the following number of days beyond 30 days after the answer was filed: 189, 31, and 60. In those three cases the average time from petition to disposition was 353 days. The court decided each of those three cases without putting them on a trial calendar. In the other three cases, the IRS moved for summary judgment after the notice of trial calendar was sent. The motions were filed the following number of days after the trial notice was issued: 479, 37, and 127. In those three cases, the average time from petition to disposition was 429 days.

Thus, we found that motions for summary judgment in CDP cases were usually filed after the trial notice was issued, and they were usually filed about 60 days before the trial. That practice clearly flouts the Internal Revenue Manual instructions to its attorneys. IRM section 35.3.5.3(5), "Motion for Summary Judgment," states: "T.C. Rule 121 provides that a motion for summary judgment can be made at any time commencing 30 days after the pleadings are closed, but within such time as not to delay the trial. *Accordingly, motions for summary judgment should rarely be filed after the issuance of the trial calendar or 90 days prior to trial*" (emphasis added).

Although most Tax Court judges seem willing to allow the IRS to file summary judgment motions in CDP cases on the eve of trial, some judges are beginning to question that practice. For example, in *Crouch v. Commissioner*,[59] Chief Special Trial Judge Peter J. Panuthos denied such a motion in a CDP case, saying:

> Respondent filed a motion for summary judgment. Summary judgment is a procedure designed to expedite litigation and avoid unnecessary, time-consuming, and expensive trials. *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). The Court scheduled the motion for hearing during the trial session. The Court concluded that holding a hearing on the motion would not expedite the resolution of this case. Thus, the case was submitted after petitioner testified and introduced evidence. Respondent's motion will be denied.

VIII. Representation in CDP and Control Cases

We looked at the cases to determine if the length of time in resolving cases might result from the involvement of an attorney representing the taxpayer. In our sample, more taxpayers were represented in CDP cases than in non-CDP cases.

Counsel represented taxpayers in 52 of the 100 L CDP cases. Of those 52 cases, two were still pending at our cut-off point, and we do not count them in calculating the average number of days pending. Of the 50 remaining cases, the average number of days until disposition was 439. This is only slightly higher than the average number of days for the total group of L cases, which was 431. Despite that slight increase, the presence of an attorney for the taxpayer does not appear to have materially altered the equation.

Among the S cases, there were also more represented taxpayers in the CDP cases (11) than in the control group of non-CDP cases (3). Of the 11 S CDP cases in which an attorney represented a taxpayer, the average number of days to disposition was 340, which was less than the overall average number of days to disposition in an S CDP case, which was 348. This suggests that attorneys brought efficiency to the processing of the cases, although the number of cases in this sample is small.

Chief counsel statistics confirm our finding that percentage-wise, CDP cases are considerably more likely than non-CDP cases to have taxpayers represented by counsel. For cases filed in the fiscal year ended September 30, 2008, chief counsel reported that of the 32,163 total petitions filed in all kinds of Tax Court cases (including CDP), 6,608 (20.5 percent) had counsel for the taxpayer. Of the 1,463 CDP petitions in that fiscal year, 480 (32.8 percent) had counsel for the taxpayer. This comports with our

[59]T.C. Summ. Op. 2009-143 at n.1.

observation of the test period, the first 42 days of 2008: Of the 154 non-CDP Tax Court petitions we studied (100 regular cases and 54 S non-CDP cases), 38 (24.7 percent) had counsel for the taxpayer. Of the 154 CDP cases we studied (100 L cases and 54 S CDP cases), 63 (40.9 percent) had counsel for the taxpayer. Whatever the reason more taxpayers have counsel in CDP cases, this does not seem to be why CDP cases proceed more slowly than other cases in the Tax Court.

IX. Anecdotal Evidence From Our Clinics

What we found in our study corroborates what we have been seeing in CDP cases in our clinics.

Within the last year, Fogg has been involved in a Tax Court CDP case in which he filed the petition. Neither he nor the IRS attorney worked the case from the time the answer was filed to one month before the trial — that is, for about 14 months after the answer was filed. Fogg also attended a calendar call at which he observed that three CDP cases came up for hearings on motions for summary judgment. In each case the taxpayer was pro se and appeared to have done nothing to advance the case. The government filed the motion for summary judgment after the notice of trial in each case although, compared with many cases in our study, the motions were filed relatively quickly after the trial notice: 12, 50, and 95 days thereafter. In each case the motions were simply set to be heard at calendar call, during which the argument on the motion essentially turned into a trial of the CDP case.

Within the last 18 months, Smith has had three CDP cases. None has been handled expeditiously.

In two of them (both L cases), he had not done the Appeals hearing, so he was uncertain what went on at the hearing and what the administrative record contained. A month or two after the answer was filed in those cases, he called each IRS attorney and promptly sent a *Branerton*[60] letter asking some questions and requesting a copy of the administrative record. The IRS attorneys said they were busy on other calendars, and so ignored his letters and telephone calls. Finally, needing to prepare for trial, about 80 days before each of the two different trial calendars, Smith served formal discovery on the IRS to get copies of the administrative record and answers to his few questions. In both cases, the IRS attorneys mailed him the administrative record on the 30th day — the last possible day for responding before he could move for an order compelling production. In one case, the record was followed within a day or so by the IRS attorney's motion for summary judgment. After studying the record in that case, Smith decided that the best course was not to oppose the motion, but to concede the case and pursue collection actions with the IRS outside CDP through the filing of a new Form 433-A with updated financial information. Had the IRS attorney just sent him the administrative record nine months before, Smith would have conceded the case back then. In the other case (which involved alleged identity theft), about a month after turning over formal discovery, the IRS attorney conceded the case. It is bizarre that Smith should have had to use formal discovery in these two cases just to obtain copies of the administrative record — and only weeks before trial.

In the third case, Smith did the Appeals CDP hearing, so he knew what was in the administrative record and did not request it. Underlying liability was properly at issue in the CDP hearing, since the IRS conceded that the taxpayer did not receive the relevant notice of deficiency. However, the settlement officer decided not to address the underlying liability, despite being provided with documentary evidence of unclaimed business deductions. She issued a notice of determination putting the taxpayer into currently not collectible status. In response, Smith filed a Tax Court petition raising the underlying liability. The IRS lawyer (who was yet a third IRS attorney) hoped he could get an auditor involved who had granted full audit reconsideration of identical issues for the same taxpayer in the prior tax year. But apparently that was not feasible. So the IRS attorney just sat with the case for a year, not contacting Smith or doing anything, until Smith finally called the attorney two months before the trial. The IRS attorney then promised to look at the case in a day or two, but still did not do so for a month. About four weeks before the trial, the IRS attorney began seriously looking at the material in the administrative record that supported the claimed business deductions. Less than three weeks before the trial, the IRS attorney proposed a settlement — which was accepted — allowing 82 percent of the business deductions claimed. His proposal was made merely on the basis of what had been in the CDP hearing record all along. Why he could not have looked at the record and resolved the case a year before is a mystery.

It was experiences like these that led us to wonder how common delay is in CDP and to commence this study.

X. Proposals to Expedite CDP Cases

A. Chief Counsel, IRS

The amount of time CDP cases took to reach disposition during the period we studied suggests that cases do not receive immediate attention from

[60]An informal discovery letter under *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974).

the chief counsel attorneys assigned to them. As discussed above, these cases do not get referred to Appeals after answer in the same manner most Tax Court cases do, because Appeals issues the determination on every CDP case. In Appeals, someone generally contacts the taxpayer within a few months after referral to set up a conference to discuss settlement. However, since CDP cases are not referred to Appeals while they are in the Tax Court, they can languish in the file drawers of chief counsel attorneys. This statement is not intended to suggest that those attorneys are not working hard. They have many cases and are trained to wait for something to happen to their docketed cases after answer. Usually, however, the CDP cases appear to just sit, with neither the taxpayer nor the IRS moving the case forward until the calendar call is issued or trial is imminent. This inactivity is perfectly permissible under the statute and the Tax Court rules, but it causes the CDP cases to take an average of a third longer to resolve than deficiency cases once they reach the Tax Court. This lengthened time frame occurs despite the apparent intention of Congress and of the notices issued by the IRS Office of Chief Counsel for this process to move expeditiously.

To the extent we have correctly identified inactivity of chief counsel attorneys as a partial source of the delay in CDP cases,[61] one apparent solution is for the IRS Office of Chief Counsel to direct its attorneys to work these cases at an earlier point in the process. Although chief counsel has issued notices suggesting early intervention through summary judgment motions (when possible), those motions are filed in only a small percentage of cases, and many of the motions come later in the proceeding.

Assuming the Tax Court rules are amended as we recommend below, we also suggest that the IRS Office of Chief Counsel adopt the rule that its attorneys file the administrative record with the court 14 days after the case is at issue. We further recommend that chief counsel adopt the rule that its attorneys file motions for summary judgment within 30 days after the filing of the administrative record, when appropriate. Those procedures would not only fulfill Congress's intent in adopting the CDP provisions, but they would expedite the process for almost every CDP case. This expedited process would allow the case to return to the collection stream sooner, giving the IRS a better chance of succeeding in its efforts to collect.

B. Tax Court

We recommend that the Tax Court amend its rules and adopt procedures that foster the early movement of CDP cases through the court. Under a new rule in Title XXXII of the Tax Court Rules (perhaps Rule 335), chief counsel should be required to file within 14 days after the case is at issue (1) the administrative record and (2) a current literal transcript of the taxpayer's account for the years at issue.

Following this filing, the court should either issue an order to show cause or an order for the filing of a report by the parties. This would require the taxpayer to state how the administrative record might be inaccurate or incomplete, and it would require both parties to state why the case should not be decided on the administrative record. This order should also note that supplementing the administrative record may be possible on a party's request, and any needed discovery should be raised with the court at that time. The parties should be given a relatively short time to identify any additional evidence they think is needed to supplement the record or to convince the court that additional discovery is necessary. We recommend that the period for the parties to respond to the court's order be no more than 30 days.

Once the record is established, the court should order the parties to file any summary judgment motions within 30 days to decide the case. On receiving a motion for summary judgment, the court should be able to decide the case in a relatively expedited manner. Under section 7443(b)(4) and (c), Congress authorized the chief judge to assign to special trial judges "any proceeding under section 6320 or 6330" and to render the decision of the court therein. The Tax Court should also encourage the parties to promptly submit CDP cases fully stipulated, if possible.

For cases in which the court determines that additional evidence is necessary or permissible, in the absence of any identified need for further discovery, those cases should be added to the next available trial calendar in the city where the trial is to take place. The closing of the record in these cases should result in an expedited briefing schedule. Once the briefs are received, the court should be able to decide the case in an expedited manner.

C. Congress

The Office of Chief Counsel or the Tax Court might be able to expedite CDP cases through manual directives or court rules, respectively. If, however, Congress does not see movement of CDP

[61]There is an equal amount of inactivity on the part of petitioners and their counsel. This discussion is not intended to suggest the chief counsel attorneys bear sole responsibility here. Because petitioners in most of the CDP cases are pro se, focusing on counsel as a place for change appears more productive than focusing on petitioners.

cases to an expedited procedure, it could further amend the statute to put pressure on the IRS to accomplish this task.

In our prior article on the administrative process and CDP cases, we recommended that Congress amend the statute to provide for a suspension of the running of interest and penalties if the case took more than six months to resolve through the administrative process. We believed a change of that nature did not require Appeals to move the cases through any more quickly than appropriate. Instead, the change would provide Appeals an incentive to move CDP cases expeditiously in most instances and provide taxpayers relief from unreasonable delays.

We considered proposing a similar solution here, but we have decided that having three parties involved at the Tax Court stage — the petitioner, chief counsel, and the court itself — makes setting a six-month time frame for court action problematic. While section 7429 judicial review of termination and jeopardy assessments functions with only a mandatory 20-day (or at most a 60-day) period for judicial action, section 7429 cases are extremely rare. By contrast, expecting the Tax Court to handle more than 1,000 CDP appeals a year in such a short time frame — or even six months — seems an unwise burden to impose on the court. That burden might wreak havoc on resolving the tens of thousands of non-CDP cases filed in the court each year.

Accordingly, we have instead looked to a different model: interest abatement under section 6404(e). Section 6404(e) permits the secretary to abate any interest on a "deficiency" in tax involving one of the taxes for which the IRS can issue notices of deficiency (income, estate, gift, generation-skipping transfer, and some excise taxes) — or on any payment of such a tax — to the extent that an IRS officer or employee delayed in performing a ministerial or managerial act. No abatement of penalties is allowed, and no abatement of interest is allowed if a "significant aspect of such error or delay can be attributed to the taxpayer involved." A procedure in section 6404(h) provides the Tax Court exclusive jurisdiction for judicial review of IRS failures to abate interest under section 6404(e).[62]

We propose that a new subsection be added to section 6404 to allow CDP delays in the Tax Court as grounds for a separate request on a Form 843 for interest and penalty abatement for any such amounts involved in a CDP case to the extent that an IRS attorney's inactivity in working on the CDP appeal materially delayed resolution of the Tax Court case. As with section 6404(e), however, we would require that no significant aspect of the delay be attributable to the taxpayer. We decided not to recommend having interest and penalty abatement considered as part of the Tax Court section 6330(d) CDP appeal proceeding, because we do not want another issue to have to be decided that might delay resolution of the case. We would have any IRS rejection of abatement requested under this new subsection be reviewable under section 6404(h) in a separate Tax Court proceeding.

Second, we recommend that Congress statutorily resolve the question of the scope of the Tax Court proceeding — whether it is to be a trial *de novo* or one limited for the most part to the administrative record. We recommend that Congress allow supplementation of the administrative record in limited but defined circumstances. This would be a trial *de novo* as to evidence, but limited to issues raised at Appeals — essentially adopting the Tax Court's approach in *Robinette*. We think the more limited scope of the Tax Court proceeding envisioned by the First, Eighth, and Ninth circuits is a bad idea. As with section 6213(a) deficiency cases, taxpayers often wait to hire counsel or gather all relevant documents until after they lose at the administrative level before the IRS. The Tax Court can easily police taxpayers who have deliberately kept back relevant evidence.[63] We are untroubled by how our proposal differs from a traditional appeal of an administrative determination in other areas of the law. As pointed out by the Tax Court in *Robinette*, a *de novo* trial is the traditional method for the Tax Court to review the IRS's decisions, even when the court applies abuse of discretion review.[64]

Resolving the potential administrative record issue will expedite the case to the point when a motion for summary judgment can be filed, or it will move the case onto a trial calendar in those limited circumstances in which the record needs supplementing.

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[62]*Hinck v. United States*, 550 U.S. 501 (2007), *Doc 2007-12316, 2007 TNT 99-21* (Tax Court jurisdiction is exclusive).

[63]*See Murphy v. Commissioner*, 125 T.C. at 315-316 (the Tax Court refused to hear testimony of the taxpayer concerning his health issues that he had deliberately not provided to the settlement officer: "We did not in *Robinette v. Comm'r, supra*, sanction the dilatory introduction at trial of new facts or documents previously withheld and not produced at the section 6330 hearing in order to justify reversal or remand of the Appeals office determination").

[64]We also considered proposing that Congress mandate that CDP cases be placed on trial calendars at the earliest possible point to expedite their movement; however, we rejected the idea that legislation mentioning and thereby codifying the current Tax Court calendaring process would be beneficial.

XI. Conclusion

The idea that CDP is an expedited process is, unfortunately, a myth. Congress created a process that has two expedited points at which a taxpayer must jump within 30 days to clear the next procedural hurdle. Aside from those two points, nothing about the CDP appears expedited — either in the administrative process or the judicial process. Delays in CDP disadvantage the government because delayed collection is often denied collection. Delays also disadvantage taxpayers because they usually come out of CDP as losers, with significantly more interest and penalties owed than when they started. This makes their climb back to the level of compliant taxpayer all the more difficult.

Modifying the system by creating mechanisms to expedite the resolution of CDP cases benefits everyone — except for the taxpayer who enters the system for purposes of delay and the government official who wants to put off working on yet another file in the drawer. Expediting the determination should still allow taxpayers who need to supplement the record an opportunity to do so when permitted, while quickly advancing the cases in which no supplementation is needed or required.

The cases studied here reflect the experience of over 10 years with the CDP system. By 2008 the judicial process for CDP cases had reached a norm. That norm is at odds with the initial purpose of CDP. The goal of an expedited determination to best address a taxpayer's collection situation has clearly failed if the measure of success is the expedited nature of the process. With the benefit of this data, the parties to this process should take a hard look at how to improve it and conform it to the goal of an expedited process for resolving collection disputes.

XII. Postscript: Tax Ct. Proposes Rule Changes

In November we shared a draft of this report and our research with the Tax Court. This apparently triggered a few of the proposed rule changes published by the court in a December 20, 2010, press release.[65] In that release, the court proposed requiring answers (and motions in lieu of answers) to be filed in CDP cases within 30 days, instead of the usual 60 days.

To prevent the late filing of motions for summary judgment in CDP and other cases, the court proposed modifying Rule 121 to add, after the current phrase requiring motions to be filed "within such time as not to delay the trial," the phrase: "and in any event no later than 60 days before the first day of the Court's session at which the case is calendared for trial, unless otherwise permitted by the Court."

Finally, the court invited comments about possibly asking the clerk's office to schedule CDP cases on trial sessions as soon as the answers are filed. This includes adding cases to existing trial calendars if the trial notice has already gone out five months in advance of trial, but only if there are at least 90 days left before the trial session starts. If this is done, the IRS could file a motion for summary judgment 30 days after the answer is filed, but it would still have at least 60 days left before the trial.

The Tax Court has asked for comments to be submitted on its proposals by March 7. It will be interesting to see whether the IRS thinks it can live with the shorter period to file the answer or make a summary judgment motion in CDP cases.

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[65]*Doc 2010-27080, 2010 TNT 244-16.*