by Bryan T. Camp

(C) Tax Analysts 2004. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

The Failure of CDP, Part 2: Why It Adds No Value

Bryan T. Camp is an associate professor of law at Texas Tech University School of Law.

This column will generally explore the laws and policies of tax administration. Its goals are to help readers navigate the law of tax administration by (1) guiding them through the thickets of particular procedural problems and (2) giving them a sense of the larger tax administration forest.

Camp wishes to thank Danshera Cords for her willingness to slog through his drafts. The author remains responsible for all remaining oddities, lousy metaphors, bad data, silly arguments, and just plain poor judgment.

Copyright 2004 Bryan T. Camp.
All rights reserved.

This month's column will continue my look at why the collection due process (CDP) scheme planted by Congress in 1998 is a most undesirable growth in the tax administration forest. This month's column will show how the CDP fails to add value to the collection process for either taxpayers or the IRS. Next month I will show how CDP imposes significant costs on both taxpayers and the IRS because of its poor fit with the inquisitorial nature of tax administration, and I will suggest some alternatives that should help taxpayers and the IRS fulfill their respective obligations.

Before I begin, here's a quick recap of the story so far. Historically, the IRS has had significant autonomy in making both tax liability and tax collection decisions, combined with equally significant unilateral power to gather any information that it determines may be useful for decisionmaking. Also, the law of tax administration has tended to emphasize the importance of determining and collecting the true and correct tax liability over the importance of protecting the private sphere of individual autonomy from governmental intrusion. A system that contains either or both of those characteristics is what I call inquisitorial.[1] The Internal Revenue Service Restructing and Reform Act of 1998 (RRA 98) shifted tax administration from an inquisitorial to an adversarial system by moving decisional power from the IRS to outside third parties. It also moved away from the inquisitorial process by attempting to limit governmental intrusion into citizen's lives, even at the cost of not collecting the "true" liability.[2]

CDP is one example of both of these shifts. CDP allows a taxpayer to obtain court review of collection decisions and, in some cases, liability decisions, thus reducing the IRS to the status of an ordinary litigant. Further, CDP imposes a statutory obligation on the decisionmakers to balance "the need for efficient collection" with "the legitimate concern . . . that any collection action be no more intrusive than necessary."[3] The Senate's original CDP proposal would have allowed (a) court review for each and every time that the IRS sought either to file a Notice of Federal Tax Lien (NFTL) or to levy on a taxpayer's assets, and (b) court review for the underlying liability determination as a matter of right. That would have brought collection to a standstill because the collection process is necessarily a volume operation designed to winnow out the easy cases.[4] As enacted, however, CDP allows (a) court review for the *first* NFTL or levy, and (b) court review of liability determinations only when the taxpayer failed to receive an appropriate opportunity for prepayment liability review.

Classifying 'Can't Pays' and 'Won't Pays'

Last month I described the collection context in which CDP is supposed to operate. I described the three stages of collection — the notice process, automated collection system (ACS), and collection field function — and emphasized how the first two stages are highly automated. Only in the last stage does the stereotypical model of an individual IRS employee pursuing an individual delinquent taxpayer hold true. Notably, most accounts receivable arise from taxpayers' self-reported but unpaid liabilities. I emphasized how collection is a process, not an event. The goal of the process is to resolve unpaid liabilities, either by collecting the full amount owed from those taxpayers who can pay (but do not want to), or by agreeing to a collection alternative for those taxpayers who cannot pay (but are willing). Collection alternatives to immediate full payment are installment agreements, offers in compromise (OIC), and designation of the account as currently not collectible (CNC).

Historically, the collection decision on who was a "can't pay" and who was a "won't pay" rested exclusively with the IRS. Since the assessment carried with it the force of a judgment, courts refused to review the tax

---

[1]*See* Bryan T. Camp, "The Inquisitorial Process of Tax Administration," *Tax Notes,* June 21, 2004, p. 1549.

[2]*See* Bryan T. Camp, "'The Evil That Men Do Lives After Them . . .'" *Tax Notes,* July 26, 2004, p. 439.

[3]Section 6330(c)(3)(C).

[4]*See* Bryan T. Camp, "Failure of Collection Due Process, Pt. 1: The Collection Context," *Tax Notes,* Aug. 30, 2004, p. 969.

or its collection until the tax was paid.[5] CDP changed that by (a) requiring court review of the IRS's classification decision before the IRS first acts on that decision to collect and (b) potentially allowing precollection liability review for even those taxes not subject to the deficiency process in the first place (*Montgomery*).

> ***The context of collection is classification. Taxpayers must be sorted into the correct box for appropriate treatment: Are they can't pays or won't pays?***

The context of collection is classification. Taxpayers must be sorted into the correct box for appropriate treatment: Are they can't pays or won't pays? Procedurally, all taxpayers start out in the won't pay box. That is because the IRS does not know why a taxpayer has not paid the tax. The taxpayer knows. The main purpose of the notice process and the ACS is to acquire the information necessary to make the classification. As with liability determinations, the inquisitorial nature of collection work is justified in large part because the information is in the taxpayers hands. Taxpayers have the obligation to come forward with the information that shows they can't pay within the policy guidance as to what that means. Until they do, the IRS pursues their assets. The won't pay presumption is proper not just because citizens have the legal duty to report their financial transactions to the government and pay the appropriate tax but also because it places the informational burden on the party who has best access to the relevant information. As a practical matter, classification decisions occur during consideration of a taxpayer's eligibility for installment, OIC, or CNC treatment.

Proper classification is difficult, even with enough information. A moment's reflection will suffice to realize that the definition of won't pay and can't pay is highly operational and contingent on tax administration policy. While simple at the extremes, classification is difficult in most cases. At one extreme, of course, are those in a tax protestor community, whether religious or political. They have the money but refuse to acknowledge the government's right to it. At the other extreme are the turnips who have no assets. In between are the majority of taxpayers who do not have enough assets to fully pay all their current liabilities, both tax and nontax. They say they can't pay taxes but what that really means is that they have insufficient assets to meet both their tax and nontax obligations — including landlords, ex-spouses, groceries, private lenders, and so on.

Proper classification thus depends mostly on policy. Deciding how many assets a taxpayer should be allowed to keep to meet competing obligations is a policy call. Likewise, deciding when a taxpayer is so poor that his or her tax obligations should be modified or forgiven is also a matter of policy. Some policies are set by Congress in statutes. For example, section 6334 lists those assets exempt from levy and can be viewed as reflecting a congressional decision to allow taxpayers to prefer some competing obligations over their tax obligations. Thus it exempts tools of the trade and personal items, up to some amount, and also exempts a minimum portion of wage income, as well as income necessary to make child support payments. Mostly, however, Treasury and the IRS set out the standards for who goes into the can't pay box. Congress will sometimes decline to make a policy call in a statute to give the agency operational flexibility. For example, in RRA 98, Congress wanted the IRS to expand the definition of can't pays who should be allowed to compromise their tax liabilities but did not express the idea in the statute (section 7122). Instead, the conference committee report instructs the IRS to create a new category of persons eligible to compromise their liabilities: those where putting the taxpayer in the can't pay box would "promote effective tax administration" because of "factors such as equity, hardship, and public policy."[6] In other words, Congress basically said "draw the right line" between can't pays and won't pays. In doing so Congress "expressed a mood" and nothing more.[7] It left the policy decision to the IRS and Treasury.

Proper classification is critical to voluntary compliance. It is a delicate task, defining the line between can't pay and won't pay. The IRS has every incentive to make the right decision. Chronic misclassification has the potential to undermine voluntary tax compliance, the foundation of our system. If the definition of can't pay is too narrow, then the IRS pursues taxpayers who truly cannot pay. Not only does that waste resources, but it also makes the IRS look hard and mean, kicking people when they're down. However, if the definition is too broad, the IRS looks like a pushover and those who have paid their taxes wonder why the hammer never falls on similarly situated taxpayers who shirked their responsibility. Error in either direction potentially weakens voluntary compliance, which depends in no small measure on perception.[8]

Misclassification results in mistreatment, by definition. To treat people "right" one must first make a judgment about what kind of people they are. The allegations in the sensationalist congressional hearings into IRS "abuse" in 1997 and 1998 were all about mistreatment and, hence, about misclassification. The IRS was allegedly treating taxpayers wrongly because it was either trying to collect taxes not really owed or else it was brutishly depriving taxpayers of the very assets they needed to survive. In other words, it was treating can't pays as won't pays.

---

[5]As I explained last month, this is the import of *Flora v. United States*, 362 U.S. 145 (1960), and laws such as the Anti-Injunction Act (section 7421(a)) and Declaratory Judgement Act (28 U.S.C. section 2201(a)) that prevent taxpayers from contesting the substance of their tax liabilities once an assessment is made until all the money has been collected.

[6]*See* H.R. Rep. No. 105-599 at 289 (1998).

[7]*See Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 487 (1947) (Frankfurter, J.). The IRS has done its best in Treas. reg. section 301.7122-1(b)(3).

[8]*See* Leandra Lederman, "The Interplay Between Norms and Enforcement in Tax Compliance,"64 *Ohio St. L. J.* 1453 (2003).

(C) Tax Analysts 2004. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

CDP promised to correct misclassification. Its premise was that IRS employees could not be trusted to make the correct classification and so require *both* internal review (by Appeals) *and* court review to ensure they get it right. While internal review can be consistent with inquisitorial process, court review is not and is the focus of my critique that CDP adds no value but instead causes problems.

> ***Proper classification is critical to voluntary compliance. It is a delicate task, defining the line between can't pay and won't pay.***

In theory, CDP inherently cannot live up to its promise for two reasons. First, CDP fails to generate any additional information for classification; it neither prods nor helps taxpayers to provide any more information than what they have already provided. Second, CDP adds no value to the review of what information there is; court review is a mere snapshot review of what is an ongoing process and, further, courts review only for an abuse of discretion. I will address each failure in turn.

CDP Adds No New Information

Proper classification depends on proper information. But CDP kicks in when the IRS seeks to file *first* NFTL or makes the *first* levy. Recall that the first NFTL and levy sent out by ACS are for taxpayers who have not yet provided enough information to be put into the can't pay box. Those are tools for collection of assets, yes, but they are also tools used to prod taxpayers into coming forward with information that will put them in the can't pay box. The tools are used when taxpayers either have not responded to prior notices or have responded inadequately to move them into the can't pay box. For example, functionally illiterate taxpayers have a very difficult time explaining their situation. Mass processing hurts most those who have a difficult time being heard. Their problem is often not so much the lack of an opportunity to explain their circumstances as it is lack of ability in gathering and presenting the information necessary for an accurate classification.

CDP does not solve the problems of nonresponsive taxpayers nor of incoherent taxpayers. As to the first group, the CDP notice gives only 30 days from the date of issue for the taxpayer to request a CDP hearing. There is little reason to believe that taxpayers who have not responded to prior IRS notices will give the CDP notice much heed, even if it comes to them in, literally, a screaming red envelope delivered by magic owls.[9] Likewise, as to the second group, there is also little reason to expect that taxpayers who have been incapable of presenting their situation to IRS employees up to that point will be any more successful, assuming they manage to meet the 30-day deadline for presenting their point of view to reviewing courts. The adversarial process simply separates the information-gathering task from the decisionmaking task, providing a supposedly neutral forum for review. It does nothing to help taxpayers gather and present the information necessary to make the correct classification. Taxpayers are still responsible for providing information. For nonresponsive taxpayers, this means that CDP just gives them another opportunity to waste. For incoherent taxpayers, CDP just gives them another opportunity to babble.

That is the story I see in the CDP statistics: Most taxpayers do not invoke their CDP rights and, of those who do, the ones not satisfied with their treatment in Appeals have no better luck with court review. The numbers show that most taxpayers who receive CDP notices do not request a hearing in Appeals, much less seek court review. In fiscal 2003, I estimate that the IRS sent out about 550,000 CDP notices.[10] Yet Appeals received just under 32,000 CDP requests in fiscal 2003, a

---

[9]Yes, this *is* a reference to Harry Potter. *See* J.K. Rowling, *Harry Potter and the Chamber of Secrets* (Scholastic Press 1999) at 87-88.

[10]This is a rough estimate and I welcome anyone with a better guess to contact me. I cannot find any source that reports how many CDP notices the IRS sent out in fiscal 2003, so I must infer the number from other numbers. For fiscal 2003 the IRS sent out about 1.7 million levies and filed over 500,000 NFTLs. *See* IRS 2003 Data Book, Table 16 at p. 27, available at http://www.irs.ustreas.gov/pub/irs-soi/03databk.pdf (last visited Sept. 12, 2004). *See also* TIGTA Report No. 2004-30-083, "Trends in Compliance Activities Through Fiscal Year 2003," *Doc 2004-9294* or *2004 TNT 84-16* (April 2004). These are not the right numbers to start with, however, because they do not directly correlate to CDP notices: that is, they do not mean that the IRS sent 2.2 million CDP notices. First, a single taxpayer may have had multiple levies and NFTLs. Second, CDP applies only the *first* levy and I cannot find statistics on how many of the 1.7 million levies were first levies. Third, the IRS collects most statistics by account and not by taxpayer. To address those three problems, one must know the number of taxpayers with new liabilities that come into the ACS system each year. But I could not find any direct statistics on that either. So I started with the only place I could find some indication of the ratio of accounts to taxpayers: in TIGTA Report 2003-30-186, "Some Automated Collection System Results Have Recently Improved," *Doc 2003-20491* or *2003 TNT 179-28*, at Figure 9 on p. 11. There, TIGTA reports that in fiscal 2002 approximately 402,000 taxpayers had a total of 1.34 million accounts that had *not* been resolved by the notice process or by ACS and so those accounts were put in the "Queue" to be assigned to revenue officers in the field. Because one would expect those taxpayers to have more delinquent accounts than average, a conservative ratio would be that every 3 accounts equals 1 taxpayer. Next, I looked at how many *new* account receivables were received into the collection system in fiscal 2003. TIGTA Report 2004-30-083, Figure 12 on p. 25, has the answer: 5.5 million taxpayer delinquent accounts were received in fiscal 2003 (I excluded taxpayer delinquency investigations). Applying the ratio means that approximately 1.65 million taxpayers had new delinquent accounts in fiscal 2003. Note those are *new* receipts, which are added to those accounts that had not been closed the prior year. Therefore, each taxpayer is entitled to a new CDP notice for the new tax period represented in the new account receivable. But as I noted last month, about two-thirds of all accounts are resolved in the notice process and so those accounts (and taxpayers) would not receive CDP notices. Therefore, only about one-third of all new

(Footnote continued on next page.)

(C) Tax Analysts 2004. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

response rate of about 6 percent.[11] And the courts reverse appeals on the substance about once in 200 cases.[12] Those statistics, particularly the high nonresponse rate, could support the proposition that IRS classification decisions are right almost all the time or that taxpayers generally agree with the presumption that they are won't pays. But the statistics also suggest, in a more nuanced reading, that CDP does not give those taxpayers who disagree with the collection process the help they need in presenting the information that could correctly classify them. That is another way of saying that the element of adversarial review added by CDP simply adds nothing of value to the information mix or the collection process.

CDP Adds No Value to Evaluation of Information

CDP's other inherent failure is that it adds no value to the processing of whatever information is at hand, and that is for two reasons. First, CDP inherently provides only a snapshot review of an ongoing process. Second, the courts invariably adopt a standard of review that places a very difficult burden on taxpayers to overcome.

> ***For nonresponsive taxpayers, this means that CDP just gives them another opportunity to waste. For incoherent taxpayers, CDP just gives them another opportunity to babble.***

It is true that many taxpayers do take advantage of the CDP notice to request a hearing with Appeals. After all, 32,000 requests for CDP hearings per year is a pretty large number, even if it represents a response rate of only 6 percent.[13] And not all requests are from the incoherent taxpayers I mentioned above. Many are quite articulate and simply disagree with being classified as won't pays. They believe they should be classified as can't pays and so receive treatment under the installment agreement, OIC, or CNC alternatives. The IRS, however, *on the information available at the time* decides that the taxpayers are still in the won't pay box. Remember, the classification decision is always contingent on the information at hand. New information can change the classification. CDP; however, provides for court review at only one point during the process. And it is the earliest point, when even fully articulate taxpayers may not have timely presented the information necessary for proper classification. CDP review here adds no value to the system for either taxpayers or the IRS.

Three cases illustrate the problem. Consider first *Brown v. Commissioner*, decided last month by Chief Special Trial Judge Panuthos.[14] Brown owed taxes for 1997, 1998, 1999, and 2000. In 2000 the IRS sent Brown a CDP notice for the first three tax periods. He did not ask for a CDP hearing. Two years later the IRS sent Brown another CDP notice for the 2000 liability, and Brown asked for a CDP hearing. Because the classification decision is made about each taxpayer, the IRS reviewed whether Brown was a won't pay or a can't pay for all the periods in question. Brown tried several times to submit an OIC and sent in his personal financial information, but Appeals concluded the information was facially incomplete and inaccurate. After some back-and-forth talks with Brown, Appeals issued a Notice of Determination to proceed with collection. Brown sought court review for all the liabilities.

Judge Panuthos properly declined to review the 1997, 1998, and 1999 tax years and dismissed Brown's petition for those periods for want of jurisdiction. For the 2000 tax year, Judge Panuthos concluded that the IRS did not abuse its discretion based on the information in front of it *at the time*. That is, Judge Panuthos looked at the snapshot of the situation as it was before Appeals. Moreover, it seems that he did not even review the substance of the information that was in front of Appeals at the time. The OIC was not made part of the record, so the court had only the affidavit from the Appeals officer that the OIC was incomplete.[15] Court review here thus added no value to interpretation of even the information before the IRS. Instead, Judge Panuthos relied on the *process* used by the IRS in interacting with the taxpayer. Thus, the court recited all the specific back-and-forths and concluded that Appeals "gave petitioner an opportunity to correct and complete financial information, yet petitioner failed to do so." Also, "petitioner failed to raise a spousal defense or make a valid challenge to the appropriateness of respondent's intended collection actions. *These issues are now deemed conceded*. See Rule 331(b)(4)." (Emphasis added.) So Brown lost, even though the OIC was not made part of the record and the court could not review the information used by the IRS to classify Brown as a won't pay.

Now it may be that Brown really was a won't pay taxpayer who was just working the system to delay collection. It also may be, however, that Brown was one of those incoherent taxpayers I mentioned above, those who simply cannot articulate their situation and whose voice gets muffled by all the presumptions and rules, such as Rule 331(b)(4), that attach serious consequences to silence. Hence the emphasized language from the opinion above. Hence the odious, but inevitable, effect of an abuse of discretion review standard. On one hand, this highly deferential level of review cannot add any value for taxpayers like Brown. On the other hand, what else can the court do? The problem, dear reader, lies with the

---

accounts will receive a CDP notice at the second stage ACS process. One-third of 1.65 million is 550,000.

[11]For CDP cases in Appeals, see National Tapxayer Advocate's 2003 Annual Report (December 2003), *Doc 2004-787, 2004 TNT 12-122*, at p. 46.

[12]*Id*. at 319 (reviewing cases issues by courts from June 1, 2002, to May 31, 2003).

[13]*See* above how I get the 6 percent figure. The National Taxpayer Advocate 2003 Annual Report to Congress reports 31,848 CDP hearing requests filed in fiscal 2003. *Doc 2004-787, 2004 TNT 12-122.*

[14]*Doc 2004-16269, 2004 TNT 155-12* (Aug. 10, 2004).

[15]In footnote 4 of the opinion, the court notes, "A copy of the offer in compromise was not made part of the record in this case."

(C) Tax Analysts 2004. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

whole fable that the adversarial process somehow adds value to the administration of the laws.

Brown's situation illustrates more than the problem of adversarial process for incoherent taxpayers. It shows another reason why the CDP snapshot review of an ongoing process adds no value to tax administration for the taxpayer or the IRS. Here, the IRS concluded Brown should be in the won't pay box. Because it made that decision about Brown the taxpayer, the decision applied to *all* the taxes he owed. But courts review only the classification decision as it concerns particular tax periods, not as it relates to *all* the taxpayer's liabilities. Thus, if the Tax Court disagreed with the IRS's classification, it could order the IRS to reclassify Brown only for the 2000 tax. The IRS would still be free to collect for the 1997, 1998, and 1999 liabilities. Whether the taxpayer's property, say his car, is taken for 1997 or 2000 is of no matter to the taxpayer; the car is still gone. It is unlikely the IRS would acquiesce to a court decision contrary to its own interpretation and evaluation of the taxpayer's situation.

The next case, *Allglass Systems v. Commissioner*, decided by Judge Robreno of the Eastern District of Pennsylvania on August 17, 2004, provides another angle on the snapshot problem.[16] The corporate taxpayers there owed employment taxes and did properly request a CDP hearing in late November 2002. They were definitely neither incoherent nor nonresponsive taxpayers. But look how CDP failed them and the system. In February 2003, the taxpayers proposed an OIC as an alternative to full payment. Acceptance or rejection of the OIC requires proper classification. Were the taxpayers in the can't pay or won't pay box? To decide, the Appeals officer in June 2003 asked for a personal financial statement from the taxpayers' principal owner and gave a 15-day deadline. The taxpayers' attorney said the deadline was unreasonable. The Appeals officer did not change the deadline, but also did not issue the Notices of Determination until six weeks later. At no point before the Notice of Determination issued did the taxpayer provide the requested information. The taxpayer then sought court review of the decision and, once the court case was pending, finally submitted the requested information.

Too late! Judge Robreno refused to consider the new information. He explained why:

> As a consequence of taxpayers' failure to provide the requested information, [the Appeals Officer] was faced with incomplete offers-in-compromise and therefore was unable to consider the offers as an alternative to the levy. Because of the deleterious effect it would have on the IRS's efforts to enforce the Revenue laws of the Unites States, taxpayers are not free to disregard administrative deadlines and, without cause, proceed at their own pace. Given these facts, the Court concludes that [the Appeals Officer] sufficiently considered taxpayers alternative collection offers, *with the information available to her*. (Emphasis added)

Judge Robreno is not an outlier. As do other judges, he recognizes why the snapshot nature of CDP review is inherent in the process. It is the same reason common to all court review of agency decisions: to protect the integrity of the process. Considering new information at the court review stage — or suspending the collection action and remanding to Appeals — would invite taxpayers to bypass the Appeals process and make courts, in effect, the primary decisionmaker instead of the IRS. Far from encouraging taxpayers to give information to the IRS, a rule other than the rule laid down by Judge Robreno would create an incentive for taxpayers to ignore information requests, perhaps even deliberately (can you imagine?) to delay collection.

> ***Brown lost, even though the OIC was not made part of the record and the court could not review the information used by the IRS to classify Brown as a won't pay.***

The third case, *Robinette v. Commissioner*, 123 T.C. No. 5 (July 20, 2004), is not to the contrary.[17] Judge Vasquez's eloquent opinion for the majority makes it clear that most of the Tax Court thought the IRS Appeals officer "had a closed mind to the arguments presented on petitioner's behalf." The concurring opinions distinguish *Robinette* from cases such as *Allglass* by emphasizing that this was not a case in which the taxpayer failed to provide requested information but in which the IRS Appeals officer refused to consider proffered information-necessary for the determination. As Judge Thornton said, in a concurring opinion joined by 10 judges: "petitioner attempted to introduce relevant evidence at the Appeals Office hearing, but the Appeals officer refused to consider that evidence and failed to include it in the administrative record."

Narrowly read for only that proposition, *Robinette* is unobjectionable. The reviewing court simply deems some evidence to be part of the administrative record considered by the IRS, similar to how the Tax Court operates when the IRS goofs up and wants the court to see stuff that counsel forgot to include in the record (like the transcript) but which Appeals should have considered. That is a good rule when it is information forcing.

---

[16] *Doc 2004-17050, 2004 TNT 165-11* (Aug. 17, 2004). (Emphasis supplied.)

[17] *Doc 2004-14878, 2004 TNT 140-17. Robinette* is a classification decision just like all the others. In *Robinette*, the issue was whether the IRS properly defaulted the taxpayer on his OIC. That is, the taxpayer had already been judged a can't pay and so the IRS accepted his offer to pay about 10 cents on the dollar of his outstanding liabilities. OICs are conditioned on five future years of timely filed returns. That is so the IRS can monitor the taxpayer and verify the taxpayer really is a can't pay. If the taxpayer "materially breaches" the OIC, then the IRS reserves the right to revisit the classification decision, decide that the taxpayer is really a won't pay and rescind the OIC and levy away. The decision in *Robinette* was all about whether the taxpayer was still a deserving can't pay or really a disguised won't pay.

(C) Tax Analysts 2004. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

We *want* the IRS to consider all the information that the taxpayer properly offers. The problem, of course, is that the CDP hearings are so informal that it is often very difficult to tell just what information Appeals actually considered or did not consider and whether the taxpayer properly offered it. There was some disagreement about that in *Robinette*. But that is a practical problem with *Robinette*, even as narrowly construed, not a theoretical problem.

To the extent *Robinette* creates any other precedent, however, it is manifestly objectionable, as Judge Halpern expertly exposes in dissent. For example, anyone who reads the case for the broad proposition that the Tax Court will make an independent credibility determination of testimony as part of an abuse of discretion review, or will not give substantial deference to Appeals' judgment, goes too far. While the majority is a bit coy about this, the concurrences insist that the court did not conduct a *de novo* review of the evidence already considered by Appeals. Likewise, taxpayers should not believe that they can raise new issues to the Tax Court not raised to Appeals. Both the majority and concurrences explicitly deny that is what happened in *Robinette*, although Judge Halpern's analysis suggests it actually did. While he may be correct in fact, for precedential purposes he is wrong. I predict the court will do some quick "clarification" to put itself back on the job of conducting true abuse of discretion review.

If broadly read as a disguised *de novo* review, *Robinette* arguably adds value to the classification process by both extracting new information from the taxpayer and giving it independent evaluation. Contrast *Brown* and *Allglass*, *supra*, where Judges Panuthos and Robreno used the right standard of review but added no value. I say *Robinette* (so construed) could add value because the court gave an extravagantly thorough review of the evidence that "should have been" before Appeals (and so was "deemed" to have been), thus increasing the potential accuracy of the decision.[18] In contrast, note how Judge Panuthos did not consider the OIC but instead relied on the IRS say-so that it was incomplete. Likewise, Judge Robreno refused to consider available evidence when doing so would have likely improved the accuracy of IRS classification decisions. Judges Panuthos and Robreno are at the heart of the bell curve of how courts review CDP decisions. Their methods are correct. A broadly interpreted *Robinette* is an outlier; few courts have the time, energy, or personnel to provide that level of scrutiny to all CDP decisions. Thus, adversarial review of CDP decisions cannot add value to the IRS's evaluation of the information before it.

[18]Note that although *de novo* review would add value in this way, it would also entail significant costs to the system in other ways, as I shall articulate next month.

Conclusion

This month I have critiqued CDP for its failure to add value to the collection process. Historically, the IRS has had inquisitorial powers to decide not only how much to collect, but also how to collect it. The powers have been inquisitorial because the IRS has historically acted as both the information-gatherer and the decisionmaker. Further, the IRS historically has been allowed to focus on one chief object — collecting taxes owed — without regard to intrusion on taxpayer's private sphere of autonomy. CDP changed that by adding court review of certain IRS collection decisions and requiring the IRS to balance the need for efficient collection with the degree of intrusion on taxpayers' lives.

Judges Panuthos and Robreno are at the heart of the bell curve of how courts review CDP decisions. Their methods are correct.

CDP represents only a *partial* shift from the inquisitorial to the adversarial process because it reviews only the *first* IRS collection decision involving either levy or NFTL and because once taxpayers get to the promised land of court review, they find themselves in a huge uphill battle and not on a level playing field. The partial shift adds no value to the process. It does not help the IRS acquire the information necessary to make the right classification decision. It does not protect those taxpayers who need protection from IRS abuse (that is, those who are incorrectly classified as won't pays). It does not help the IRS make the policy decisions about who should be pursued for full payment and who should receive preferential treatment through alternative collection methods, like OIC. Next month, I will discuss the costs of CDP on tax administration.

(C) Tax Analysts 2004. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.