

MURDOCK INN OF COURT

SKIT: COLLECTION DUE PROCESS HEARINGS

TAXPAYER'S PERSPECTIVE

SCENE 1: TAXPAYER'S ATTORNEY'S OFFICE:

Taxpayer ("TP"): Thank you for meeting with me. I received this Final Notice of Intent to Levy from the IRS and I just don't know what to do. Out of the blue, the IRS wants to levy my property for employment taxes. They call it a "civil penalty". When I got the preliminary notices before, I didn't take it seriously. I thought it was a joke. I didn't have anything to do with submitting the employment taxes to the IRS for my employer. I shouldn't be subject to a penalty!

TP Attorney: OK. Let me look at this. What position were you in ---this is a hospital, correct?

TP: Yes. I was the CEO but I only handled healthcare issues. Merlyn, the CFO, handled the finances. The hospital went bankrupt last year, and I guess he just was overwhelmed. I eventually found out that the employment taxes weren't being paid and so I made a big scene and ordered Merlyn to pay them. Fred (or Frederica), the owner of the hospital, fired me the next day. I didn't know it was so bad. The IRS wants me to pay over a million dollars! I don't have anything close to that---it will definitely wipe out all of my assets and savings. I'll be living on the street.

TP Attorney: Well---the employment tax liability is joint and several, so if Merlyn or Frederica or any other responsible person pays any amount, the amount due for you will also decrease. Also, the IRS has cost of living allowances, so luckily they can't take everything you own.

TP: Can you delay this levy so maybe the others will pay more?

TP Attorney: Yes, this Final Notice was issued about ten days ago so we are within the 30 day limit and can certainly file a request for a Collection Due Process hearing. We in the business call it a "CDP hearing". I have to warn you, however, that not too many taxpayers win at these hearings. However, it does slow down the collection process substantially. The IRS doesn't do anything very fast, once we start the CDP hearing procedures.

TP: How do you file the CDP hearing request? Is it a long process?

TP Attorney: No. A Form 12153, Request for a Collection Due Process Hearing, should have been enclosed with the Final Notice of Intent to Levy. Did you see that form?

TP: I may have---I probably have it at home.

TP Attorney: No worries. I can get the form online. The IRS has a great website.

TP: As long as they don't garnish my wages or seize my home for awhile, a delay for a hearing will help me figure out what to do. Maybe Merlyn or Frederica will pay something. What questions are on the form? Do they need all my financial information?

TP Attorney: No. The form is very short. Just a few boxes to check, and a short statement. I can fill it out very quickly. IRS Collections will need your financial information if you eventually want to enter into an Offer in Compromise or monthly payment plan.

Taxpayer: Oh. I'm not ready to do that. I shouldn't owe the tax in the first place! File the hearing request. Maybe the IRS will see the error of their ways.

TP Attorney: OK. I'll file the request for a CDP hearing tomorrow. I am assuming you haven't had a chance to challenge it since the liability is due to unpaid employment taxes. Correct?

Taxpayer: I haven't talked to anyone about this. I keep hoping it's just a bad nightmare and I'll wake up and none of this will have happened.

TP Attorney: Good. We will be able to challenge your liability for the tax then, as well as collection procedures.

SCENE 2: AT THE CDP HEARING AT IRS APPEALS:

TP Attorney: Good afternoon. At the outset, I want to make it clear that my client is challenging his liability for these employment taxes.

IRS Appeals Officer: Well, he was the CEO for the hospital, correct?

TP Attorney: Yes, but in name only. He handled the healthcare issues. You know there's quite a lot of paperwork associated with Medicare and Medicaid these days, not to mention private insurance. He was up to his eyeballs in paperwork that had nothing to do with the IRS. His CFO, Merlyn, handled the taxes.

IRS: Doesn't matter. A CEO is always a responsible person.

TP Attorney: Not always---there is some case law that looks at many factors to determine whether the targeted taxpayer is a responsible person, and CEO's are not always liable. (e.g. *Turpin v. United States*, 970 F.2d 1344 (4th Cir. 1992))

IRS: Well, in the cases that I handle a CEO is always liable for nonpayment of employment taxes. I'll issue my report and you can appeal it if you want. I don't think you understand how aggressively the IRS goes after nonpayment of employment taxes. We turn over every stone to collect every last dollar of the trust fund taxes.

TP Attorney: My client saw that they weren't paying the employment taxes and immediately told Merlyn to pay them immediately. Then he was fired by Frederica. That should count for something.

IRS AO: Doesn't matter. I always win these CDP cases.

TP Attorney: OK. We'll see you in Court. My client is not going to pay over a million dollars when he just wasn't responsible for the nonpayment. And---he was fired! He really hasn't found a good job since then so his ability to pay anything is very limited.

IRS AO: Ha. You won't be able to challenge his liability in court. Only I get to decide that issue.

TP Attorney: Well we'll see if the Judge agrees with me that you abused your discretion.

SCENE 3: TP ATTORNEY'S OFFICE

TP Attorney: The IRS didn't accept my argument that you aren't liable for the employment taxes. Since you have the title of CEO, he wasn't hearing any of my counter-arguments.

TP: OK. What can we do now?

TP Attorney: We'll have to wait for the IRS Appeals Officer's final Notice of Determination, and then we have 30 days to file a lawsuit in the US Tax Court.

TP: Oh—there is a special court that only handles tax issues? Only 30 days to decide?

TP Attorney: Yes. It is a short time period so we need to be ready. The Tax Court gets a lot of these CDP cases. However, its jurisdiction is very limited under IRC §6330(d) and the legislative history and so they generally can't review whether you are liable or not. Their review is limited to whether the IRS is pursuing the least intrusive methods of collection, and whether the IRS abused its discretion.

TP: Well, just going after me as someone who is liable is not the least intrusive method, and the IRS definitely abused its discretion.

TP Attorney: True, we certainly think so, but the Court may not agree. These CDP cases are generally decided in favor of the government. The abuse of discretion standard is a high bar to overcome.

TP: Why would we file a lawsuit then. It doesn't seem like I have much to gain.

TP Attorney: Fair point. The only reason would be to delay the collection activities so that perhaps Merlyn will have paid more of the amount owed. Also, there is a chance that the Court could find that the IRS abused its discretion. Are there others who might be classified as responsible persons who are also liable?

TP: Yes. The owner, Frederica. She could pay it off with one check, but she'll fight to the death.

TP Attorney: Well, maybe she'll not be able to prevent the IRS from seizing her assets for payment. Seems like, if she's president and fired you, she might be a better target with deeper pockets.

TP: OK. I guess it's worth it to file a lawsuit. How much will it cost me?

TP Attorney: Litigation is expensive, but I'll try to keep it at a reasonable level. It's up to you, though, whether to go forward.

TP: How long would the lawsuit delay the IRS collection activities?

TP Attorney: A lawsuit would probably delay collection by a couple of years. The Tax Court takes its time with these cases.

TP: OK. Sounds good. Let's plan on litigating. Who knows—I could win!

SCENE 4: One year later.

TP Attorney (this could be a new person---new attorney since time has passed with appropriate language indicating the change in counsel): Good to talk with you again. It's been a long time. How have you been?

TP: I've been good. I got a new job with a small hospital. It was difficult because of the IRS filings, but I found something through my dad. Potential employers could find the IRS notices on my properties, so it's been hard. Since we are in court, the IRS can't do anything so I'm fine for now. That was a great decision to go to court. However, I'm worried about what will happen when the case is decided.

TP Attorney: As you know, the case was submitted fully stipulated so there won't be an actual trial. The Court will decide the case based upon the written record. While we didn't agree with

the IRS' decisions, they are what they are and the Judge will decide if the IRS abused its discretion. That means there won't actually be a trial, which is how these CDP cases are usually decided. There really aren't any factual disputes, so the Judge looks at how the IRS handled your appeal.

TP: Well, I have a factual dispute. I shouldn't be liable for these employment taxes! I had nothing to do with it.

TP Attorney: I know. But unfortunately that's not how the system works.

TP: When do you think the Court will decide?

TP Attorney: Hard to say. I filed the Reply Brief about 8 months ago and so a decision should be coming out fairly soon. When it is issued, we'll see how much has already been paid by Merlyn and Frederica. Fingers crossed!

[END]