

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Michael J. Smith
Office of Appeals
Policy and Valuation Operations

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subject: Submission of Financial Information as a Condition to Granting a Face-to-face
Collection Due Process Conference

ISSUE

Whether the Office of Appeals (Appeals) may require a taxpayer to submit financial information as a condition to granting a request for a face-to-face Collection Due Process (CDP) conference.

CONCLUSION

The Service may require a taxpayer to submit financial information as a condition to granting a request for a face-to-face CDP conference if the sole purpose of the conference is to discuss a collection alternative, the evaluation of which requires financial information, unless Appeals determines that a face-to-face conference is necessary to explain the requirements for becoming eligible for a collection alternative.

LAW AND ANALYSIS

There is no requirement that a CDP hearing include a face-to-face conference; one or more written or oral communications are sufficient for a valid CDP hearing. Treas. Reg. § 301.6330-1(d)(2)Q&A-D6; see also Katz v. Comm'r, 115 T.C. 329, 337 (2000); Davis v. Comm'r, 115 T.C. 35, 41 (2000). However, Appeals will ordinarily grant a taxpayer's request for a face-to-face CDP conference if the taxpayer wishes to discuss any relevant, non-frivolous issue relating to the unpaid tax or proposed collection action, such as spousal defenses, challenges to the appropriateness of collection actions,

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offers of valid collection alternatives, and non-frivolous challenges to the existence or amount of underlying tax liability. I.R.C. §§ 6320(c); 6330(c)(2).

Appeals may condition the granting of a face-to-face CDP conference concerning a collection alternative on the taxpayer becoming eligible for the alternative. “A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or offer to compromise liability, will not be granted unless other taxpayers would be eligible for the alternative in similar circumstances.” Treas. Reg. § 301.6320-1(d)(2)Q&A-D8 and Treas. Reg. § 301.6330-1(d)(2)Q&A-D8. The term “eligible” means “to be qualified to participate or be chosen.” Merriam-Webster Online Dictionary, retrieved March 5, 2010, from <http://www.merriam-webster.com/dictionary/eligible>. In this context, eligibility requirements are those threshold conditions that must be met in order for the Service, including Appeals, to consider the taxpayer’s proposed alternative to collection. The regulations give as examples of eligibility requirements the filing of all requisite returns and making of certain required deposits of tax. See Treas. Reg. §§ 301.6320-1(d)(2)Q&A-D8; 301.6330-1(d)(2)Q&A-D8. These examples, however, are not intended to be exclusive.

An equally important eligibility requirement for some collection alternatives is the submission of relevant financial information. Service personnel may not consider a collection alternative for which financial information is required unless the taxpayer has provided the information. See Rev. Proc. 2003-71, sec. 4.03, 2003-2 C.B. 517, 518; IRM 5.8.3.5(4), (5) (Mar. 26, 2010) (offers in compromise), IRM 5.14.2.1.1(1), (5) (Sept. 26, 2008) (partial payment installment agreements), IRM 5.19.1.5.5(10) (Dec. 4, 2009) (nonstreamlined installment agreements) and IRM 5.14.7.3.1(5) (Oct. 31, 2008) (in-business trust fund installment agreements, except those meeting the “express” criteria).¹ For these particular installment agreements, financial information is essential for Service personnel to evaluate the taxpayer’s ability to pay the liability in a lump sum and, if not, whether the taxpayer has sufficient disposable income to make the proposed periodic payments. See IRM 5.14.1.4 (Sept. 26, 2008). For offers in compromise based on doubt as to collectibility, financial data is necessary to determine if the amount offered is equal to or greater than the taxpayer’s reasonable collection potential. See IRM 5.8.5 (Sept. 23, 2008).

The CDP regulations recognize the necessity of financial information for the consideration of these collection alternatives. Treas. Reg. §§ 301.6320-1(e)(1) and 301.6330-1(e)(1) provide that “[t]axpayers will be expected to provide all relevant information requested by Appeals, *including financial statements*, for its consideration of the facts and issues involved in the hearing.” (emphasis added). Courts also have recognized the importance of this financial information. For example, in Kindred v. Comm’r, the court held the failure to consider an offer in compromise was not an abuse of discretion when the taxpayer failed to provide any of the required financial information despite being given an opportunity to do so. See 454 F.3d 688, 697-98 (7th Cir.

¹ Submission of financial information is not required, however, for Service consideration of a guaranteed installment agreement, streamlined installment agreement, or an in-business trust fund installment agreement meeting “express” criteria. See generally, IRM 5.14.5. (Sept. 26, 2008).

2006)(citing Treas. Reg. § 301.6330-1(e)(1)). See also Olsen v. United States, 414 F.3d 144, 154 (1st Cir. 2005) (“Given [the taxpayer’s] failure to cooperate fully despite the appeals officer’s repeated attempts to obtain the information deemed necessary to evaluate the offer. . . we cannot say the appeals officer abused her discretion in determining the collection action to be ‘no more intrusive than necessary.’” (internal citation omitted)). Indeed, the Tax Court has repeatedly held that failure to provide complete financial information “alone is sufficient to sustain the determination by the Office of Appeals to proceed with a levy against [the taxpayer].” TGI Enterprises, Inc. v. Comm’r, T.C. Memo. 2009-123, 2009 WL 1530163, at *6 (June 1, 2009); see also Prater v. Comm’r, T.C. Memo. 2007-241, 2007 WL 2389549 (Aug. 22, 2007), Chandler v. Comm’r, T.C. Memo. 2005-99, 2005 WL 1077491 (May 9, 2005); and Roman v. Comm’r, T.C. Memo. 2004-20, 2004 WL 157817 (Jan. 28, 2004).

The purpose behind conditioning the grant of a face-to-face CDP conference on the satisfaction of eligibility requirements is to ensure the conference will be productive in assisting the settlement officer evaluate the collection alternative. See T.D. 9290, 2006-2 C.B. 879; T.D. 9291, 2006-2 C.B. 887 (“There will be instances. . . when a face-to-face conference is not practical. The final regulations identify typical situations in which a face-to-face conference will be neither necessary nor productive.”). Requiring a taxpayer to submit his or her financial information is a reasonable prerequisite for a face-to-face CDP conference if the collection alternative requested by the taxpayer requires the submission of financial information. Without a verifiable record of an alternative means or source for collection found within the taxpayer’s financial information, the settlement officer will be unable to productively discuss the taxpayer’s collection alternative with the taxpayer at the face-to-face conference. If a taxpayer submits no financial information, the officer will not be able to ask probative questions about the taxpayer’s assets, income and expenses or otherwise be able to gather information from the taxpayer necessary to determine the viability of the collection alternative.

There may be cases where a taxpayer submits some, but not all, of the requested financial information. In such a case, the information need only be complete enough to enable the settlement officer to practically discuss the viability of the proposed collection alternative with the taxpayer at the face-to-face CDP conference. Whether the submitted financial information is sufficient to permit a productive face-to-face CDP conference must be made on a case-by-case basis. For example, the failure to complete any of the Monthly Income/Expense Statement in Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, would prevent a productive discussion about the amount of monthly payments the taxpayer could make under an installment agreement or how much future income should be included in the taxpayer’s reasonable collection potential in evaluating an offer in compromise. By contrast, the taxpayer’s omissions of financial data considered de minimis by the settlement officer or the failure to include supporting documentation may not prevent a productive discussion. The settlement officer may be able to obtain the missing information or request the supporting documentation at the conference and still be able to engage in a productive discussion with the taxpayer.

It is important to note that conditioning the grant of a face-to-face CDP conference on the submission of financial information will not be reasonable in all cases in which the taxpayer seeks the consideration of a collection alternative. If a taxpayer wishes to discuss collection alternatives and one or more other relevant issues at the face-to-face CDP conference, the settlement officer cannot deny the request for such conference solely because the taxpayer fails to submit adequate financial information. Likewise, the settlement officer should not deny a taxpayer's request for a face-to-face CDP conference if Appeals determines that a face-to-face conference is necessary to explain the requirements for becoming eligible for a collection alternative. Treas. Reg. § 301.6320-1(d)(2)Q&A-D8 and Treas. Reg. § 301.6330-1(d)(2)Q&A-D8. Furthermore, Appeals may not deny a requested face-to-face CDP conference solely because the financial information indicates the taxpayer can pay the liabilities in full or will not be able to make payment pursuant to any collection alternative. Treas. Reg. § 301.6320-1(d)(2)Q&A-D8 and Treas. Reg. § 301.6330-1(d)(2)Q&A-D8 provide that "[f]or purposes of determining whether a face-to-face conference will be granted, the determination of a taxpayer's eligibility for a collection alternative is made without regard to the taxpayer's ability to pay the unpaid tax."

In all cases, the taxpayer must be given an opportunity to demonstrate eligibility and to become eligible for a collection alternative in order to obtain a face-to-face CDP conference. Treas. Reg. §§ 301.6320-1(d)(2)Q&A-D8,;301.6330-1(d)(2)Q&A-D8. A taxpayer requesting a face-to-face CDP conference to discuss a collection alternative must be given an opportunity to become eligible by submitting required financial information on Form 433-A, Form 433-B, Collection Information Statement for Businesses, or other form prescribed by the Service. Similarly, a taxpayer who, on or before requesting a face-to-face CDP conference, submits a financial statement missing information necessary for a productive meeting should be given a reasonable opportunity to supplement the financial statement. If a financial statement is submitted for the first time in response to the initial opportunity to become eligible and it is missing information necessary for a productive conference, the settlement officer must give the taxpayer a reasonable opportunity to supply the missing data before denying the face-to-face CDP conference request.

Based on the foregoing analysis, Appeals may require a taxpayer to submit complete financial information before granting a request for a face-to-face CDP conference, provided that the requested face-to-face CDP conference only concerns potential collection alternatives and the financial information is necessary for the settlement officer to consider the requested collection alternatives.

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