

ASTPS Appeals Masterclass

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The Purpose, Role & Mission of Appeals

The IRS Independent Office of Appeals

The Appeals Mission is to resolve tax controversies, without litigation, on a basis which:

- Is fair & impartial to both the Government & the Taxpayer
- Promotes a consistent application & interpretation of, and voluntary compliance with, the Federal tax laws, and;
- Enhances public confidence in the integrity & efficiency of the Internal Revenue Service.

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Overview of the Appeals Process

APPEALS FUNCTIONS

Proposed Regulation §601.106

- Is an independent function within the IRS
- Which is separate & distinct from compliance (Examination & Collection)
- Was established to provide an informal forum for taxpayers to present their tax matters when they disagree with an IRS determination
- Where Appeals' primary role is to resolve tax disputes without litigation, while considering each case in a fair and impartial manner
- And Appeals is also designed to improve overall public confidence in the integrity and efficiency of the IRS by issuing impartial decisions & determinations.

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Overview of the Appeals Process

The IRS Independent Office of Appeals Personnel

- **Appeals Officer:**
 - Considers matters involving audits/examinations, complex tax matters, etc.
 - Penalty Assessments
 - TFRP Assessments
 - Employee Worker Classifications
 - And any other addition to tax matter
- **Settlement Officer:**
 - Typically considers matters involving collection related issues
 - Levy & Lien Collection Matters
 - And other additions to tax
- **Appeals Team Manager (ATM):**
 - Oversees legal & procedural decisions & determination of Appeals Personnel
 - Settles disputes between Taxpayers & Appeal and Settlement Officers

Polling Question

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The Mission of IRS Appeals

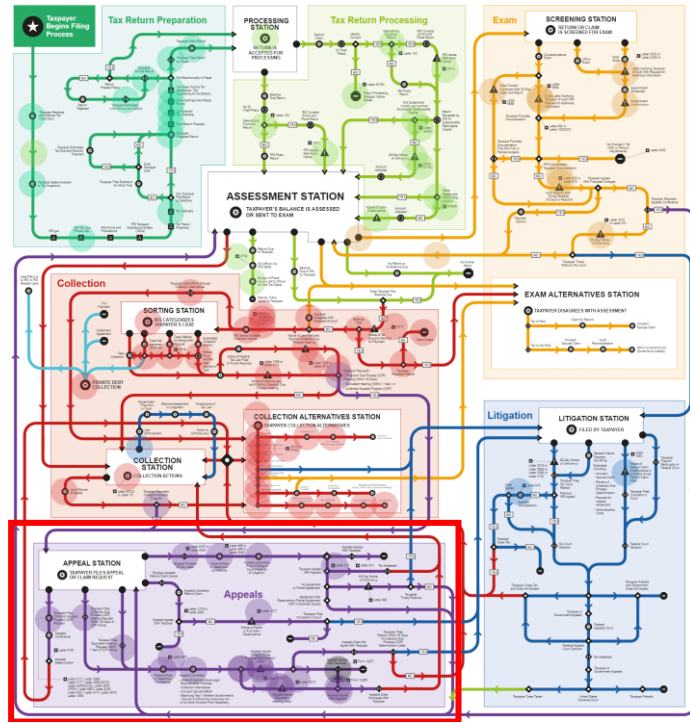
IRS Independent Office of Appeals Policies

Key “EXAMINATION” Policy Clarifications:

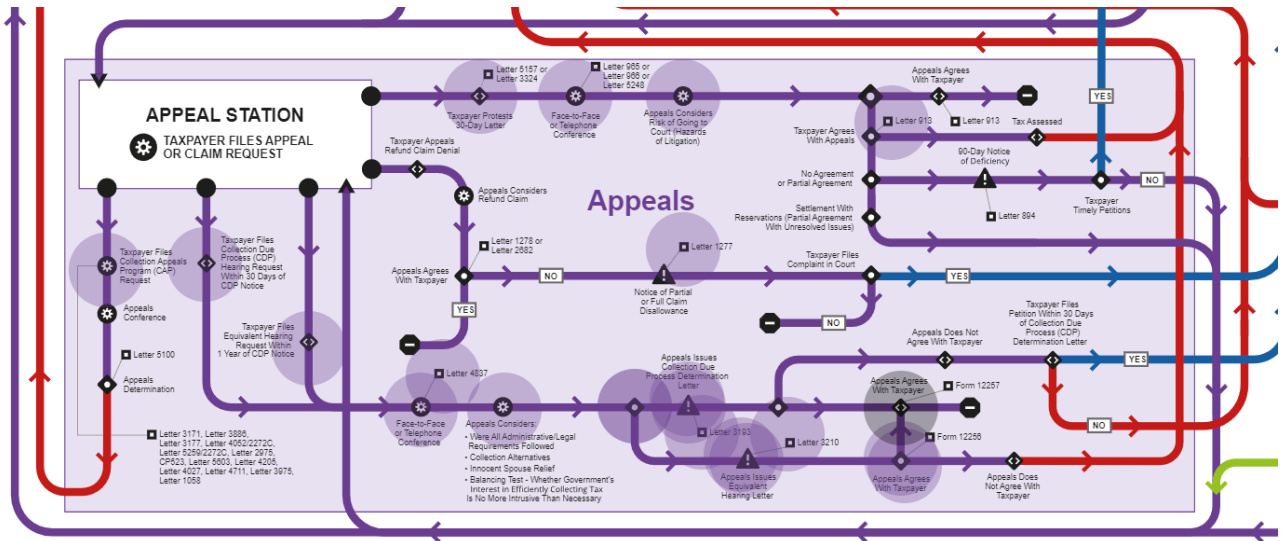
- Appeals will attempt to settle a case based on **factual hazards** (hazards of litigation) when not fully developed by Examination.....*IRM 4.23.22.10.3*
 - (i.e. - Cases *will not be returned* to Examination for further development).
- Appeals will **not raise new issues or reopen issues** on which the taxpayer and Examination have reached an agreement, with limited exceptions.
- Most new **non-docketed case receipts** in Appeals *must have at least “one year remaining on the statute of limitations* (SOL). Cases received in Appeals where a petition has been filed with the United States Tax Court (docketed cases) do not have similar SOL concerns.

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IRS Roadmap



Appeals Roadmap



The Mission of IRS Appeals

Independent Office of Appeals Policies

Key “EXAMINATION” Policy Clarifications-Continued:

- Appeals **will return** non-docketed cases to Examination when a taxpayer submits new information or evidence or raises a new issue that, in the judgment of the Appeals Officer, merits investigation or additional analysis.
- Appeals will **retain jurisdiction of docketed cases** when a taxpayer submits new information or evidence or raises a new issue that merits investigation or additional analysis. However, Appeals will request assistance from Examination in performing those functions. If Examination does not provide assistance, Appeals will attempt to settle the case based upon the “hazards of litigation” associated with the new information & the other information in the case file.
- For **most** work streams, Appeals will engage Examination for review and comment when a taxpayer raises a relevant new theory or alternative legal argument.

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The Mission of IRS Appeals

Independent Office of Appeals Policies

Key “COLLECTION” Policy Clarifications:

- Appeals will **not take investigative actions** with respect to financial information provided by taxpayers. Case will be remanded.
- Appeals will **only consider assets** that were documented by Collection or introduced by the taxpayer.
- Appeals will **accept as “verified”** those financial statements reviewed by Collection within the previous 12 months.

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Reasons for Appealing

Audits & Examinations

Audit/Examination Appeal Reasons: IRC §7602

- The taxpayer disagrees with the IRS Agent's decision or determination
- The IRS made an incorrect decision based on a misinterpretation or misapplication of the law
- The IRS disregarded and/or misapplied the facts of the case
- The IRS miscalculated a tax or penalty
- The IRS improperly disallowed legal & proper tax deductions or adjustments
- The IRS improperly inflated the taxpayer's income or misidentified sources of income
- The IRS disregarded proper administrative and/or legal procedures during conduct of the case
- Form 12203, "Request for Appeals Review" may be used for audit proposed adjustments of <\$25K

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Reasons for Appealing

Exam-Proposed Deficiency

Statutory Notice of Deficiency: IRC §6212

- Taxpayer is allowed 30 days from the date of the Exam proposed determination to file a formal appeal
- However, if the taxpayer does not file a timely appeal, the IRS will issue a "Statutory Notice of Deficiency" (SNOD) which allows the taxpayer to file a Tax Court Petition within 90 days from the date proposed deficiency was issued/mailed (or 150 days if the taxpayer is outside of the United States)
- The IRS is prohibited from assessing the proposed amount of the deficiency during the 90-day (or 150-day) period, in addition to the time a petition is pending, plus an additional 60 days post petition
- A formal appeal based upon Publication 5 guidelines apply

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Reasons for Appealing

Collections

Collection Appeal Reasons:

- The taxpayer desires to appeal a proposed levy action (CAP Appeal Matter)
- The taxpayer desires to appeal an actual levy action – IRC §6330, “Notice & Opportunity of Hearing Before Levy”
- The taxpayer desires to appeal a proposed lien action (Cap Appeal Matter)
- The taxpayer desires to appeal a NFTL filing - IRC §6320, “Notice & Opportunity of Hearing Upon Filing of Lien”
- The taxpayer wants to appeal the denial or termination of an Installment Agreement – Treas. Reg. §301.6159-1(c)(5)
- The taxpayer wants to appeal the proposed assessment of the Trust Fund Recovery Penalty (TFRP)
- The IRS is misapplying IRS National and/or Local Standards
- The IRS is improperly disallowing Allowable Expenses via a CIS
- The IRS miscalculated Gross Income with respect to presentation of a CIS
- Other non-common collection actions are appealable
- Form 12153, “Request for a Collection CDP or EH Request” may be used or if appropriate,
- Form 9423, “Collection Appeal Request” (both Forms are discussed later in the text)

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Reasons for Appealing

Penalty Matters

Appeal of an Assessed Penalty: *IRM Chapter 20*

- Taxpayer is generally allowed 30 days (from the date of the rejection letter) to file an appeal
- *A taxpayer is allowed to appeal an individual or business penalty pertaining to:*
 - Failure to File (FTF)
 - Failure to Pay (FTP)
- *The taxpayer may qualify to file a formal appeal if:*
 - The Taxpayer received a letter that the IRS assessed a failure to file and/or failure to pay penalty to your individual or business tax account
 - The taxpayer filed a written request with the IRS requesting abatement or removal of the penalty
 - The IRS denied the taxpayer’s request to abate or remove the penalty
 - The taxpayer also received correspondence from the IRS denying their request for abatement, which also conveys their appeal rights
 - Follow Publication 5, “Your Appeal Rights & How to Prepare a Protest If You Disagree”

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Reasons for Appealing

Determination

Rejection of an Innocent Spouse Relief Request: IRC §6015 & IRM 25.15.6.10.3

- Taxpayer is allowed 30 days (from the date of the rejection letter) to file an appeal to the denial of an Innocent Spouse Request
- If Compliance makes a preliminary determination to fully or partially deny relief, the “Requesting Spouse” (RS) may appeal this determination to deny relief
- Also, the “Non-Requesting Spouse” (NRS) may appeal the preliminary determination to the extent relief is granted
- Based upon the preceding, Compliance’s preliminary determination to partially deny relief could possibly result in both spouses filing a formal appeal to the determination
- However, the NRS can not appeal a decision to deny relief to the RS.
- A formal appeal based upon Publication 5 guidelines apply

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Reasons for Appealing

Exam-Proposed Determination

Worker Classification Determination: IRC §7436

- Taxpayer is allowed 30 days from the date of the Exam proposed determination to file a formal appeal
- However, if the taxpayer does not file a timely appeal, the IRS will issue a “Notice of Employment Tax Determination” (NETD) letter which allows the taxpayer to file a Tax Court Petition prior to the 91st day from the date of the proposed determination
- The IRS is prohibited from assessing the proposed amount of the determination during the 90-day appeal period, in addition to the time a petition is pending, plus an additional 30 days post petition
- A formal appeal based upon Publication 5 guidelines apply

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Reasons for Appealing

Collections

Rejection of an Offer-in Compromise (Offer): IRC §7122(e)

- Taxpayer is allowed 30 days (from the date of the rejection letter) to file an appeal to the rejection of an Offer
- The appeal is required to be submitted to the IRS Office that issued the rejection
- Reason may be the miscalculation of the Asset/Equity Table (AET)
- Reason may be the miscalculation of the Income/Expense Table (AET)
- Include a copy of the rejection letter with your appeal
- Form 13711, “Request for Appeal of Offer-in-Compromise” may be used or
- A formal appeal (w/o the Form 13711) based upon the guidelines & requirements of Publication 5

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Reasons for Appealing

Collections

Rejection of an Installment Agreement Request: IRC §7122(e)

- Taxpayer is allowed 30 days (from the date of the rejection letter) to file an appeal to the rejection of an Installment Agreement
- Although **IRC §7122(e)** only addresses the right to appeal the “rejection of an installment agreement” request, however **Treas. Reg. §301.6159-1(e)(5)** allows the taxpayer to also “statutorily” appeal the “termination, proposed termination, modification or proposed modification of an installment agreement” Also see **IRM 5.19.8.2.1-3**
- Again, include a copy of the rejection letter with your appeal (for formality)
- **Form 9423**, “Collection Appeal Request” should be used
- A formal appeal (w/o the Form 9423) based upon the guidelines & requirements of Publication 5

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Reasons for Appealing

Collections

Proposed Assessment of the Trust Fund Recovery Penalty (TFRP): IRC §6672

- Taxpayer is allowed 60 days (from the date of the proposed assessment) to file a formal appeal
- The IRS is prohibited from assessing the proposed penalty during the 60-day appeal period, plus an additional 30 days
- TFRP Appeals are usually heard by Appeals Officers (pre-collection action)
- A formal appeal based upon Publication 5 guidelines apply

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The Taxpayer's Right to Appeal

Taxpayer First Act (TFA)-Public Law 116-25 (P. L. 116-25)

The “taxpayer’s right to appeal” has recently been exemplified via the TFA which amended IRC §7803 to establish an IRS “*Independent Office of Appeals*”. This office is expected to be headed by the “Chief of Appeals”. The Chief of Appeals is directed to be appointed by and report directly to the Commissioner of the IRS. The “tasks” of this office are outlined via the “IRS Mission” statements referenced above. The intent of the Independent Office of Appeals is to ensure that all taxpayers are able to:

- Access the “*administrative review process*”
- Have their cases heard by an “*independent*” decision maker
- Provide for “*notice & protest*” procedures, as well as
- Congressional oversight for taxpayers precluded from using the administrative review process.

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The Taxpayer First Act (TFA)

IRC §7803 (e) - “Independent Office of Appeals”

As stated above, the TFA amended IRC §7803 to incorporate the provisions & guidelines stipulated via P. L. 116.25. These provisions are more specifically defined via IRC §7803(e) as follows:

- 1) Establishment (of Independent Office of Appeals)
- 2) Chief of Appeals
- 3) Purpose & Duties of Office
- 4) **Right of Appeal** (Although now “statutory”, this “right” can be disallowed)
- 5) Limitation on Designation of Cases as Not Eligible for Referral to the Independent Office of Appeals
- 6) Staff
- 7) Access to Case Files

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The Taxpayer First Act (TFA)

IRC §7803(3) - “Execution of Duties in Accordance with Taxpayer’s Rights”

“Taxpayer Rights” were statutorily employed via IRC §7803 as follows:

- (A) the right to be informed,
- (B) the right to quality service,
- (C) the right to pay no more than the correct amount of tax,
- (D) the right to challenge the position of the Internal Revenue Service and be heard,
- (E) the right to appeal a decision of the Internal Revenue Service in an independent forum,
- (F) the right to finality,
- (G) the right to privacy,
- (H) the right to confidentiality,
- (I) the right to retain representation, and
- (J) the right to a fair and just tax system.

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The Taxpayer First Act (TFA)

IRC §7803 (e) - “Independent Office of Appeals”-Continued

Right of Appeal - IRC §7803(e)(4):

Although the TFA appears on the surface to be somewhat of a perceived “improvement” regarding taxpayer’s overall access to and experience with the new “Independent Office of Appeals”, the “Right of Appeal” although now statutory *may be denied* to “certain” taxpayers pursuant to **IRC §7803(e)(5)**.

Does TBOR Create a “Legal Right” to an IRS Appeal:

A court of competent jurisdiction addressed this question in **Facebook, Inc. v. Internal Revenue Service, No. 17-cv-06490-LB (N. D. Calif. 2018)** and **concluded that there is no legal right to have an administrative appeal for a tax dispute.**

- **NOTE:** Most “Collection Action Appeal Rights” *are statutory*; however, Examination or Audit Appeal rights, are administrative in nature and although normally or usually granted, are subject to discretion & scrutiny as discussed later.

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The Taxpayer First Act (TFA)

P. L. 116-25 & IRC §7803 (e) (4)- “Right of Appeal”

Right of Appeal – Actual Reading:

“The resolution of process described in paragraph (3) shall be **generally** available to all taxpayers”.

Commentary

Typically, the word “*generally*” indicates that there is *no* “*absolute right*” (per se) to an Appeal.

Additionally, the TFA did not mandate a change or “modification” of **IRM 1.2.1.9.4 Policy Statement 8-24** (discussed below) which **continues to be relative & applicable** with respect to the authority of Appeals.

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POLICY STATEMENT 8-24

“Conferences Not Granted in 90-Day Cases in Absence of Unusual Circumstances”

If a taxpayer had an Appeals conference in the pre-statutory notice status, **or** the *opportunity for such conference was accorded but not availed of*, there will be **no Appeals conference granted** in the 90-Day status after the mailing of the Statutory Notice of Deficiency (SNOD) in the absence of unusual circumstances.

- **IRM 1.2.1.9.4 (12-31-60)**

Observation:

This issue may become to be quite “debatable” among colleagues, associates & various practitioners as to whether an actual “right” to an Appeal exists or not; however, the TFA & the Independent Office of Appeals appear to stipulate that

- *“In general, all Taxpayers have a right to **request administrative review** of an issue or matter before the Independent Office of Appeals”.*

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The Taxpayer First Act (TFA)

IRC §7803 (e) - “Independent Office of Appeals”-Continued

Limitation on Designation of Cases Not Eligible for Referral to Independent Office of Appeals - **IRC §7803(e)(5):**

In General –If any taxpayer which is in receipt of a Notice of Deficiency authorized under **IRC §6212** requests referral to the IRS Independent Office of Appeals and ***such request is denied***, the Commissioner of the IRS shall provide such taxpayer *a written notice which*

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The Taxpayer First Act (TFA)

IRC §7803 (e)(7) - “Access to Case Files”

Although there appear to be “issues” with the exact intent of the TFA, there are some inherent benefits such as the change to “Access to Case Files” afforded via the TFA & IRC §7803(e)(7) as follows

- In General – In any case in which a conference with the Internal Revenue Service “Independent Office of Appeals” has been scheduled upon request of a specified taxpayer (explained below) the Chief of Appeals shall ensure that **such taxpayer is provided access to the nonprivileged portions of the case file** on record regarding the disputed issues (other than documents provided by the taxpayer to the IRS) not later than 10 days before the date of such conference.

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The Taxpayer First Act (TFA)

IRC §7803 (e)(7): Access to Case Files” – Continued

- In General, the term specified taxpayer means
- In the case of any taxpayer who is a **natural person**, a taxpayer whose adjusted gross income does not exceed \$400,000 for the taxable year to which the dispute relates, and H. R. 3151-5,
- In the case of **any other taxpayer** whose gross receipts do not exceed \$5 million for the taxable year to which the dispute relates.

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Starting the Appeals Process

Examinations/Audits

When & How to Request an Appeal – “30-Day Letter Issued”

- An audit report is issued & the taxpayer disagrees with the proposed changes– Treas. Reg. §601.105(c)
- An appeal must be filed within 30 days from the date of the “30-days” letter – Treas. Reg. §601.105(d)
- However, the “30-day” period is “not statutory” and is allowed to be extended by the Examiner
- There must be at least “240 days” remaining on the ASED when the 30-day letter is issued
- If an Appeal is filed, the **statute of limitations** on any case sent to Appeals should have **no less than 395 days remaining on the statute** when the case is forwarded from the exam group to Technical Services for transfer to Appeals. The case must have **365 days on the statute when received by Appeals**, with an extra 30-day allowance for Technical Services to review and transfer the case. *IRM 4.23.14.4*
- The ASED is **NOT tolled** if and when a formal appeal is filed
- If no appeal is filed a “*Statutory Notice of Deficiency*” (90-day Letter) will be issued
- Form 12203 is allowed to be utilized for “Small Case Appeal” procedures (<\$25K)
- Publication 5 guidelines are required for “Large Case Appeals” (>\$25K)

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Starting the Appeals Process

Collection Matters

IRC §6330 & Treas. Reg §301.6330-1

When & How to Request an Appeal– “Final Notice of Intent to Levy” (Timely) ... IRC §6330

- The taxpayer may request a “Collection Due Process (CDP) Hearing” via IRS Form 12153
- A CDP appeal must be filed within 30 days from the date of the Letter 1058, LT-11 or other final notice
- A timely CDP Appeal affords the taxpayer additional judicial rights outside of an IRS Appeals determination
- Enforced collection actions are **statutorily prohibited** during the pendency of a CDP
- Form 12153, “Request for a Collection Due Process or Equivalent Hearing” should be utilized

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Starting the Appeals Process

Collection Matters

IRM 8.24.1.2, IRM 5.1.9.4.2 & IRM 5.19.8.4.16.4

When & How to Request an Appeal – “Collection Appeal Program (CAP) Appeal”

- A taxpayer may request an “CAP Appeal” (CAP) prior to or subsequent to the proceedings of a CDP, EH or Retained Jurisdiction (RJ) hearing (discussed later)
- However, if an issue is raised & decided in a CAP Appeal that concluded before the taxpayer has requested a CDP hearing (or EH), the issue may not be raised in a subsequent CDP or EH hearing unless new information is presented
- The CAP Appeal request must be submitted to either the RO or the Group Manager, however a “**managerial conference**” is required to take place prior to any consideration by Appeals
- Generally, *enforced collection actions are suspended* during the CAP Appeals process
- **Form 9423**, “*Collection Appeal Request*” must be received by the IRS or postmarked within four (4) business days of the taxpayer’s request for a conference *or collection action may resume*
- The IRS manager is generally instructed to respond to the taxpayer within two (2) business days of making the CAP request

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Starting the Appeals Process

Collection Matters

IRM 8.24.1.2, IRM 5.1.9.4.2 & IRM 5.19.8.4.16.4

“Collection Appeal Program (CAP) Appeal” – **Appealable Actions Under CAP:**

- A levy or seizure action that has been or is scheduled to take place
- A NFTL that will be or has been filed
- A special condition NFTL pertaining to a nominee, alter ego or transferee matter
- Denial of release of lien, certificates of subordination, certificates of discharge, etc.
- Disallowance of request for levied property or third-party wrongful levy matter

“Collection Appeal Program (CAP) Appeal” – **Appeal Actions Excluded Under CAP:**

- TFRP issues-pre or post assessment or Rejection of an Offer-in-Compromise
- Claim for Refund or Abatement or Audit Reconsideration issue
- Original requests for return of levied property or
- Actions under the control of a court of competent jurisdiction or IRS Criminal Investigation

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Preparation for the Appeal

Appeal Prep Procedures

1. Gather, group & organize all relevant tax records & documents for presentation to Appeals. An organized approach may provide clarity to your substantiation & arguments, and possibly create a more negotiable atmosphere for conduct of the Appeals conference.
2. Conduct relevant tax case research (case law, statutory & administrative).
3. Present the results of your research via the citing of IRC sections, Revenue Rulings, IRM provisions to bolster the technical provisions of your case.
4. Restate the appropriate “facts & circumstances” relative to the issues of the Appeal fully explain the taxpayer’s position.
5. Request access to the taxpayer’s “Administrative File” via IRC §7803(e) as referenced above, prior to finalizing your formal protest.
6. Subsequent to receipt, review & analysis of the “Administrative File” and careful review the Audit/Examination report, take note of any adverse, contrary or inaccurate comments listed by the Examining Agent and develop effective “counter arguments” to provide a different perspective to the case matters and points of law raised by the Examining Agent; and they should be drafted in a manner to professionally “challenge or erode” the veracity of the Examining Agents’ positions & comments.

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Preparation for the Appeal

Appeal Prep Procedures-Continued

7. Consider the preparation & submission of a FOIA subsequent to review of the “Administrative File” to obtain additional relevant documents and information that may have been provided by the taxpayer during the initial examination (the Administrative File only provides internal IRS files & records).
8. Now, you should prepare a persuasive formal protest based upon provisions of your case research and based upon the facts & circumstances of the taxpayers’ case. The formal appeal should also be prepared in a manner to conform to the guidelines & provisions as required via “Publication 5” to be deemed an acceptable & legally prepared protest. Attempt to maximize the points of law & factual issues that are more colorable to the taxpayer’s case, while also minimizing any issues and points of law that are unfavorable to the taxpayer and or the case. Ensure to address each & every element of a proper appeal as noted via the Pub.
9. The formal appeal should also be prepared in a manner to conform to the guidelines & provisions as required via “Publication 5” to be deemed an acceptable & legally prepared protest.
10. File your protest in a timely manner, which also increases your credibility within the Appeals process & arena.

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Preparation for the Appeal

Recommended Research Tools

1. The Internal Revenue Code (IRC) – Specific to or relevant to the IRC cites raised by the Examining Agent.
2. Relevant Treasury Regulations (Treas. Regs.)
3. Review of relevant Court Cases (recent & non-recent) first pertaining to the taxpayers relevant Circuit.
4. Tax Research Programs/Software such as:
 - Thompson Reuters-Checkpoint
 - Parker Tax Service
 - Bloomberg Law - Tax Practice Center
 - Wolters Kluwer-Cheetah
 - Lexis Advance Tax
 - Westlaw – Tax Practice Area
 - CCH AnswerConnect

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Preparation for the Appeal

Preparation of a Formal Protest/Appeal

“Publication 5” - Requirements of a Formal Protest:

If a **formal protest** is required, it should be filed in a timely manner & include the following:

- Taxpayer’s name and address, and a daytime telephone number (preferably the rep’s).
- A statement that taxpayer wants to appeal the IRS findings to the Appeals Office.
- A copy of the Examining Agent’s final audit report or letter of proposed tax adjustment.
- A detailed list of the tax periods or years involved.
- A list of the issues that the taxpayer does not agree with, and the reasons for disagreement.
- The facts & circumstances supporting the taxpayer’s position on any issue of disagreement.
- All points of law and/or authority, on which the taxpayer is relying, and;
- The taxpayer should sign the written protest, stating that it is true, under the penalties of perjury as follows: **“Under the penalties of perjury, I declare that I examined the facts stated in this protest, including any accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete.”**
- If the taxpayer’s representative (YOU) prepares and signs the protest for the taxpayer, he or she must use the applicable penalties of perjury statement, based upon whether they have personal knowledge regarding the information stated in the protest and accompanying documents or not.
 - See Appendix for Formal Protest Examples

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The Appeals Conference

What to Expect During the Conference

1. The Appeals conference may be conducted in a rather informal manner, however the taxpayer's representation **must provide a valid Form 2848 (POA)**
2. Testimony provided during the Appeals conference is not provided "under oath".
3. Appeals **will not return cases to Examination** when the case is *not fully developed*, and the taxpayer has not presented new information or evidence. Appeals will instead attempt to settle the case on "factual hazards" discussed earlier. *See IRM 4.23.22.10.3 & IRM 4.2.1.8.1*
4. In general, you may be represented by an:
 - Attorney (Atty)
 - Certified Public Accountant (CPA)
 - Enrolled Agent (EA)
5. Appeal Conferences May be Conducted by: *See IRM 8.6.1.5.1*
 - Video Conferencing
 - Telephonic Conference, or
 - An in-person (face-to-face) conference
6. Generally, the choice of conference venue is decided by either the taxpayer or the taxpayer's representative. The type conference venue chosen should have no impact upon the decision or determination of Appeals.

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Face-to-Face Appeals Conference

IRM 8.6.1.5.1

- However, in determining if a "face-to-face" conference is actually warranted, an Appeals Officer's ATM may consider certain facts & elements of the case in making a decision such as:
 1. Whether there are **substantial books and records** to review that cannot be easily referenced with page numbers or indexes;
 2. Whether an in-person conference is necessary to judge the *credibility of the taxpayer's oral testimony*;
 3. Whether **the taxpayer has special needs** that can only be accommodated with an in-person conference;
 4. Whether there is a *risk of an unauthorized disclosure or breach of confidentiality* due to numerous conference participants;
 5. Whether an **alternative conference procedure** (e.g., Post Appeals Mediation or Rapid Appeals Process) involving separate caucuses will be used; and
 6. Whether **another IRM section calls** for an in-person conference.

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Possible Outcomes of the Appeals Process

Potential Appeal Conference Dispositions

1. When an agreement is reached, the Appeals Officer will provide the taxpayer an agreement letter, i.e., “Letter 969”, Agreement Form Transmittal - Non-Docketed Case, and enclose an agreement form and in most instances, the settlement computation. The Appeals Officer **must** enclose a detailed interest computation when the agreement letter contains a stated interest amount.
2. The taxpayer or the taxpayer’s representative may be asked to execute a “closing agreement”. A closing agreement is an agreement authorized under IRC §7121. A closing agreement contains some of the attributes of a contract, but it is not strictly subject to the law of contracts. For example, legal consideration is not required, and court decisions have held that closing agreements are interpreted using ordinary contract law principles. The greatest disparity between the ordinary contract and a closing agreement is the finality given to a closing agreement by the terms of the statute.
3. If agreement is not reached, Appeals is authorized to issue a:
 - Statutory Notice of Deficiency (SNOD) Audit/Exams
 - Notice of Determination (NODT) CDP Collection Matter
 - Notice of Decision (NODC) EH Collection Matter (Non-Judicial)
 - Notice of Employment Tax Determination (NETD) .. Worker Classification

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If You Disagree with Appeals

Disagreement Options

Based upon the nature or source of the proposed tax liability or tax determination, the taxpayer may qualify to:

1. Request a Managerial Conference with the ATM or TM
2. File a Tax Court Petition
3. File Suit in District Court
4. File Suit in the Federal Court of Claims
5. Pay the tax & file a Claim for Refund
6. File an Offer-in-Compromise (DATL, DATC, DATCSC or ETA)
7. Request an Installment Agreement (PPIA, Streamlined, Statutory, etc.)

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Appeals Judicial Approach & Culture (AJAC) Project

Internal Guidance Memorandums (IGMs)

- IGM **AP-08-0713-03** (approximately 30 pages) provided guidance with respect to “IRS Collection Division” tax case matters, and;
- IGM **AP-08-0714-04** (approximately 62 pages) provided guidance with respect to “IRS Examination Division” tax case matters
 - The stated goal of the AJAC Project was to promote a “**quasi-judicial**” approach with respect to the manner in which, the Appeals office executes & decides their cases.

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Appeals Judicial Approach & Culture (AJAC) Project

IGMs Continued

- Significant IRM Areas/Provisions Affected by AJAC
 - Examination/Audit Division (Exam)
 - Collection Due Process (CDP)
 - Offer-in-Compromise (OIC)
 - Collection Appeal Program (CAP)

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Ex-Parte Communications & AJAC

IRM 8.1.10 & Revenue Procedure 2012-18

Ex-Parte Communications:

- “Communications that take place between any Appeals employee & employees of the other IRS functions, *without the taxpayer or taxpayer’s representative being given an opportunity to participate in the communication.* The term includes all forms of communications, oral or written. Written communications include those that are manually or electronically generated.”

AP-08-0714-0004:

- Although the FTA did not specifically mention, address and/or modify provisions of the “*Ex-Parte Communications*” guidelines & procedures, IGM “AP-08-0714-0004” was implemented via AJAC and has been incorporated into and, also modified various provisions of the Internal Revenue Manual (IRM) as follows:

Polling Question

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Ex-Parte Communications & AJAC

AJAC Modifications/Updates to the IRM

AP-08-0714-0004:

- Implementation of the AJAC Project Examinations & General Matter (Phase 2) “*Permissible Communications*” **IRM 8.1.10.3.1**
- Implementation of the AJAC Project Examinations & General Matter (Phase 2) “*Premature Referrals*” **IRM 8.1.10.3.1.2**
- Implementation of the AJAC Project Examinations & General Matter (Phase 2) “*New Information Received or New Issues Raised*” **IRM 8.1.10.3.1.3**

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Appeals & Retained Jurisdiction

Treas. Regs. §301.6320 & §301.6330

Retained Jurisdiction of Appeals – IRC §6320 Matters

- (1) In general. The Appeals office that makes a determination under **IRC §6320** retains jurisdiction over that determination, including any subsequent administrative hearings that may be requested by the taxpayer regarding the NFTL and any collection actions taken or proposed with respect to Appeals' determination. Once a taxpayer has exhausted his other remedies, Appeals' retained jurisdiction permits it to consider whether a change in the taxpayer's circumstances affects its original determination. Where a taxpayer alleges a change in circumstances that affects Appeals' original determination, Appeals may consider whether changed circumstances warrant a change in its earlier determination.

Retained Jurisdiction of Appeals – IRC §6330 Matters

- (2) In general. The Appeals office that makes a determination under **IRC §6330** retains jurisdiction over that determination, including any subsequent administrative hearings that may be requested by the taxpayer regarding levies and any collection actions taken or proposed with respect to Appeals' determination. Once a taxpayer has exhausted his other remedies, Appeals' retained jurisdiction permits it to consider whether a change in the taxpayer's circumstances affects its original determination. Where a taxpayer alleges a change in circumstances that affects Appeals' original determination, Appeals may consider whether changed circumstances warrant a change in its earlier determination.

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Disputes Appeals Will Not Consider

Prop. Reg. Sec. §301.7803-2(c)

In brief, the above proposed regulation provides a list of 24 exceptions to the types of cases that IRS Appeals **WILL NOT** consider as follows:

- Frivolous Positions
- Penalties Related to Frivolous Positions & False Information (Fake News)
- Whistleblower Awards
- Administrative Determinations Made by Other Agencies
- Taxpayer Assistance Order (Taxpayer Advocate Service)
- Material To be Deleted From a Written Determination
- Denials of Access Under the Privacy Act
- Issues Settled by a Closing Agreement
- The IRS Erroneously Returns or Rejects an OIC
- Criminal Prosecution is Pending Against a Taxpayer
- Branded Prescription Drug Fee & Health Insurance Providers Fee
- Seriously Delinquent Tax Debts (Denial of Passport Issues)
- Issues Barred from Consideration in CDP Cases
- Authority Over the Matter Rests With Another Office

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Disputes Appeals Will Not Consider

Prop. Reg. Sec. §301.7803-2(c) Continued:

- Certain Technical Advice Memorandum
- Technical Advice From an Associate Office in a Docketed Case
- Letter Rulings Issued by an Associate Office
- Challenges Alleging that a Statute is Unconstitutional
- Challenges Alleging that a Treasury Regulation is Unconstitutional
- Challenges Alleging that a Notice or Revenue Procedure is Invalid
- Case/Issue Designated for Litigation or Withheld from Appeals ** (See Appeal Rights)
- Appeals Issued the Determination that is the Basis of the Tax Court's Jurisdiction
- Appeals Consideration is a Prerequisite to the Jurisdiction of Tax Court
- An Administrative Determination to Deny or Revoke a CPEO Certification

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Other IRS Appeal Venues

Fast Track Mediation

- The IRS offers fast track mediation (FTM) services to help taxpayers resolve many disputes resulting from examinations, offers in compromise, trust fund recovery penalties, and other collection actions. The IRS has a fast track mediation program called SB/SE Fast Track Mediation-Collection (FTMC), specifically directed at resolving certain collection cases and issues. FTMC allows taxpayers an opportunity to resolve certain offer-in-compromise (OIC) and trust fund recovery penalty (TFRP) disputes on an expedited basis with an Office of Appeals mediator serving as a neutral party.

Fast Track Settlement

- Fast Track Settlement (FTS) provides an opportunity for small business/self employed taxpayers to use FTS to expedite case resolution at the earliest opportunity within the IRS's "Small Business/Self Employed" (SB/SE) as well as the Large & Midsized Business (LMSB) divisions of the IRS. The purpose of SB/SE FTS is to enable SB/SE taxpayers that currently have unagreed issues in **at least one open year under examination** to work together with SB/SE and the Office of Appeals (Appeals) to resolve outstanding disputed issues **while the case is still in SB/SE jurisdiction**. SB/SE and Appeals will jointly administer the SB/SE FTS process. SB/SE FTS will be used to resolve factual and legal issues and may be initiated at any time after an issue has been fully developed, *preferably before the issuance of a 30-day letter* or equivalent notice.

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Other IRS Appeal Venues

Post-Appeals Mediation (Collection Cases) IRM 8.26.9.2

1. Post Appeals Mediation (PAM) is a part of the Appeals process and enhances voluntary compliance. Mediation is appropriate only after:
 - Appeals settlement *negotiations are unsuccessful*.
 - All issues are resolved but for the issue(s) for which mediation is requested, and
 - The issue(s) for which mediation is requested is/are *fully developed*.
2. Appeals may mediate only those cases under its active consideration or jurisdiction, so the taxpayer's written mediation request must be submitted while the case is under consideration by Appeals.

Post-Appeals Mediation (Non-Collection Cases) IRM 8.26.5

1. PAM for Non-Collection Cases is an extension of the Appeals process and will enhance voluntary compliance.
2. PAM is a non-binding process that uses the services of a mediator or mediators, as neutral third parties, to help Appeals and the taxpayer reach their own negotiated settlement. PAM is optional for both the taxpayer & Appeals personnel. To accomplish this goal, the mediator will act as a facilitator; assist in defining the issues; and promote settlement negotiations between Appeals and the taxpayer. The mediator will not have settlement authority in the mediation process and will not render a decision regarding any issue in dispute.
3. PAM (Non-Collection) is initiated while the case remains under Appeals jurisdiction only.

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IRS Appeals - Formal Appeal Engagement

CDP-Notice of Determination (Collection Case Issue)

A taxpayer filed a request for a CDP hearing in which they filed and requested an Offer-in-Compromise” (Offer) as an alternative resolution to collection. The taxpayer’s Offer was eventually “rejected” by the IRS Offer-in-Compromise Division. Since the Offer was submitted pursuant the filing of a CDP request, the IRS Offer Division systematically forwarded the case to IRS Appeals for review & consideration as required by their internal procedures. The case was reviewed by IRS Appeals, who ultimately sustained the Offer Division’s position and subsequently issued a “Notice of Determination” which afforded the taxpayer “30-days” to file a Tax Court Petition for which the taxpayer’s did pursue.

Conclusion:

- IRS Chief Counsel initiated jurisdiction over the case matter
- IRS Chief Counsel sustained Appeals denial of the Offer
- The residing representatives (both EAs) spoke on behalf of the taxpayer during the U. S. Tax Court Pre-Trial Conference (of course with the Judge’s request & permission)
- IRS Chief Counsel issued a compromised settlement to classify the taxpayer’s case as “Currently-Not-Collectible” (CNC) – Keep in mind that the IRS was initially demanding full payment of the tax liability via seizure of the taxpayer’s assets.

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IRS Appeals - Formal Appeal Engagement

Exam “30-day” Notice Matter (Audit Case Issue)

A tax-exempt entity was audited for the 2018 tax year. The officers & directors, as part of the tax-exempt audit procedures, were subjected to individual tax audits pertaining to proposed assessments of “Excess Benefit Transactions” (EBT) related to the alleged misuse of the tax-exempt entity’s funds and each of the taxpayers were issued “30-day” *letters and informed of their appeal rights*. Focusing on only one of the taxpayers, a formal appeal was filed on his behalf to challenge the proposed EBT in the amount of **\$810,721** (which included a 200% ETB penalty in addition an IRC §6651 penalty assessment). Although significant documentation, substantiation & relevant explanations were provided to the IRS, IRS Appeals was not initially willing to settlement the case. However, the effective use of “Affidavits” as well as conducting several joint case conference calls, we were able to settle the case as follows:

Conclusion:

- Convinced the IRS to concede the 200% ETB penalty in the proposed amount of **\$690,342**
- Convinced the IRS to concede the IRC §6651 penalty in the proposed amount of **\$34,068**
- Agree to a **60% reduction** of the actual ETB Adjustment
- The taxpayer was extremely satisfied to settle upon an adjusted proposed tax liability of only **\$110,444**.
 - The secret to resolving this tax matter was due to a *persistent EA by the name of Ms. Angelene Wierzbic*. Thanks Ang.

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IRS Appeals - Formal Appeal Engagement

Equivalent hearing (EH) -Notice of Determination (Collection Case Issue)

A corporate taxpayer had IRS issues relating to employment taxes. During COVID, the first Revenue Officer (RO#1) on the case filed a Substitute for Return (SFR) relating to a 940 that was not disclosed to the taxpayer. The taxpayer had filed the original. Due to COVID, the return was submitted by both parties multiple times. The original assessment posted matched the actual 940 but an additional assessment was posted a few months later (SFR). A FOIA was done for the additional assessment. Even though the company filed the original return, RO#1’s SFR was processed afterwards. A Doubt as to Liability OIC (DATL OIC) was filed to correct the matter.

While all this was going on, a new RO (RO#2) filed a lien which included the 940 and a 1st Q 941. The 940 balance was reported as what was due from original filing. RO#2 filed another NFTL with the same 940 and a 2nd Q 941 liability. The 2nd Q 941 liability was erroneously reported as both the 941 and 940 balance due. An EH was filed on NFTL #2 due to the duplicate lien filing and the lack of CDP rights. Taxpayer also needed NFTL to be resolved to maintain state business licensing.

Conclusion:

- IRS held that both NFTLs could remain in place since there was an outstanding liability on the 940.
- However, appeals reviewed the 940 and found the pending adjustments from the DATL OIC & an ERC claim.
- Appeals let taxpayer make payment for the difference between the pending adjustments and current liability.
- Provided letter that there was a pending lien release to provide to state so taxpayer could keep business license.

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IRS Appeals - Formal Appeal Engagement

Notice of Determination “90-day” Letter Matter (Audit Case Issue)

A taxpayer was audited relating to a C-Corporation matter. IRS expanded audit to sole shareholder’s personal returns too. Auditor determined certain business payments were for personal purposes and determined them to be “Constructive Dividends”. The corporate adjustments included payments for tax planning and preparation, office rent, net operating losses and client rebates. Due to the nature of the taxpayer’s occupation and business practices, FOIA revealed examiner did not understand some aspects of common business practices. Corporate adjustments of \$93,390 and \$71,915 in constructive dividends were appealed. During the review of the FOIA, it was determined there were a few duplicate business expenses and concessions of \$7,258 in expenses were made. Concession of excess transfers of \$44,271 which was included in constructive dividends.

Conclusion:

- Convinced IRS allowed 100% of the corporate rebates of **\$30,981**
- Convinced IRS allowed 100% of the corporate NOLs of **\$28,424**
- Convinced IRS allowed 50% of the rent deemed previously a constructive dividend **\$8,971 allowed**
- The taxpayer was satisfied to settle upon corporate deficiency of **\$8,295 (Original \$33,010)**
- Constructive Dividends were reduced for 50% of Rent & Medical and reduced to **\$65,895**

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Thank You!

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