

Tips For Representing Your Client Before The Appeals Division Of The Internal Revenue Service

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This is another in a continuing series of articles written by members of the ABA Tax Section in which a senior member of the section teams up with a member selected from the Young Lawyers Forum.

THERE ARE NUMEROUS LEVELS of interaction between taxpayers and the Internal Revenue Service. The most familiar are the office auditors and field auditors (Tax Examiners and Revenue Agents) and collection agents (Revenue Officers). When taxpayers are unable

to resolve a tax matter with one of these branches of the Service, they may have an opportunity to discuss their case with the Appeals Division.

The Appeals Division of the Internal Revenue Service is composed of Appeals Officers, many of whom are attorneys or certified public

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accountants with many years of experience, who handle cases that could not be resolved during their initial stages. They attempt to settle their cases by negotiating with the taxpayers in an effort to resolve the cases without litigation—which is their primary function. Appeals have the ability to effectively resolve many cases when there are continuing disputes because they are a separate and an independent division of the IRS. Additionally, because of their independence, working with Appeals can usually save the taxpayer time and money.

THE BENEFITS OF APPEALS • Taxpayers need to make the decision about whether they want to apply to have their cases heard before the Appeals Division. In most of the cases described herein, it is highly recommended that the taxpayer take advantage of this opportunity, because the majority of such cases are resolved with the Appeals Division.

When cases are heard in Appeals, the Officers offer a fresh look at the case. Although they will review the notes of the Revenue Officer or Agent, they are not personally involved in developing the case and are able to independently assess the value of the case and arguments. As a practical matter, during the course of an examination, the Revenue Officer or Agent usually invests several hours when developing a case. Even though they are not collecting a personal debt, they sometimes tend to become personally involved because of the amount of time and effort they spend on the case. Occasionally, such involvement clouds their judgment when they are making decisions as to how to proceed with winding up the case and they are not able to focus on specific issues. The Appeals Officer, however, will normally focus on the issues presented without considering all of the other details of the examination.

Appeals Officers are also granted additional discretion in considering the resolution of tax

cases that Revenue Officers or Agents do not have. Appeals Officers have this additional discretion in an attempt to resolve cases without resorting to litigation.

One more benefit of Appeals is the right to go to Tax Court in an unresolved case. Therefore, it is sometimes imperative that an appeal be filed in order to protect the taxpayer's rights. Moreover, the fact that the case may move forward to Tax Court is another reason that Appeals will want to settle the case. They will look at the hazards of litigation including time, cost, and likelihood of being successful.

As a general rule, in just about every case it is beneficial to the taxpayer to proceed to the Appeals level. Even if the case is not successful, it will allow the IRS to fully consider all the issues and give the taxpayer additional time to attempt to resolve the disputed issues.

GETTING TO APPEALS • A case is transferred to the Appeals Division at the request of the taxpayer when the taxpayer does not agree with the determination of the Revenue Officer, Revenue Agent, or Tax Examiner. There are several types of cases that Appeals will review on a regular basis, including audits, offers in compromise, innocent spouse requests, collection due process requests, collection appeal requests, and docketed Tax Court cases.

Audits

An audit has occurred when the taxpayer's tax return for a particular year is reviewed and, perhaps, some items are changed. The taxpayer will be notified of the audit and provided the opportunity to be present and discuss the changes with which the taxpayer disagrees. If the taxpayer does not respond to the notice of audit or change by the IRS, he or she will receive a notice from the IRS of a right to appeal the proposed adjustments—this is known as the 30-day letter. This letter gives notice of the change

and allows the taxpayer 30 days to respond to the changes. If the taxpayer does not respond to this notice, he or she will then receive the 90-day letter or statutory notice of deficiency. This letter notifies the taxpayer of the changes and allows 90 days to petition the Tax Court regarding any of the changes. If the taxpayer does not respond, the chance to be heard before the Tax Court will be lost.

Appeals will examine audit cases or audit reconsideration cases (an audit that is requested by the taxpayer after an audit has taken place, if new information is available or the taxpayer did not participate in the initial audit) when a taxpayer disagrees with the decision of the IRS representative performing the audit and then timely files an appeal regarding those issues. The appeal should usually be filed with the examining representative, who will forward it to Appeals. The manager of the representative will review the appeal before forwarding the appeal and in some rare cases, may adjust the examiner's report based upon the appeal.

Using the following steps will help you draft a clear and convincing appeal:

- First draft an outline stating the issues the taxpayer disagrees with. The outline is to be used to assist in the preparation of the appeal.
- The issues listed on the outline will be used to create titles in the appeal. Each issue will be a different subheading within the appeal.
- There are specific items that must be presented in the appeal. As part of the overall process, the taxpayer will be informed of the format and necessary items to be presented. Additionally, IRS Publication 5 (available on the IRS website) provides the same information.
- In drafting the body of the appeal, the first portion of the appeal should contain and explain the applicable laws. Before listing the statute or other reference, use a title that relates to the statute, such as "Business Deductions or

Rental Income." Below the title you should state the applicable statute and case law and the meaning or holding of each.

- After the legal issues have been stated, you should state the specific factual issues for the particular case. These issues should be directly related to and correspond to the same order as the statute and case law section. For example, state business expenses and then list the taxpayer's business expenses, and how they relate to the business and the applicable law.
- The final section of the appeal will contain the conclusion. The conclusion should bring together the statutes and facts to state why the taxpayer's case is correct and what appropriate action should be taken.

Preparing an appeal in this manner, by breaking down each subject matter and further separating the law and the factual aspects, allows the Appeals Officer to have a better understanding of the issues at hand.

After the appeal is drafted, be sure to include any documents that will assist the Appeals Officer in making a decision. The documents should be well indexed and titled, and assembled in the same order as the appeal is written. Providing all of this information at this point will be important in first making a positive impression upon the Appeals Officer.

Collection Due Process Appeal

A Collection Due Process appeal ("CDP") is an appeal from certain collection actions by the IRS. The two most common circumstances in which a CDP is filed occur when the IRS files either a Notice of Federal Tax Lien or a Notice of Intention to Levy. A CDP is requested by filing Form 12153, which can be obtained on the IRS website. It is important to fill out every section of the form, and to sign and date it. If an attorney is signing the form on behalf of the taxpayer, it is imperative that the attorney submit

Form 2848, Power of Attorney, for the tax periods included on the notice. If the Power of Attorney is not currently on file, it should be submitted to the Centralized Authorization File unit at the same time as the CDP, and a copy of the Form 2848 should be sent with the CDP. The CDP request *must* be submitted within 30 days of the notice received for either the lien or levy. If the request is not made within that time the taxpayer loses his or her rights to the CDP hearing. However, there are other methods to reach Appeals that we will discuss below.

In the section of Form 12153 that requests the grounds for disagreement, it is important to list alternative collection measures and the harm that may be caused to the taxpayer by the collection action stated in the notice being appealed. When arguing that a lien should not be filed, it is important to fully explain how the lien will harm the taxpayer and hinder the taxpayer from producing income to eventually pay the tax liability. For example, if the individual is a contractor and the lien will prevent him or her from getting a contractor's license, that would be a good argument. To make such an argument, you should provide substantial documentation and even a denial of the license for said purposes, if possible. It is also important to mention that there may be alternative methods of collection, such as an Offer in Compromise or an Installment Agreement. If it is the case that the taxpayer wants an installment agreement, the amount is less than \$25,000, and it will be paid within five years, the IRS may not file the tax lien. Arguing for the proposition of the non-filing of a tax lien is difficult, at best, and it is hard to prevent this type of action. The IRS will usually deny this request as it is the least-intrusive method for the IRS to protect its interest.

Appealing A Levy

If you are appealing a levy, it is also important to state alternative collection possibilities

because the levy is a collection action by the IRS. It may be a one-time seizing of a bank account or it could be a continuing levy imposed upon an individual's wages, which means that the individual will not receive the pay check, because the funds will go directly to the IRS. Some of the alternative collection actions are an Offer in Compromise, an Installment Agreement, or classifying the debt as being in a currently not collectible status. If you intend to argue that any of the above-listed alternatives are available, you should be ready to submit the necessary documentation to substantiate your claim. You should mention these alternatives in your appeal and explain how the levy will cause a hardship upon the taxpayer. It is important to remember that when the IRS levies, it may take all of the bank account or the majority of the taxpayer's wages.

Benefits To Filing A CDP

There are several benefits to filing a CDP. First, when the CDP is filed, all collection activity will cease. This means that if a levy is going to take place on a bank account, the hold will temporarily prevent the levy from being enforced. It is important to note, however, that while the hold on collection activity is in place, the statute of limitations for collection activity will cease to run as well.

Another benefit of the CDP is that if an agreement is not reached by the Appeals Officer and the taxpayer, then the taxpayer may appeal to the U.S. Tax Court. This may be an advantage depending upon the situation. Appeals want to prevent the case from going forward to the U.S. Tax Court if appropriate, so using the fact that you intend to litigate as leverage may be a good strategy. It is important to note that if the IRS determines that a delay will jeopardize its interest, it may be able to continue with the collection process.

COLLECTION APPEAL REQUEST • A Collection Appeal Request (“CAP”) is very similar to a CDP. To file the CAP, use Form 9423 (available on the IRS website). The CAP is very similar to the CDP in that you should file the form with all the available information, and that it also temporarily stops further collection activity. Once again, if the IRS determines that the taxpayer may prevent the IRS from collecting the funds, it may declare it a jeopardy situation and continue with collection activity.

There are a couple of differences between a CAP and CDP that should be clearly understood:

- If the CAP is denied, you do not have the right to appeal to the Tax Court.
- The appeal is conducted in a quicker manner than the CDP, because the Appeals Officers are required to attempt to resolve and close the cases more hastily (usually within 14 days).

The benefits of the CAP are:

- The CAP can be requested at any time after the lien is filed, a notice of levy is received (if after the 30-day period for the CDP), or an installment agreement is denied.
- The case goes to Appeals. As discussed above, Appeals are more willing and able to resolve taxpayers’ cases.
- This is the only appeal that can be used if the installment agreement is denied.

OFFERS IN COMPROMISE • The IRS has the right and ability to negotiate settlements of tax debts with the taxpayer in accordance with section 7122 of the Internal Revenue Code. An Offer in Compromise can be filed with the IRS if a taxpayer:

- Has an outstanding balance and is unable to pay the entire amount;
- Believes he or she is not liable for the entire amount; or

- Can pay the entire amount, but because of certain circumstances, it would be inequitable to force the taxpayer to pay the entire liability.

Offers are filed using Form 656, Offer in Compromise, and depending on the reason for the submission, require certain financial forms (Forms 433-A or 433-B) to be filed as well. The purpose of the Offer in Compromise is to give the taxpayer a fresh start. The IRS representative will look at the taxpayer’s assets, income, and expenses and, using a certain equation, will determine a one-time payment that the taxpayer can make to resolve all of the tax liabilities. When the Offer in Compromise is filed, it is important to note that all of the necessary documents, depending upon the type of offer, are submitted to the IRS along with the filing fee, unless exempt, or the Offer in Compromise will not be considered.

The response to the appeal of a rejected Offer in Compromise is similar to that of the audit. When an Offer in Compromise is rejected, the Offer Examiner sends a formal rejection letter to the taxpayer. The taxpayer will then have 30 days to appeal the Offer Examiner’s determination. It is best in this type of appeal to categorize the appeal using subheadings—each heading should address the specific issue with which the taxpayer disagrees.

In the appeal for the Offer in Compromise, the taxpayer should raise all objections and should also provide updated financial information. It is important to note that when appealing an Offer in Compromise and the taxpayer provides additional information or a significant amount of time has passed, which usually happens with an Offer in Compromise appeal, the Appeals Officer may want all updated information. Although in some circumstances this may benefit the taxpayer, if expenses have increased, there could also be an increase to income, which will not benefit the taxpayer.

INNOCENT SPOUSE RELIEF • Innocent spouse relief is granted to a taxpayer under Code section 6015. Innocent spouse relief is a request by one spouse to the IRS to be granted relief from a joint tax liability. The requesting spouse must establish:

- That he or she did not have knowledge of the deficiency;
- The deficiency occurred because of the non-requesting spouse;
- The requesting spouse did not benefit from the additional income;
- It is inequitable to hold the requesting spouse liable for the tax; and
- That the request is made within two years of the knowledge of the deficiency. The form that is filed is Form 8857, and the IRS has a publication (Pub. 971) that explains the process.

All of the above requirements must be met for the relief to be granted. After a request is made, a questionnaire is sent to both the requesting taxpayer and the non-requesting taxpayer (except in domestic violence cases). The form will ask certain questions to assist the IRS in determining if the relief should be granted. Usually it is looking for a way to determine whether the requesting spouse had knowledge of or benefited from the omitted income.

If the initial request is denied, then an appeal may be filed. Upon receipt of the denial notice the taxpayer will have 30 days to respond with an appeal. In the innocent spouse relief request situation, it is important to refer back to the Code section and to make sure you state how every requirement is met. Provide any additional documentation with this appeal, such as affidavits from witnesses or friends. Also, bank statements will be helpful to show they did not have the income in their account. These cases can usually be resolved with Appeals if you properly provide it with the documentation it

requests and then go beyond that documentation to provide additional helpful documents.

TAX COURT CASES • When a Tax Court petition is filed and the answer is filed, the case will usually first be handled by the Appeals Division. In this situation, Appeals will contact the taxpayer. Appeals will have the details of the case and may request additional information. Usually there is no additional effort by the taxpayer to make sure the case goes to Appeals.

RULES FOR DEALING WITH APPEALS • When dealing with Appeals, it is important to remember that Appeals will focus on the specific issues that were mentioned in the memorandum sent to it on behalf of the taxpayer or issues discussed with the IRS representative from whom the taxpayer is appealing the decision. Although Appeals sometimes are willing to deviate from these issues, it is important to mention the taxpayer's disputes in the appeal memorandum. Although you might want to include everything involved in the matter, if a particular issue has been settled, do not raise it again on appeal because it could change the original decision, and sometimes unfavorably for the taxpayer.

Appeals will generally respond to the taxpayer in a reasonable amount of time. Therefore, it is important to respond to Appeals in the same reasonable amount of time. When a Collection Appeal Request has been filed, it will be more important to quickly respond, because the Appeals Officers need to process these cases quickly and will return the case or make a determination without all the information if the information is not timely provided.

While dealing with Appeals, it is important to remember that everything you supply them must be factual and true. Certain documents must be signed under penalties of perjury;

therefore, it is imperative that all of the facts be checked to make sure the information is accurate.

THE APPEALS MEETING • In all of the cases described above when an appeal is filed, the taxpayer will receive a contact letter from Appeals scheduling a meeting date. If the meeting date is inconvenient, contact Appeals immediately to change the date. Usually changing the date is not a problem. The only time when it may become a problem is when the case is a CAP and needs to be handled quickly or when the case is docketed for trial and the trial date is quickly approaching.

On the meeting date, the taxpayer/representative has two options: to have a telephonic meeting or a face-to-face meeting. There are advantages and disadvantages for each.

In most cases, a face-to-face meeting would be recommended. This meeting is more personal, and it is sometimes easier to work in this manner. Also, it allows the representative or taxpayer to bring additional information to the meeting that was not previously provided to the Appeals Officer. In the case of an appeal of an audit, the meeting should always be in person. An in-person meeting is preferred for an audit situation because it is easier to discuss the issues that arose and to review the documents together in order for a case to be made. Although this is helpful in most cases, it is extremely helpful in the audit appeal situation.

The in-person meeting is also helpful because it will personalize the meeting. When the Appeals Officer sees you face to face, it helps to bridge a gap that usually occurs in a telephone meeting. Eye contact and body language are normally very helpful when dealing with the Appeals Officer and may be beneficial in presenting the arguments.

Get Ready

Before your meeting, be sure to organize the necessary documents you will need at the meeting, making a copy for yourself and the Appeals Officer. Although the Appeals Officer already has a copy of the documents you previously provided, it is a good idea to have a fresh copy because it will be easier for the Appeals Officer to access it. (And usually, anything you do to make their lives easier will be appreciated.) Also, you should prepare for the meeting by reviewing all correspondence you have had with the Appeals Officer and preparing an outline of the issues you want to discuss at the meeting. Having the information written down in front of you will assist you in not forgetting to discuss any important topics.

Meeting Tactics

At the meeting, you should be sure to raise all of the topics that you wish to discuss. Be sure to refer to documents you have previously furnished, because the IRS will need verification of all information. If the Appeals Officer requests a document that you do not have with you, get it to the Appeals Officer after your meeting. Be sure to provide it within a reasonable amount of time. It is also important that if you are asked a question to which you do not know the answer, clearly state that you will provide an answer later. While at the appeals meeting, you should not expect to walk out with a determination, but it is usually a good start towards one.

Telephonic Meeting

When the circumstances do not provide for the in-person meeting, a telephonic meeting will be possible. It is important to prepare for the telephone conference in the same manner that you would an in-person meeting. However, one major difference is that you must provide the necessary documents to the Appeals Officer ahead of time. When you send the doc-

uments to the Appeals Officer, make sure they are in the same order as your documents and clearly marked. This will make identification easier when you are on the phone. One additional important factor when having a telephone meeting is not to use a speaker phone. When a speaker phone is used, it is difficult for the other party to hear and it always sounds better when you are talking directly into the phone. Likewise, it is highly recommended not to use cellular phones inasmuch as many times their reception is not very good and can cause misunderstandings.

Keep Client Out?

For an in-person meeting or a teleconference, if a taxpayer representative is handling the matter, he or she should seriously consider not having the client present. Such a meeting is usually an emotional time for the client. Sometimes the client may inappropriately respond to a comment of the Appeals Officer. Although the client

does not react intentionally, it is sometimes difficult to control one's reactions. Moreover, although the representative may prepare the client for the meeting, an issue may arise during the discussion of which the representative is not aware. If the client is present, the IRS will probably require a response immediately. If the client is not present, the representative has the opportunity to talk with the client in private about the matter before responding to the question.

CONCLUSION • When a taxpayer has a case that may be reviewed by the Appeals Division of the IRS, it is usually beneficial to select that option. Appeal rights are available on several different types of cases: audits, liens, levies, offers in compromise, installment agreements, innocent spouse relief, and Tax Court cases. In many situations, the case will be resolved with Appeals because it is more willing to compromise and wants to prevent litigation hazards.

PRACTICE CHECKLIST FOR Tips For Representing Your Client Before The Appeals Division Of The Internal Revenue Service

The Appeals Division of the Internal Revenue Service attempts to settle cases by negotiating with taxpayers in an effort to resolve the cases without litigation. Appeals have the ability to effectively resolve many cases when there are continuing disputes because they are a separate and an independent division of the IRS. Additionally, because of their independence, working with Appeals can usually save the taxpayer time and money.

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