

Docketed vs. Undocketed Appeals? A look at the case from the perspective of IRS Counsel and Appeals

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Role of Appeals

Appeals' role within the IRS

Dispute resolution

The IRS Independent Office of Appeals is an administrative appeal function available to taxpayers. Appeals can review a tax matter either after Compliance has made its decision (non-docketed case) or after a taxpayer has petitioned the Tax Court (docketed case)

Mission

To resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.

Independence

The independence of the appeals function is mandated by statute and includes the prohibition on ex parte communications between Appeals and other IRS employees to avoid the appearance of improper influence

Receipts by type

Workstream	FY 2017	FY 2018	FY 2019
Collection Due Process (CDP)	37,667	35,168	37,196
Offers in Compromise (OIC)	9,564	8,864	6,841
Innocent Spouse	3,407	2,657	1,575
Penalty Appeals	10,652	8,190	5,757
Coordinated Industry Cases	88	65	42
Industry Cases	955	885	826
Examination	30,657	27,290	24,862
Other	10,584	9,311	8,187
Total	103,574	92,430	85,286

Appeals settlement authority

Appeals is expressly authorized to enter into settlements that take into consideration hazards of litigation

A “litigating hazard” is a substantial uncertainty in the event of litigation as to:

- How the courts would interpret and apply the law
- What facts the courts would find or
- The admissibility of or weight that would be given to a specific item of evidence

Appeals must consider probable outcomes to avoid arbitrary settlements

Independence policies



Appeals will not raise new issues or reopen issues agreed to by taxpayer and Compliance (except for cases involving fraud or malfeasance)



Appeals will attempt to settle a case based on factual hazards when the case is not fully developed and taxpayer presents no new information or evidence



Taxpayer First Act of 2019

Appeals-related provisions:

- **Codified the “IRS Independent Office of Appeals”**
- **Codified mission statement**
- **Provided that the process by which Appeals resolves federal tax controversies is generally available to all taxpayers**
- **Codified Appeals’ right to legal advice from Chief Counsel**
- **Provided that certain specified taxpayers must be provided access to the nonprivileged portions of their case files regarding disputed issues at least 10 days prior to an appeals conference**
- **Required reporting of cases designated for litigation by Chief Counsel**

Role of Counsel

IRS Office of Chief Counsel Divisions

National Office Only:

- ▶ Procedure and Administration (P&A)
- ▶ Wage & Investment (W&I)
- ▶ Pass Throughs and Special Industries (PSI)
- ▶ Income Tax and Accounting (ITA)
- ▶ Corporate (Corp)
- ▶ Financial Institutions and Products (FIP)

National Office and Field:

- ▶ Small Business/Self Employed (SBSE)
- ▶ Large Business & International (LB&I)
- ▶ Tax Exempt and Government Entities (TEGE)
- ▶ Criminal Tax (CT)
- ▶ General Legal Services (GLS)

Specialties:

- ▶ Whistleblower's Office
- ▶ TIGTA/OPR
- ▶ Health Care
- ▶ Taxpayer Advocate

Rev. Proc. 2016–22, published in Internal Revenue Bulletin No. 2016-15

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 87–24, 1987–1 C.B. 720, to clarify and describe the practices for the administrative appeals process in cases docketed in the United States Tax Court (Tax Court).¹ The purpose of this revenue procedure is to facilitate effective utilization of administrative appeals and achieve earlier development and disposition of Tax Court cases.

Highlights from Rev. Proc. 2016–22

.05 When a docketed case is forwarded to Appeals for consideration, Appeals has the sole authority to resolve a docketed case through settlement until the case is returned to Counsel.

Highlights from Rev. Proc. 2016–22

.07 A docketed case proceeding as a small tax case under the provisions of section 7463, or as a regular case in which the amount at issue for each year is \$50,000 or less, that has been forwarded to Appeals for consideration may be recalled by Counsel after six months. If not recalled, Appeals will return the case so that it is received by Counsel no later than 30 calendar days prior to the date of the calendar call. In all other docketed cases, Appeals will return the case to Counsel when Appeals concludes that the case is not susceptible to settlement or within 10 calendar days after the case appears on a trial calendar, whichever is sooner. In all cases, Counsel and Appeals may agree to extend the time for Appeals to consider a case if settlement appears reasonably likely.

Highlights from Rev. Proc. 2016–22

.11 When transferring a docketed case to Appeals, Counsel may request to be included in a settlement conference with the taxpayer. Appeals may, with manager approval, decline to include Counsel in the settlement conference if, after considering the views of both Counsel and the taxpayer, Appeals determines that Counsel's participation in the settlement conference will not further settlement of the case. Whether or not Counsel participates in the settlement conference, Counsel will continue with trial preparation, which may include, but is not limited to, asking the taxpayer to participate in informal discovery conferences with Counsel only.

Settlement vs. Trial Preparation

- ▶ Appeals' focus is on settling cases
- ▶ Counsel's role is to try cases, but Counsel still has the ability to settle cases

Timeline of an appeal

Independence policies

Limitations period

Most new case receipts in Appeals must have at least one year remaining on the statute of limitations

New information

Appeals generally returns non-docketed cases to Compliance when taxpayer submits new information or evidence or raises a new issue warranting investigation or additional analysis (exceptions apply)

New arguments

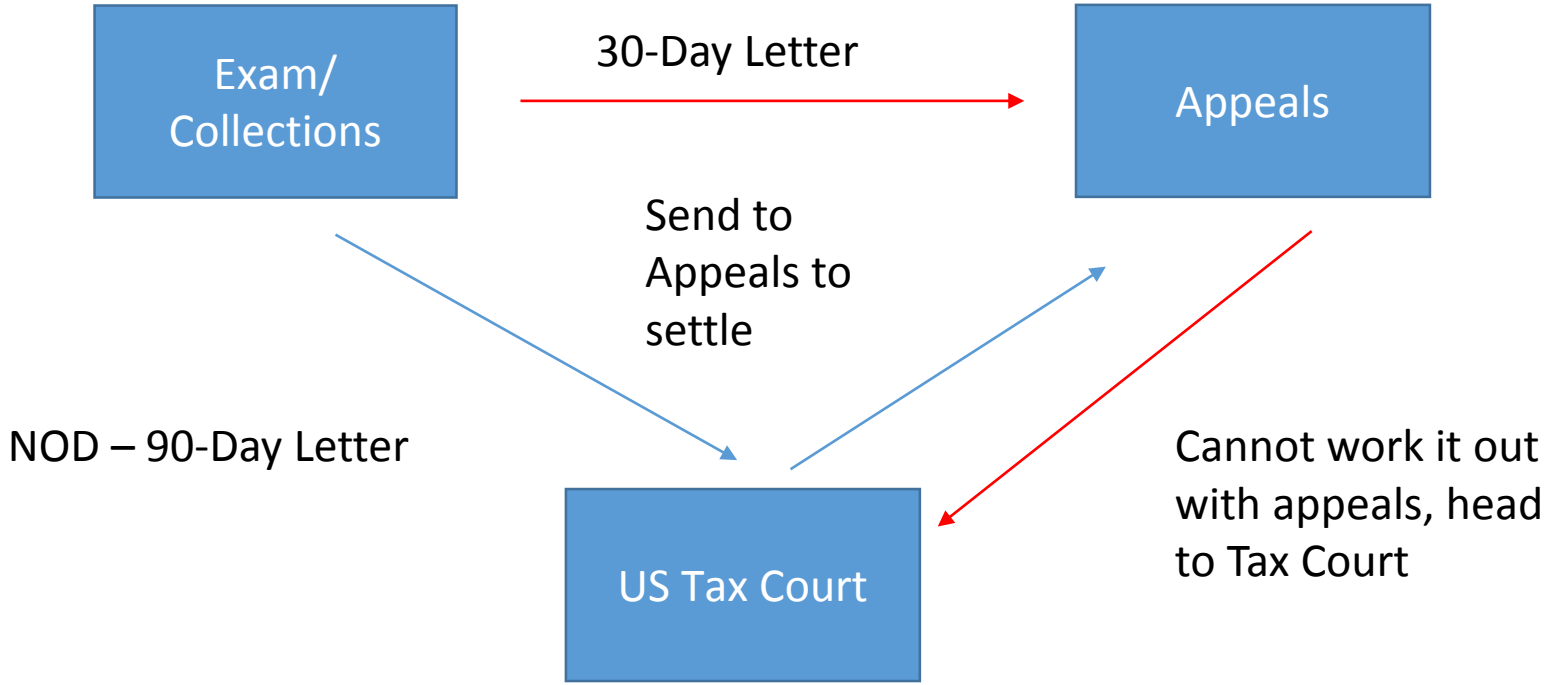
Appeals generally engages Compliance for review and comment (subject to *ex parte* requirements) when taxpayer raises a new theory or alternative legal argument on a non-docketed case

Timeline of Tax Court Practice



1. Congress passes law
2. IRS issues regulations
3. Taxpayer engages in taxable activity
4. Taxpayer files return
5. IRS examines return
6. Examination is unagreed - **Option to protest to Appeals or**
7. Statutory Notice of deficiency - **Referral to Appeals**
8. Taxpayer petitions Tax Court
9. Tax Court decision

So How Do You Get To Appeals?



Exam – Thirty-Day Letter



Department of the Treasury
Internal Revenue Service
Small Business and Self-Employed
150 Court Street
New Haven CT 06510

Date:
March 30, 2020
Taxpayer ID number (last 4 digits):
0000
Form:
1040
Tax periods ended:
December 31, 2013
December 31, 2014
December 31, 2015

MR. TAXPAYER
TAXPAYER'S COMPANY
MAIN STREET
NEW HAVEN, CT 06511

Person to contact:
Audit Manager
Contact telephone number:
203 xxx-xxxx
Contact fax number:
877 xxx-xxxx
Employee ID number:
08-0000000
Response due date:
April 29, 2020

Dear TAXPAYER:

I have enclosed an examination report and two copies of an agreement form showing proposed changes to your tax for the periods above. Review the report, and tell us whether you agree or disagree with the changes **by the response due date above**. If you have an interest in any partnerships, S corporations, trusts, etc., this report may not reflect examinations of those entities. Changes to those accounts could also affect your tax.

If you agree with the proposed changes in the report

1. Sign and date one copy of the agreement form and keep the other copy for your records. If you filed a joint return, both spouses must sign for the case to be fully agreed.
2. Include payment for the full amount you owe (if the report shows you owe additional tax) to limit penalty and interest charges to your account. Make your check or money order payable to the United States Treasury.
3. Return the signed and dated agreement form with your payment in the enclosed envelope by the response due date.

If you agree, but can't pay the full amount you owe

Pay as much as you can, and sign, date, and return one copy of the agreement form, as explained above. We explain payment options in the enclosed Publication 3498, The Examination Process. You can also find more information regarding payment options by visiting Tax Topic 202 at www.irs.gov/taxtopics/tc202.html and www.irs.gov/payments.

When examination is unagreed, 30-Day letter is issued

- ▶ 30-Day Letter is issued upon the conclusion of the audit in an attempt to encourage payment or settlement of the asserted adjustment without the need for litigation.
 - ▶ Issuance of the 30-day letter is not required by statute prior to assessment, but the content of the letter is covered in I.R.C. § 7522 (re: content of notices).
- ▶ Three possible responses to 30-day letter:
 - ▶ *Consent*. Agree with the examiner's findings.
 - ▶ *Appeal*. Request hearing with Appeals. The request must be within 30 days. **Publication 5**. Information specifically directed to taxpayer appeal rights.
 - ▶ *Ignore and wait for Statutory Notice of Deficiency (SNOD)*.

Collection Due Process

- Collection ceases for those periods
- Case Sent to Appeals (Settlement Officer)
- US Tax Court Rights

Docketed Appeals

Rev. Proc. 2016-22

- Counsel will refer cases to appeals
- Appeals has exclusive authority over settlement until (a) Appeals determines the case cannot be settled or (b) the case is calendared for a Tax Court trial; however, Appeals may hold the case if settlement is likely.
- Ex parte rules apply between Appeals and Exam or Collections.
- Ex parte rules do not apply between Appeals and Counsel.
- Counsel may request to be included in settlement discussions. Rev. Proc. 2016-22(4.11)

Considerations for settlement negotiations with Counsel

- ▶ Counsel is not bound by a rejected Appeals offer
- ▶ Counsel may defend the statutory notice of deficiency, even if a lower amount was offered during settlement negotiations
- ▶ Counsel has authority to raise new issues and increased deficiencies
- ▶ Settlement discussion while case is in Appeals or with Counsel are not relevant at trial and evidence regarding these discussions is inadmissible during trial
 - ▶ Federal Rule of Evidence 408 - inadmissible to prove liability
 - ▶ Exception- facts disclosed by taxpayer/representative during course of negotiations are admissible

Rev. Proc. 2016-22 (cont.)

Counsel does not refer cases to Appeals when:

- The issue is “designated for litigation.” Rev. Proc. 2016-22(3.02)
- If the issue involves a matter that the IRS has designated for a particularly treatment (this is rare).
- If the case has already been through Appeals (following a 30 day letter).

Notice of Deficiency (“90-Day Letter”)



Department of the Treasury
Internal Revenue Service
Small Business and Self-Employed

955 South Springfield Avenue
Springfield NJ 07081

Date: **OCT 26 2016**

Taxpayer ID number:

Form:
1040

Person to contact:

Contact telephone number:

Contact fax number:

Employee ID number:

CERTIFIED MAIL

CLIENT NAME
CLIENT ADDRESS
CITY, STATE ZIP

Last day to file petition with US tax court:

JAN 24 2017

Tax Year Ended:	December 31, 2014	December 31, 2015
Deficiency:		
Increase in tax	\$18,617.00	\$10,394.00
Penalties or Additions to Tax		
IRC 6662(a)	3,723.40	2,078.80

If The 90-Day Letter was Issued First

- Cannot ask for rescinding
- Cannot ignore it
- File in the United States Tax Court
- If you file in United States Tax Court, and the case has not already been to Appeals it will be sent there. IRM 8.4.1.4, Revenue Procedure 2016-22

US Tax Court Petition

UNITED STATES TAX COURT
www.ustaxcourt.gov

(FIRST) (MIDDLE) (LAST)

 (PLEASE TYPE OR PRINT) Petitioner(s)
 v.
 COMMISSIONER OF INTERNAL REVENUE,
 Respondent

} Docket No.

PETITION

- Please check the appropriate box(es) to show which IRS ACTION(S) you dispute:

<input type="checkbox"/> Notice of Deficiency	<input type="checkbox"/> Notice of Determination Concerning Relief From Joint and Several Liability Under Section 6015 (or Failure of IRS to Make Determination Within 6 Months After Election or Request for Relief)*
<input type="checkbox"/> Notice of Determination Concerning Collection Action	<input type="checkbox"/> Notice of Certification of Your Seriously Delinquent Federal Tax Debt to the Department of State
<input type="checkbox"/> Notice of Final Determination for [Full/Partial] Disallowance of Interest Abatement Claim (or Failure of IRS to Make Final Determination Within 180 Days After Claim for Abatement)*	<input type="checkbox"/> Notice of Determination Under Section 7623 Concerning Whistleblower Action*
<input type="checkbox"/> Notice of Determination of Worker Classification*	

*For additional information, please see "Taxpayer Information: Starting a Case" at www.ustaxcourt.gov (accessible by hyperlink from asterisks above, or in the Court's information booklet).

2. If applicable, provide the date(s) the IRS issued the NOTICE(S) checked above and the city and State of the IRS office(s) issuing the NOTICE(S): _____

3. Provide the year(s) or period(s) for which the NOTICE(S) was/were issued: _____

4. SELECT ONE OF THE FOLLOWING (unless your case is a whistleblower or a certification action):

If you want your case conducted under small tax case procedures, check here: (CHECK)
 If you want your case conducted under regular tax case procedures, check here: (ONE BOX)

NOTE: A decision in a "small tax case" cannot be appealed to a Court of Appeals by the taxpayer or the IRS. If you do not check either box, the Court will file your case as a regular tax case.

5. Explain why you disagree with the IRS determination in this case (please list each point separately):

UNITED STATES TAX COURT
www.ustaxcourt.gov

 Petitioner(s)
 v.
 COMMISSIONER OF INTERNAL REVENUE,
 Respondent

} Docket No.

STATEMENT OF TAXPAYER IDENTIFICATION NUMBER
 (E.g., Social Security number(s), employer identification number(s))

Name of Petitioner _____
 Petitioner's Taxpayer Identification Number _____
 Name of Additional Petitioner _____
 Additional Petitioner's Taxpayer Identification Number _____

If either petitioner is seeking relief from joint and several liability on a joint return pursuant to Section 6015, I.R.C. 1986, and Rules 320 through 325, name of the other individual with whom petitioner filed a joint return:

 Taxpayer Identification Number of the other individual, if available:

 SIGNATURE OF PETITIONER OR COUNSEL DATE

 SIGNATURE OF ADDITIONAL PETITIONER DATE

UNITED STATES TAX COURT
www.ustaxcourt.gov

 Petitioner(s)
 v.
 COMMISSIONER OF INTERNAL REVENUE,
 Respondent

} Docket No.

REQUEST FOR PLACE OF TRIAL

PLACE AN "X" IN ONLY ONE BOX TO REQUEST THE PLACE OF TRIAL. IF PETITIONER(S) ELECTED TO HAVE THE CASE CONDUCTED AS A SMALL TAX CASE, REQUEST ANY CITY LISTED BELOW; OTHERWISE, REQUEST ANY CITY NOT MARKED WITH AN ASTERISK (*).

- | | | |
|--|---|--|
| ALABAMA
<input type="checkbox"/> Birmingham
<input type="checkbox"/> Mobile | KANSAS
<input type="checkbox"/> Wichita*
KENTUCKY
<input type="checkbox"/> Louisville
LOUISIANA
<input type="checkbox"/> New Orleans
<input type="checkbox"/> Shreveport* | OHIO
<input type="checkbox"/> Cincinnati
<input type="checkbox"/> Cleveland
<input type="checkbox"/> Columbus |
| ALASKA
<input type="checkbox"/> Anchorage | MAINE
<input type="checkbox"/> Portland* | OKLAHOMA
<input type="checkbox"/> Oklahoma City |
| ARIZONA
<input type="checkbox"/> Phoenix
<input type="checkbox"/> Little Rock | MARYLAND
<input type="checkbox"/> Baltimore
MASSACHUSETTS
<input type="checkbox"/> Boston
<input type="checkbox"/> San Francisco | OREGON
<input type="checkbox"/> Portland |
| ARKANSAS
<input type="checkbox"/> Little Rock | MICHIGAN
<input type="checkbox"/> Detroit | PENNSYLVANIA
<input type="checkbox"/> Philadelphia
<input type="checkbox"/> Pittsburgh |
| CALIFORNIA
<input type="checkbox"/> Fresno*
<input type="checkbox"/> Los Angeles
<input type="checkbox"/> San Diego
<input type="checkbox"/> San Francisco | MINNESOTA
<input type="checkbox"/> St. Paul | SOUTH CAROLINA
<input type="checkbox"/> Columbia |
| COLORADO
<input type="checkbox"/> Denver | MISSISSIPPI
<input type="checkbox"/> Jackson | SOUTH DAKOTA
<input type="checkbox"/> Aberdeen* |
| CONNECTICUT
<input type="checkbox"/> Hartford | MISSOURI
<input type="checkbox"/> Kansas City
<input type="checkbox"/> St. Louis | TENNESSEE
<input type="checkbox"/> Knoxville
<input type="checkbox"/> Memphis
<input type="checkbox"/> Nashville |
| DISTRICT OF COLUMBIA
<input type="checkbox"/> Washington | FLORIDA
<input type="checkbox"/> Jacksonville
<input type="checkbox"/> Miami
<input type="checkbox"/> Tallahassee* | TEXAS
<input type="checkbox"/> Dallas
<input type="checkbox"/> El Paso
<input type="checkbox"/> Houston
<input type="checkbox"/> Lubbock
<input type="checkbox"/> San Antonio |
| FLORIDA
<input type="checkbox"/> Jacksonville
<input type="checkbox"/> Miami
<input type="checkbox"/> Tallahassee* | GEORGIA
<input type="checkbox"/> Atlanta | UTAH
<input type="checkbox"/> Salt Lake City |
| HAWAII
<input type="checkbox"/> Honolulu | IDAHO
<input type="checkbox"/> Boise
<input type="checkbox"/> Pocatello* | VERMONT
<input type="checkbox"/> Burlington* |
| ILLINOIS
<input type="checkbox"/> Chicago
<input type="checkbox"/> Peoria* | INDIANA
<input type="checkbox"/> Indianapolis | VIRGINIA
<input type="checkbox"/> Richmond
<input type="checkbox"/> Roanoke* |
| IOWA
<input type="checkbox"/> Des Moines | NEBRASKA
<input type="checkbox"/> Omaha | WASHINGTON
<input type="checkbox"/> Seattle
<input type="checkbox"/> Spokane |
| | NEVADA
<input type="checkbox"/> Las Vegas
<input type="checkbox"/> Reno | WEST VIRGINIA
<input type="checkbox"/> Charleston |
| | NEW MEXICO
<input type="checkbox"/> Albuquerque | WISCONSIN
<input type="checkbox"/> Milwaukee |
| | NEW YORK
<input type="checkbox"/> Albany*
<input type="checkbox"/> Buffalo
<input type="checkbox"/> New York City
<input type="checkbox"/> Syracuse* | WYOMING
<input type="checkbox"/> Cheyenne* |
| | NORTH CAROLINA
<input type="checkbox"/> Winston-Salem | |
| | NORTH DAKOTA
<input type="checkbox"/> Bismarck* | |

The case lands in Appeals

- Preparation is very similar to an audit
- Documentation should be prepared
- Any arguments you have should be presented (need to build the record)

Hearing

- Usually done by phone
- May request an in-person – documents to present, witness testimony, etc.
- In-person is not guaranteed, but Appeals' policy is to grant an in-person conference to taxpayers who request one

What issues to raise

- I raise every issue
- If you do not raise it at Appeals you may be precluded from raising it later in Tax Court
- New information may result in the case being sent back to compliance (this is not a bad thing)
- AJAC

Settling cases directly with Counsel

“With the exception of certain relatively rare test cases, it has long been the position of the Office of Chief Counsel that sincere efforts should be made to settle those cases susceptible of settlement. In general, the Office of Chief Counsel regards all cases susceptible of settlement except those which involve negligible litigation hazards and cases designated for litigation.”

IRM 35.5.2.2

IRM 35.5.2 – Settlements by Counsel

- IRM 35.5.2 sets forth the procedural guidelines for settlements with Counsel
- Counsel has settlement authority over all Tax Court cases *however* the trial attorney will often have to obtain approval from Chief Counsel, the DOJ Tax Division, and perhaps other agencies.
 - Counsel may seek to settle the case at any time, even after trial.
- The IRS often takes policy positions - meaning even if settlement makes sense in the context of the case, the IRS may not be able to settle given the big picture.

Settlements by Counsel

- Trial counsel must prepare a settlement memorandum explaining why the case should be compromised
- Counsel will generally defend appeals from CDPs
 - If settlement based on a different collection alternative is prudent, Counsel will generally seek approval from Appeals
 - In lieu of a settlement Counsel case request remand of the case back to Appeals

Mediating with the IRS

Mediation options

Fast track mediation—collection

Voluntary process for OIC and Trust Fund Recovery Penalty (TFRP) cases

Appeals employee serves as mediator and has no settlement authority (hazards of litigation may not be considered)

If no resolution, taxpayer retains traditional appeal rights

Fast track settlement

Voluntary process for examination cases

Appeals employee serves as mediator and may propose settlement based on litigating hazards

If no settlement, taxpayer retains traditional appeal rights

Rapid appeals process

Voluntary process for large business and E&G cases

After pre-conference, ATCL may suggest mediation between taxpayer and Compliance as an alternative to a traditional conference

If a RAP is unsuccessful, Compliance leaves and settlement negotiations are conducted between the ATCL and the taxpayer

Post appeals mediation

Voluntary process available for exam, OIC and TFRP cases if traditional appeals negotiations fail

Taxpayer may request PAM, but Appeals manager decides if case should get PAM

New Appeals employee serves as mediator between original Appeals employee and taxpayer

Must use Appeals mediator, but taxpayer may also use non-IRS co-mediators (at own expense)