CHALLENGING THE TAX MAN: NUTS AND BOLTS OF AN IRS AUDIT

Travis Austin Greaves
T. Joshua Wu
Greaves | Wu LLP

CPA Academy
OUTLINE

- Audit Selection
- Setting the Stage
- Information Gathering
- Role of Tax Advisor
- Resolving Case at Audit
- Appeals
- Alternative Dispute Techniques
Poll Question #1

- How often do you work on IRS audits?
# Audit Selection

## IRS Audits: Who’s a Target?
Percentage of returns audited, by adjusted gross income:

<table>
<thead>
<tr>
<th>Income Level</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No income</td>
<td>5.26%</td>
</tr>
<tr>
<td>$1-$24,999</td>
<td>0.93%</td>
</tr>
<tr>
<td>$25,000-$49,999</td>
<td>0.54%</td>
</tr>
<tr>
<td>$50,000-$74,999</td>
<td>0.56%</td>
</tr>
<tr>
<td>$75,000-$99,999</td>
<td>0.52%</td>
</tr>
<tr>
<td>$100,000-$199,999</td>
<td>0.65%</td>
</tr>
<tr>
<td>$200,000-$499,999</td>
<td>1.75%</td>
</tr>
<tr>
<td>$500,000-$999,999</td>
<td>3.62%</td>
</tr>
<tr>
<td>$1 million-$4.9 million</td>
<td>6.21%</td>
</tr>
<tr>
<td>$5 million-$9.9 million</td>
<td>10.53%</td>
</tr>
<tr>
<td>$10 million or more</td>
<td>16.22%</td>
</tr>
</tbody>
</table>

Source: IRS Data Book 2014
George Petras, USA TODAY
AUDIT SELECTION

- Matching Programs/DIF Score
- Referrals or Public Sources
- Related Returns
AUDIT SELECTION

- Returns identified for examination are reviewed and inspected
- Classifiers identify issues and determine whether to assign individual returns to a revenue agent or tax compliance officer
- Returns sorted for different types of exams
AUDIT SELECTION

- Correspondence examinations
- Office examinations
- Field examinations
CORRESPONDENCE VS FIELD AUDITS

1998

2015
Poll Question #2

- What is the most common form of an IRS audit?
AUDIT SELECTION – CORRESPONDENCE EXAMINATIONS

- Generally conducted by campus operations
- Conducted by mail and fax
- Tax examiners and tax compliance officers
- 80% of individuals audits are done this way
A U D I T  S E L E C T I O N  –  O F F I C E  E X A M I N A T I O N

• Generally individual returns
• Limited number of issues; only lasts a few hours
• Conducted in IRS offices closest to the taxpayer
• Tax compliance officers
AUDIT SELECTION – FIELD EXAMINATION

- Generally conducted at place of business, home, representative office, where books and records are kept.
- All business returns, some individual returns
- Includes large business and international (LB&I)
- All types and sizes of issues
- Revenue Agent
**SETTING THE STAGE**

- Begins with a letter notifying taxpayer that their tax return has been selected for examination.

- Notification letter is typically followed with an Information Document Request (“IDR”). IDRs are the revenue agents’ “informal” device for gathering information. IDRs don’t look terribly informal.

- Taxpayer responds to the IDR, after which a meeting is scheduled with the revenue agent to discuss taxpayer’s responses and potential issues. If a taxpayer is represented, the representative will attend the meeting with the agent on behalf of the taxpayer.

- *See generally* IRM 4.10.2. for an overview of the Service’s pre-contact responsibilities and procedures for initial contact.
**SETTING THE STAGE**

- Considering gross income
- Minimum income probes
  - Nonbusiness return
  - Individual business returns
  - Corporations and other business returns
**SETTING THE STAGE: MINIMUM INCOME PROBES**

- Nonbusiness return
  - Ensure tax return includes data from information returns the IRS received
  - Interview the taxpayer
  - Financial status analysis (office audit only); review information disclosed on the tax return as filed with information obtained over the course of the case and information obtained through other sources. Use all this information to determine whether income is sufficient to support the taxpayer’s financial activities.
SETTING THE STAGE: MINIMUM INCOME PROBES

- Individual business probes
  - Prepare financial status analysis
  - Conduct interview with taxpayer
  - Tour the business, review the website to gain familiarity with taxpayer’s operations and internal controls
  - Evaluate the internal controls (determine reliability of books and records, identify high risk issues)
  - Reconcile the income per return to books and records
  - Test gross receipts tying original source docs to books
  - Analyze personal, business, and financial accounts
  - Prepare an analysis of business ratios to evaluate reasonableness of taxpayer’s business operations
  - Determine e-commerce and/or internet use
Setting the Stage: Minimum Income Probes

- Corporations and other business returns
  - Prepare a balance sheet
  - Reconcile schedules M-1, M-2, and M-3
  - Evaluate the tax returns of significant shareholders or partners
  - Interview the taxpayer
  - Perform a tour of business site
  - Evaluate the internal controls
  - Test gross receipts or sales
  - Prepare a business ratio analysis
  - Determine if there are internet use and e-commerce income activity
Poll Question #3

- Minimum income probes usually involve an interview of the taxpayer (True/False)?


**SETTING THE STAGE – STATUTE OF LIMITATIONS**

- **3 years** – IRS has 3 years from date of filing return or due date of return (w/o extensions), whichever is later, in normal case.
- **6 years** – IRS has 6 years where there has been an omission of over 25% of gross income
- **Unlimited time** – false or fraudulent returns, willful attempt to evade tax, no return
- **Extended pursuant to agreement with taxpayer**
  - E.g., Form 872
Setting the Stage – Practice Tip

- The starting point is to ask yourself what is your goal? At what level and for what amount can you dispose of your case?
  - Examination
  - Appeals
  - Litigation
- Then you need to think both strategically and tactically about your examination.
  - Strategically – where do you want to end up?
  - Depending on that answer – tactically how do you get there?
INFORMATION GATHERING

• Code authorizes the IRS to
  ● Examine records,
  ● Issue a summons, and
  ● Take testimony as may be relevant to determining the correctness of a return, determining the liability of a taxpayer, making a substitute return, collecting tax, or inquiring into any criminal tax offenses.

• Information Document Requests (IDRs)

• Summons
  ● Traditional summons
  ● Third-party summons
  ● John Doe summons
Information Gathering – IDRs

- Form 4564, Information Document Requests
  - Primary tool the IRS uses to obtain information from a taxpayer during an audit
  - Facts in each case will determine what is considered an adequate description of the requested data.
  - Must sufficiently specify the books, papers, records, or other data. The request should also include the particular activity and time period.
  - If taxpayer fails to comply with IDR, IRS may summons the documents or information from the taxpayer or third party.
Poll Question #4

- If a taxpayer refuses to respond to an IDR, the IRS agent may:
INFORMATION GATHERING – SUMMONSES

- IRS must consider a number of factors before issuing a summons:
  - The tax liability involved
  - The time and expense of obtaining the records
  - The probability of having resort to court action
  - The potential adverse effect on voluntary compliance by other parties if the enforcement efforts are not successful
  - Whether a criminal case is pending

- Enforcement
  - IRS must seek court order to enforce
  - Court must consider four Powell factors
  - Summons must served by hand to the person to whom it is directed or left at the person’s last known address
INFORMATION GATHERING – THIRD-PARTY SUMMONS

• IRS may issue summons on third party, but must give timely notice to the taxpayer

• Taxpayer may contest summons within 20 days after the date the notice is given

• Taxpayer lacks standing to raise as a defense any argument that affects only the interest of the third-party
  • Third-party may raise defenses personal to it

• Pending a third-party summons action
  • IRS may not examine the records subject to the summons
  • SOLs with respect to assessment, collection, criminal prosecution of the taxpayer are suspended
  • Summoned third party is required to assemble records in question
INFORMATION GATHERING – JOHN DOE SUMMONS

- Used where identity of taxpayer or group of taxpayers under investigation is not known.
- Used in exceptional circumstances
- Elements:
  - Relates to investigation of particular person or ascertainable group;
  - Reasonable basis for such person/group may fail, or have failed, to comply with IRC; and
  - Information sought is not readily available from other sources.
- Tolls statute if John Doe summons remains pending after six months of services
- Taxpayer may not intervene
- Third-party receives immunity
Role of the Tax Advisor

- Practice Before the IRS and applicable rules
- Professional standards
- Duty of competence
- Tax advice due diligence
- Representations to the IRS
- Privilege issues
- Penalties for violations
WHAT RULES APPLY TO TAX PRACTITIONERS?

- Circular 230, 31 C.F.R. Part 10
- Internal Revenue Code
  - E.g., §§ 6694, 6695, 7216
- ABA Model Rules of Professional Conduct
- State Rules of Professional Conduct
- AICPA Rules and Statements on Standards for Tax Services (SSTS)
CIRCULAR 230
PRACTICE BEFORE THE IRS

- Who is covered per Circular 230?
  - Attorneys, CPAs, enrolled agents, registered return preparers and other persons representing taxpayers before the IRS
  - Anyone who preparers (or assists with) all or a substantial portion of a document pertaining to a taxpayer’s liability (Section10.8(c))

- What is practice before the IRS?
  - 5 U.S.C. § 500 – Broadly authorizes attorneys to practice before all Federal agencies and CPAs to practice before the IRS
CIRCULAR 230
PRACTICE BEFORE THE IRS

• 31 U.S.C. § 330
  • Subject to section 500 of title 5, the Secretary of the Treasury may –
    • regulate the practice of representatives of persons before the Department of the Treasury; and
    • before admitting a representative to practice, require that the representative demonstrate –
      • good character
      • good reputation
      • necessary qualifications to enable the representative to provide to persons valuable service; and
      • competency to advise and assist persons in presenting their cases
  • After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative
What is “practice of representatives”? Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014)
- Tax return preparers are not “representatives”
- Preparing tax returns does not constitute “practice” before the Treasury
- History of statute indicates that Congress intended the statute to cover representation in contested proceedings
- Thus, assisting someone prepare a tax return is not practice before the Treasury
CIRCULAR 230
PRACTICE BEFORE THE IRS

  - Preparation of “ordinary” refund claims is not “practice before the IRS,” and thus the IRS cannot regulate the kind of fees Ridgely charged (contingent fee restriction per Cir. 230 § 10.27)

  - Sexton was suspended from practice by IRS OPR and argued that OPR had no authority to investigate him, post-suspension, because his work did not involve “practice before the IRS.”
  - IRS OPR enjoined from requiring production of documents to investigate whether Sexton was engaged in practice.
CIRCULAR 230
PRACTICE BEFORE THE IRS

- Questions after Loving and Ridgely
  - How do the cases impact other areas of Circular 230?
  - Can the IRS find other sources for regulation of persons not practicing before the IRS?
  - Will Congress provide new authority to Treasury?
    - Senate Finance Committee recently dropped return preparer regulations from two draft tax bills
  - Do the standards in Circular 230 impact malpractice suits?
- Circular 230 continues to be a viable standard along with ABA Model Rules and AICPA standards
Poll Question #5

• Circular 230 continues to be a viable standard for ethics (True/False)?
WHY DO CLIENT’S WANT TAX ADVICE?

• Penalty protection
  ● Reliance on tax professional may constitute reasonable cause
  ● Reasonable basis standard (IRC 6662)

• Comfort for investors

• Assist business decision makers with evaluation of strength of position

• Impacts reporting requirements
TAX ADVICE LEVELS OF AUTHORITY

- Will: 95-100%
- Should: 60-80%
- More Likely Than Not (MLTN): over 50%
- Substantial Authority: 40%
- Realistic possibility of success: 33%
- Reasonable Basis: 20%
- Not frivolous: 10%-20%
TAX ADVICE LEVELS OF AUTHORITY
MINIMUM STANDARDS

• Lawyer shall not assert an issue unless there is a basis in law or fact for doing so that is not frivolous. See Rule 3.1, ABA Model Rules.

• A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous. Circular 230 § 10.34.

• Lawyer may advise reporting a position on a return if there is some realistic possibility of success if the matter is litigated. ABA Ethics Op. No. 85-352 (1985).

• A member should not recommend a tax return position or prepare or sign a tax return taking a position unless the member has a good-faith belief that the position has at least a realistic possibility of being sustained administratively or judicially on its merits if challenged. AICPA SSTS No. 1(5)(a).
Duty of Competence

• Circular 230 §10.35
  • Effective beginning June 12, 2014

• ABA Model Rule 1.1
  • A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

• AICPA SSTs No. 7
  • A member should use professional judgment to ensure that tax advice provided to a taxpayer reflects competence and appropriately serves the taxpayer’s needs.
Duty of Competence

• New section 10.35
  • A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.
**Due Diligence**

- **Circular 230 § 10.22** – Due diligence required:
  - Return preparation
  - Written representations to IRS
  - Written representations to client
  - A practitioner will be presumed to have exercised due diligence if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person. 10.22(b).

- **Treas. Reg. § 1.6694-1(e)(1)** – Return Preparer Penalty Safe Harbor
DUE DILIGENCE

- ABA Model Rule 4.1
  - Truthfulness in Statements to Others
- Circular 230 § 10.37 – Written advice
  - Based on reasonable factual and legal assumptions
  - Consideration of all relevant facts that practitioner knows or reasonably should know
  - Reasonable efforts to identify and ascertain the facts
  - Not rely on representations of the taxpayer or others if reliance on them would be unreasonable
  - Relate law to facts
  - Cannot consider possibility of audit
Due Diligence - Reliance

• Treas. Reg. § 1.6664-4(c)
  ● Reasonable cause and good faith reliance on tax opinion only applies if (1) the advice is based on all pertinent facts and the law as it relates to those facts, and (2) the advice is not based on unreasonable factual or legal assumptions and does not unreasonably rely on representations of others.

• Courts examine tax opinions for reasonableness
  ● Conflicts of interest (Long-Term Capital Holdings, 330 F. Supp. 2d 122)
  ● Unreasonable withholding of facts by client (Palm Canyon X Investments, LLC v. Comm’r, T.C. Memo 2009-288)
  ● Inadequate qualification of tax advisor
  ● Bad faith and no reliance by taxpayer (Rovakat, LLC v. Comm’r, T.C. Memo 2011-225)
REPRESENTATIONS TO THE IRS

- Circular 230
  - Section 10.22 – Due diligence
  - Section 10.33(4) – Acting fairly and with integrity
  - Section 10.34(a) – Reasonable positions

- DC Rule 3.3
  - Candor to the tribunal

- ABA Formal Op. 314
  - In all cases...the lawyer is under a duty not to mislead the IRS deliberately, either by misstatements or by silence or by permitting the client to mislead
**Amending Returns**

- **Circular 230, Section 10.21**
  - A practitioner who knows a client has not complied or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws, must advise the client of such error and the consequences thereof.

- **26 C.F.R. 1.451-1(A)**
  - If a taxpayer ascertains that an item should have been included in gross income in a prior taxable year, he should, if within the period of limitation, file an amended return and pay any additional tax due.

- **AICPA Statement on Standards for Tax Services No. 6**
  - A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return, an error in a return that is the subject of an administrative proceeding, or a taxpayer’s failure to file a required return. A member also should advise the taxpayer of the potential consequences of the error and recommend the corrective measures to be taken.
Poll Question #6

• Taxpayers have a legal duty to file amended returns where they discover an error in a prior return (True/False)?
Privilege Issues for Tax Opinions

- Attorney-Client, Work Product and IRC 7525 Privilege
  - Kovel arrangements
- Exceptions
  - Tax Shelters
    - *Doe v. Wachovia*, 268 F. Supp. 2d 627 (W.D.N.C. 2003). The court held that in marketing the same tax opinion to more than one client, a firm acting as promoter could not expect that the communications were confidential.
  - Crime-Fraud
    - *In re Grand Jury Investigation (The Corporation)*, 87 F.3d 377, 380 (9th Cir. 1996). To invoke the crime-fraud exception successfully, the government has the burden of making a prima facie showing that “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.”
Privilege Issues for Tax Opinions

- **Waiver of Attorney-Client Privilege**
    - Taxpayer received six tax opinions on a transaction but refused to disclose them to the IRS on privilege grounds
    - Taxpayer raised “reasonable cause” defense to penalties
    - Tax Court held that reasonable cause defense puts the taxpayer’s understanding of the law at issue and, under the doctrine of implied waiver, waives privilege as to communications related to the transaction

- **Waiver of Work Product Privilege**
  - Disclosure to adversary
  - Disclosure to auditors
Penalties for Tax Advisors

- Section 6700
  - Penalty on any person who organizes (or assists in the organization of) or participates in the sale of any interest in an entity, plan or arrangement; and in connection, makes or furnishes:
    - a statement which the promoter knows or has reason to know is false or fraudulent as to any material matter, or
    - a “gross valuation overstatement.”

- Section 6662
  - Accuracy-related penalty on the understatement of tax resulting from an incorrect tax position due to (i) negligence, disregard or substantial misstatements, or (ii) a substantial understatement of tax.
  - Penalties can be reduced based on adequate disclosure and reasonable cause

- Circular 230 § 10.50 – Censure, suspension or disbarment
- Department of Justice and IRS Office of Professional Responsibility (OPR) may seek to enjoin a practitioner from engaging in offensive activities and practices
Penalties for Tax Advisors

- Section 6694
  - Penalties for unreasonable positions or willful or reckless conduct

- Section 6701
  - Penalties for adding and abetting understatement of tax

- Section 7201
  - Criminal penalties for willful attempt to evade or defeat tax

- Section 7203
  - Criminal penalties for willful failure to file return, supply information or pay tax

- Section 7206
  - Criminal penalties for false returns
RESOLVING THE CASE AT EXAM

- Closing a case at Exam
- Civil penalties
- Qualified Offers
- Statute extensions
RESOLVING THE CASE AT EXAM

- **Method of Closing an Exam**
  - No-Change with Adjustment Report (e.g., Form 4549)
  - Agreed cases
    - Form 4549
    - Form 870, Waiver of Restrictions on Assessment
    - Issues for joint returns
- **Closing to Appeals**
  - Requires 180 days on statute of limitations (special rule for partnerships)
- **Closing Agreements**
  - Form 906, Closing Agreement on Final Determination
  - Form 886, Agreement as to Final Determination of Liability
  - Contractual agreements
CLOSING AGREEMENTS

- Examples, Form 886:
  - To determine tax liability to facilitate sale of asset
  - Estate liability determination to obtain discharge by court
  - Trustee seeks liability determination before making distributions

- Examples, Form 906:
  - Resolving offshore voluntary disclosure cases
  - Resolving issues of cost, valuation, or adjusted basis
  - Determine amount of NOLs, credits or capital losses
CIVIL PENALTY ISSUES

- Failure to file penalty (IRC 6651(a)(1))
  - 5% of amount required to be shown on return for each month (or fraction) in the addition period (up to 25%)
  - The penalty is tripled to 15% if the failure to file is due to fraud (up to 75%) (IRC 6651(f))

- Failure to pay penalty (IRC 6651(a)(2),(3))
  - 0.5% of unpaid tax for each month (or part of a month) that the payment is late (up to 25%)

- Failure to make estimated tax payments (IRC 6654)
  - An addition to tax of the Federal short term rate + 3% from the due date of the payment until it is received (or April 15, if earlier)

- Civil fraud penalty (IRC 6663)
  - Penalty is 75% of any portion of the underpayment attributable to fraud
  - Only applies if taxpayer filed a return

- Accuracy-related penalties (IRC 6662)
  - Punishes taxpayers for not using ordinary care and prudence in preparing your return
  - Generally, 20% penalty on the underpayment

- Reasonable cause and good faith defense
  - Affirmative defense to negate penalty
  - Reliance on tax preparer (may result in penalties brought against preparer)
**Qualified Offer – IRC 7430(g)(1)**

- **Definition**
  - Written offer by taxpayer to IRS during qualified offer period
    - Specifies amount offered
    - Designated at time made as “qualified offer”
    - Remains open from date made and ending on earliest of the date rejected, the date trial begins, or the 90th day after the date the offer is made.

- **Qualified Offer Period**
  - After date on which first letter proposing deficiency is sent which allows opportunity for Appeals review and ending on date which is 30 days before the date the case is first set for trial.
STATUTE EXTENSIONS

- Strategy considerations
  - Desire to proceed to Appeals
  - Complexity of case

- Time
  - Must be executed before statutory period expires
  - Forms 4549 and 870 are not consents to extend the period of time to assess
  - Exam may request when:
    - 180 days left and not sufficient to complete exam
    - Firm indication that substantial tax due and less than 180 days
    - Taxpayer requests Appeal
    - Joint investigation with IRS-CI in progress

- Restricted Consents
  - Extends for one or more specific issues only.
  - Taxpayer may request, IRS not required to agree
IRS Appeals

- Purpose of Appeals
- Appeals Statistics
- Cases from Exam (Non-Docketed)
  - Protests
  - Authority to settle
  - Returning case to Exam
- Cases from Tax Court (Post-Docketed)
- Appeals conference
- Ex Parte rules
- Closing the case
Purpose of Appeals

• Mission statement
  ● 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 from Exam
  ● To resolve disputes effectively, Appeals must show itself to be objective, impartial, and neutral in fact as well as appearance.

• Hazards of litigation settlement authority
  ● Resolution vs Settlement
### Appeals Data

#### Table 21. Appeals Workload, by Type of Case, Fiscal Year 2015

<table>
<thead>
<tr>
<th>Type of case</th>
<th>Cases received</th>
<th>Cases closed [1]</th>
<th>Cases pending September 30, 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases [2]</td>
<td>113,870</td>
<td>117,673</td>
<td>52,969</td>
</tr>
<tr>
<td>Collection Due Process [3]</td>
<td>41,849</td>
<td>42,505</td>
<td>19,929</td>
</tr>
<tr>
<td>Examination [4]</td>
<td>35,430</td>
<td>37,096</td>
<td>20,762</td>
</tr>
<tr>
<td>Penalty Appeals [5]</td>
<td>10,504</td>
<td>10,533</td>
<td>3,538</td>
</tr>
<tr>
<td>Offers in Compromise [6]</td>
<td>9,622</td>
<td>9,880</td>
<td>4,178</td>
</tr>
<tr>
<td>Innocent Spouse [7]</td>
<td>2,622</td>
<td>3,120</td>
<td>1,284</td>
</tr>
<tr>
<td>Industry Cases [8]</td>
<td>986</td>
<td>1,528</td>
<td>1,254</td>
</tr>
<tr>
<td>Coordinated Industry Cases [9]</td>
<td>131</td>
<td>191</td>
<td>298</td>
</tr>
<tr>
<td>Other [10]</td>
<td>12,726</td>
<td>12,820</td>
<td>1,726</td>
</tr>
</tbody>
</table>

[1] Cases closed includes cases received in Fiscal Year 2015 and in prior fiscal years.

---

![Graph](image-url)
CASES FROM EXAM (NON-DOCKETED)

- Small cases (under $25,000)
  - Less formal protest procedures
- Normal cases (exceeding $25,000)
  - Taxpayer must file written protest
- The Protest
  - Responds to Revenue Agent’s Report (RAR)
  - Must include: name, address, phone number, copy of letter with proposed changes, identification of tax years involved, list of changes the taxpayer does not agree with and why, facts supporting the taxpayer’s position on each issue, and the authority on which the taxpayer’s position relies, signature of the taxpayer under penalties of perjury.
  - Exam has opportunity to send “rebuttal” to Appeals.
CASES FROM EXAM (NON-DOCKETED)

- Authority to settle
  - Based on hazards of litigation
  - Some areas where authority limited
    - Compliance Coordinated Issues (CCI)
    - Technical Advice Memoranda (TAM)
    - Accounting Methods

- Return to Exam
  - Significant unresolved factual issues
  - Protest lacks substantive detail
  - New issues are discovered that are substantial and have material effect on tax liability
  - Appeals Judicial Approach & Culture (AJAC)
Poll Question #7

- IRS Appeals has full authority to settle cases except where:
**Post-Docketed Cases**

- Once statutory notice of deficiency is issued, different procedures apply.
- Appeals may relinquish jurisdiction on any case where NOD is issued.
- The “ex parte” communication rules do not apply to communications between Appeals and Counsel with respect to cases docketed in Tax Court.
- Tax Court will generally direct case to Appeals if no prior opportunity for taxpayer to meet with Appeals.
APPEALS CONFERENCE

• Pre-conference and Appeals conference
  ● Exam may present their case at pre-conference
  ● Exam does not attend Appeals conference

• Appeals conference
  ● May be by telephone or in person
  ● Held on date and in locations reasonably convenient to taxpayers and representatives
  ● May occur outside the IRS
  ● If taxpayer states that they want to consult with representative during a phone conference, Appeals must suspend the conference and reschedule
**Ex Parte Rules**

- An “ex parte communication” is one between Appeals employee and employees of other IRS functions, *without the taxpayer/representative* being given the opportunity to participate in the communication. Rev. Proc. 2012-18.

- Ex parte communications between Appeals employees and employees of originating functions are prohibited to the extent the communications appear to compromise Appeals’ independence.

- Not all communications are “ex parte”
  - Communications between Appeals employees
  - Communications with IRS functions not considered an “originating function”
    - TAS is not an "originating function."

- Appeals may participate in IRS multifunctional meetings
CLOSING THE CASE OUT OF APPEALS

- Resolution of some or all issues at Appeals
  - Form 906
  - Form 870-AD
- Unagreed case
  - Statutory notice of deficiency issued
- Appeals settlement only binding on years at issue
  - Exam may adopt settlement terms for later years
- For large refunds (over $2M) Appeals must seek Joint Committee review
ALTERNATIVE DISPUTE TECHNIQUES

- Early referral to appeals
- Fast Track Settlement
ALTERNATIVE DISPUTE TECHNIQUES-
EARLY REFERRAL TO APPEALS (ER)

• Apparent issue(s) cannot be resolved in Exam.
• ER is initiated by taxpayer prior to 30 day letter, and must be approved by Director of Field Operations and Appeals Area Director.
• If accepted, appeals works contentious issues and exam work other issues arising during audit.
• Appropriate issues
  • If resolved, can reasonably be expected to result in a quicker resolution of the entire case;
  • Are fully developed; and
  • Are part of a case where the remaining issues are not expected to be completed before Appeals could resolve the early referral issue.
**Alternative Dispute Techniques - Early Referral to Appeals (ER)**

- Taxpayer submits request to Team Manager (14 day review period)
- If accepted, Agent will complete a NOPA within 30 days of acceptance date
- Taxpayer must respond to NOPA within 30 days from date it was sent (this serves as the protest)
- Normal appeals procedures are observed
- If agreement is reached, parties enter into a closing agreement
- If no agreement, taxpayer may request mediation; otherwise, issue(s) return to exam.
- Appeals will not reconsider these issues if the case is later protested to Appeals.
ALTERNATIVE DISPUTE TECHNIQUES-FAST TRACK SETTLEMENT

• FTS is generally available if:
  ● all disputed issues are fully developed;
  ● all Examination issue resolution strategies have been exhausted; and
  ● taxpayer has stated a position in writing (or, if applicable, filed a small case request).

• IRS may offer FTS in
  ● field exam before issuance of 30-day letter,
  ● office exam after taxpayer requested Appeals hearing,
  ● Civil penalty case where taxpayer has not indicated agreement

Notes: FTS should not be offered to taxpayers that failed to cooperate or respond to IRS information requests during the audit.
**ALTERNATIVE DISPUTE TECHNIQUES - FAST TRACK SETTLEMENT**

- Mediator from the IRS Office of Appeals is assigned to help you and the IRS reach an agreement on the disputed issue(s).
- Mediator facilitates settlement discussions and offers settlement proposals to resolve disputes.
- Either taxpayer or IRS may agree to or deny the mediator’s settlement proposal.
- FTS process should be completed within 60 calendar days of Appeals’ acceptance of FTS application.
Poll Question #8

- What is the most valuable thing you learned on today’s webinar?
QUESTIONS?
SPEAKERS

Travis Austin Greaves
(202) 412-0019
tgreaves@greaveswu.com
LinkedIn

T. Joshua Wu
(571) 294-3850
jwu@greaveswu.com
LinkedIn