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TAX PRACTICE AND PROCEDURE

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LEARNING OBJECTIVES

After completing this session, participants will be able to perform the following:

✔ Know how to complete Form 2848, Power of Attorney and Declaration or Representative

✔ Understand the IRS deficiency procedures

✔ Understand how the IRS assesses tax due to a clerical or mathematical error

✔ Know how to contact the IRS in response to a notice or letter

✔ Understand when a taxpayer is entitled to an Appeals conference

✔ Discuss the Appeals procedure

✔ Recognize when the IRS can assert liability against a transferee, nominee, or alter ego

✔ Explain when the taxpayer can file an amended return or a superseding return

✔ Know the impact of a superseding return on the assessment and refund statutes of limitations

INTRODUCTION

This chapter explains how to complete Form 2848, Power of Attorney and Declaration of Representative. It reviews the IRS deficiency procedures, and two exceptions to those procedures for mathematical and clerical errors and jeopardy assessments.

On February 5, 2022, the IRS announced that it suspended the automatic mailing of more than a dozen letters, including automated collection notices normally issued when a taxpayer owes federal tax or automated notices asking a taxpayer to file a tax return when the IRS has no record of the filing of the return. Despite that suspension, tax practitioners may have received several notices and letters. This chapter reviews ways to contact the IRS in response a notice or letter. It also explains when a taxpayer is entitled to an Appeals conference.

Finally, this chapter discusses when the IRS can assert liability against a transferee, nominee, or alter ego of the taxpayer. It also explains amended returns and when and how a taxpayer should file a superseding return to replace a previously filed return.

FORM 2848, POWER OF ATTORNEY

This section discusses Form 2848 and how to complete, submit, and revoke the form.

Form 2848, Power of Attorney and Declaration of Representative, grants a taxpayer's representative the right to represent the taxpayer in tax matters before the IRS.

Form 2848 can grant the taxpayer's representative general authority to perform the acts described in the power of attorney, and it can grant authority to handle specific tax matters. This section reviews who is an authorized representative, and how to complete and submit Form 2848.

Authorized Representative

The individual that a taxpayer authorizes to represent him or her on Form 2848 must be a member of one of the following categories:

1. *Attorney*. Any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, or the District of Columbia
2. *CPA*. Any individual who is duly qualified to practice as a certified public accountant in any state, possession, territory, commonwealth, or the District of Columbia
3. *Enrolled agent*. Any individual who is enrolled to practice before the IRS and is in active status pursuant to the requirements of Circular No. 230
4. *Enrolled actuary*. Any individual who is enrolled as an actuary by, and is in active status with, the Joint Board for the Enrollment of Actuaries
5. *Temporary enrolled agent*. Any individual who is granted temporary recognition as an enrolled agent by the director of practice
6. *Relation to the taxpayer*. Any individual authorized to represent a taxpayer with whom a special relationship exists, such as a full-time employer, a member of his or her immediate family; an individual who is a bona fide officer or regular full-time employee of a corporation or certain other organizations may represent that entity
7. *Unenrolled return preparer*. For tax returns and claims for refunds prepared and signed after December 31, 2015, any individual who has a valid Annual Filing Season Program record of completion for the calendar year in which the tax return or claim for refund was prepared and signed, and a valid Annual Filing Season Program record of completion for the year or years in which the representation occurs
8. *Special appearance*. Any individual who, upon written application, is authorized to represent a taxpayer in a particular matter, such as a qualifying student or law graduate working for a Low Income Taxpayer Clinic or a Student Tax Clinic Program [see Delegation Order 25-18 (August 19, 2019)]
9. *Enrolled retirement plan agent*. Any individual who is enrolled to practice before the IRS and whose representation is limited to retirement plan issues

CROSS-REFERENCE

Levels of Representation

Enrolled agents, CPAs, and attorneys have unlimited representation rights before the IRS. Tax professionals with these credentials may represent their clients on any matters including audits, payment and collection issues, and Appeals. Preparers without one of these credentials have limited or no representation rights. See pages 249–250 in the *2016 National Income Tax Workbook* for a discussion of levels of representation before the IRS.

Completing Form 2848

Form 2848, Part 1, Power of Attorney, requires information about the taxpayer, information about the representative, and a description of the authorized acts. It allows the taxpayer or representative to specify acts that are not authorized.

Taxpayer Information

Form 2848, line 1, requests information about the taxpayer. An individual taxpayer who files a tax return that includes Schedule C (Form 1040), Profit or Loss From Business, and who is authorizing a representative for both individual and business tax matters, must enter both a social security number (SSN) and an employer identification number (EIN). Each spouse must submit a separate Form 2848 in connection with a jointly filed return.

Partnerships that are subject to the centralized partnership audit regime enter the partnership representative's name and the partnership name. However, they enter only the taxpayer identification number (TIN) and address of the partnership.

Corporations enter the name, EIN, and business address of the corporation. Corporations filing consolidated tax returns need to enter only the parent company information. Exempt organizations enter the name, address, and EIN of the exempt organization.

Trusts enter the trustee's name and address, and the trust's name and EIN. Estates enter the decedent's name and the name, title, and address of the decedent's executor or personal representative. For Form 706, United States Estate (and Generation-Skipping) Transfer Tax Return, estates enter the decedent's SSN or individual taxpayer identification number (ITIN). For all other IRS forms, estates enter the estate's EIN, or if the estate does not have an EIN, the decedent's SSN or ITIN. For gift tax issues, Form 2848 must include the donor's name, address, and SSN or ITIN.

Practitioner Note

Deceased Taxpayers

Form 2848 terminates upon the taxpayer's death. However, the executor of a decedent's estate may appoint a representative. The executor must file Form 2848 and attach Form 56, Notice Concerning Fiduciary Relationship, and a copy of the letters of administration, letters testamentary, or court order appointing the executor. Under Treas. Reg. § 601.503, if no executor or trustee is acting or responsible for disposition of the matter and the estate has been distributed to the residuary legatee, the residuary legatee is considered the fiduciary of the taxpayer (with power to act on behalf of the taxpayer).

Representative Information

On Form 2848, line 2, the taxpayer can authorize up to two representatives and can check the box to authorize the representative(s) to receive notices and communications sent to the taxpayer. Form 2848 must list the representative's Centralized Authorization File (CAF) number and preparer tax identification number (PTIN), if applicable.

Practitioner Note

Authentication Alert

When a representative with a Form 2848 calls the IRS on behalf of a taxpayer, he or she must pass authentication procedures before the IRS will speak to the agent about the tax information. The IRS asks questions to verify that the caller is the agent designated on Form 2848. The IRS will ask for the caller's SSN and date of birth.

Authorized Acts

Line 3 of Form 2848 describes the tax matters, form numbers, and years or periods for which authorization is given. The taxpayer can authorize information from any prior tax year and for future tax years. However, future years or periods listed cannot exceed 3 years from December 31 of the year that the IRS receives the Form 2848. If the tax matter relates to estate tax, the decedent's date of death is used instead of the year or period.

Representatives cannot be authorized to endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the representative or any firm or other entity with whom the representative is associated) issued by the government with respect to a federal tax liability. Unless specifically provided on line 5a, the authorization does not include the power to substitute or add another representative, the power to sign certain returns, the power to execute a request for disclosure of tax returns or return information to a third party, or the power to access IRS records via an intermediate service provider. Representatives are not authorized to sign Form 907, Agreement to Extend the Time to Bring Suit, unless language to authorize the signing is added on line 5a.

Specific Acts Not Recorded on the CAF System

Generally, the IRS records powers of attorney on the CAF system. The CAF system is a computer file system that records authorizations, including Forms 2848, to allow IRS personnel quicker access to authorization information without requesting the original document from the taxpayer or representative. A specific use power of attorney is a one-time or specific issue grant of authority to a representative or is a power of attorney that does not relate to a specific tax period (except for civil penalties) that the IRS does not record on the CAF system.

To grant a specific-use power of attorney, the taxpayer describes the issue on line 3 and checks the box on line 4 of Form 2848. Examples of specific uses that are not recorded on the CAF system include, in part, the following:

- Requests for a private letter ruling or technical advice
- Applications for an EIN
- Corporate dissolutions
- Applications for recognition of exemption
- Applications for an exemption from self-employment tax

Additional Acts Authorized

Line 5a is used to modify acts that the taxpayer's representative can perform or to authorize additional acts. The taxpayer checks the box and describes the limitations or other authorized acts. **Figure 8.1** shows line 5a of Form 2848.

FIGURE 8.1
Form 2848, Line 5a

5a **Additional acts authorized.** In addition to the acts listed on line 3 above, I authorize my representative(s) to perform the following acts (see instructions for line 5a for more information): ☐ Access my IRS records via an Intermediate Service Provider;
☐ Authorize disclosure to third parties; ☐ Substitute or add representative(s); ☐ Sign a return; ____________

☐ Other acts authorized: ____________

One option on line 5a is to allow the designated representative(s) to access the taxpayer's IRS records through an intermediate service provider. Intermediate service providers are privately owned companies that offer subscriptions to their software and services that an authorized representative can use to retrieve, store, and display personal or business tax return data instead of obtaining tax information directly from the IRS through the IRS e-Services Transcript Delivery System. Intermediate service providers are not affiliated with the IRS.

Line 5a can also be used to authorize the representative, or an agent who is not the representative, to sign the taxpayer's income tax return on behalf of the taxpayer for specified reasons [see Treas. Reg. § 1.6012-1(a)(5)]. Line 5b is for specific acts that are not authorized.

Retention/Revocation of Prior Power(s) of Attorney

The power of attorney will generally revoke earlier powers of attorney previously recorded on the IRS CAF system for the same matters and years or forms. The taxpayer can check the box on line 6 if he or she does not want to revoke a prior power of attorney. The taxpayer must also attach a copy of the prior power of attorney.

Cross-Reference

CAF Client List Request

See pages 105–108 in the *2019 National Income Tax Workbook* for a discussion of how to obtain a CAF 77 listing that shows all the tax practitioner's active Forms 2848 in the CAF system.

Example 8.1
Changing Agent

Edward James provided the IRS Office of Chief Counsel with a Form 2848 authorizing Katherine Hileman, attorney at law, to represent him in a private letter ruling (PLR) matter. Now, several months later, Edward decides that he wants to have his CPA, Chris Carter, handle this matter for him. By submitting a Form 2848 designating Chris Carter to handle the same PLR matter, Edward is revoking the earlier authorization for Katherine to represent him.

Taxpayer Declaration and Signature

Handwritten signatures are required on a Form 2848 that is mailed or faxed. Digital, electronic, or font typed signatures are not valid signatures on the mailed or faxed forms. The signer must certify that he or she has authority to sign the form on behalf of the taxpayer. The following persons have authority to sign the form:

1. *Individuals*. The individual must sign his or her own form.
2. *Corporations*. The officer with legal authority to bind the corporation must sign and enter his or her title.
3. *Partnerships*. If only one partner is authorized to act in the name of the partnership, only that partner signs and enters his or her title. A copy of the authorization must be attached. Otherwise, all partners must sign and enter their exact titles.
4. *Estates*. If there is more than one coexecutor, only one coexecutor who has authority to bind the estate must sign the form.
5. *Employee plans*. If the plan is listed as the taxpayer on line 1, a duly authorized individual with the authority to bind the plan must sign and enter that individual's exact title. If the trust is the taxpayer on line 1, a trustee having the authority to bind the trust must sign and

enter his or her trustee title. The trustee completes and attaches Form 56, Notice Concerning Fiduciary Relationship.

6. *All others*. If the taxpayer is a dissolved corporation, deceased individual, insolvent, or a person for whom or by whom a fiduciary (a trustee, guarantor, receiver, executor, or administrator) has been appointed, see 26 C.F.R. § 601.503(d) for these requirements.

Practitioner Note

Signing Order

Generally, the taxpayer signs first, granting the authority; and then the representative signs, accepting the authority granted. For domestic authorizations, the representative must sign within 45 days after the date the taxpayer signed (60 days for authorizations from taxpayers residing abroad). If the representative signs first, the taxpayer does not have a required time limit to sign.

Declaration of Representative

In Part II of Form 2848, the representative must sign the declaration shown in **Figure 8.2**.

FIGURE 8.2
Form 2848, Part II, Declaration of Representative

Part II Declaration of Representative

Under penalties of perjury, by my signature below I declare that:

- I am not currently suspended or disbarred from practice, or ineligible for practice, before the Internal Revenue Service;
- I am subject to regulations in Circular 230 (31 CFR, Subtitle A, Part 10), as amended, governing practice before the Internal Revenue Service;
- I am authorized to represent the taxpayer identified in Part I for the matter(s) specified there; and
- I am one of the following:

a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.
b Certified Public Accountant—a holder of an active license to practice as a certified public accountant in the jurisdiction shown below.
c Enrolled Agent—enrolled as an agent by the IRS per the requirements of Circular 230.
d Officer—a bona fide officer of the taxpayer organization.
e Full-Time Employee—a full-time employee of the taxpayer.
f Family Member—a member of the taxpayer's immediate family (spouse, parent, child, grandparent, grandchild, step-parent, step-child, brother, or sister).
g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the IRS is limited by section 10.3(d) of Circular 230).
h Unenrolled Return Preparer—Authority to practice before the IRS is limited. An unenrolled return preparer may represent, provided the preparer (1) prepared and signed the return or claim for refund (or prepared if there is no signature space on the form); (2) was eligible to sign the return or claim for refund; (3) has a valid PTIN; and (4) possesses the required Annual Filing Season Program Record of Completion(s). ***See* Special Rules and Requirements for Unenrolled Return Preparers *in the instructions for additional information.***
k Qualifying Student or Law Graduate—receives permission to represent taxpayers before the IRS by virtue of his/her status as a law, business, or accounting student, or law graduate working in a LITC or STCP. See instructions for Part II for additional information and requirements.
r Enrolled Retirement Plan Agent—enrolled as a retirement plan agent under the requirements of Circular 230 (the authority to practice before the Internal Revenue Service is limited by section 10.3(e)).

▶ IF THIS DECLARATION OF REPRESENTATIVE IS NOT COMPLETED, SIGNED, AND DATED, THE IRS WILL RETURN THE POWER OF ATTORNEY. REPRESENTATIVES MUST SIGN IN THE ORDER LISTED IN PART I, LINE 2.

Note: For designations d–f, enter your title, position, or relationship to the taxpayer in the "Licensing jurisdiction" column.

Designation—Insert above letter **(a–r).**	Licensing jurisdiction (State) or other licensing authority (if applicable)	Bar, license, certification, registration, or enrollment number (if applicable)	Signature	Date

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Practitioner Note

Form 8821

If an unenrolled return preparer does not meet all the representation requirements, the taxpayer can authorize the unenrolled return preparer to inspect and/or request tax information by filing Form 8821, Tax Information Authorization. Filing a Form 8821 does not authorize the unenrolled return preparer to represent the taxpayer.

Submitting Form 2848

Forms 2848 and 8821 can be submitted in several ways:

1. Using an IRS Tax Pro Account
2. Submitting the forms online
3. Faxing or mailing the forms

Cross-Reference

Tax Pro Account

The IRS Tax Pro Account is an all-digital method of submission with electronic signatures and real-time processing. This method requires the tax professional to have a Tax Pro Account, and the individual taxpayer must have an IRS online account. The tax professional submits the request to the individual taxpayer's online account for electronic signature. See the "IRS Issues" chapter in this book for a discussion of setting up and using the Tax Pro Account.

Online Submission

Tax practitioners can submit Form 2848 (and Form 8821) electronically. If the tax professional uses the online option, the signatures on the forms can be handwritten or electronic (or digitized image). Form 8821 needs only the taxpayer's signature. If the tax professional uses the electronic signature option for a new client, the tax professional must first authenticate the client's identity. There is no expedited processing for online submissions. The CAF Unit processes online submissions in the same manner as forms that are faxed or mailed, which means they are reviewed on a first-come, first-served basis. See www.irs.gov/tax-professionals/submit-forms-2848-and-8821-online.

Fax or Mail Submission

Faxed and mailed forms are processed on a first-in, first out basis. Signatures must be handwritten. See www.irs.gov/instructions/i2848#f11981u01 for where to file by fax or mail.

IRS ASSESSMENTS

This section discusses the IRS general deficiency procedures and the summary assessment procedure for mathematical or clerical errors.

An assessment is the statutorily required recording of a tax liability. Under I.R.C. § 6203, an assessment of tax (including interest, additions to tax, and assessable penalties) is made by recording the liability of the taxpayer in the IRS office in accordance with rules or regulations prescribed by the IRS. When requested by a taxpayer, the IRS must furnish a copy of the record of assessment to the taxpayer. Prior to making an assessment, the IRS must typically follow deficiency procedures. This section reviews the general deficiency procedures.

To correct mathematical and clerical errors on a return, the IRS can summarily assess additional tax using its math error authority. The National Taxpayer Advocate has stated that millions of taxpayers have received math error notices adjusting their returns, including the amount of recovery rebate credit (RRC), child tax credit, or other items claimed on their return. As of April 7, 2022, the IRS had issued 9,400,000 math error notices of which 8,300,000 were related to the RRC and the child tax credit. This section also discusses the summary assessment procedure for mathematical or clerical errors.

Deficiency Procedures

In a typical deficiency determination, if the IRS questions an item on a taxpayer's return it will conduct an examination and ask the taxpayer to provide an explanation with documentation to substantiate the item(s) in question on the return. The IRS reviews the documentation and sends the taxpayer what is commonly called a 30-day letter. The letter proposes no change if the IRS finds that the taxpayer's explanation or supporting documentation is sufficient to substantiate the items on the return.

If the taxpayer does not respond or if the IRS believes the documentation provided does not support the questioned item(s), the IRS issues a 30-day letter that proposes an adjustment. The taxpayer can agree to the proposed adjustment, or protest and request an Appeals conference (discussed later). If the taxpayer does not respond, the IRS sends a statutory notice of deficiency that gives the taxpayer 90 days to file a petition in the US Tax Court. This process is called *deficiency procedures*.

Notice of Deficiency

Under I.R.C. § 6212, if the IRS determines that there is a tax deficiency, the IRS is authorized to send notice of the deficiency to the taxpayer by certified or registered mail. In general, the notice is sent to the taxpayer's last known address. In most cases, the IRS must issue a notice of deficiency, also called a statutory notice of deficiency or a 90-day letter, before assessing additional income tax, estate tax, gift tax, and certain excise taxes, unless the taxpayer agrees to the additional assessment.

The notice of deficiency is a legal determination that is presumptively correct and consists of the following:

1. A letter explaining the purpose of the notice, the amount of the deficiency, and the taxpayer's options
2. A waiver to allow the taxpayer to agree to the additional tax liability
3. A statement showing how the deficiency was computed
4. An explanation of the adjustments

The purpose of a notice of deficiency is to comply with I.R.C. § 6213, to ensure the taxpayer is formally notified of the IRS's intention to assess a tax deficiency, and to inform the taxpayer of the opportunity and right to petition the Tax Court to dispute the proposed adjustments. A notice of deficiency must be issued when there is a proposed tax deficiency with which the taxpayer does not agree and

1. the statute of limitations is imminent and no extension can be obtained;
2. the taxpayer does not respond to, or file a valid protest to, a 30-day letter; or
3. the taxpayer requests the issuance of the notice so the taxpayer can file a petition with the Tax Court.

Letter 531, Notice of Deficiency, is the letter used most often for income tax deficiencies.

Restrictions on Assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States after the notice of deficiency is mailed (not including Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except in limited situations, no assessment of a deficiency and no levy or proceeding in court for its collection may be made, begun, or prosecuted until the IRS has mailed the notice to the taxpayer and the 90-day or 150-day period has expired.

If the taxpayer timely files a petition with the Tax Court, no assessment can be made until the decision of the Tax Court is final. If the taxpayer does not petition the Tax Court or agree to the deficiency by signing a waiver, then the case is closed as unagreed. The deficiency can then be assessed because the taxpayer has defaulted (i.e., has not responded to the notice of deficiency).

Jeopardy Assessments

There is an exception to the general deficiency procedures for a jeopardy assessment. The term *jeopardy assessment* may refer to either a termination assessment under I.R.C. § 6851, or a jeopardy assessment under I.R.C. §§ 6861 and 6862. Both types of assessment are based on a determination that the collection of the tax is in jeopardy.

A termination assessment applies to income taxes for the current tax year, or the immediately preceding tax year if the due date for the return has not passed. If jeopardy is determined, the taxpayer's tax year is terminated and treated as a complete tax year for assessment purposes. A jeopardy assessment applies to a closed tax year or tax period, where the due date for filing a return has expired. For income, estate, gift, and certain excise taxes, assessment is made pursuant to I.R.C. § 6861. The IRS can assess the tax immediately without waiting for expiration of the 90-day or 150-day period. If the jeopardy assessment is made before the notice is mailed under section 6212(a) (the notice of deficiency), then the IRS must mail a notice within 60 days after making the assessment. For other kinds of taxes (employment and other excise taxes), assessment is made pursuant to I.R.C. § 6862.

Grounds for Jeopardy Assessments

Treas. Reg. § 301.6861-1(a), by reference to Treas. Reg. § 1.6851-1(a), provides that jeopardy exists if the IRS finds that any of the following apply:

1. The taxpayer is (or appears to be) planning to leave the United States or to remove his or her property from the United States.
2. The taxpayer is concealing himself or herself or his or her property within the United States.
3. The taxpayer is doing any other act threatening the collection of tax for the current or the preceding tax year, such as transferring or dissipating assets, making oneself financially insolvent, or, for a corporation, liquidating substantially all its assets. The financial solvency of the taxpayer must be threatened or appear to be imperiled.

Courts may consider many factors in determining whether one of these three circumstances is present. For example, the courts may consider whether the following have occurred:

1. The taxpayer possesses, or deals in, large amounts of cash.
2. The taxpayer's prior tax returns report little or no income despite the taxpayer's possession of large amounts of cash.
3. The taxpayer's assets have been dissipated, such as through forfeiture, expenditures for attorney's fees, or appearance bonds.
4. The taxpayer has a lack of assets from which potential tax liability can be collected.
5. The taxpayer used aliases that make it more difficult to locate the taxpayer or his or her assets.
6. The taxpayer failed to supply appropriate financial information.
7. The taxpayer used multiple addresses, making it hard to find the taxpayer.
8. The taxpayer has a history of illegal activity and/or convictions, or there is probable cause to believe that the taxpayer was engaged in illegal business activities.
9. The taxpayer has a history of concealing assets overseas.
10. The taxpayer recently sold or transferred property, including a transfer of property to relatives for inadequate consideration.

Practitioner Note

Form and Procedure

Only the IRS's area director has the authority to determine that a jeopardy assessment should be made. Written approval by the Chief Counsel or their delegate is also required. For income, estate, gift, and certain excise taxes, a statutory notice of deficiency for the jeopardy assessment must be issued within 60 days following assessment. See I.R.M. § 5.17.15.2.2 (February 28, 2022).

Mathematical or Clerical Errors

Math error procedures give the IRS authority to bypass normal deficiency procedures in certain circumstances, allowing the IRS to make adjustments quickly, and offering fewer opportunities for taxpayers to contest the adjustments. When the IRS makes a math error adjustment, it will send the taxpayer a notice informing the taxpayer of (1) the adjustment, correction, and balance due or corrected refund amount, and (2) the right to request an abatement within 60 days of the date the notice was sent.

The IRS issues several variations of its math error notices, of which the most common are shown in **Figure 8.3**.

FIGURE 8.3
Math Error Notices

Notice Number	Description
CP11	We made changes to your return because we believe there is a miscalculation. You owe money on your taxes as a result of these changes.
CP12	We corrected one or more mistakes on your tax return. As a result, you are now either due a refund or your original refund amount has changed.
CP13	We made changes to your return because we believe there's a miscalculation. You're not due a refund nor do you owe an additional amount because of our changes. Your account balance is zero.

Types of Mathematical or Clerical Errors

The term *mathematical* or *clerical error* includes, in part, the following:

1. An addition, subtraction, multiplication, or division error shown on any return
2. An incorrect use of any IRS table if such incorrect use is apparent from the existence of other information on the return
3. An entry on a return that is inconsistent with another entry of the same or another item on the return
4. An omission of information that is required to substantiate an entry on the return
5. An entry on a return of a deduction or credit that exceeds a certain statutory limit, if such limit is expressed as a specified monetary amount, or as a percentage, ratio, or fraction, and if the items needed to apply the limit appear on the return
6. An omission of a correct taxpayer identification number (TIN) required for the earned income tax credit, child and dependent care credit, deduction for personal exemptions (when allowed), child tax credit, or education credits
7. An entry on a return claiming the earned income tax credit for net earnings from self-employment and no self-employment tax has been paid

Example 8.2
Use of Incorrect Table

Diane Chamberlin is a married taxpayer. In 2022, she separated from her husband and filed her income tax return as married filing separately. However, when calculating the amount of tax on taxable income from the IRS tax tables, Diane entered the amount for married filing jointly taxpayers. Diane's use of the incorrect table is a math or clerical error.

Example 8.3
Omission of Information

On her 2022 income tax return, Sharon Tanaka claimed a deduction for a contribution to a health savings account. She failed to attach Form 8889, Health Savings Accounts (HSAs). Failure to attach the required form is a math or clerical error.

Example 8.4
Exceeding Statutory Limit

In 2022, Robert McDonald filed single and claimed a $2,500 student loan interest deduction. His modified adjusted gross income exceeded the $85,000 statutory limit for claiming the deduction. Claiming the deduction is a math or clerical error.

Request for Abatement

After receiving the notice of a math or clerical error adjustment, taxpayers can either accept the changes that the IRS made and pay the amount due, accept the reduction of a credit, or request abatement.

Practitioner Note

Math Error Responses

If the taxpayer disagrees with the math error notice, the IRS will characterize the response as either a substantiated protest or an unsubstantiated protest. A substantiated protest occurs when a taxpayer provides supporting documentation, either orally or in writing, that proves the IRS's math error calculation is incorrect [see I.R.M. § 21.5.4.5.4, Math Error Substantiated Protest Processing]. An unsubstantiated protest occurs when a taxpayer fails to provide supporting documentation to prove that the IRS's math error calculation is incorrect [see I.R.M. § 21.5.4.5.5, Math Error Unsubstantiated Protest Processing].

The taxpayer has 60 days to request abatement of the assessment or reversal of the credit adjustment without having to provide substantiation. If the taxpayer requests abatement or reversal within the 60-day time period, the IRS must make the abatement or reversal and then follow the regular deficiency procedures to reassess the tax.

The following are not considered mathematical/clerical errors for purposes of the 60-day abatement request and do not qualify for abatement:

- A correction to withholding or estimated tax payments
- A tax decrease or increase of credits resulting in a larger refund than the taxpayer expected

Practitioner Note

Assessments

Treas. Reg. § 301.6203-1 specifies that an assessment is made by an assessment officer signing the summary record of assessment, which through supporting records must include the identification of the taxpayer; the character of the liability assessed; the tax period, if applicable; and the amount of the assessment. Under the regulations, if a taxpayer requests a copy of the record of assessment, the IRS will give the taxpayer a copy of the pertinent parts of the assessment. There is no requirement that the assessment be recorded on a specific form or that the taxpayer be provided with a certain form as a record of assessment. An assessment is not invalid, and collection is not precluded, because the IRS has not provided a summary record of assessment to the taxpayer [Rev. Rul. 2007-21, 2007-1 C.B. 865].

RESPONDING TO AN IRS NOTICE OR LETTER

This section reviews ways to respond to an IRS notice or letter.

The 2021 filing season was challenging for the IRS and also for tax practitioners. According to the National Taxpayer Advocate, the IRS finished the 2021 filing season with a backlog of over 35,000,000 individual and business income tax returns that require manual processing.

Tax practitioners with a third-party authorization may have received several notices and letters from the IRS. This section discusses traditional methods to contact the IRS to respond to a notice or letter. The next section discusses when the tax practitioner can request an Appeals hearing to resolve a notice or letter.

Practitioner Note

Suspension of Notices

As part of ongoing efforts to provide additional help for taxpayers, the IRS announced in February 2022 that it suspended more than a dozen letters, including the mailing of automated collection notices normally issued when a taxpayer owes additional tax and the IRS has no record of a taxpayer filing a tax return. Although the notices were suspended, the taxpayer still has an obligation to pay any tax owed. See the list of suspended notices at www.irs.gov/newsroom/irs-continues-work-to-help-taxpayers-suspends-mailing-of-additional-letters.

Contacting the IRS

The IRS sends notices and letters for the following reasons:

- The taxpayer has a balance due.
- The taxpayer is due a larger or smaller refund.
- The IRS has a question about a tax return.
- The IRS needs to verify identity.
- The IRS needs additional information.
- The IRS changed a return.
- The IRS needs to notify the taxpayer of delays in processing a return.

The IRS provides a contact phone number that is usually on the top right-hand corner of the notice or letter. The tax practitioner can try to call the number. However, the National Taxpayer Advocate, in its fiscal year *2022 Objectives Report to Congress*, notes that

> The IRS received more telephone calls during the 2021 filing season than it had ever received in a full fiscal year. During the height of the filing season, the IRS at one point received telephone calls at the rate of about 1,500 per second. Needless to say, IRS employees could not handle this massive volume of calls. The IRS reported a "Level of Service" on its Accounts Management telephone lines of 15 percent, with only seven percent of taxpayer calls reaching a telephone assistor. The most frequently called toll-free number is the "1040" line for individual income tax services. It logged about 85 million calls, and only three percent of calls (i.e., three out of 100) reached a Customer Service Representative.

Alternatively, the tax practitioner can write to the IRS at the address in the notice or letter. He or she can also try to call the Practitioner Priority Service.

Example 8.5
Responding to a Notice

Jesse Smith is a US citizen. In 2021, he purchased land in Arizona for $200,000. The seller was a Canadian citizen. Jesse's tax practitioner withheld $30,000 ($200,000 × 15%) from the sale proceeds and remitted the funds to the IRS with Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, and Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests. Both forms reported the $200,000 amount realized and the $30,000 amount withheld. Jesse's tax practitioner received the notice shown in **Figure 8.4**.

FIGURE 8.4
Jesse Smith's Tax Notice

IRS Department of the Treasury
Internal Revenue Service

OGDEN UT 84201-0034

OMB Clearance No.: 1545-0902

In reply refer to: 0425807462
Jan. 14, 2022 LTR 3104C 0 R
***-**-8500V 202107 17
00017227
BODC: NOBOD

LORI B MILLER PC
100 CENTRAL AVE STE 203
WHITEFISH MT 59937

.7956

Taxpayer Identification Number: ***-**-
Tax Period: July 31, 2021
Form: 8288

Dear Taxpayer:

Thank you for filing the above referenced income tax return.

FORM 8288 SHOWS AN AMOUNT REALIZED OF $26,242.57 ON LINE 5. THE FORM 8288-A SHOWS AMOUNT REALIZED OF $26,242.57 ON LINE 3. PLEASE PROVIDE AN EXPLANATION OR DOCMENTATION TO SUBSTANTIATE THE DIFFERENCE.

Please provide the information requested within 30 days from the date of this letter.

If you need to order a tax form or publication, call the IRS toll-free number, 1-800-TAX-FORM (1-800-829-3676) or visit our website at www.irs.gov.

If you have any questions, please call us toll free at 1-800-829-0115 or at 1-267-941-1000 if you are calling from outside the United States (toll charges apply).

If you prefer, you may write to us at the address shown on page one of this letter.

Whenever you write, please include this letter and, in the spaces below, give us your telephone number with the hours we can reach you. Keep a copy of this letter for your records.

Telephone Number (   )________________________ Hours________________

Jesse's tax practitioner has a power of attorney and can try to call the phone number on the notice to explain that the amount realized is incorrect. In the alternative, she should write to the address on the letter and include a copy of the letter, a copy of the settlement statement, and a copy of the filed forms showing that the amount realized was $200,000.

Practitioner Priority Service

At the time of this writing, the Practitioner Priority Service line is limited. **Figure 8.5** shows the cautionary statement on the Practitioner Priority Service website.

FIGURE 8.5
Practitioner Priority Service Website

Service on the Practitioner Priority Service line is extremely limited. Expect delays for Centralized Authorization File (CAF) number authorizations. Please look for help on IRS.gov. Normal operations will resume as soon as possible.

The Practitioner Priority Service (PPS) is a tax practitioner's primary point of contact with the IRS. A tax practitioner with valid third-party authorization could call the PPS at 866.860.4259 to resolve account-related issues. The PPS is a professional support line that is staffed by IRS customer service representatives specially trained to handle practitioners' account questions. PPS service hours are weekdays as follows:

- 7 a.m. to 7 p.m. local time (Alaska and Hawaii follow Pacific time)
- 8 a.m. to 8 p.m. local time for Puerto Rico

Cross-Reference

Taxpayer Transcripts

If a tax practitioner is registered for e-Services and has a valid third-party authorization recorded on the Centralized Authorization File (CAF), he or she does not need to contact PPS to obtain a taxpayer transcript. The practitioner can obtain the transcript through e-Services. See the "IRS Issues" chapter in this workbook for a discussion of obtaining transcripts.

Figure 8.6 shows the PPS phone prompts.

FIGURE 8.6
PPS Phone Prompts

Please listen carefully to each option before making a selection.

For general tax law questions, including filing a return or tax rules and regulations, press or say 1.

- For questions related to Filing, Dependents, Income and Credits for Form 1040, press 1.
- For questions related to Schedule D, Self-Employment, or Pensions/IRAs, press 2.
- For questions related to the Affordable Care Act, press 3.
- All others, press 4.
- To repeat these options, press 9.

For questions about individual accounts that are not in collection or examination status, press or say 2.

For questions about business accounts that are not in collection or examination status, press or say 3.

If your client's account is in Automated Collection System status, ACS, or you need to address balance due issues, press or say 4.

For questions about an Automated Underreporter Notice, AUR, that your client received, press or say 5.

- Please look at the top right-hand corner of the Notice's front page.
- If the phone number is 800-829-8310, press or say 1.
- If the phone number is 800-829-3009, press or say 2.
- If the phone number is 877-571-4712, press or say 3.

If your client's account is under Correspondence Examination, press or say 6.

- If the number on the letter is 866-897-0161, press or say 1 for the Small Business, Self-employment Examination toll-free line.
- If the number on the letter is 866-897-0177, press or say 2 for the Wage and Investment Examination toll-free line.

To hear these options again, press or say 9.

[IRS.gov, "Practitioner Priority Service ®," online at www.irs.gov/tax-professionals/practitioner-priority-service-r, accessed June 23, 2022]

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The PPS account service is available to tax practitioners who provide tax advice, prepare income taxes, or act on an individual taxpayer's behalf and are calling regarding an account-related issue before the IRS. It offers the following account-related services:

- Locating and applying payments
- Explaining IRS communications (i.e., notices and letters)
- Providing general procedural guidance and timeframes
- Making account adjustments
- Securing taxpayer income verification
- Providing transcripts of taxpayer accounts
- Providing a forgotten/lost CAF number

PPS limits the number of clients per call to five clients. Transcript requests have a combined limit of 30 per client with a maximum of 10 Integrated Data Retrieval System (IDRS) internal transcripts per client. Issues outside the scope of the PPS employees' authority are transferred or referred to the appropriate IRS functions, such as accounts assigned to a revenue officer or revenue agent. If the PPS assistor cannot transfer the call, the assistor will provide the caller with the appropriate contact telephone number.

Advice for Responding to a Math Error

The National Taxpayer Advocate (NTA) issued the following advice for responding to a math error notice a taxpayer may receive:

1. If a taxpayer disagrees with the notice, the taxpayer or tax practitioner should contact the IRS by the date provided in the notice, which is at the top right-hand corner of the first page. If the adjustment is disputed within the 60-day time period, the adjustment will be reversed. The case may then be sent to Exam, where the taxpayer and tax practitioner will be able to support the item(s) being challenged.
2. Taxpayers can call the IRS and request reversal of the adjustment, but reaching the IRS by phone is challenging (for filing season 2022, as of the week ending April 9, 2022, the level of service for the phone lines that serve math error notice recipients was just under 10%). In light of this poor level of service on the phones, the NTA recommends that taxpayers or tax practitioners send a letter to the IRS via certified mail requesting a reversal of the adjustment.
3. If taxpayers do not agree with the notice but the 60-day period for requesting reversal has passed, taxpayers may still be able to challenge the adjustment administratively. However, taxpayers will need to provide documentation showing that they in fact reported the item correctly and no error was made. If the IRS finds the documentation is insufficient, the IRS will not reverse the adjustment. If the adjustment results in a reduced refund or no tax due, the taxpayer may contest the adjustment by filing suit in a US district court or the US Court of Federal Claims. If the adjustment results in a liability, the taxpayer must pay the liability prior to filing suit in one of these courts.
4. In limited situations, taxpayers may challenge the math error adjustment in the US Tax Court, even if they did not request abatement of the tax within the 60-day time period. For example, if the IRS takes collection action against the taxpayer and sends a Letter 11, Notice of Intent to Levy and Notice of Your Right to a Collection Due Process Hearing, the taxpayer may request a collection due process (CDP) hearing and petition the US Tax Court for review of the Appeals CDP determination. The taxpayer may challenge the adjustment at the CDP hearing because receiving a math error notice is not a prior opportunity under I.R.C. § 6330(c)(2)(B) that would otherwise prevent the taxpayer from disputing the liability.

Additional Phone Resources

The following phone resources may be useful when responding to an IRS notice of letter:

1. *Business and Specialty Tax Line and EIN Assignment*: 800.829.4933
   Monday–Friday, 7:00 a.m. to 7:00 p.m. taxpayer local time (Alaska & Hawaii follow Pacific time)
   For businesses, corporations, partnerships, and trusts that need information and/or help regarding their business returns or business accounts. Services cover EINs, 94x returns, 1041, 1065, 1120-S, excise returns, estate and gift returns, and issues related to federal tax deposits.
2. *Electronic Products and Services Support e-Help Desk*: 866.255.0654
   Monday–Friday, 6:30 a.m. to 6:00 p.m. central time
   The e-Help Desk supports the following:
   a. e-Services: A suite of web-based products that allow third parties and payers to conduct business with the IRS electronically
   b. Registration: Establishes an electronic account that enables individuals to login, apply for, and use e-services products
   c. IRS e-file Application: Allows a business or organization to become an authorized e-file provider to participate in the e-file program
   d. Taxpayer Identification Number (TIN) Matching: Enables authorized payers (firms who withhold or make specified payments to the IRS) to verify a TIN and name combination
   e. Transcript Delivery System: Allows the tax preparer to request transcripts and wage and income documents from the IRS

   The e-help Desk does not answer account-related questions.
3. *Tax Exempt and Government Entities*: 877.829.5500
   Monday–Friday, 8:00 a.m. to 5:00 p.m. taxpayer local time (Alaska & Hawaii follow Pacific time)
   For questions regarding employee plans and exempt organizations determination applications; affirmations of tax-exempt status; miscellaneous issues for exempt organizations, employee plans, and government entities; and account/notice inquiries. Specific employment tax issues (Form 941 returns/notices) should be referred to 800.829.4933.

Cross-Reference

IRS Online Tools

When reaching the IRS by phone is challenging, tax practitioners may find online tools useful to resolve a taxpayer's notice or letter. See the discussion of tax transcripts and the Tax Pro Account in the "IRS Issues" chapter in this book. See also the discussion of online tools on pages 299–305 in the *2021 National Income Tax Workbook*.

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INDEPENDENT OFFICE OF APPEALS The Office of Appeals helps to resolve tax disputes.

The IRS Independent Office of Appeals (Appeals) is an independent organization within the IRS that helps to resolve tax disputes. This section discusses what notices and letters have appeal rights, and when and how to request an Appeals conference. It also explains the Appeals review procedure.

Notices and Letters That Offer an Appeal Opportunity

If the taxpayer receives a notice or letter from the IRS and the taxpayer does not agree with the IRS's decision, the taxpayer may be entitled to an Appeals hearing. The notice (CP) or letter (LTR) has a number on either the top or the bottom right-hand corner. This section reviews the notices and letters that give the taxpayer a right to an Appeals hearing to dispute an increase in tax or other adjustment.

1. *CP90, Final Notice, Notice of Intent to Levy and Notice of Your Right to a Collection Due Process Hearing*, notifies the taxpayer of unpaid taxes and that the IRS intends to levy to collect the amount owed.
2. *CP92, Notice of Levy upon Your State Tax Refund Notice of Your Right to a Hearing*, notifies the taxpayer that the IRS levied his or her state tax refund to pay unpaid federal taxes.
3. *CP242, Notice of Levy upon Your State Tax Refund, Notice of Your Right to a Hearing*, notifies the taxpayer that the IRS levied his or her state tax refund to pay unpaid federal taxes.
4. *CP297, Final Notice, Notice of Intent to Levy and Notice of Your Right to a Collection Due Process Hearing*, notifies the taxpayer that the IRS has not received full payment despite sending several notices about unpaid federal taxes, and that the IRS may seize (levy) the taxpayer's property or rights to property.
5. *CP523, Default on Your Installment Agreement (IA) Notice, Intent to Terminate your IA*, notifies the taxpayer that the IRS intends to terminate his or her installment agreement in 30 days.
6. *CP2000, Request for Verification of Unreported Income, Payments, and/or Credits*, notifies the taxpayer that the IRS received income, deduction, or credit information that does not match the taxpayer's return, and provides a computation of the proposed adjustments to the tax return based on this information.
7. *Letter 11, Final Notice of Intent to Levy and Notice of Your Right to a Hearing*, notifies the taxpayer of unpaid taxes and that the IRS intends to levy to collect the amount owed.
8. *Letter 73, Notice of Levy and of Your Right to a Hearing*, notifies the taxpayer that the IRS has not received payment of federal employment tax and has issued a notice of levy to collect a taxpayer's unpaid taxes. The IRS has determined that the taxpayer is not entitled to a prelevy hearing because the taxpayer (or his or her predecessor) previously requested a collection due process hearing under I.R.C. § 6330 that included an employment tax period that fell within the 2-year period that ended with the beginning of the period shown on the notice.
9. *Letter 525, General 30-Day Letter,* provides the taxpayer with a computation report of proposed adjustments to his or her tax return.
10. *Letter 531, Notice of Deficiency*, notifies the taxpayer that he or she owes additional tax or other amounts for the tax year(s) listed in the letter.
11. *Letter 692, Request for Consideration of Additional Findings*, provides the taxpayer with a computation report of proposed adjustments to his or her tax return.

12. *Letter 915, Examination Report Transmittal*, explains adjustments in the amount of tax owed.
13. *Letter 950, 30-Day Letter-Straight Deficiency*, proposes adjustments for unagreed, straight deficiency, straight overassessment, or mixed deficiency and overassessment cases. This letter may be used for various types of tax.
14. *Letter 1058, Final Notice Reply Within 30 Days*, notifies the taxpayer of unpaid taxes and that the IRS intends to levy to collect the amount owed.
15. *Letter 1085, 30-Day Letter Proposed I.R.C. 6020(b) Assessment*, notifies the taxpayer that his or her business did not file a tax return for a tax period in which the IRS believes the taxpayer has a filing requirement. The letter notifies the taxpayer that the IRS has prepared a tax return on behalf of the business for the tax period identified.
16. *Letter 1153, Proposed Trust Funds Recovery Penalty Letter Notification*, explains that the IRS's efforts to collect the federal employment or excise taxes due from the business named on the letter have not resulted in full payment of the liability. Therefore, the IRS proposes to assess a penalty against the taxpayer.
17. *Letter 3016, I.R.C. Section 6015 Preliminary Determination Letter (30-Day)*, gives the taxpayer 30 days to appeal the determination for innocent spouse relief under I.R.C. § 6015.
18. *Letter 3391, 30-Day Non-filer Letter*, advises the taxpayer that the IRS believes he or she is liable for filing tax returns for the periods identified in the letter. It includes a report giving the taxpayer a computation of the proposed adjustments to the tax return and explains the adjustments.
19. *Letter 3172, Notice of Federal Tax Lien Filing and Your Rights to a Hearing under I.R.C. 6320*, notifies the taxpayer that the IRS filed a notice of tax lien for the unpaid taxes.

Penalty Appeals

If the IRS rejected a request to remove a penalty, the taxpayer may be able to request an Appeals conference or hearing. The taxpayer generally has 30 days from the date of the rejection letter to file a request for an Appeals conference. The taxpayer can file an appeal if all the following have occurred:

- The taxpayer received a letter that the IRS assessed a failure-to-file and/or failure-to-pay penalty on an individual or business tax account.
- The taxpayer sent a written request to the IRS asking them to remove the penalty.
- The IRS denied the request to remove the penalty (penalty abatement).
- The taxpayer received a letter denying the request and stating that the taxpayer has appeal rights.

For an overview of the penalty appeals process, see IRS Publication 4576, *Orientation to the Penalty Appeals Process*.

Cross-Reference

Penalty Relief

The IRS may grant reasonable cause relief when a taxpayer exercises ordinary business care and prudence in determining his or her tax obligations but is unable to comply with those obligations due to circumstances beyond the taxpayer's control. The IRS can also abate penalties because of certain statutory exceptions and administrative waivers. See the "Penalties and Defenses" chapter in the *2016 National Income Tax Workbook* for a further discussion of penalty relief.

Requesting an Appeals Conference

To request an Appeals conference, the taxpayer must send a written protest (unless the small case request procedure applies, discussed later) to the address on the letter or notice. Before sending the case to Appeals, the IRS examination or collection office that made the tax assessment or initiated collection action will consider the protest and attempt to resolve the disputed tax issues. If that office cannot resolve the issues, they will forward the case to Appeals for consideration.

The taxpayer can represent himself or herself at an Appeals hearing or can retain a professional representative. The representative must be an attorney, a certified public accountant, or an enrolled agent authorized to practice before the IRS and must provide the IRS with a copy of a completed Form 2848, Power of Attorney and Declaration of Representative.

Formal Written Protest

A formal written protest is required if the proposed change to the total amount of tax and penalties for any tax period exceeds $25,000. A formal written protest is also required in the following cases:

- Employee plan and exempt organization cases regardless of the dollar amount
- Partnership and S corporation cases regardless of the dollar amount
- In all other cases, unless the taxpayer qualifies for the small case request procedure, or other special appeal procedures, such as requesting Appeals consideration of liens, levies, seizures, or installment agreements

A formal written protest must include a statement that the taxpayer wants to appeal the changes proposed by the IRS, and it must include the following information:

1. The taxpayer's name, address, and a daytime telephone number
2. A copy of the letter that the taxpayer received that shows the proposed change(s)
3. The tax period(s) or year(s) involved
4. A list of each proposed change that the taxpayer disagrees with and
   a. the reason(s) the taxpayer disagrees with each item;
   b. facts that support the position on each item; and
   c. the law or authority, if any, that supports the position on each item and how the law applies to the facts.
5. One of the following penalties-of-perjury statements:
   a. Under penalties of perjury, I declare that I submitted the protest and accompanying documents, and to the best of my personal knowledge and belief, the information stated in the protest and accompanying documents is true, correct, and complete.
   b. Under penalties of perjury, I declare that I submitted the protest and accompanying documents, and I have no personal knowledge concerning the information stated in the protest and accompanying documents.

The formal written protest must be submitted within the time limit specified in the letter that offers the taxpayer the right to appeal the proposed changes. Generally, the time limit is 30 days from the date of the letter.

Small Case Request

If the entire amount of additional tax and penalties proposed for each tax period is $25,000 or less and the case is eligible, the taxpayer can make a small case request. The taxpayer can use Form 12203, Request for Appeals Review, (or a form referenced in the IRS letter to file the appeal); or can prepare a brief written statement to file the appeal. The taxpayer must list the disputed tax items and the reason why the taxpayer disagrees with the IRS's position.

The Appeals Process

If the case qualifies for an appeal, an Appeals employee will review the issues of the case with a fresh, objective perspective and schedule a conference with the taxpayer or his or her representative. Appeals conferences are informal and are conducted by correspondence, telephone, or video conference, or at an in-person conference. Appeals will consider any reason for disagreement, except for moral, religious, political, constitutional, or conscientious objections, or similar grounds.

First Notice from Appeals

Appeals response times can vary, depending on the type of case and the time needed to review the file. If it has been more than 120 days since the taxpayer or the taxpayer's representative filed the request, the taxpayer or the taxpayer's representative should contact the office where he or she filed the Appeals request. If the IRS office has forwarded the case to Appeals, the taxpayer or taxpayer's representative can call Appeals at 559.233.1267. The taxpayer or tax practitioner must leave a message with the taxpayer's name and identifying number, and Appeals will research the status of the case and return the call within 48 hours. Appeals will not return the call if they have not yet received the case.

Practitioner Note

Time for Appeals

According to the chief of the IRS's Independent Office of Appeals, the cycle for appeals rose from an average 194 days in fiscal year 2018 to 372 days in the fiscal year that ended September 30, 2021.

Virtual Conferences

Appeals has expanded the availability of virtual conferences via WebEx or Zoom. The Appeals officer will email a link to attend the conference. During the conference, the tax practitioner can share documents on his or her screen but cannot electronically transfer files.

I.R.M. § 8.6.1.5 specifies the conference techniques that Appeals employees must use. In part, the Appeals employee must do the following:

1. Explain the Appeals process
2. Notify the taxpayer that he or she may be contacted by an outside contractor to complete a survey
3. Be thoroughly prepared for all aspects of the case
4. Have an open mind and a genuine interest in achieving a mutually acceptable agreement
5. Set realistic target dates for the taxpayer and/or the representative to submit additional information, and proposal and counterproposal settlements
6. Timely complete the conference and make an accurate and prompt decision to ensure the least amount of delay
7. Inform the taxpayer and/or representative of the final decision regarding the amount of tax liability, or other issues in dispute
8. Handle conferences objectively with a goal of reaching a sound decision based upon the merits of the issues in dispute
9. Conduct conferences in an open atmosphere that fosters cooperation in the resolution of disputes
10. Be a good listener

Practitioner Note

No Resolution at Appeals

If the taxpayer and the Appeals employee are unable to agree on all or some of the issues, the taxpayer can file a petition in Tax Court or pay the disputed tax and litigate the case in the US Court of Federal Claims or the taxpayer's applicable US district court.

Alternative Dispute Resolution

IRS Appeals offers alternative dispute resolution (ADR) to help with an unresolved issue with the IRS or if the taxpayer disagrees with an IRS decision or action. If an IRS examiner or collection officer is currently managing the case, the taxpayer may be able to request Fast Track or early referral to Appeals. If Appeals is currently managing the case, the taxpayer may be eligible for the Rapid Appeals Process.

Practitioner Note

Determining Who Is Assigned

To determine which IRS person is assigned to the taxpayer's case, the tax practitioner must look at the person's title and the key terms in the letter(s) from IRS. The contact is an IRS examiner if his or her title is "revenue agent" or "tax compliance officer" and key terms in the letter include *examination, unreported income, proposed adjustment*, or *explanation of changes*. The contact is an IRS collection officer if his or her title is "revenue officer" and key terms found in the letter include *unpaid tax, balance due, seize, levy, lien*, or *collection*. The contact is with the IRS Independent Office of Appeals if his or her title is "Appeals officer" or "settlement officer" and key terms found in the letter include *hearing, conference, determination*, or *sustain*. If the letter(s) has no individual IRS person's name listed as the person to contact in the upper right portion of the first page of the letter, then mediation is not an option.

Fast Track Program

Fast Track is a voluntary mediation program that may help resolve a tax dispute more quickly than a traditional appeal. The taxpayer can request Fast Track for most examination disputes, offer-in-compromise cases, and trust fund recovery penalty cases. The taxpayer requests Fast Track when the IRS examiner or collection officer has completed his or her work and there are issues that remain unresolved.

With Fast Track, an independent Appeals mediator will try to help reach an agreement on the disputed issue(s). The taxpayer can be represented by an eligible representative with a power of attorney. The Appeals mediator will facilitate settlement discussions and may offer settlement proposals. Which Fast Track program to request depends on the case.

Small Business/Self-Employed

For small business and self-employed (SB/SE) taxpayers, the goal is to resolve cases within 60 days. Taxpayers apply for the program on Form 14017, Application for Fast Track Settlement. Rev. Proc. 2017-25, 2017-14 I.R.B. 1039, provides cases that are eligible, the application process, and the settlement process.

In general, SB/SE Fast Track Settlement is available for cases in the SB/SE jurisdiction if

1. the case contains disputed factual or legal issues,
2. the issues are fully developed, and
3. the issues remain unresolved after the involvement of the group manager.

SB/SE Fast Track Settlement is not available, in part, for the following:

- Cases in which the taxpayer did not act in good faith during the audit process, such as, but not limited to, cases in which the taxpayer failed to cooperate or unduly delayed the audit process
- Correspondence examination cases worked solely in a campus/service center site
- Partnership cases under the Tax Equity & Fiscal Responsibility Act (TEFRA)
- Collection cases, including collection due process, Collection Appeals Program, offer-in-compromise, and trust fund recovery penalty cases
- Issues designated for litigation
- Issues docketed in any court

If any one issue is determined not to be eligible for SB/SE Fast Track Settlement, no issues in the case are eligible for SB/SE Fast Track Settlement.

Collection Issues

Fast Track Mediation - Collection lets taxpayers resolve disputes related to offers in compromise or trust fund recovery penalties. The goal is to resolve these cases within 40 days. To apply, the taxpayer completes Form 13369, Agreement to Mediate.

Early Referral to Appeals

If an IRS examiner or collection officer is working on a tax matter, the taxpayer or tax practitioner may request the transfer of a developed but unagreed issue to Appeals, while the IRS continues to develop other issues in the case. This is called an early referral. Resolving a key issue early may help the taxpayer and the IRS resolve other issues in the case. The taxpayer or tax practitioner can also request an early referral for issues regarding an involuntary change in method of accounting, employment tax, employee plans, and exempt organizations. Regular Appeals procedures apply, including opportunities for taxpayer conferences. For additional information, see Rev. Proc. 99-28, 1999-2 C.B. 109.

Rapid Appeals Process

If the taxpayer has an audit or collection activity, has already worked with an Appeals officer, and still has unresolved issues, the taxpayer may be able to elect mediation at the start of his or her appeal. This voluntary process allows Appeals to convert the preconference meeting between the taxpayer and the IRS examiners into a mediation session where Appeals helps the parties resolve unagreed issues. If mediation is unsuccessful, Appeals will use the traditional Appeals process to try to negotiate a settlement. The rapid appeals process is available for most Large Business & International cases and SB/SE estate and gift cases.

Post-Appeals Mediation

Post-Appeals mediation (PAM) allows the Appeals officer or settlement officer to resolve disputes while the case is still under Appeals' consideration. The goal is resolution within 60 to 90 days. With PAM, a trained mediator from the IRS Office of Appeals is assigned to help reach an agreement on the disputed issue(s). The taxpayer must first work cooperatively and try to resolve all issues with the Appeals officer or settlement officer before seeking the services of an Appeals mediator.

The following issues are not eligible for PAM:

- Offer-in-compromise cases considered by an IRS campus site
- Issues docketed in any court, designated for litigation, or under consideration for designation for litigation
- Whipsaw issues, which are issues for which resolution with respect to one party might result in inconsistent treatment without the participation of the other party
- Collection cases, except for certain offer-in-compromise and trust fund recovery penalty cases as provided for in Rev. Proc. 2014-63, 2014-53 I.R.B. 1014
- Other issues listed in Rev. Proc. 2014-63

To apply for PAM, the taxpayer or tax practitioner must send the Appeals officer or settlement officer a written statement that contains a specific request for PAM and details about the taxpayer's position on the disputed issue.

CROSS-REFERENCE

Taxpayer Advocate Service

The Taxpayer Advocate Service (TAS) is an independent organization within the IRS that helps taxpayers and protects taxpayer rights. TAS can work with taxpayers and their representatives to resolve tax issues. See pages 284–291 in the *2021 National Income Tax Workbook* for a discussion of the TAS.

TRANSFEREES, NOMINEES, AND ALTER EGOS

When a taxpayer transfers assets to third parties, transferees, nominees, or alter egos, the IRS has several ways to collect against the transfered assets.

In some situations, the IRS can hold a third party liable for the tax liability of another taxpayer. Different legal theories for third-party liability include transferee liability, or liability of a nominee or alter ego.

Transferee Liabilities

Under I.R.C. § 6901 the IRS can assess a taxpayer's tax liability against a person or entity who received the taxpayer-transferor's assets for less than full, fair, and adequate consideration. The IRS can also collect the liability from the person or entity who is legally responsible for paying the taxpayer-transferor's liability.

Transferee liability can arise from the transfer of property by a taxpayer (income tax), a decedent (estate tax), or a donor (gift tax). A transferee liability can arise for other taxes (e.g., excise tax or employment taxes) if there was a liquidation of a corporation or a partnership, or a corporate reorganization under I.R.C. § 368.

There are two types of transferee liabilities: transferee at law and transferee in equity. *Transferee at law* arises when a person or entity is responsible for the transferor's tax liability because of an existing law or because of a contractual agreement with the transferor (i.e., an assumption or guarantee agreement). To pursue a transferee liability at law, the IRS must show that the transferee assumed the liability under a valid contract or that the transferee is liable under a specific state or federal statute.

Transferee in equity is the most common form of transferee liability. This situation arises when a person or entity receives the transferor's assets for less than full, fair, and adequate consideration, leaving the transferor insolvent and unable to pay the tax liability. Transferee-in-equity cases are based on the state or federal fraudulent conveyance statutes. In these cases, the transferee liability is limited to the value of the assets received from the transferor. This section primarily discusses transferee-in-equity cases.

To pursue a transferee-in-equity liability, the IRS must establish the following:

1. The transferor was insolvent when the asset transfer occurred or was rendered insolvent because of the asset transfer(s) (some states do not require insolvency for a transferee-in-equity liability).
2. The asset transfer was for less than adequate or full consideration.
3. The asset transfer occurred after the transferor's tax liability accrued (when this condition is required).
4. The transferor was liable for the tax.
5. The IRS made a reasonable attempt to collect the tax from the transferor or it would be futile to pursue collection from the transferor (e.g., a dissolved corporation).

Transferee Defined

A transferee under I.R.C. § 6901 can be anyone who receives property for inadequate consideration from a taxpayer who has an unpaid tax liability or a person who receives property or other distributions from a corporation or partnership if the entity has an unpaid tax liability. The definition of a transferee under Treas. Reg. § 301.6901-1(b) includes the following:

1. An heir, legatee, devisee, or distributee, of an estate of a deceased person
2. The shareholder of a dissolved corporation
3. The assignee or donee of an insolvent person
4. The successor of a corporation
5. A party to a reorganization as defined in I.R.C. § 368

6. All other classes of distributees
7. With respect to gift tax, a donee (without regard to the solvency of the donor)
8. Any person who under I.R.C. § 6324(a)(2) (estate tax lien on estate property) is personally liable for any part of such tax

Property Transfers

In some cases, the transfer of property must occur after the accrual of a tax liability (not the actual assessment). The tax accrues by the last day of the tax period, not on the due date of the return. IRS area counsel must be consulted to determine when the liability accrued [I.R.M. § 4.11.52.4.3].

Example 8.6
Accrual vs. Assessment

Andy Thompson filed his 2021 tax return on April 15, 2022. In 2022, Andy gifted stock to his brother, Bill. In June 2022, the IRS determined that Andy had $10,000 unreported income in 2021 and assessed additional tax. Because the tax liability related to the $10,000 income accrued in 2021 before the stock transfer, the IRS can assess a transferee liability against Bill if Andy cannot pay the tax.

The transfer of property must be for less than adequate consideration. Often, such transfers occur because of a close relationship between the parties involved. A preferential transfer occurs if the transfer was made to an insider because of a prior debt, the transfer was made at a time the transferor was insolvent, and the insider had reason to believe that the transferor was insolvent at the time the transfer was made.

Example 8.7
Transfers Between Corporation and Shareholder

Upon dissolution, CT Corporation paid a debt it owed to its majority shareholder but failed to pay an outstanding tax liability. The repayment of the loan may be a preferential transfer to an insider, thus making the shareholder a transferee liable for CT Corporation's unpaid tax. Similarly, an unreasonable bonus or salary paid to an employee/shareholder may also be treated as the equivalent of a distribution of the corporate assets and result in a transferee liability.

A property transfer can be a direct or an indirect transfer, and includes the following:

- Disposition of an asset or an interest in an asset
- Payment of money
- Payment of a debt
- Granting of a lease
- Compensation (especially if it is excessive) paid to corporate officers
- Release of a debt or claim
- Creation of a lien or other encumbrance
- Distribution of sales proceeds or other corporate assets to shareholders
- A sham transaction or a transaction that lacks economic substance or a business purpose

[I.R.M. § 5.17.14.3.1]

Source of Liability

The existence and the extent of a transferee's liability is based on either law or equity. An at-law liability is directly imposed by federal or state law. It can also arise from an express or an implied agreement. For example, a purchaser of a business may agree to purchase the assets and assume all liabilities of the business.

An in-equity liability is a transferee liability based on equity or fairness principles. It generally arises from the Federal Debt Collection Procedures Act (FDCPA) or state fraudulent conveyance statutes that prohibit a debtor from transferring assets for less than adequate consideration if he or she is unable to meet his or her obligations. Currently, 45 states and the District of Columbia have adopted the Uniform Voidable Transactions Act or its predecessor, the Uniform Fraudulent Transfer Act [www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49]. An in-equity transferee liability can also arise from the trust fund doctrine.

Fraudulent Conveyance

A fraudulent conveyance can involve constructive or actual fraud. *Constructive fraud* exists if the transferor transfers property for inadequate consideration and the transferor either is insolvent when the transfer occurs or is made insolvent by the transfer. The transferor's intent is immaterial.

Actual fraud exists when a taxpayer transfers property with the intent to hinder, delay, or defraud a creditor who is collecting a debt. Actual fraud may be established through circumstantial evidence (known as the indicators of fraud), which include the following:

1. Transfer lacks fair consideration
2. Transferor and transferee are closely related
3. Transferor retains the enjoyment, possession, and control of the property after the transfer
4. Transfer is concealed or not recorded
5. Transferor was sued or threatened with suit prior to the transfer
6. Transferor transferred substantially all of his or her assets
7. Transferor secretly left the jurisdiction
8. Transferor removed or concealed assets
9. Transferor was insolvent prior to the transfer or became insolvent shortly thereafter
10. Transfer occurred shortly before or after transferor incurred a substantial debt
11. Transferor transferred an essential asset of a business to a lienholder, who then transferred the asset to an insider

Trust Fund Doctrine

Transferee liability may also exist based on the trust fund doctrine, which is a judicially created equitable doctrine. The theory of the doctrine is that when a transfer leaves the transferor without enough assets to pay debts, the transferee holds the transferred property in trust for the benefit of the transferor's creditors. The trust fund doctrine is most commonly used to impose transferee liability on a shareholder for a corporation's taxes when the shareholder receives assets from a corporation prior to its dissolution. Recovery under this doctrine is limited to the value of the transferred property.

To apply the trust fund doctrine, the IRS must establish the value of the transferred property and show the following:

1. The alleged transferee received property of the transferor.
2. The transfer was made without consideration or for less than adequate consideration.
3. The transfer was made during or after the period for which the tax liability of the transferor accrued.
4. The transferor was insolvent prior to or because of the transfer (or series of transfers).
5. The IRS made all reasonable efforts to collect from the transferor, and further efforts would be futile.

Practitioner Note

Trust Fund Recovery Penalty

Application of the trust fund doctrine is different than the assertion of the trust fund recovery penalty under I.R.C. § 6672. Section 6672 directly imposes liability on a third party who is required to collect, truthfully account for, and pay over any tax imposed, and who willfully fails to do so.

Assessing Transferee Liability

A transferee's liability for the transferor's federal tax liability also includes any additions to tax, penalties, and interest that have been assessed with respect to the tax. Transferee liability is several and the IRS may proceed against one or more of any number of potential transferees [*Phillips v. Commissioner*, 283 U.S. 589 (1931)]. In addition, the government is not bound by any agreements among the transferees as to how the liability is apportioned. The IRS can assess transferee liability under section 6901 or can bring an action in district court. This section discusses the administrative assessment procedure and statute of limitations on the assessment.

Administrative Assessment Procedure

The IRS uses the following procedures for establishing transferee and fiduciary liability under section 6901:

1. The IRS mails a notice of transferee or fiduciary liability to the transferee or fiduciary.
2. The transferee or fiduciary may petition the Tax Court within 90 days.
3. The IRS assesses the liability against the transferee or fiduciary if the Tax Court enters a decision against the transferee or fiduciary, the transferee or fiduciary defaults on the notice of liability, or the transferee or fiduciary agrees to an assessment of the liability.
4. Once the liability is assessed, and after notice and demand and a refusal to pay, the IRS creates a lien that attaches to all property of the transferee or fiduciary. The IRS files a notice of federal tax lien to protect its interests under I.R.C. § 6323.
5. The IRS can collect the assessment administratively from all property and rights to property of the transferee or fiduciary.
6. The IRS's period for collection of the assessment against the transferee is the I.R.C. § 6502 collection statute of limitations (generally, 10 years from the assessment against the transferee).

Statute of Limitations on Assessment

Generally, the IRS must assess liability for the initial transferee within 1 year of the expiration of the statute of limitations for assessment against the transferor [I.R.C. § 6901(c)]. If there is a subsequent transferee of a transferee, the related assessment must be made within 1 year after the expiration of the statute of limitations for assessment against the preceding transferee, but not more than 3 years after the statute expiration for assessment against the initial transferor.

However, if there is a timely initiated court proceeding for assessment or collection against the transferor or the last preceding transferee, the period for assessment against the transferee will expire 1 year after the court proceeding is final (court order stating that judgment has been executed). For fiduciary liability (discussed later), the IRS must assess the liability within 1 year after the fiduciary liability arises or the period for collection of the tax ends, whichever is later.

The running of the statute of limitations on assessment against a transferee is suspended during the 90-day period in which the IRS is prohibited from making the assessment under section 6213 (150 days if the taxpayer is outside the United States) plus 60 days. If the transferee initiates a proceeding in Tax Court, the assessment period is suspended until the Tax Court decision becomes final plus 60 days.

Estate and Gift Tax Transfers

I.R.C. § 6324(a)(2) and (b) impose liability on the transferee for unpaid estate and gift tax. Liability is generally limited to the extent of the fair market value (FMV) of the property received from the estate or the property transferred by gift.

I.R.C. § 3713(b) imposes personal liability on a representative of a person or an estate paying any part of a debt of the person or estate before paying a debt due to the United States. The fiduciary is liable to the extent of the payment for unpaid claims if the fiduciary knew or should have known that an obligation was due to the United States. Personal liability only applies when the person or estate is insolvent. The liability is limited to the value of the assets that the fiduciary distributes in violation of the federal priority. The procedure to assess fiduciary liability is the same as the procedure to assess transferee liability (discussed earlier).

Defenses against Transferee Liability

Defenses against transferee liability could include the following:

1. Proof the transferor paid the tax (or another transferee paid the tax) and waived the right to a refund or the period of limitations to seek a refund has expired
2. Proof that the transferor does not owe any tax
3. Expiration of the statute of limitations
4. Return of the transferred property
5. Proof that the IRS has not exhausted all remedies against the transferor

[I.R.M. § 5.17.14.5.5]

Practitioner Note

Successor Corporation's Liability

Many state corporate merger and consolidation statutes provide that a surviving corporation is liable for the debts of a predecessor corporation when the surviving corporation is the result of a formal merger or consolidation of two corporations. In these cases, the surviving corporation is primarily liable for the tax debts of the predecessor corporation as a successor in interest.

Nominee and Alter Ego Liability

The IRS can collect a taxpayer's liabilities against the taxpayer's property held by nominees or alter egos. A *nominee* is someone designated to act for another. For example, if a taxpayer titles assets in the name of another person or entity but retains control of the assets and other incidents of ownership, the transfer is in name only. An *alter ego* means a second self. An alter ego is an entity with a separate legal identity, but because of the unity of ownership and interest between the taxpayer and the entity, the entity is not considered separate from the taxpayer. For reporting purposes, a nominee is also a taxpayer who receives an information return that reports income payable to more than one taxpayer.

Nominee

Generally, a nominee holds specific property for the exclusive use and enjoyment of the taxpayer. The IRS may collect a taxpayer's liability from assets held by the third party as the taxpayer's nominee. A nominee situation typically involves one or more of the following:

1. The taxpayer previously owned the property.
2. The nominee paid little or no consideration for the property.
3. The taxpayer retains possession or control of the property.

4. The taxpayer continues to use and enjoy the property conveyed just as before the transfer.
5. The taxpayer pays all or most of the expenses of the property.
6. The property conveyance was for tax-avoidance purposes.

[I.R.M. § 5.17.2.5.7.2]

The IRS will issue a nominee Notice of Federal Tax Lien with the name of the taxpayer listed as "Nominee Name, Nominee of Taxpayer."

Alter Ego

An alter ego is an entity that is legally distinct from the taxpayer but is so intermixed with the affairs and assets of the taxpayer that they are not readily separable. The IRS treats the entity and the individual as one for collection purposes. A corporation may be the alter ego of an individual making the assets in the corporation available to satisfy individual debts, or the individual may be the alter ego of a corporation, making the individual's assets available to satisfy corporate debts.

Factors that indicate an alter ego situation include one or more of the following:

1. Commingling of corporate and personal finances and use of corporate funds to pay personal expenses
2. Unsecured interest-free loans between the corporation and the shareholder
3. The taxpayer is a shareholder, director, or officer of the corporation or otherwise exerts substantial control over the corporation
4. The corporation is undercapitalized relative to its reasonable anticipated risks of business
5. Failure to observe corporation formalities, such as issuance of stock, payment of dividends, director and shareholder meetings, or the maintenance of corporate records
6. Failure to disregard the corporate fiction presents an element of injustice or fundamental unfairness

[I.R.M. § 5.17.2.5.7.1]

The IRS will issue an alter ego Notice of Federal Tax Lien with the third-party alter ego listed. For example, the lien may show "Corporate Name, as alter ego of Taxpayer Name."

Collection by Lawsuit

In some cases, the IRS will file suit in federal district court to establish that the property is held by the taxpayer's nominee or that the legally separate entity is an alter ego of the taxpayer. Filing suit is most common in situations where

1. the IRS wants to clear title to maximize the sale price of property,
2. there is dispute as to the priority of a lien or security interest in encumbered property,
3. the property is a principal residence (judicial approval is required for seizure),
4. the 10-year section 6502 collection statute is close to expiration, or
5. there is some uncertainty about whether there was a fraudulent transfer or a nominee situation.

Nominees for Reporting Purposes

Banks and other institutions usually issue only one income document for each account or transaction. Thus, a taxpayer may receive an information document (i.e., Form 1099) that includes income reportable by more than one taxpayer. The recipient is a nominee recipient. The nominee, not the original payer, is responsible for filing subsequent Forms 1099 to show the amount allocable to each owner. The taxpayer must file the same type of Form 1099 with the IRS for each of the other owners showing the amounts allocable to each and provide a copy to each of the other owners. The taxpayer is listed as the "payer," and the other owner is the "recipient."

The taxpayer must report the full amount shown on the information document. For interest and dividends, the taxpayer reports the gross amount on Schedule B (Form 1040), Interest and Ordinary Dividends, and makes an additional negative entry as a “nominee distribution” reflecting the amount on the information return sent to the other owner(s).

For a sale of property, the taxpayer reports the full sale price and basis on Form 8949, Sales and Other Dispositions of Capital Assets, and reports an adjustment for the portion of gain or loss allocable to another owner in column (g) with code “N” in column (f), signifying nominee. The taxpayer reports only his or her share of capital gains on Schedule D (Form 1040), Capital Gains and Losses, and must attach a statement showing the full amount received and the amount received as a nominee.

Example 8.8
Nominee Reporting Rental Income

George Lane and his two brothers, Chris and Steve, jointly purchased a car in 2018 for $21,000. They put the car on Touro and made $3,000 in 2022. George had registered the account in his name and received Form 1099-K, Payment Card and Third Party Network Transactions. Form 1099-K listed George’s name and social security number. George filed Forms 1099-K for Chris and Steve reflecting George as the payer and each brother as the recipient of $1,000 [$3,000 ÷ 3]. He furnished copies to Chris and Steve. George reports the full $3,000 proceeds from Form 1099-K on his income tax return, and he includes an adjustment for the $1,000 reported to Chris and the $1,000 reported to Steve.

AMENDED AND SUPERSEDING RETURNS

This section reviews filing an amended return or a superseding return.

The IRS must assess tax within 3 years after the return for that year was filed unless extended by one of the exceptions in I.R.C. § 6501. A taxpayer must file a claim for refund of any tax within 3 years from the later of the time the return was filed, or 2 years from the time the tax was paid (unless the taxpayer and the IRS agree to extend the period).

An amended return is a return filed after the original or superseding return and filed after the expiration of the filing period (including extensions). An amended return changes the original return and becomes the new return. However, filing an amended return does not impact the assessment or refund statutes of limitations.

A superseding return is a return filed within the time for filing the original return, including extensions. A superseding return corrects the initial return, and those corrections are, in effect, incorporated into and treated as relating back to and modifying the original return. If the superseding return is filed on or before the original due date, it is deemed filed on the last day prescribed for filing [I.R.C. §§ 6501(b)(1) and 6513(a)]. Generally, if a superseding return is filed during an extension period, the return is treated as filed on the day it is received. However, it is the IRS's position that the original return, not the superseding return filed during the extended period, controls the statutory period both for assessment and for filing a refund claim.

Individual Amended Returns

The taxpayer may need to file an amended return to correct an error or, for example, to claim a credit that the taxpayer neglected to claim. This section reviews when an individual taxpayer should file an amended return, and how to file that return.

Reasons to Amend Return

If the taxpayer discovers a math or clerical error after the return has been filed, the IRS will likely correct the error when it processes the return. If the taxpayer does not include a required schedule or form, the IRS may accept the return and request the additional information. The taxpayer may need to file an amended return in the following circumstances:

- The taxpayer did not claim the correct filing status.
- The taxpayer reported incorrect income.
- The taxpayer claimed incorrect deductions or credits.
- The taxpayer is making certain elections after the deadline.
- The taxpayer must change amounts that the IRS adjusted.
- The taxpayer is claiming a carryback due to a loss or unused credit.

The IRS Interactive Tax Assistant (ITA) provides a series of questions to determine whether the taxpayer must file an amended return [www.irs.gov/help/ita/should-i-file-an-amended-return].

Copies of tax returns and other records are necessary to file an amended return. If a copy is not available, a copy of a return and all attachments (including Form W-2) can be obtained from the IRS by filing Form 4506. There is a $43 fee for each return requested. See the instructions for Form 4506 regarding where to file the request. If only information is needed from the return, a transcript may be ordered by calling 800.908.9946, using IRS.gov/Transcript, or filing either Form 4506-T or Form 4506T-EZ. There is no fee for ordering a transcript from the IRS.

When to File Amended Return

The taxpayer should typically wait until the original return has been processed before amending the return. To find out if the return has been processed, taxpayers can

- use the Where's my Refund? Tool (if a refund is due),
- log in to their IRS online account, or
- call the IRS at 800.829.1040.

Practitioner Note

Penalties and Interest

If additional tax is owed because of an IRS adjustment, or an error on the return, the taxpayer should file the amended return and pay the tax due to avoid accruing penalties and interest.

Generally, for a credit or refund, the taxpayer must file an amended return within 3 years (including extensions) after the date that he or she filed the original return or within 2 years after the date that the taxpayer paid the tax, whichever is later. If the taxpayer filed the original return early (for example, March 1 for a calendar-year return), the return is considered filed on the due date (generally April 15). However, if the taxpayer had an extension to file (for example, until October 15) but filed earlier, the return is considered filed when received. The time limit for filing a claim for credit or refund can be suspended for certain people who are physically or mentally unable to manage their financial affairs, people who are affected by federally declared disasters, and individuals in combat zones and contingency operations.

An amended return to claim a credit or refund based on a bad debt or worthless security must generally be filed within 7 years after the due date of the return for the tax year in which the debt or security became worthless. An amended return to claim or change a foreign tax credit or deduction for foreign taxes must generally be filed within 10 years from the due date for filing the return (without regard to any extension of time to file) for the year in which the foreign taxes were actually paid or accrued.

An amended return based on a net operating loss (NOL) or capital loss carryback or a credit carryback must generally be filed within 3 years (for carryback of a foreign tax credit or deduction, 10 years) after the due date of the return (including extensions) for the tax year of the net operating loss, capital loss, or unused credit.

Law Change

Net Operating Loss Carryback

For NOLs arising in tax years ending after December 31, 2017 (with limited exceptions), taxpayers cannot carry back an NOL but can carry it forward indefinitely. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, provided a 5-year carryback for taxpayers with an NOL for tax years beginning in 2018, 2019, and 2020.

Practitioner Note

Form 1045

Form 1045, Application for Tentative Refund, must be filed within 1 year after the end of the year in which the loss, credit, or claim of right adjustment arose. Individuals, estates, and trusts use Form 1045 to apply for a quick tax refund resulting from the carryback of an NOL in certain situations, the carryback of an unused general business credit, the carryback of a net section 1256 contracts loss, or an overpayment of tax due to a claim of right adjustment (discussed later).

How to File Form 1040-X

Individual taxpayers file an amended return (Form 1040, 1040-NR, or 1040-SR) on Form 1040-X, Amended U.S. Individual Income Tax Return. For 2019 and later returns, the taxpayer uses the July 2021 version of Form 1040-X (until a new version is issued). For 2018 or earlier returns, the taxpayer uses the January 2020 version.

The taxpayer must show the year of the original return that is being amended and explain the changes that are being made. A separate Form 1040-X is necessary for each amended year. All forms or schedules that are necessary to explain the changes must be attached to the Form 1040-X.

Where to File

Form 1040-X is mailed to the Internal Revenue Service Center serving the area of the taxpayer's residence. If the taxpayer is filing an amended return in response to an IRS notice, he or she mails Form 1040-X to the address shown on the notice. Amendments to a Form 1040-NR (or 1040-NR-EZ) are mailed to the IRS in Austin, Texas.

Practitioner Note

Form 1040-X Electronic Filing

Currently, electronic filing is available to amend 2019 or later Forms 1040 or 1040-SR that were originally filed electronically. Corrected Forms 1040-SS and Form 1040-PR for tax year 2021 can also be filed electronically. All other amended returns must still be mailed to the IRS.

Deceased Taxpayers

When filing an amended return for a deceased taxpayer, write or type "Deceased," the deceased taxpayer's name, and the date of death across the top of Form 1040-X, page 1. If a joint return was originally filed, and the surviving spouse is filing Form 1040-X to claim a refund, he or she will need to sign the return and enter "Filing as surviving spouse" in the return signature area. The taxpayer does not have to file Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer. However, if the surviving spouse is not the personal representative, that individual must also sign the return. A court-appointed personal representative or anyone else claiming the refund will need to attach Form 1310.

Practitioner Note

Tracking an Amended Return

If the taxpayer filed the amended return electronically, he or she can use the Where's My Amended Return? online tool to check the status of the return. Filers can use this online tool or call 866.464.2050 3 weeks after filing the return to check on the status of a paper-filed return. The IRS website indicates that the current processing time for an amended return is more than 20 weeks (instead of up to 16 weeks). The National Taxpayer Advocate website states that the processing time is considerably more than 20 weeks, and they have suspended accepting cases where the sole issue involves processing amended returns.

Claim of Right Adjustment

I.R.C. § 6411(d) allows taxpayers to apply for a tentative refund of amounts treated under I.R.C. § 1341(b)(1) as an overpayment of tax under a claim of right adjustment. Under the general rule, there is a claim of right adjustment when

1. an item was included in income in a prior tax year because it appeared that the taxpayer had an unrestricted right to that item;
2. after the end of that prior tax year, the taxpayer establishes that he or she did not have an unrestricted right to that item and a deduction is allowable; and
3. the amount of the deduction exceeds $3,000.

The decrease in tax is treated as a payment for the prior tax year and is refunded or credited as if it was an overpayment. A taxpayer (other than a corporation) files Form 1045, Application for Tentative Refund, to claim a refund of the overpaid tax. Form 1045 must be filed within 1 year after the end of the year in which the loss, credit, or claim of right adjustment arose.

Example 8.9
Overpayment—Claim of Right Adjustment

Robert Ceres is the owner of Ceres Cabinets, a cash method sole proprietorship. In 2021, William Industries paid Ceres Cabinets $12,000 to produce custom office cabinets. Robert included the payment in income on his 2021 Schedule C (Form 1040), Profit or Loss From Business (Sole Proprietorship). A subsequent dispute arose about the cabinet design. To resolve the dispute, in October 2022, Ceres Cabinets returned $5,000 to William Industries. The $5,000 payment results in an ordinary business deduction under I.R.C. § 162, and Robert can claim an overpayment by filing Form 1045.

Superseding Returns

An amended (Form 1040-X) or corrected (duplicate) return that's filed after an original return is filed, but before the due date (including extensions) of the original return, is a superseding return. A superseding return is treated as a replacement of an original return. A superseding return can be filed to correct an error or change a binding tax election.

Planning Pointer

Revoking or Making an Election

Certain elections are irrevocable, but the taxpayer can withdraw the election by filing a superseding return. For example, the election by a real estate professional to group all rentals as one activity under I.R.C. § 469(c)(7) can be withdrawn if the taxpayer files a superseding return by the original (without extensions) due date of the return. Taxpayers that have filed a joint return may revoke the joint election by filing superseding separate returns by the original due date. Also, a taxpayer may file a superseding return to ensure that an election that was not made on the original return is timely made.

Statute of Limitations on Assessment

Under I.R.C. § 6501(a), the IRS must assess tax within 3 years after the taxpayer filed the return regardless of whether the taxpayer filed the return on or after the due date of the return. If the taxpayer files the return before the due date (without extensions), it is deemed filed on the due date. A return filed during an extension period is treated as filed on the day it is received, if received on or before the extended due date, or on the postmark date if filed before but received after the extended due date. There is no time limit on assessing tax if the taxpayer does not file a return.

Statute of Limitations on Refund

I.R.C. § 6511 provides the limitation period for a credit or refund of an overpayment. With some exceptions, if a return is filed, the taxpayer may file for a refund within 3 years of the date the return was filed, or 2 years from the time that the tax was paid, whichever is later. If no return was filed, the claim must be filed within 2 years from the time the tax was paid.

If the claim was filed within the 3-year period, the amount of the refund or credit cannot exceed the portion of the tax paid within the period immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the claim was not filed within the 3-year period, the amount of the refund cannot exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim. Under I.R.C. § 6513(a), payments made prior to the due date for filing (without extensions) are deemed paid on the due date.

Effect of Superseding Return on Statute of Limitations Periods

Office of Chief Counsel Memorandum 202026002 (February 26, 2020) considers the effect of superseding returns on the statute of limitations under sections 6501 (assessments) and 6511 (refunds). If both the original and superseding returns are filed before the original due date, the statute of limitations begins on the due date because a return filed before the last day prescribed for filing is deemed filed on the last day for filing.

However, a return that is filed during an extension period is treated as filed when received. Thus, if the first return is filed before the last date prescribed for filing (original or extended), and a second return is subsequently filed during the extension period, the statute would begin running on different dates, depending on the interpretation of *return*. Similarly, if the original and superseding returns are both filed during the extension period, the statute would begin running on different dates, depending on the interpretation of *return*.

The memorandum concludes that the original return, not the superseding return, is the return that starts the statutory periods. The filing of a superseding return does not extend the assessment statute expiration date or the refund statute expiration date [I.R.M. § 25.6.1.9.4.2.1].

Example 8.10
Date of Assessment

Emma Childress timely filed for an extension of time to file her 2021 return (to October 15, 2022). On June 4, 2022, she filed her original 2022 return. She discovered in early August that she had made an error on the return, and she filed Form 1040-X on August 26, 2022. The return filed on August 26 is a superseding return. However, the statute of limitations for assessment begins running on June 4, 2022, the date of the originally filed return.

Filing a Superseding Return

There are no written instructions on to how to file a superseding individual income tax return, only when it must be filed to become the taxpayer's return for the year. The taxpayer can file a superseding return in the format of the original return and write "SUPERSEDING RETURN" across the top of the first page so that the IRS does not process it as a duplicate return. The taxpayer can also use Form 1040-X. A new, electronic checkbox has been added for Forms 1040/1040-SR, 1040-NR, and 1040-SS/1040-PR to indicate that a superseding return is being filed electronically.

Superseding returns for a corporation can be filed electronically (and must be filed electronically if the original return had to be filed electronically). A superseding return for a corporation must be a complete filing of the entire return, with all required forms, schedules, and attachments. The filer must indicate that the return is a superseding return by selecting the "superseded return" box. If the corporation fails to check the box, the IRS may reject the return as a duplicate filing. There is no checkbox if the taxpayer files a paper return.

Practitioner Note

Filing for Extensions

Even if a taxpayer intends to file by the original due date, it may be beneficial to file for an extension. For example, taxpayers with an interest in a pass-through entity that issues Schedule K-1 (Form 1120-S or Form 1065) after April 15 may include the information on a superseding return that will constitute the original filing if the taxpayer requested an extension to file the return.