

Everyone must pay federal income taxes. Yet exactly how much you owe, and on exactly how much, is famously complex. All tax returns must be signed under penalties of perjury. That means you have to do your best to report everything fully and honestly. But the grey areas are legion.

BY ROBERT W. WOOD

# 13 Tax Notice Tips Every Lawyer Should Know



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## Tax Notice Tips

For example, exactly when is something income, even though you physically don't have it? What type of proceeds qualified for long-term capital gain rather than ordinary income rates? What losses are full write-offs, and which ones are limited to offsetting gains? What assets can be written off all at once, and what must be capitalized and written off ratably over many years?

These and many other questions come up at tax return time. You must have some answers to be able to file, even if you are leaving many of the details to tax return preparers. But once you sign your name and file, what about the IRS notices that come? How should you react, and in what order?

You can contest many IRS tax bills, although there are times not to. When you disagree with the IRS, procedure is important. You must pay attention to the order in which notices arrive and the specific ways in which you can respond.

### 1 Most Audits Are Via Correspondence

When you disagree with the IRS, procedure is important.

Most audits do not involve sitting across the desk from an IRS agent. Let's say you file your tax return and later receive a notice from the IRS saying it has information that you received \$6,000 that you failed to report. It might be due to a Form 1099 you mislaid, one that failed to show up in the mail, or some other bit of information the IRS has that does not match your return.

Usually such a notice will ask you to sign the form and mail it back if you agree. Alternatively, the notice will ask for an explanation of why the information is incorrect. You can contest it—if you do so promptly. You can also agree if the IRS is right.

### 2 Don't Fight Every Tax Bill

If you know the IRS is correct, don't fight. Likewise, if the IRS is seeking a small amount of tax, you may be better off not fighting it, even if you are right. Just consider whether it is worth it if the dollars are small. Of course, what is a small tax bill can mean different things to different people.

Sometimes, disputing something small can end up triggering other issues that might have best been left alone. So consider that too. But in most cases, if you get a bill for additional taxes, you'll want to preserve your rights. Timelines and procedure are critical.

### 3 Watch Out for Proposed Deficiencies

The notice described above is not a Notice of Proposed Deficiency. Still, you should answer it. An Examination Report may follow the first notice if you fail to respond. Most tax lawyers call the Examination Report and accompanying letter a "30-day letter." It will say you have 30 days to respond in a so-called administrative "protest." A protest is just a letter.

### 4 Make Sure You Prepare a Timely Protest

If you receive an IRS Examination Report, make sure you prepare a protest and sign and mail it before the deadline. Keep a copy. Keep proof of mailing too, preferably certified mail to provide verification of mailing and of IRS receipt. Explain yourself thoroughly and attach documents where they will be helpful.

Your protest should analyze the facts and the law. Put your best foot forward. The IRS may review your protest and agree with you. Even if they don't, how you frame your protest can help later. If you have protested in a timely way, you will normally receive a response that the IRS is transferring your case to the IRS Appeals Division.

### 5 IRS Appeals Division is Nationwide

The IRS Appeals Division is a separate part of the IRS. Its mission statement is to resolve cases. By definition, these are cases in

which the auditor has recommended additional taxes, and the taxpayer disagrees. The Appeals Officer assigned to your case works for the IRS, and in that sense, can never be truly unbiased.

Even so, the IRS Appeals Office is separate, and they try to be impartial and (when they can) to split the baby. This process of working out compromises works surprisingly well. A tax lawyer may be best qualified to handle your case, but an accountant can too. Alternatively, you can do it yourself.

Just be aware that while it is less expensive to do it yourself, it is also generally less effective. The vast majority of tax cases are resolved at Appeals. Usually, you'll be assigned to the Appeals Office closest to you.

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Offices are throughout the U.S. Sometimes you are assigned to an Appeals Office in some far corner of the country.

This is generally based on the workload of the offices and Appeals Officers. It can also be based on particular tax issues that some offices are handling. If that location doesn't facilitate a face-to-face meeting and you want one, you can ask for the case to be moved to the IRS Appeals Office nearest you, nearest to your tax lawyer, your books and records, etc.

The IRS is not required to grant such requests, but they usually do. Most IRS Appeals Officers are happy to get a case they are assigned off their desk and assigned to someone else!

## **6 Beware a Notice of Deficiency**

If you fail to protest, or if you do not resolve your case at IRS Appeals, you'll next receive an IRS Notice of Deficiency. An IRS Notice of Deficiency always comes via certified mail. It can't come any other way. A Notice of Deficiency is often called a "90-day letter" by tax practitioners, because you'll have 90 days to respond.

There used to be many flubs about exactly when that 90 days ran out. So today, the IRS is required to prominently display on page one of the Notice of Deficiency the *actual deadline* for your response. Don't write the IRS to protest a Notice of Deficiency. In fact, only one response to a Notice of Deficiency is permitted: filing a Tax Court petition in the U.S. Tax Court clerk's office in Washington, D.C.

Although it is best to hire a tax lawyer, some taxpayers handle their Tax Court case on their own, *pro se*. There are special simplified procedures available to taxpayers who represent themselves in cases where less than \$50,000 in tax is in dispute. Whether

you are handling the case yourself or you hire a tax lawyer, the U.S. Tax Court cannot hear your case if you miss the 90-day deadline.

## **7 Tax Court Judges Travel to Your Area**

The Tax Court building and clerks are all in Washington, D.C. However, the 19 Tax Court judges travel to federal courthouses all around the country to conduct trials. You can pick the city where you want your case to be heard when you file your Tax Court petition.

Tax Court procedure and rules of evidence are streamlined, with no jury, and with relaxed rules of evidence. You can call witnesses, and many cases are presented based on a "stipulated record." In it, you and the government agree on certain facts.

## **8 Your Case Can Go Back to IRS Appeals**

Remember, the only way you can respond



to a Notice of Deficiency is to file a timely petition in U.S. Tax Court. Fortunately, though, that doesn't mean your case will necessarily be decided in court. An IRS lawyer will file an answer to your Tax Court petition. As with most other answers in litigation, the IRS will generally deny whatever your petition says.

But then, you can ask the IRS lawyer to transfer your case to IRS Appeals. Often, a Notice of Deficiency is issued before a case has ever gone to IRS Appeals. In that sense, it can seem as if the IRS is trying to cut off your right to an Appeal. Actually, though, it is usually because of workload, or because the IRS is worried that the statute of limitations on the tax year in question is about to run.

The IRS often issues a Notice of Deficiency to make sure you can't later say the IRS is too late to assess taxes. When this happens, the IRS lawyer will almost always be happy to transfer your case to (or back to) IRS Appeals. This also ties into extensions of the IRS statute of limitations, below.

## 9 IRS Often Asks You to Extend the Statute

Often, the IRS says it is auditing you, but needs more time. Giving the IRS more time to audit you? It may sound counter-intuitive—if not downright crazy—to give the IRS more time, but it is not, as we will see. The IRS may *ask you* for an extension because they need more time to audit you.

Your first reaction may be to relish the thought of telling the IRS absolutely not! Even a routine tax audit can be expensive and nerve-wracking. The IRS normally has three years to audit, measured from the return due date or filing date, whichever is later. But the three years is *doubled* in a number of cases. For example, the IRS gets six years if you omitted 25 percent or more of your income.

Even worse, the IRS has *no* time limit if you *never* file a return, or if you skip certain key forms (for example if you have an offshore company but fail to file IRS Form 5471). You have to assume that if the IRS is asking you to extend the statute, the IRS

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is already monitoring you closely. And for the most part, people usually do *voluntarily* give the IRS more time to audit.

Why would *anyone* do that? It works like this. The IRS contacts you (usually about two and a half years after you file), asking you to extend the statute. Most tax advisers say you should usually agree. If you say “no” or ignore the request, the IRS will assess extra taxes, usually based on

an incomplete and quite unfavorable picture.

You might think that you could fail to say yes or no and that the IRS might forget about you. But this is something the IRS is very careful about. The IRS rarely misses issuing a Notice of Deficiency, and you usually will be worse off (often *much* worse off) than if you agreed to the extension. There are exceptions to this rule, but relatively few. And sometimes you can agree to the extension but limit the extra time you give, or even the tax issues at stake. Get a professional to help you weigh your facts.

## 10 You Can Sometimes Get Extensions Too

Everyone knows there are automatic six-month extensions to filing your taxes. April 15 can become October 15, although you still must *pay* any taxes due by April 15. But what about extensions when the IRS demands a response to a notice or letter within 30 days?

For many notices, the IRS will grant an extension of time to respond. In some cases, though, they can't. For example, when you receive a Notice of Deficiency (90-day letter), you must file in Tax Court within 90 days, and this date cannot be extended. Most other notices are less strict. If you do ask the IRS for an extension, confirm it in writing, and keep a copy. In fact, confirm *everything* you do with the IRS in writing.

## 11 Some IRS Actions Can Be Undone

It is always best to respond to IRS notices within their stated time frames. Still, it is sometimes possible to undo an IRS action after the fact. For example, even after the IRS places a lien on property or levies on a bank account, this can be reversed. However, it is usually harder and more expensive to undo something, and it usually requires professional help.

## 12 You Can Pay Up, Then Sue

If you do not respond to a Notice of Deficiency within 90 days, and you have an


assessment, all is not lost. You will not be able to go to Tax Court, but you can contest the taxes in federal district court or in the U.S. Claims Court. Usually you must pay the taxes first and file a claim for refund. If the refund request is not granted, then you can sue for a refund.

The primary advantage of proceeding in Tax Court is that you need not pay the tax first. In contrast, most taxpayer suits in U.S. District Court or U.S. Claims Court are *after* the tax has been paid. Sometimes, though, you can cleverly shoehorn yourself into one forum even though it might seem that you don't satisfy the rules.

Take the case of *Colosimo v. United States*.<sup>1</sup> There, the IRS pursued the company and its owners for payroll taxes. The owners sued in District Court for a ruling they were not "responsible persons" required to pay the payroll taxes. But the owners paid only a fraction of the taxes the IRS was seeking. This was a clever use of the notion that sometimes you can pay only a portion of the tax due, and with

your suit resolve both pieces of the asserted tax: the part you paid, and the part you didn't.

## 13 Be Careful

Remember, there are many different types of tax notices, even if you are only talking about the IRS. We have covered a few types of IRS notices here, including a Notice of Deficiency. However, there are many other types of important notices, including liens, levies and summonses. Forms of response vary, and procedure is important. You're best advised to get some professional help. In general, don't ignore anything you get from the IRS! 

### endnote

1. 630 F.3d 749 (8th Cir. 2011).