



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D C. 20224

July 18, 2016

Control Number: TEGE-04-0716-0019  
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Affected IRM: 4.82.3  
Reference: TEGE-04-0715-0019

MEMORANDUM FOR ALL TAX EXEMPT BOND EMPLOYEES

FROM: Steven A. Chamberlin /s/ *Steven A. Chamberlin*  
Acting Director, Tax Exempt Bonds

SUBJECT: Reissuance: Interim Guidance - Procedures for Conducting  
Examinations of Direct Pay Bonds

This memorandum is a reissuance of Interim Guidance (IG) Memorandum TEGE-04-0715-0019 dated July 20, 2015 of the same title. The affected IRM is now 4.82.3.

This memorandum provides guidance to tax exempt bond examiners and managers on conducting examinations of Direct Pay Bonds. Please ensure this information is distributed to all affected employees within your organization.

Direct Pay Bonds are obligations that meet applicable requirements for credits allowed under IRC section 6431. Direct Pay Bonds include build America bonds, (including a special type that is eligible for an increased credit amount called recovery zone economic development bonds), new clean renewable energy bonds, qualified energy conservation bonds, qualified zone academy bonds, and qualified school construction bonds.

The credit paid to issuers of Direct Pay Bonds is treated as an overpayment of tax and under IRC section 6431 is to be paid (contemporaneously with each interest payment date under such bonds) to the issuer (or to any person who makes interest payments on behalf of the issuer.)

The examination and processing of resolutions of these bonds present unique situations that require procedures specifically tailored to these bonds. The specific procedures to be followed are included as an attachment to this memo and will be incorporated into IRM 4.82.3, Direct Pay Bonds, no later than one year from the date of this memo.

This guidance was effective on **July 20, 2015**.

If you have any questions about this guidance or need additional information, please contact your group manager.

Attachment

Distribution:

[IRS.gov \(http://www.irs.gov\)](http://www.irs.gov) (If the guidance meets [E-FOIA criteria](#))

## Attachment

### 4.82.3.1 Introduction

- (1) This IRM section contains examination guidelines for Direct Pay Bonds (“DPBs”), a type of tax-advantaged bond with respect to which the interest paid on the bonds is taxable to the holder and the bond issuer is allowed a refundable tax credit.
- (2) DPBs are obligations that meet applicable requirements for credits allowed under IRC 6431. DPBs were first introduced by the American Recovery and Reinvestment Act of 2009 (“ARRA”) as build America bonds (“BABs”), including a special type of BABs eligible for an increased credit amount called recovery zone economic development bonds (“RZEDBs”). Subsequently, in 2010 the Hiring Incentives to Restore Employment Act (“HIRE”) extended the direct payment of credit option to four types of previously authorized tax credit bonds. These bonds, defined as specified tax credit bonds in IRC section 6431(f) include new clean renewable energy bonds (“New CREBs”), qualified energy conservation bonds (“QECBs”), qualified zone academy bonds (“QZABS”), and qualified school construction bonds (“QSCBs”).
- (3) The credit on DPBs is treated as an overpayment of tax and under IRC section 6431(b) is to be paid (contemporaneously with each interest payment date under such bonds) to the issuer of such bonds (or to any person who makes interest payments on behalf of the issuer).

#### 4.82.3.1.1 Background

- (1) Under IRC section 6431(a), issuers of DPBs are allowed a credit with respect to each interest payment under the bonds which is payable as provided in IRC section 6431(b). The credit allowed for BABs equals 35% of the interest payment. The credit allowed for RZEDBs equals 45% of the interest payment. The credit allowed for New CREB, QECBs, QZABS and QSCBs equals up to 100% of the interest payment. However, the amount of allowable credit is limited by the amount that would be payable at the applicable credit rate determined under IRC section 54A(b)(3) as follows: (i) for QZABS and QSCBs, by 100% of the credit rate, and (ii) for New CREBs and QECBs, by 70% of the credit rate, as described in IRC section 6431(f)(1)(C) and (f)(2), respectively.
- (2) DPBs must meet many requirements applicable to traditional tax-exempt bonds, including the information return filing requirement. Issuers of build America bonds were initially required to file Form 8038-G, Information Return for Tax-Exempt Governmental Obligations, but later were required to file Form 8038-B, Information Return for Build America Bonds and Recovery Zone Economic Development Bonds. Issuers of specified tax credit bonds are required to file

Form 8038-TC, Information Return for Tax Credit Bonds and Specified Tax Credit Bonds.

- (3) To receive payment of allowed credits, issuers of DPBs must file Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds. Form 8038-CP is a tax return filed with respect to an interest payment or interest payments made or to be made under the DPBs. Generally, Form 8038-CP is accepted by the IRS for processing prior to the related interest payment date so that the return can be processed and the credit payment made approximately at the same time as the interest payment. IRC section 6431 provides for the credit payment to be made to the issuer, or if so designated, to any person who makes interest payments on behalf of the issuer.

#### **4.82.3.1.2 Examination Procedures**

- (1) The examination of DPBs will, generally, be initiated on the information return on which the bond transaction was reported (i.e., Form 8038-G, Form 8038-B, or Form 8038-TC), and will follow the examination procedures generally applicable to tax-exempt bonds (currently under IRM 4.81.5) with the modifications and additional procedures provided in this section.

#### **4.82.3.1.3 Examination of Related Claim Returns**

- (1) The examination of a Form 8038-CP generally will be opened as a related case to the examination of an information return for DPBs. An adverse determination on the qualification of DPBs directly impacts whether the credits claimed on all related Form 8038-CP returns are allowable. Accordingly, an examination of related Form 8038-CP returns generally will be opened when a Form 5701-TEB, Notice of Proposed Adjustment, with respect to DPBs is issued.
- (2) Additionally, examinations of an individual Form 8038-CP return may be initiated for matters related to the credit amount allowable for any interest payment date that do not involve qualification noncompliance (for example, duplicate claims, incorrect credit percentages, incorrect interest amounts, and failure to file within time limits for submission of claims for the credit payment). These examinations generally will be focused on the facts and circumstances requiring an adjustment of the credit requested on the affected Form 8038-CP return.

#### **4.82.3.1.4 Roles & Responsibilities**

- (1) The following roles are referred to in this IRM 4.82.3:
  - a) 90-Day Reviewer: the employee assigned to monitor petitions to the U.S. Tax Court and to perform the other responsibilities as described in IRM 4.82.3.9.9 and 4.82.3.9.11;

- b) DPB Case Control Coordinator: the employee assigned to establish case controls and to perform other responsibilities described in IRM 4.82.3;
- c) Examiner: with respect to any examination of a DPB issue information return or Form 8038-CP, the revenue agent or tax law specialist assigned the examination;
- d) GE Closing Unit: The TE/GE Governmental Entities Closing Unit;
- e) GECU: the TE/GE Government Entities Compliance Unit;
- f) GECU DPB Compliance Review Function: managers and employees within GECU with responsibility for GECU's assignments for the prepayment compliance review of credit claims filed on Form 8038-CP;
- g) Group manager: the direct supervisor of an examiner or reviewer;
- h) Reviewer: with respect to a review required under this IRM 4.82.3 on issuance of a notice of deficiency, the revenue agent or tax law specialist assigned to the review of the examination case when a case is expected to close unagreed and a notice of deficiency is expected to be issued;
- i) TEB DPB Compliance Review Coordinator: the TEB revenue agent or tax law specialist assigned to coordinate TEB's activities with respect to the TEB DPB Compliance Review Function and to perform the responsibilities described in this section;
- j) TEB DPB Compliance Review Function: the managers and employees within TEB with responsibility for TEB's assignments for the prepayment compliance review of credit claims filed on Form 8038-CP.

#### **4.82.3.2 Statute Considerations for Direct Pay Bonds**

- (1) DPB examinations present certain unique statute control issues for examiners because the assessment of any adjustment resulting from the exam will generally be made on a return module other than the one initially assigned for examination. This IRM section contains procedures for statute identification and statute control procedures.

##### **4.82.3.2.1 Statute Identification Procedures**

- (1) When opening a DPB examination, the examiner will identify all Form 8038-CP returns filed with respect to the DPB information return under examination with 120 days or more remaining on the period for assessment for each such return.

- (2) The examiner will send a request, via email, to the TEB DPB Compliance Review Coordinator for a listing of all Form 8038-CP returns received for the issuer's EIN.
- (3) The TEB DPB Compliance Review Coordinator will provide, in an Excel worksheet, a listing of all Form 8038-CP returns filed by the issuer (EIN matched) recorded in the database maintained by the TEB DPB Compliance Review Function.
- (4) Based on the information provided by the TEB DPB Compliance Review Coordinator, the examiner will prepare Form XXX, TEB Evaluation of Statute Expiration, for the Form 8038-CP returns related to the DPB information return under examination. The form will include, as an attachment, the debt service schedule filed with the information return for the DPBs. Form 8038-CP returns may be processed on the issuer's EIN or a designated payee's EIN, as elected by the issuer for each return filed. Form XXX should reflect the EIN of the payee, whether the issuer or a designated payee. If the original debt service schedule attached to the information return does not agree with the credits requested on the 8038-CP returns, the examiner should request a copy of the debt service schedule currently on file in the database maintained by the TEB DPB Compliance Review Function. The debt service schedule on file may have been updated. (Note that more than one Form 8038-CP return may be filed and processed for an interest payment date.) Form XXX is a permanent part of a DPB examination case file and is required to be updated every six months or more frequently, if necessary.

#### **4.82.3.2.2 Criteria for Establishing Case Controls of Related Cases**

- (1) Upon identification of potential noncompliance that may result in an adverse determination with respect to the qualification of DPBs (the "Identified Qualification Issue"), the examiner will establish case controls for all Form 8038-CP returns related to the DPB information return under examination with 120 days or more remaining on the period for assessment on RCCMS in status 10, as more fully-described in the following paragraph (2). The establishment of case controls for related Form 8038-CP returns utilizes the AIMS and RCCMS systems to monitor and protect the statutory period of assessments. Establishment of controls does not open an examination of the related Form 8038-CP returns. Criteria for opening the examination of related Form 8038-CP returns is provided in IRM 4.82.3.3.2.
- (2) An Identified Qualification Issue is the identification of potential noncompliance for consideration during the examination. An Identified Qualification Issue does not require a Form 5701 to have been prepared, but there should be sufficient information available to allow a statutory notice of deficiency to be prepared if

necessary. The Identified Qualification Issue must involve the qualification of the DPBs for the credit allowed under IRC section 6431 and should be reasonably present in the subject case. A reasonable basis to believe that a violation of the qualification requirements has occurred, and not full development of potential noncompliance, is sufficient to constitute an Identified Qualification Issue.

#### **4.82.3.2.3 Timeframes for Considering Case Controls of Related Cases**

- (1) The examiner should consider whether, based on the information available, an Identified Qualification Issue is present upon opening the DPB examination. If no Identified Qualification Issue exists at that time, the examiner should document that determination on Form XXX by entering "None" in the Identified Qualification Issue(s) column, entering the date, and then electronically signing the Form. Managerial concurrence on Form XXX is not required for the exam opening evaluation.
- (2) During an examination, the examiner should consider if sufficient information is present to constitute an Identified Qualification Issue at all times. Such consideration must be documented at least every six months during the examination on Form XXX.

#### **4.82.3.2.4 Managerial Approval of Establishing Case Controls**

- (1) When an Identified Qualification Issue is identified during an examination of DPBs, the examiner will notate this on Form XXX and submit the form to the group manager for concurrence that there is a reasonable basis to believe that a violation of the qualification requirements may exist in the case. The group manager will discuss the factual record with the examiner and consider whether a statutory notice of deficiency would be supported by Counsel based on the existing information in the case file. The group manager will either indicate concurrence with establishing related case controls by electronically signing Form XXX and returning it to the examiner, discuss the additional development required before controls should be established, or explain why establishing case controls is not required.
- (2) In cases where no Identified Qualification Issue is identified the examiner will notate this on Form XXX and submit the form to the group manager for concurrence within six months of the start of the exam and on or before each six month period thereafter. The manager will discuss the case development with the examiner and electronically sign Form XXX indicating his or her concurrence that no Identified Qualification Issue has been identified in the exam.

#### **4.82.3.3 Establishing Related Case Controls**

- (1) Multiple Form 8038-CP return modules may be affected by any information return examination conclusion. This IRM section describes the procedures for establishing related case controls.

#### **4.82.3.3.1 Establishment of Case Controls for Related Form 8038-CP Returns**

- (1) Upon identification of an Identified Qualification Issue and the documented concurrence by the group manager, the examiner will establish all related Form 8038-CP returns with 120 days or more (from the date of concurrence) remaining on the statutory period for assessment of tax on RCCMS generally following the procedures provided at IRM 4.82.3.
- (2) The related cases will be established in status 10.

#### **4.82.3.3.2 Opening Examinations of Established Form 8038-CP Returns**

- (1) Related Form 8038-CP returns established on RCCMS in status 10 upon an Identified Qualification Issue generally will not be opened for examination until the decision to issue Form 5701 on the primary examination of the information return for the DPBs has been made. The examiner will discuss opening related returns with his or her group manager and, upon concurrence documented in the examiner's case chronology record, issue Letter YYY to the issuer of the DPBs indicating that the listed related Form 8038-CP returns will be opened in connection with the current examination of the DPB information return.
- (2) Letter YYY will inform the issuer of the opening of an examination with respect to the credit paid on the Form 8038-CP returns opened. The letter will briefly state the issue(s) identified during the examination of the related DPB information return.
- (3) The examiner will prepare Form 4549-TEB (see IRM 4.82.3.5) and compute the proposed adjustment to the related returns opened (the "Revenue Agent Report" or "RAR") for submission with Form 5701 describing the matters concerning the DPBs qualifications for the credit allowed under IRC section 6431.

#### **4.82.3.3.3 Survey of Non-Examined Form 8038-CP Returns**

- (1) A Form 8038-CP return established on RCCMS that is not opened before the related examination of the DPB information return is resolved with no changes, either with or without a closing agreement, will be closed "Survey After Assignment".
- (2) For any RCCMS established but unopened Form 8038-CP return for which a Form 872-A extension of the statutory period for assessment has been received from the issuer of the DPBs, the examiner will issue Letter ZZZ to the issuer indicating the examination to which the Form 8038-CP is related has been closed



with no changes and no further action is planned with respect to the Form 8038-CP return(s). Form 872-T indicating the termination of the extension by the Internal Revenue Service will be prepared and included with Letter ZZZ. If the Form 872-A extension also includes periods for which an assessment or overassessment of tax or the issuance of a statutory notice of deficiency may be made, see IRM 4.82.3.4.12.

#### **4.82.3.4 Statute Controls for Direct Pay Bonds**

- (1) Statute protection for DPBs is similar to the control procedures for most types of tax assessments. There are, however, several important differences. This IRM section describes procedures for controlling the statute on Direct Pay Bonds.

##### **4.82.3.4.1 Direct Pay Bond Statute Control Procedures**

- (1) For Form 8038-CP returns established in RCCMS pursuant to IRM 4.82.3.3.1, TEB will follow the Statute Control procedures in IRM 25.6.23 as modified or clarified in this section for the extraordinary features of DPBs. References in IRM 25.6.23 to ERCS, EPIC, or EOIC will refer to RCCMS for purposes of statute control on DPBs.

##### **4.82.3.4.2 Computing Statute Expiration Date for Direct Pay Bonds**

- (1) For purposes of calculating assessment statute expiration dates, the examiner will treat the period for assessment of tax on Form 8038-CP returns as three years from the date the return is filed. (NOTE: The normal application of IRC section 6501(b)(1) does not apply to Form 8038-CP returns because the due date of such return was not fixed by law or regulations promulgated pursuant to law for the filing thereof. The due dates for filing Form 8038-CP was established by the instructions to the form.) IRC section 7502 provides that the date of delivery of any return received after the prescribed filing date is deemed to be the postmark date. Generally, the postmark date is not available from electronic copies of the return or information data retrieval system (IDRS). If the postmark date is not available, absent satisfactory evidence of the actual date the return was filed, the examiner should compute the statute expiration date for Form 8038-CP returns by treating the return as filed on the date which is seven days prior to the return received date reflected on IDRS. For unagreed cases closing from the group where the assessment statute period has less than 450 days remaining and such period has not been extended by agreement the examiner should request the original return using the ESTAB IDRS command. Evidence of the postmark date is generally included with the original return. The assessment statute expiration date (ASED) field in RCCMS should be updated if necessary before closing the case from the examination group.

##### **4.82.3.4.3 Initial Statute Control of Direct Pay Bonds**

- (1) An adverse determination may affect the availability of the section 6431 credit with respect to DPBs. Therefore, statute controls may be required to protect the period of limitation for assessment for affected Forms 8038-CP.
- (2) Upon managerial approval of the establishment of related Form 8038-CP returns (see IRM 4.82.3.4.1) the examiner will prepare Form 895 for each related Form 8038-CP return identified on Form XXX with less than one year remaining on the statutory period for assessment.

#### **4.82.3.4.4 Procedures for Solicitation of Extensions for Direct Pay Bonds**

- (1) Examiners generally will follow the procedures prescribed in IRM 25.6.22 as clarified or modified in this section when requesting extension of the period to assess tax on Form 8038-CP returns.

#### **4.82.3.4.5 Form for Solicitation of Extensions for Direct Pay Bonds**

- (1) Examiners will generally use Form 872-A to request an extension for the assessment period(s). Form 872-A is used to extend the assessment period related to a return indefinitely. Form 872 is used to extend the assessment period related to a return to a specific date. Extensions pursuant to Forms 872-A end when tax is assessed or the extension is terminated by either the taxpayer or the IRS. The use of Form 872-A minimizes the administrative burden of statute controls with respect to Form 8038-CP returns during the remaining examination process and any potential action by the Office of Appeals (Appeals). Form 872 with a specific statute extension date may be used as an alternative to Form 872-A if requested by the issuer. If a Form 872 is requested, the examiner will advise the issuer of the differences and advantages of each of these statute extension forms.

#### **4.82.3.4.6 Name and Address of Taxpayer on Extension Form for Direct Pay Bonds**

- (1) The issuer of the DPBs is the only party permitted to extend the period for assessment for Form 8038-CP returns, regardless of any payee the issuer may have designated in Form 8038-CP. Accordingly, the EIN and the name and address of the issuer of the DPBs must be entered on Form 872-A, and the EIN, name, and address of a designated payee other than the issuer entered in Part I of the Form 8038-CP return should not be entered on Form 872-A.

#### **4.82.3.4.7 Type of Tax on Extension Form for Direct Pay Bonds**

- (1) The examiner should enter "Income" for the type of tax on the extension form. Credits under IRC section 6431 are treated as overpayments of tax.

#### **4.82.3.4.8 Return Period(s) and Restrictive Consents for Form 872-A**

- (1) Generally, the assessment period to be extended in connection with the examination of an issue of DPBs will be restricted to those credits attributable to one or more specific DPB issue(s) under examination. Because there may be insufficient space on Form 872-A to specify both the periods covered by the consent and the matters to which the consent applies, the examiner should enter “See Attachment I for periods covered by this consent and the bond issues to which this consent applies” on the line following “for the period(s) ended” as printed on the form.
- (2) The examiner shall prepare and attach a schedule titled “Attachment I to Form 872-A” when requesting an extension. Attachment I should include the following:
  - a) Identification of the issuer, including the name, address, and EIN as specified on Form 872-A;
  - b) A restrictive paragraph as follows: The amount of any deficiency assessment is to be limited to that resulting from any adjustment to the credit or credits allowed under IRC section 6431 with respect to the bond issue(s) specified below, any penalties and additions to tax attributable thereto, and any consequential changes to other items based on such adjustment.

Note: If the restricted consent language included in Attachment I is modified from the example above, the consent will require Field Counsel approval. (See IRM 25.6.22.8.6);
  - c) A complete description of the bond issue(s) covered by the extension, including the name of the issue, the issue date, and a statement “including CUSIP number \_\_\_\_\_” where the CUSIP of the last maturity is entered, if available; and
  - d) The specific interest payment dates corresponding to all Form 8038-CP return periods covered by the extension.
- (3) Generally, an initial statute extension will include all periods with one year or less remaining as of the date the Identified Qualification Issue described in IRM 4.82.3.2.2 is initially identified. With the concurrence of the group manager and the issuer, the examiner may include additional interest payment dates in the initial extension request where factors indicate the examination may not be concluded with at least 450 days remaining on the statutory period for assessment of such returns. This 450 day period is to allow for normal processing of the case and to allow a minimum of one year remaining on the statutory period for assessment required by IRM 8.20.5.2.1(2) for consideration by Appeals.

- (4) If more than one Form 8038-CP return was filed for a single interest payment date (i.e., BABs and RZEDBs in the same bond issue, fixed rate bonds and variable rate bonds in the same bond issue, or multiple maturity specified tax credit bonds) the interest payment date need only be entered once on Attachment I. The period for assessment of each Form 8038-CP return with the same interest payment date is extended accordingly.

#### 4.82.3.4.9 Address for Delivery of Form 872-T

- (1) Form 872-T is used to terminate the extension of the period for assessment and may be used by the issuer or the IRS to terminate the agreement created on Form 872-A. For taxpayer initiated terminations Form 872-T must be delivered to the address specified by the IRS. Examiners should enter the name and address of their group manager on Line 4 of Form 872-A as the location Form 872-T must be delivered to terminate the extension agreement. The format of the address should be:

|   |  |
|---|--|
| If MAILING Form 872-T, send to:   | If HAND CARRYING Form 872-T, deliver to:                       |
| Internal Revenue Service<br>Attn: Manager's Name<br>Mailing Address<br>Manager's telephone number | Manager's Name<br>Internal Revenue Service<br>Physical Address |

- (2) If the address for delivery changes during the course of the examination, the examiner should issue Form 872-U to the issuer to notify them of such change. Causes requiring a change of delivery address include the transfer of a case to another group or change in manager. Note: For cases sent to Appeals, Form 872-U will be issued by Appeals personnel designating the Appeals Officer assigned. The examiner should indicate on Form 3198-A that Form 872-A is in the case file and that Form 872-U should be sent to the issuer to update the Form 872-T address. If an examiner receives Form 872-T after a case has been transferred to another group or to Appeals, the examiner will immediately notify the group or Appeals, as applicable.

#### 4.82.3.4.10 Person to Sign Form 872-A on Behalf of the Commissioner, Internal Revenue

- (1) The delegation authority in TE/GE DO 6 (Rev. 1, effective 12/5/1999), pursuant to the authority in Commissioner's Delegation Order No. 42 (Rev. 28), dated September 13, 1995 (Updated 11/24/1999 to reflect new organizational titles required by IRS Modernization), provides the authority to sign all consents fixing

the period of limitations on assessment or collection is delegated to group managers.

#### **4.82.3.4.11 Termination of Form 872-A for No-Change Cases**

- (1) In examinations of DPBs resulting in no change in the qualifications of the bond issue, where the assessment periods for related Form 8038-CP returns have been extended using Form 872-A, the examiner must prepare a Form 872-T terminating the Form 872-A extensions. This termination information is to be included with the no-change closing letter. Attachment I (similar to the schedule described in IRM 4.82.3.4.8(2) with an appropriate modification to the restrictive paragraph) should be completed identifying the periods covered by the notice. In the box on Form 872-T titled "Tax Period(s) Covered by this Notice" the examiner shall enter "See Attachment I" and attach the completed Attachment I to Form 872-T.
- (2) If the Form 872-A extension also includes periods for which an assessment or overassessment of tax may be made, or if a statutory notice of deficiency is issued, see IRM 4.82.3.4.13.

#### **4.82.3.4.12 Termination of Form 872-A for Other than No-Change Cases**

- (1) The agreement to extend the period for assessment on Form 872-A is terminated when the assessment of tax or overassessment of tax is made representing the final determination of tax for a period. Additionally, the agreement on Form 872-A is also terminated when a statutory notice of deficiency is issued by the IRS.
- (2) The termination in paragraph (1) above is only with respect to the period for which the assessment, overassessment, or statutory notice relates. If the Form 872-A covers periods with no changes, or periods that were not opened for examination Form 872-T must be issued. Attachment I for Form 872-T should only identify those periods for which an assessment, overassessment, or statutory notice of deficiency is not required.

#### **4.82.3.4.13 Issuer Refusal to Extend Assessment Period**

- (1) If an issuer refuses to extend the period for assessment of tax on Form 8038-CP return(s) in order to allow the completion of the examination with more than 1 year remaining for the period of assessment, the examiner will discuss with the issuer the potential noncompliance identified in the examination, the remaining case development required, and the notice of deficiency process.
- (2) If the issuer still refuses to extend the assessment period, the examiner will follow the procedures at IRM 4.82.3.9.3.

#### **4.82.3.4.14 Case File Location of Statute Extensions**

- (1) The examiner will attach completed original Forms 872, 872-A, and 872-T to the back of each Form 8038-CP return to which the statute extension applies. Copies should also be included with the return in the electronic work paper file. (Note: Until other guidance is received, original extension forms should be retained in the case file.)

#### **4.82.3.5 Revenue Agent Report Procedures**

- (1) There are a number of special requirements for proposing adjustments resulting from DPB examinations. This IRM section sets forth the procedures for completing the Revenue Agent Report.

##### **4.82.3.5.1 Revenue Agent Report of Adjustments to Form 8038-CP Accounts**

- (1) Potential noncompliance related to the qualification of DPBs will be presented on Form 5701-TEB in connection with the examination of the information return reporting the DPBs transaction. In cases where the examiner has determined that the DPBs were not qualified, the credit amount for each affected Form 8038-CP return will be adjusted on Form 4549-TEB. If the only adjustment to the Form 8038-CP return account is the complete disallowance of the credit(s) previously claimed, the explanation of items associated with the Proposed Adverse Determination Letter must support the adjustments reflected on Form 4549-TEB.
- (2) Adjustments to the credit amounts claimed on Form 8038-CP are computed on Form 4549-TEB. This form can be used to adjust all Form 8038-CP accounts related to a specific DPB information return. The form consists of two pages and can include up to 25 related Form 8038-CP returns. For cases where more than 25 Form 8038-CP returns are involved, additional Form 4549-TEBs should be used and numbered "X of Y" in the Other Information section. The examiner and issuer must sign each Form 4549-TEB included in multiple report cases.
- (3) For adjustments of credit amounts claimed on Form 8038-CP returns related only to the computation or timing of the credit amount, a Form 5701-TEB and a Proposed Adverse Determination Letter are not prepared for inclusion in the examination case file of the information return for DPBs. Accordingly, an explanation of items including the facts, law, and arguments should be attached to Form 4549-TEB to support the adjustments included in the report.

##### **4.82.3.5.2 Specific Line Instructions for Form 4549-TEB**

- (1) Instructions for Form 4549-TEB Page 1:
  - a) Name and Address of Issuer of Bonds – The name of the issuer must agree with the issuer name reported on the information return, Form 8038-

G, Form 8038-B, or Form 8038-TC. The address should be the current address of the issuer;

- b) Employer Identification Number – This is the EIN of the entity that issued the bonds;
- c) Return Form Number – Form 8038-CP;
- d) Person with whom examination adjustments were discussed – Generally a person authorized to sign tax returns or a properly authorized representative;
- e) Period – This is the year and month of the interest payment date for each Form 8038-CP return being adjusted (YYYYMM);
- f) Report Number – This is the three digit report number for the master file account on which the Form 8038-CP return was processed, or re-processed if the Issuer designated a payee to receive the payment for the period. Form 8038-CP returns are processed on master file tax code (MFT) 46 and use report numbers from the 800, 200, and 400 numbering series. The report number serves to differentiate one account from other returns filed with the same EIN and the same period, which is based on the year and month of the interest payment date;
- g) Credit amount per Form 8038-CP or as previously adjusted – This is the amount of credit per the return (TC 766) or as previously adjusted. Master file accounts for Form 8038-CP returns were generally not designed to accept amended returns, however, adjustments could be made to the credit amount by increasing or decreasing the amount of credit in the subsequent return for the next scheduled interest payment date using line 21. Such subsequent adjustments require an explanation to be attached to the return in which an adjustment on line 21 is made; As long as the adjustment on line 21 was made timely and in good faith to correct an error in a prior period, no restatement of the credit per return or as previously adjusted will be made in the period where the error occurred or was corrected. The Internal Revenue Service will not make an adjustment on examination to correct a credit amount that was corrected in accordance with the instructions to Form 8038-CP;

Example: The credit claimed on the Form 8038-CP filed for period 1 was \$1,000. Subsequently, the issuer determined that the credit claimed was incorrect and should have been \$900. The credit allowable for the interest payment date for period 2 was \$800. If the issuer adjusted the amount of credit claimed to reduce the amount for period 2 from \$800 to \$700 by including the \$100 correction

from period 1 on line 21, then the amount per return for period 1 would be \$1,000 and the amount per return for period 2 would be \$700.

- h) Credit as Corrected – This is the correct amount of credit allowable as determined under IRC section 6431 net of any appropriate adjustment on line 21; and

Example: Continuing with the same facts as in Example 1 above; it was determined that the allowable credit for interest payable on qualified bonds during period 2 was \$200 rather than the \$800 originally claimed. Because line 21 decreased the allowable credit for period 2 by \$100 the amount of credit as corrected would be \$100 (\$200 allowable credit for the period less the \$100 line 21 adjustment).

- i) Adjustment – This is the difference between the credit per return or as previously adjusted and the credit as corrected. An additional assessment would be reflected as a positive amount and an overassessment would be reflected as a negative amount.

(2) Instructions for Form 4549-TEB Page 2:

- a) The following fields on page 2 of the form should be carried over from Page 1: Name of Issuer of Bonds, Employer Identification Number, Period, Payee EIN, Report Number, and Credit Adjustment.
- b) Penalty Code Section – The section number of any applicable penalties should be noted. If no penalties are proposed leave blank;
- c) Penalty Amount – Enter the amount of penalty applicable to the adjustment for each specific Form 8038-CP return included in the report;
- d) Interest (IRC section 6601) Computed to \_\_\_\_\_ - Specify the date interest is computed to in the column heading. Generally, this will be the date payment of tax, penalty, and interest is expected to be paid to the IRS. The examiner should compute interest payable on each account from the interest payment date of each Form 8038-CP return through the payment date of any additional tax, penalties, and interest. If the case is unagreed or no payment is expected at closing, the examiner should compute interest to the date of the report. The IRS will assess the interest on the account for each Form 8038-CP return(s) and will bill the issuer for the final tax, penalty, and interest due;



- e) Amount Due or (Refund) – This is the sum of the Credit Adjustment, Penalty Amount, and Interest as computed and reflects the balance due on each Form 8038-CP return;
- f) Other Information – This is a memo field for information related to the computation of credit adjustments. If more than one Form 4549-TEB is used for computing the adjustment on all related Form 8038-CP returns, the continuation should be noted in this section;
- g) Total Amount Due or (Refund) – This field is the total of the Amount Due or (Refund) column for all Form 8038-CP returns included on the Form 4549-TEB report;
- h) Examiner's Signature;
- i) Employee ID – The examiner's employee ID number from his or her IRS issued identification badge;
- j) Office – This field should reflect the examiner's office codes as follows where the last four digits reflect the examiner's group number; SE:T:GE:TEB:72XX; and
- k) Date – This field should reflect the date the Form 4549-TEB report was discussed with, or mailed to, the issuer of the bonds.

#### **4.82.3.5.3 Agreed Revenue Agent Report**

- (1) Generally, qualification noncompliance for DPBs is addressed during the examination of the information return for the bond issue. As such, the normal TEB examination discussion of potential noncompliance and resolution procedures have preceded the opening of the Form 8038-CP examination. Form 4549-TEB is the report used to present the proposed tax adjustment for changes in the credit amount paid on Form 8038-CP.
- (2) For cases in which the issuer agrees with the adjustments proposed on Form 4549-TEB, the examiner should obtain the signature of a person authorized to sign on behalf of the issuer (generally, a person authorized to sign the return). The examiner should prepare instructions for the payment of any balance due reflected on Form 4549-TEB via the Electronic Funds Transfer Payment System. Payments should be processed to the earliest period included on Form 4549-TEB. (See IRM 4.82.3.5.4 for further instructions on payment processing.)

#### **4.82.3.5.4 Processing Balance Due Payments Made via EFTPS**

- (1) For administrative convenience the total balance due reflected on Form 4549-TEB should be paid via EFTPS and credited to the module of the earliest return

period included on the report. The examiner should obtain a copy of the EFTPS confirmation from the issuer and verify the payment was made using the IDRS EFTPS command.

- (2) The examiner shall notify Governmental Entities closing unit personnel that a payment has been made and request transfer of the payment to the appropriate return period modules as shown on Form 4549-TEB in the amounts reflected in the balance due column.
- (3) Payments related to civil penalty assessments will need to be transferred to the MFT 13 account on which penalties were assessed.

#### **4.82.3.5.5 Unagreed Revenue Agent Report and Issuance of the 30-Day Letter**

- (1) In cases where the issuer does not agree with the adjustments proposed on Form 4549-TEB, a copy of the explanation of items prepared for the Proposed Adverse Determination Letter will be attached to Form 4549-TEB supporting the proposed adjustments. The examiner will prepare Letter XXX, commonly referred to as the 30-Day Letter, to include all related Form 8038-CP periods included on Form 4549-TEB and issue it simultaneously with the Proposed Adverse Determination Letter issued as part of the examination of the information return.

#### **4.82.3.5.6 Managerial Review of Revenue Agent Report**

- (1) Form 4549-TEB should be approved by the examiner's group manager prior to issuance.

#### **4.82.3.6 Closing Agreement Procedures for Direct Pay Bonds**

- (1) Closing agreements resolving examinations of DPBs will generally follow the procedures applicable to tax-advantaged bonds (currently in IRM 4.81.6).

#### **4.82.3.7 30-Day Letter Procedures for Direct Pay Bonds**

- (1) Generally, Letter XXX (the "30-Day Letter") is used to notify issuers of DPBs of their opportunity to protest the proposed assessment of tax to Appeals. The potential noncompliance related to the qualification of DPBs is generally considered in the examination of the information return reporting the bond transaction. The 30-Day Letter should be issued simultaneously with the Proposed Adverse Determination Letter issued for the information return examination.
- (2) Attachments to Letter XXX shall include Form 4549-TEB, an explanation of the adjustments, and Publication 1035.

##### **4.82.3.7.1 Managerial Review of 30-Day Letter**

- (1) Letter XXX should be approved by the examiner's group manager prior to issuance.

#### **4.82.3.7.2 Appealed Cases**

- (1) For cases where the only potential noncompliance involves the qualification of the DPBs, no separate protest is required apart from an adequate protest of the related Proposed Adverse Determination Letter. If adjustments contained in the Form 4549-TEB relate to the computation of the credit amount or the allowance of any specific credit(s), not involving the overall qualification of the bonds for which a separate explanation of items is required under IRM 4.82.3.5.1, then the issuer's protest must identify and address the specific adjustments to which they do not agree.
- (2) Because the IRS will generally continue to process Form 8038-CP returns until a final adverse determination, subsequent Form 8038-CP returns received generally will need to be associated with the case in Appeals for consideration. The examiner shall prepare a schedule of anticipated Form 8038-CP returns, Form BBB, to notify the appeals officer of the anticipated claims during the next three year period. Form BBB will be included in the information return examination case file at closing (see TEB treatment of subsequent claims at IRM 4.82.3.8).

#### **4.82.3.7.3 Additional Procedures for Credits Paid on Non-Issuer EIN Accounts**

- (1) When an issuer has designated another party to receive credit payments (a "Paying Agent") on Form 8038-CP, a new tax module will need to be established in cases where an assessment of tax is to be made. Making an assessment on the account module for the return processed under the Paying Agent's EIN could result in disclosure violations if the notices generated from balance due master file accounts were sent to the designated payee.
- (2) If a case is to be closed with a no change or using a closing agreement, no assessment will be made to the Form 8038-CP module and no further procedures are required.
- (3) Upon approval of the decision to open an examination of a Form 8038-CP return that has been processed under the EIN of a Paying Agent the examiner will prepare Form 12810, Account Transfer Request Checklist, indicating that this return and all transaction codes in the Paying Agent's return module be moved to a new return module under the issuer's EIN using the following procedures:
  - a) Enter the DLN from the Paying Agent's return module for transaction code 150;

- b) Enter examiner's name, address, unit, stop number, phone, and fax number;
  - c) Review BMFOLT for the Paying Agent module to determine that the return was posted, the credit was allowed, and the refund has been paid;
  - d) Check the boxes in the form as applicable and attach original return and print of BMFOLT;
  - e) Check the box for "MF to MF";
  - f) In the "From" Account box enter the name, EIN of the Paying Agent, MFT 46, the return period, and the return received date of the module to be reprocessed;
  - g) Enter the transaction codes, the date, and amount to be reprocessed to the new module under the Issuer's EIN;
  - h) In the "To" Account box enter the name, EIN of the Issuer, MFT 46, and return period;
  - i) Enter the transaction codes, dates, and amounts that should be reflected in the new module;
  - j) In the Remarks section, indicate "Form 8038-CP for reprocessing to Issuer's EIN";
  - k) Obtain group manager authorization;
  - l) Submit Form 12810, the a copy of the Form 8038-CP return to be reprocessed, and a copy of the BMFOLT for the return module to be reprocessed to the DPB Case Control Coordinator; and
  - m) Document the case file when the transfer request documents were sent to the DPB Case Control Coordinator.
- (4) This should be done as early in the examination as possible because the creation of the new return module may take up to eight weeks to complete.
- (5) (5) Once the return has been moved to the new account under the issuer's EIN, new RCCMS activities will be established by the examiner and the activities created under the EIN of the Paying Agent will be closed as an error. AIMS controls will be opened for the new modules established.

#### **4.82.3.8 Post Examination Procedures for Subsequent Claims**

- (1) After the resolution of a DPB examination resulting in a closing agreement, an assessment of tax, an appeal to the IRS Office of Appeals, or a final adverse determination, additional claims on Form 8038-CP returns may be filed for subsequent interest payment dates. In cases where future credit amounts are reduced or not allowed, the TEB DPB Compliance Review Coordinator should be notified by the agent or specialist closing the case in order to update the database maintained by the TEB DPB Compliance Review Function to ensure processing of future Form 8038-CP returns according to the examination resolution.

#### **4.82.3.8.1 Notification of Compliance Review Function**

- (1) Where an issuer agrees the DPBs are not qualified, an issuer enters into a closing agreement in which future credits are reduced, or a Final Adverse Determination Letter is issued, the examiner should prepare Form UUU, Notification of TEB DPB Compliance Review Function, identifying the DPB transaction for which the agreement or final adverse determination is made, and instructing that any claims filed for refund of credits on Form 8038-CP returns related to the nonqualified DPBs should be disallowed. A copy of the agreed Form 4549-TEB, closing agreement, or Final Adverse Determination Letter should accompany the notice. This notification will be used to disallow any subsequent claims and should include sufficient information to support such claim disallowance.
- (2) Where future credit amounts are modified from those originally expected based on the terms of the bonds, (i.e., under terms of a closing agreement), Form UUU should be completed and accompanied by a debt service schedule for the remaining term of the bonds including credits expected to be allowed and a copy of the closing agreement or other basis for the modification.
- (3) Where the 30-Day Letter has been protested, Form UUU should be completed to indicate that the case is currently in Appeals and the TEB DPB Compliance Review Coordinator should be notified of any subsequent claim activity.
- (4) For DPB examination cases with no change to the qualification of bonds, Form UUU is not required.
- (5) Form UUU and all required attachments should be included in a single .pdf file and submitted via secure email to the TEB DPB Compliance Review Coordinator as soon as the examination resolution has been determined, but not later than the closing of the case.

#### **4.82.3.8.2 Processing Form UUU, Notification to Governmental Entities Compliance Unit**

- (1) Upon receipt of Form UUU the TEB DPB Compliance Review Coordinator will review the form for completeness and determine all required attachments are included.
- (2) The TEB DPB Compliance Review Coordinator will identify all approved transaction database records for the subject bond issue. Generally, this will only be one record, but if there were more than one type of qualified bond in the same bond issue, or if there were both fixed and variable rate bonds in the same bond issue, there could be more than one record.
- (3) The TEB DPB Compliance Review Coordinator will ensure that each identified record is modified by inserting the Form UUU and applicable attachments into the file. As TEB and GECU personnel perform their normal compliance checks on any future Form 8038-CP returns filed for such bonds the Form UUU will notify them of: (1) the modified expected credit amounts, (2) whether the claim should be disallowed, or (3) whether the case is currently in Appeals.
- (4) If the credit amounts indicated on the debt service schedule on file for the subject DPB transaction have been modified, for example by the terms of a closing agreement, the TEB DPB Compliance Review Coordinator will update the debt service schedule on file in the database maintained by that TEB DPB Compliance Review Function with a schedule indicating the approved amounts.

#### **4.82.3.8.3 Treatment of Form 8038-CP Returns Filed During Appeal**

- (1) The GECU will notify the TEB DPB Compliance Review Coordinator if a new Form 8038-CP has been received and processed on a case currently pending in Appeals (see IRM 4.82.3.8.1), and the TEB DPB Compliance Review Coordinator will forward a copy of the new Form 8038-CP return and Form UUU to the examiner's group manager.

Note: This expedited process to associate newly filed related returns with a matter presently before Appeals bypasses the normal TEB referral process. The group manager will assign the case, generally to the same examiner who worked the prior case.

- (2) The examiner will review the Form 8038-CP to determine whether potential noncompliance present in the case before Appeals is present in the case assigned. If the same potential noncompliance before Appeals is present in the case assigned, the examiner will coordinate with the DPB Case Control Coordinator to establish the case on RCCMS, prepare Form 4549-TEB, and open the examination of the subsequent Form 8038-CP return using Letter CCC. Because the referral received may precede processing of the Form 8038-CP return, the establishment of case controls on AIMS may be delayed until the return has been processed and the examiner must confirm the master file

account has been established on IDRS before establishing AIMS controls through RCCMS. Letter CCC will advise the issuer that an examination of a subsequent return has been opened and offer an expedited procedure to associate this return with the DPB information return and related Form 8038-CP returns currently in Appeals without any additional protest required. Letter CCC will also serve as the 30-Day Letter if the issuer does not request the expedited protest.

- (3) If the issuer returns the attachment to Letter CCC requesting immediate Appeals consideration, the examiner will notify his or her group manager, prepare Form 3198-A indicating the key case this return should be associated with, and close the case to Appeals using RCCMS closing code 601 Appealed – Protest to Appeals. For cases to be associated with the key case in Appeals where no new potential noncompliance has been identified, the mandatory review of cases closed to Appeals is not required.
- (4) The group manager will notify the Supervisory Appeals Officer responsible for assigning TEB cases that a related return is being closed under expedited procedures for association with a key case already under Appeals jurisdiction. The group manager will then ensure AIMS control has been established and the ASED was properly updated before closing the case.
- (5) If the issuer does not elect the expedited Appeals consideration option, the examiner will follow the normal 30-Day Letter procedures and require a formal protest.

#### **4.82.3.9 Statutory Notice of Deficiency Procedures**

- (1) The assessment of income taxes is subject to the deficiency procedures described in chapter 63, subchapter B, of the Internal Revenue Code of 1986 as amended. These deficiency procedures require that before an assessment of tax may be made, the IRS must send a notice of deficiency to the taxpayer. The taxpayer may waive the restrictions on assessment by providing the Secretary a signed written notice (i.e., Form 870 or Form 4549-TEB). Generally, TEB will need to issue a notice of deficiency only in cases where the taxpayer does not timely protest the 30-Day Letter or the period for assessment will not allow sufficient time for the examination to be completed and allow the Office of Appeals to consider the case. A notice of deficiency is issued by the Office of Appeals for unagreed deficiencies of income tax liabilities under their jurisdiction.
- (2) A notice of deficiency, also called a “statutory notice of deficiency” or “90-Day Letter,” is a legal notice in which the Commissioner determines the taxpayer’s tax deficiency. The notice of deficiency is a legal determination that is presumptively correct and consists of:

- a) A letter explaining the purpose of the notice, the amount of the deficiency, and the taxpayer's options;
  - b) A waiver to allow the taxpayer to agree to the additional tax liability;
  - c) A statement showing how the deficiency was computed; and
  - d) An explanation of the adjustments.
- (3) The purpose of a notice of deficiency is 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.
- (4) When taxpayers disagree with a tax determination, they may petition the United States Tax Court (Tax Court) for a judicial determination of the tax liability after receiving a notice of deficiency. This section outlines procedures for issuing statutory notices of deficiency under IRC section 6212, Notice of Deficiency.

#### **4.82.3.9.1 Notice of Deficiency Review**

- (1) All cases closed for issuance of a notice of deficiency must be reviewed. Accordingly, examiners must submit a request to their manager for the assignment of a reviewer to the case as soon as possible after the determination is made that a notice of deficiency is required.
- (2) The reviewer assigned may request information to review the case and will coordinate with the examiner on any additional case development that is necessary; the scope of the review will include the determination of the following:
  - a) Correct technical conclusions on identified noncompliance;
  - b) Proper consideration and computation of penalties;
  - c) Accurate computation of the tax deficiency;
  - d) Proper completion of all procedural requirements;
  - e) Proper managerial involvement; and
  - f) Proper protection of taxpayer rights.
- (3) Cases closed for issuance of a notice of deficiency will generally be petitioned by the issuer and the case file will need to be forwarded to Appeals and Field Counsel. Accordingly, the examiner shall print all electronic documents in the RCCMS case file to prepare a hard copy case file prior to closing in RCCMS.



- (4) Notice of deficiency RCCMS case files must generally be transferred in status 25 (Pre-90 Day Letter) out of the examination group to the group of the reviewer assigned with at least 45 days remaining on the assessment period. Any exception to this general rule requires approval from the Manager, TEB Field Operations and the Manager, TEB Compliance & Program Management.
- (5) If the reviewer does not agree that a notice of deficiency should be issued, the reviewer shall discuss their position with their manager. Upon concurrence, the reviewer, the reviewer's group manager, the examiner, and the examiner's group manager shall discuss the case and decide if the notice of deficiency should be issued or the case should be returned to the examiner's group for further development or normal closure. If the group managers do not concur, TEB's senior management shall determine if a notice of deficiency should be issued. Any decision to allow the period for assessment of any period to lapse should be documented.
- (6) Generally, notices of deficiency shall be reviewed and approved by Field Counsel before issuance. Notices of deficiency shall be issued to protect the government's interest regardless of whether Field Counsel review has been completed in cases where there is less than two weeks remaining on the statutory period for assessment.

#### **4.82.3.9.2 No 30-Day Letter Issued**

- (1) In cases where the examiner has identified one or more items of potential noncompliance that may result in an adverse determination with respect to the qualification of DPBs pursuant to IRM 4.82.3.3.1 and the issuer has refused to extend, or has terminated an extension for, the period(s) for assessment on one or more Form 8038-CP returns and such period(s) will expire in less than one year, TEB will protect the government's interests by issuing a notice of deficiency.
- (2) The examiner will first discuss with the issuer the examination/appeals/notice of deficiency process indicating the following:
  - a) TEB will open examinations of Form 8038-CP returns related to the examination of the information return for the DPB transaction (Form 8038-G, 8038-B, or 8038-TC);
  - b) TEB will propose an assessment of tax based on the current development of specified potential noncompliance;
  - c) In order to protect the government's interests the IRS will prepare a notice of deficiency;

- d) The assessment of tax cannot be appealed directly to the IRS Office of Appeals without an extension of the statutory period;
  - e) If other material areas of potential noncompliance have not been fully developed, the TEB examination may continue for the information return and related Form 8038-CP returns not impacted by the short statute dates;
  - f) If a petition is filed with the U.S. Tax Court for cases where the taxpayer was not allowed an administrative appeal, Field Counsel will generally refer the docketed case to the IRS Office of Appeals for its consideration. The period for assessment is stayed while the case is docketed. Appeals has indicated that where a docketed case involving Form 8038-CP cases is received such case will be considered based on the arguments and evidence included in the case files of the docketed case; and
  - g) If a petition is not filed with the U.S. Tax Court in the time prescribed once a notice of deficiency has been issued, the proposed tax, penalty, and interest will be assessed.
- (3) The examiner will document in the case chronology record that the issuer has been informed of the process as described in paragraph (2) above and does not wish to extend the statutory period for assessment.
- (4) The examiner will determine whether there are any material areas of potential noncompliance affecting qualification of the bonds in the case that have not been fully developed. If there is any additional undeveloped potential noncompliance, the examiner will discuss the remaining areas of potential noncompliance with his or her group manager and determine if the examination should remain open to complete case development or whether a Proposed Adverse Determination Letter should be issued in the examination of the information return.

#### **4.82.3.9.3 No Undeveloped Material Potential Noncompliance Remaining**

- (1) If it is determined that no material potential noncompliance remains undeveloped in the examination the examiner will:
- a) Issue a Proposed Adverse Determination Letter for the information return under examination regardless of whether a Form 5701 has been previously issued;
  - b) Open the examination of all Form 8038-CP returns for which case controls have been established;
  - c) Prepare Form 4549-TEB computing the adjustment proposed;

- d) Close the RCCMS case files for all Form 8038-CP returns to his or her group manager and request the case(s) be transferred to the group manager of the reviewer assigned for issuance of a notice of deficiency; and
- e) Upon valid protest, close the examination of the information return to Appeals.

#### **4.82.3.9.4 One or More Undeveloped Material Areas of Potential Noncompliance Remain**

- (1) If it is determined that one or more material areas of potential noncompliance remain undeveloped in the examination the examiner will:
  - a) Open the examination of all Form 8038-CP returns where the period for assessment will have fewer than 450 days remaining by the expected completion date of the examination;
  - b) Prepare Form 4549-TEB computing the adjustment proposed for all open Form 8038-CP periods;
  - c) Prepare an explanation of items for the Identified Qualification Issue(s) and any additional potential noncompliance sufficiently developed supporting the adjustments contained in Form 4549-TEB;
  - d) Close the RCCMS case files for all open Form 8038-CP returns to his or her group manager and request transfer to the group manager of the reviewer assigned for issuance of a notice of deficiency; and
  - e) Continue the examination of the DPB information return as a priority case.
- (2) Cases in which case development continues will require the group manager to submit a monthly status report to the Field Operations Manager on or before the first Monday of each calendar month until closed. The status report will be made on Form AAA, Status Report of Priority DPB Examination Cases, and indicate the developments in the case and a projected closing date.

#### **4.82.3.9.5 Case File for Notice of Deficiency Cases**

- (1) The examiner will prepare an examination case file for each Form 8038-CP return, which will include the following:
  - a) Form 3198-A indicating “DPB Related Return – Issuer Refused Statute Extension – Statutory Notice”;
  - b) A copy of Form 8038-CP;

- c) Form 895 (if applicable);
  - d) Form 4549-TEB with explanation of items for proposed adjustments for the periods;
  - e) A description of the Identified Qualification Issue(s) for which case controls were established under IRM 4.82.3;
  - f) Factual details developed during the examination to date of the information return relating to the issue(s) included in the explanation of items for Form 4549-TEB;
  - g) A copy of Form 5464, Case Chronology Record, from the examination file of the related information return;
  - h) Copies of any correspondence or other evidence related to the issuer's refusal to extend the period for assessment;
  - i) The TEB Statute Evaluation Form for the related bond examination; and
  - j) A description of the current examination status including all remaining items of potential noncompliance and outstanding IDRs for the related information return examination.
- (2) If more than one Form 8038-CP return is included on Form 4549-TEB, the case file indicated above will be included in the Form 8038-CP return case file with the earliest interest payment date. All other case files for Form 8038-CP returns included in the 4549-TEB will contain the Form 3198-A, a copy of Form 8038-CP, and Form 895 referenced above. The Form 3198-A should also indicate "See related case file for MM/DD/YYYY interest payment date for the examination case file."
- (3) Notice of deficiency RCCMS case files will be transferred from the examiner's group to the group manager of the reviewer assigned using disposal code 604 (Unagreed Without Protest).

#### **4.82.3.9.6 No Protest of 30-Day Letter**

- (1) In examination cases where the assessment period is not in jeopardy, a 30-Day Letter was issued per IRM 4.82.3.5.5, and a protest was not received in the time prescribed, the examiner will include a copy of the examination case file from the examination of the related information return and a copy of the Final Adverse Determination Letter issued with respect to the DPBs in the case file of the Form 8038-CP return with the earliest interest payment date.

- (2) Form 3198-A indicating “DPB Related Return – No 30-Day Letter Protest – Statutory Notice” should be included in the case file with the earliest interest payment date. Form 3198-A should also be included in any additional related return case file(s) and should include a cross reference to the file containing examination work papers.
- (3) If the issuer protests the Proposed Adverse Determination Letter, but fails to timely protest the 30-Day Letter with respect to the related Form 8038-CP returns, the examiner should determine whether such failure was intended, or due to a mistaken understanding of the requirement to protest both the Proposed Adverse Determination Letter and the 30-Day Letter. If such failure was unintended the examiner should determine a reasonable extension of time to allow the issuer to file a valid protest to the 30-Day Letter, and with the concurrence of the group manager, send a letter notifying the issuer of such additional time to protest the 30-Day Letter. (Note: extension of time to protest the 30-Day Letter is not required in cases where a protest to the Proposed Adverse Determination Letter was not timely filed.)
- (4) For cases where no protest of the 30-Day Letter is received the RCCMS case files will be closed to the examiner’s group manager and transferred to the group manager of the reviewer assigned for issuance of a notice of deficiency using RCCMS closing code 604 (Unagreed – Without Protest). The status code should be updated on RCCMS from 12 to 25 - Pre-90 Day Letter.

#### **4.82.3.9.7 Notice to TEB DPB Compliance Review Function**

- (1) For cases transferring from an examiner’s group for issuance of a notice of deficiency where a final adverse determination is issued, examiners should follow the notification requirements in IRM 4.82.3.8. For cases transferring from an examiner’s group for issuance of a notice of deficiency where the examination of the information return remains open, the notification is not required.

#### **4.82.3.9.8 Preparation and Issuance of the Notice of Deficiency**

- (1) The general procedures provided in IRM 4.8.9 will be used in the preparation, issuance, suspense, and monitoring of a TEB notice of deficiency as modified herein.
- (2) The notice of deficiency will be prepared by the reviewer assigned.
- (3) The reviewer will coordinate with Field Counsel to request an attorney be assigned for the review and approval of the notice of deficiency.
- (4) The reviewer will prepare the notice of deficiency and assemble together with other documents a package (the “Notice of Deficiency Package”) to include:

- a) Letter 531 addressed to the issuer;
  - b) Explanation of Tax Adjustment (See IRM 4.82.3.9.9);
  - c) Letter 937 transmitting a copy to the POA, if applicable;
  - d) Form 4549-TEB (from the examination case file);
  - e) Form 870 (from the examination case file);
  - f) Pub 594;
  - g) Copy of current IDRS command codes TXMODA and INOLES prints reflecting issuer's name and address on file;
  - h) Copies of any Form 2848 (from the examination case file); and
  - i) Copies of any statute extensions obtained for any period included in the notice of deficiency.
- (5) The reviewer will send the Notice of Deficiency Package plus any additional documents requested to the Field Counsel attorney assigned for review.
  - (6) The reviewer will take any required actions necessary to perfect the Notice of Deficiency Package as described in written advice from Field Counsel.
  - (7) If Field Counsel determines that a notice of deficiency should not be issued, the reviewer will consider whether additional development is required and return the case to the examiner's group for additional development or closure. Any decision to allow the period for assessment to expire for any tax period should be documented in the case file.
  - (8) Upon receipt of approval by Field Counsel or determining to issue a notice of deficiency in the absence of a response from Field Counsel as described in IRM 4.82.3.9.1(6), the reviewer will prepare or coordinate preparation of printed copies of items (a) through (f) in the Notice of Deficiency Package described in paragraph 4 above with a file copy and any required copies for POAs, including all required addressed envelopes (the package for the issuer will be addressed to the address and addressee indicated by the INOLES). The reviewer will forward or arrange forwarding of the taxpayer copy, POA copy, file copy, envelopes, together with the IDRS prints, Form 2848, and statute extensions described in (g), (h), and (i) of paragraph 4 above, and a copy of Field Counsel's written approval to the Manager, CPM, or his or her designee, using next day air mail service.
  - (9) The Manager, CPM, or his or her delegate, will review the Notice of Deficiency Package and upon approval, sign the letters, and ensure the mailing of the notice

of deficiency to the issuer using certified mail with return receipt requested. A copy of the notice will be mailed to authorized representatives per the Form 2848.

- (10) Upon receipt of the return receipt evidencing delivery of the notice, a copy of the notice, evidence of mailing, and copies of POA transmittal letters will be sent to the reviewer to be included in the RCCMS case file.
- (11) The reviewer shall forward to the 90-Day Reviewer a copy of the Letter 531 mailed to the Issuer and update the status of each RCCMS case included in the notice of deficiency to status 24, 90-Day Letter.

#### **4.82.3.9.9 Explanation of Tax Adjustments**

- (1) The explanation of tax changes will generally consist of a short paragraph explaining the adjustments proposed on Form 4549-TEB. This paragraph does not require the statement of facts, law, and arguments generally included with Form 5701 or a Proposed Adverse Determination Letter, but merely an explanation of the reason for the adjustment.
- (2) Following are examples of IRC section 6431 specific explanations:
  - a) We have disallowed the IRC section 6431 credit for qualified bonds you claimed because [NAME OF BOND ISSUE] are private activity bonds and are not qualified bonds;
  - b) We have disallowed the IRC section 6431 credit for qualified bonds you claimed because [NAME OF BOND ISSUE] are arbitrage bonds and are not qualified bonds;
  - c) We have disallowed the IRC section 6431 credit for qualified bonds you claimed because [NAME OF BOND ISSUE] were not issued before January 1, 2011 and are not qualified bonds;
  - d) We have disallowed the IRC section 6431 credit for qualified bonds you claimed because you did not make an irrevocable election to have the provisions of IRC section 54AA apply to [NAME OF BOND ISSUE] and the bonds are not qualified bonds;
  - e) We have disallowed the IRC section 6431 credit for qualified bonds you claimed because the issue price has more than a de minimis amount of premium over the stated principal amount of [NAME OF BOND ISSUE] and the bonds and are not qualified bonds; or
  - f) We have disallowed the IRC section 6431 credit for qualified bonds you claimed because proceeds of [NAME OF BOND ISSUE] required to be

used for certain qualifying purposes were not used for such purposes and the bonds are not qualified bonds.

Note: Violations related to nonqualifying uses of proceeds may result from uses of proceeds to pay costs of issuance in an amount in excess of applicable limitations (for example, in excess of the 2% cost of issuance limit for purposes of determining the amount of available project proceeds under IRC section 54A).

- (3) For adjustments resulting from noncompliance not described in the examples above, the reviewer shall provide an explanation conforming to the IRM 4.8.9.8.6 guidance on the explanation of adjustments, the examples in paragraph (2) above, and the numerous examples provided in IRM Exhibit 4.10.10.

#### **4.82.3.9.10 Post Issuance Procedures for Notice of Deficiency Cases**

- (1) After issuance of the notice of deficiency, issuers have 90 days to petition U.S. Tax Court. The IRS is barred from making an assessment before the expiration of this 90-day period, unless a waiver is received.
- (2) The 90-Day Reviewer shall establish a 120-day follow-up (allowing 30 days past the 90-day expiration date to allow for time lags in mailing and inputting the information) for each case placed in 90-day suspense in accordance with IRM 4.82.3.9.8(11).
- (3) Daily, the 90-Day Reviewer shall review the daily docket listing from the Director, Legal Processing Division, Procedure and Administration Office of Chief Counsel to determine if the U.S. Tax Court has been petitioned for any case in 90-Day suspense.

Note: Field Counsel must respond to a petition within 60-days, so it is important to identify cases petitioned as soon as possible.

- (4) If the issuer files a petition with the U.S. Tax Court, the 90-Day Reviewer will notify the reviewer assigned and the reviewer will close petitioned cases on RCCMS using disposal code 603 (Unagreed – Petition to Tax Court). The hard copy case file will be shipped by the reviewer to Appeals via overnight mail to the following address:

Internal Revenue Service Boston  
Appeals Office  
10 Causeway Room 493  
Boston, MA 02222-1047

- (5) The reviewer will coordinate with the GE Closing Unit to close the case on RCCMS.



- (6) If a petition is not identified, upon expiration of the 120-day suspense period, the 90-Day Reviewer will conduct research at [www.ustaxcourt.gov](http://www.ustaxcourt.gov) (select "Docket Inquiry") to determine if the issuer has petitioned the Tax Court. If no petition has been filed the 90-Day Reviewer will notify the reviewer. The reviewer will close the non-petitioned case on RCCMS using disposal code 604 (Unagreed – Without Protest). The hard copy case file may be destroyed to the extent all documents are included in the electronic case file.
- (7) If the reviewer receives a waiver, Form 870, authorizing the immediate assessment and collection of tax, the reviewer will review the waiver for completeness and close any case for which a valid waiver was received using disposal code 102 (Agreed Tax or Penalty Changes).
- (8) Upon receipt of a valid waiver, the reviewer will notify the 90-Day Reviewer that the 90-Day suspense case can be closed.

#### **4.82.3.9.11 Requests for Reconsideration**

- (1) IRM 4.8.9.23 contains procedures for responding to protests, correspondence, or other requests for reconsideration after the notice of deficiency has been issued.

#### **4.82.3.9.12 Rescinding Statutory Notices of Deficiency**

- (1) Circumstances may exist where a notice of deficiency may need to be withdrawn. Examples would include: the identification of an error in the notice, agreement to resolve the matter through a closing agreement, establishment of facts that resolve the matter with no assessment required, willingness to extend the assessment period, or other request by the issuer.
- (2) Rescission of a notice of deficiency may not be made after the filing of a petition to the U.S. Tax Court or the expiration of the 90-day suspense period and may only be accomplished by agreement between the issuer and the IRS. A rescission requires the consideration of a number of factors contained in IRM 4.8.9.28.
- (3) Rescission of a notice of deficiency issued for TEB cases must follow procedures established in Rev. Proc. 98-54, use Form 8626, and be approved by the Director, Tax Exempt Bonds.

#### **4.82.3.10 Claim Disallowance Procedures for Direct Pay Bonds**

- (1) Normal claim processing, described at IRM 21.5.3.1, generally involves an amended return modifying an established account for a previously filed return. Form 8038-CP represents a claim for credit for which no prior return or account module exists.

- (2) Each Form 8038-CP return undergoes a TE/GE prepayment compliance review by the GECU DPB Compliance Review Function following receipt of the return at the Ogden Service Center main campus. In conducting its review, the GECU DPB Compliance Review Function evaluates, among other things, the consistency between the amount of the credit requested on Form 8038-CP and the corresponding amount indicated in the database maintained for prepayment compliance review purposes by the TEB DPB Compliance Review Function.
- (3) Upon identification of an excess of the amount of credit claimed on Form 8038-CP over the amount of credit allowed with respect to the related DPBs and interest payment date as indicated on Form UUU, the GECU, as directed by the TEB DPB Compliance Review Coordinator, edits lines 19 through 22 of Form 8038-CP to reflect the allowable credit under IRC section 6431 for the interest payment date. For example, in the case of a final adverse determination, the amounts as edited would be zero.
- (4) The GECU submits the edited Form 8038-CP return into normal processing. The return will establish a module on Master File under the applicable EIN, the period established from the interest payment date, and a report number assigned by the GECU.
- (5) The TEB DPB Compliance Review Coordinator will request from the GECU a copy of each Form 8038-CP return edited to comply with a Form UUU.

#### **4.82.3.10.1 Claim Disallowance Procedures for Direct Pay Bonds**

- (1) The TEB DPB Compliance Review Coordinator will prepare a DPB claim disallowance referral package for establishment of case controls on RCCMS and issuance of a notice of claim disallowance or partial claim disallowance. The DPB claim disallowance referral package shall consist of:
  - a) A claim disallowance referral, Form RRR;
  - b) A copy of the edited Form 8038-CP return reflecting zero or reduced credit allowed;
  - c) A copy of Form UUU; and
  - d) A copy of the Final Adverse Determination Letter or closing agreement, obtained from the database maintained by the TEB DPB Compliance Review Function.
- (2) The TEB DPB Compliance Review Coordinator will forward the DPB claim disallowance referral package to the DPB Case Control Coordinator.

- (3) The DPB Case Control Coordinator will establish the case on RCCMS using master file 46, activity code 300, appropriate project and tracking codes, and source code 30.
- (4) The DPB Case Control Coordinator will transfer the RCCMS case file to the group of the examiner who examined the related DPB information return on which the final determination was made. Generally, the examiner who originally examined the DPB information return will be assigned the case.
- (5) The examiner will review the DPB claim disallowance referral package and determine if the credit claimed per the Form 8038-CP return as filed should be allowed, partially allowed, or disallowed. The examiner may contact the persons authorized on the Form 8038-CP return to obtain additional information necessary to process the return. The examiner will document the conclusion and the factual basis for such conclusion reached in the RCCMS case file.
- (6) If the amount of credit allowable as determined by the examiner does not agree with the amount of credit on line 22 of Form 8038-CP as edited by the GECU, Form 4549-TEB will be prepared to make any required adjustment to the credit.
- (7) If the examiner determines the original claim as filed should be allowed in full Form 4549-TEB should be prepared reflecting a full refund of the credit amount claimed; no taxpayer approval is required and Letter SSS should be issued to notify the issuer of the initial claim disallowance and the refund allowed on the return during the review process.
- (8) In all other cases Letter 105-TEB will be issued to notify the issuer of any full or partial claim disallowance. The claim disallowance or partial claim disallowance letter will indicate the reason for the disallowance and the amount of credit disallowed, and will also indicate that the claim disallowance may be protested. The letter will also clearly identify the issuer's options to file suit in U.S. District Court or the U.S. Court of Claims. The basis for the claim disallowance (i.e., the Final Adverse Determination Letter or the closing agreement) should be included as an attachment to the claim disallowance letter.
- (9) The examiner will consider whether the penalty for erroneous claims under IRC section 6676 is applicable (See IRM 20.1.5.16).

#### **4.82.3.11 Assessment of Penalties for Erroneous Claims**

- (1) The penalty for erroneous claims under IRC section 6676 should be considered in all DPB examinations resulting in a proposed adjustment to tax. If the examiner determines that the penalty is applicable, the examiner should obtain group manager approval for opening a penalty examination case and document such approval on Form 5464, Case Chronology Record. The examiner shall

notify the issuer that a penalty assessment may be made and determine whether any reasonable cause exists for the underpayment of tax. Issuers are liable for a penalty, which is not subject to deficiency procedures, of 20% of the excessive claim amount unless it is shown that the claim for such excessive amount has a reasonable basis. (See IRM 20.1.5.16)

- (2) The examiner assigned the DPB examination or claim disallowance case shall establish a separate compliance activity on RCCMS for each period in which the penalty is applicable. The Type of return is "Non-Return" and the Activity code is 508 - Form 8278 (The Non-filer –Required to File (Non-ATAT) label does not apply for GE). IRC section 6676 cases should not be established on AIMS. In RCCMS the MFT will be 99, but the GE Closing Unit will make the assessment on MFT 13 when Form 8278 is processed. Each penalty case established under this procedure will be referred to as a "related case" to the information return for the bond issue, which will be referred to as the "key case."
- (3) After consideration of all the facts and circumstances, if the examiner determines an IRC section 6676 penalty applies, then the examiner prepares Form 886-A, Explanation of Items.
- (4) The examiner shall discuss the proposed assessment of the IRC section 6676 penalty with the issuer and offer a meeting, including the examiner's group manager, to discuss any unagreed matters.
- (5) If the issuer agrees with the assessment of the penalty, Form 5838-EC, Agreement to Assessment and Collection of IRC section 6676 Erroneous Claim for Refund or Credit Penalty, is used to secure the issuer's agreement.
- (6) If the issuer does not agree with the assessment of the IRC section 6676 penalty, the examiner will issue Letter 4143-C, IRC section 6676 Erroneous Claims Penalty Assessment Notification Letter, with Form 5838-EC and Form 886-A attached.
- (7) If the issuer files a protest in response to Letter 4143-C, the related penalty cases should be associated with the key case unless the ASSED is imminent and the issuer refuses to extend the statute.
- (8) The IRC section 6676 penalty is not subject to deficiency procedures, which means the penalty should not be included on the examination report for the disallowed claim for refund or credit return, on an examination 30-Day Letter, or Statutory Notice of Deficiency relating to the disallowed claim.
- (9) The key case work papers should clearly reflect consideration of the IRC section 6676 penalty, including the specific reasons for non-applicability, to the extent required under applicable policies or guidance.

- (10) Form 8278 will be prepared by the examiner to make a civil penalty assessment (MFT 13) for each separate period. If there are multiple assessments in the same period (i.e., multiple Form 8038-CP filings for multiple maturities of specified tax credit bonds) those assessments must be aggregated and treated as a single assessment.
- (11) The period for assessment of the IRC section 6676 penalty will generally expire three years from the date the claim for refund or credit was filed. The ASED for assessment of a tax deficiency and the ASED for assessment of the IRC section 6676 penalty must be separately controlled and protected. Form 872-EC, Consent to Extend the Time on Assessment of IRC section 6676 Erroneous Claim for Refund or Credit Penalty, is used to obtain the issuer's consent to extend the ASED.
- (12) The case file shall include a copy of the return(s) for which the penalty is assessed, a description why the penalty is applicable, a calculation of the penalty amount, evidence of consideration of reasonable cause, and a completed Form 8278. If the amount of penalty equals 20% of the adjustment reflected on Form 4549-TEB, no additional computation is required. Under IRC section 6751 both the originator of Form 8278 and that person's immediate supervisor, or other person designated by the Secretary, must sign Form 8278. Electronic signatures are acceptable. (See IRM 20.1.5.1.6)
- (13) Agreed cases will be closed on RCCMS for assessment. Unagreed cases will be closed together with the key case as a package.

#### **4.82.3.12 Direct Pay Bond Collection Procedures**

- (1) This section provides collection procedures used by examiners for DPBs.
- (2) This section describes the examiner's responsibility with respect to securing full payment. If the assessment to be made on a master file MFT 46 account is not paid in full at the conclusion of the examination, the examiner will make a referral to the Collection Territory Manager with jurisdiction over the Issuer.

##### **4.82.3.12.1 Examiner's Responsibilities**

- (1) Examiners are expected to consider collectability pursuant to assessments made under IRM 4.82.3.5.3 or 4.82.3.9.1 and/or a penalty assessment made under IRM 4.82.3.10.
- (2) At the initial examination appointment, issuers will be advised that payment options will be discussed, and payment solicited, during the closing conference if any deficiency is recommended.

- (3) Once the examination is completed and an assessment is recommended, examiners will request payment of agreed deficiencies resulting from the examination.
- (4) If the issuer is unable to make full payment, the examiner will explain payment options to the issuer. These options include installment agreements and Offers-in-Compromise (doubt as to collectability). Pub 594, The IRS Collection Process, may be used for this purpose.
- (5) TEB examination employees have the authority to accept streamlined installment agreements (See IRM 4.20.4.3, Streamlined Installment Agreements). If the taxpayer requests an installment agreement that does not meet TEB's authority, a referral is made to Collection for consideration. Collection has jurisdiction for Offers-in-Compromise doubt as to collectability and currently not collectible determinations. See IRM 4.18.1 through 7 for examination procedures on processing doubt as to liability offers.
- (6) Examiners should document the case file and their workpapers, when applicable, concerning the collectability discussion (tiered interview) as outlined in IRM 4.20.3.3, Securing Collection Information:
  - a) If collectability was an issue, was it considered?
  - b) Was payment received?
  - c) Was an installment agreement secured?
  - d) If the taxpayer asked for an installment agreement outside the examiner's authority, was the case referred to Collection? and
  - e) If the agreed deficiency was not paid, was the case referred to Collection?

Note: The case file documentation should enable the reviewer to readily make a determination regarding the above aspects. The requisite documentation should generally be included in the payment and closing conference agenda workpaper.
- (7) Form 9440, Taxpayer Levy Source and Contact Information, is completed and included in the case file in all unpaid cases (agreed and unagreed). See IRM 4.20.3.3 for detailed information.
- (8) If the examiner does not secure full payment or an installment agreement from the issuer, (see IRM 4.20.4.2, Installment Agreements), a referral to the Collection Territory Manager with jurisdiction over the Issuer is mandatory for assessments made on MFT 46 accounts.

- (9) The referral will consist of a memorandum from the Group Manager to the Collection Territory Manager including:
- a) A detailed description of the assessment made (Most Collection personnel will not be familiar with DPB assessments.);
  - b) An explanation that a manual referral is required because the Collection Integrated Collection System (ICS) does not include MFT 46 accounts (Again, Collection personnel may not be aware that their inventory system does not accommodate MFT 46 accounts.);
  - c) A description of the collection efforts taken by TEB and Issuer response to such activity;
  - d) A copy of Form 4549-TEB and Form 870 if applicable; and
  - e) A copy of Form 9440.

#### **4.82.3.12.2 Processing Form 9440**

- (1) In all unpaid cases (agreed and unagreed), financial data about the taxpayer should be included in the case file and recorded on Form 9440, Taxpayer Levy Source and Contact Information, to assist in future collection efforts. The information for completion of the form will be based on the facts developed during the examination. See IRM 4.20.3.3, Securing Collection Information, for more information on completing Form 9440.
- (2) Attach the completed Form 9440 to the referral to Collection required for all unpaid assessments on MFT 46 accounts.