



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

8.6.4

JUNE 16, 2020

## EFFECTIVE DATE

(06-16-2020)

## PURPOSE

- (1) This transmits revised IRM 8.6.4, Conference and Settlement Practices, Reaching Settlement and Securing an Appeals Agreement Form.

## MATERIAL CHANGES

- (1) Incorporated AP-08-0719-0009, *Reissuance of Interim Guidance on Specific Dollar Settlements*, dated July 1, 2019.
- (2) Moved paragraphs (5) and (6) from IRM 8.6.4.1.2 to IRM 8.6.4.2 as paragraphs (4) and (5).
- (3) Added new IRM 8.6.4.1 Program Scope and Objectives and its related subsections to comply with the Deputy Commissioners of Services and Enforcement and Operations Support memo dated September 14, 2016, entitled Heightened Awareness, Sensitivity, and Understanding of Internal Controls.
- (4) Revised IRM 8.6.4.2.10, Disagreements with Appeals Determinations.
- (5) Added new IRM 8.6.4.9, Policy for Use of Fax in Taxpayer Submissions to comply with the Deputy Commissioner for Services and Enforcement memo dated November 19, 2015, entitled Revision of Policy for Use of Fax in Taxpayer Submissions, which was later clarified in a memo entitled Clarification of Policy for Use of Fax in Taxpayer Submissions, dated October 29, 2019.
- (6) Added new IRM 8.6.4.10(5) to include the servicewide guidance for use of digital signatures on statute extension consent forms to comply with IRM 25.6.22.5.11, *Delegation of Authority to Sign for Commissioner and Date*.
- (7) Made editorial changes.

## EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 8.6.4 dated March 16, 2015. This IRM incorporates Interim Guidance AP-08-0719-0009, *Reissuance of Interim Guidance on Specific Dollar Settlements* dated July 1, 2019.

## AUDIENCE

Appeals employees

Steven M. Martin  
Director, Case and Operations Support



8.6.4

Reaching Settlement and Securing an Appeals Agreement Form

## Table of Contents

### 8.6.4.1 Program Scope and Objectives

8.6.4.1.1 Background

8.6.4.1.2 Authority

8.6.4.1.3 Responsibilities

8.6.4.1.4 Program Reports

8.6.4.1.5 Terms and Acronyms

8.6.4.1.6 Related Resources

### 8.6.4.2 Fair and Impartial Settlements per Appeals Mission

8.6.4.2.1 Mutual-Concession Settlements

8.6.4.2.2 Split-Issue Settlements

8.6.4.2.3 Specific Dollar Settlements

8.6.4.2.4 Nuisance Value Settlements

8.6.4.2.5 Judicial Attitude Towards Settlement

8.6.4.2.6 Burden of Proof

8.6.4.2.7 Case Evaluation for Settlement Purposes

8.6.4.2.8 Partial Settlements

8.6.4.2.9 Settlements That Affect Later Taxable Years

8.6.4.2.10 Disagreements with Appeals Determinations

### 8.6.4.3 Settlement of Related Cases

8.6.4.3.1 Settlement Procedure in Whipsaw Cases

8.6.4.3.2 Settlement of Non-Examined Years Affected by Appeals Settlements

### 8.6.4.4 Agreements Forms Secured in Appeals Cases

8.6.4.4.1 Distinction Between General and Special Agreement Forms

8.6.4.4.2 Use of Agreement Forms 870 and 4549

8.6.4.4.3 Agreement Used When Taxpayer Requests Greater Finality

### 8.6.4.5 Modification of Agreement Forms 870 and 870-AD Types

8.6.4.5.1 Modification of Agreement for Partial Agreement

8.6.4.5.2 Modification of Agreement for Settlements With Reservations

8.6.4.5.3 Modification of Form 870-AD for Carrybacks Provided by Law

8.6.4.5.4 Modification of Agreement When Overpayments Applied Against Deficiencies

8.6.4.5.5 Modification of Agreement for Prepayment Credit Adjustments

8.6.4.5.6 Modification of Footnotes on Agreement Forms

8.6.4.5.7 Modification of Agreement in Joint Committee Cases and in Potential Joint Committee Cases Because of Carrybacks

### 8.6.4.6 Closing Agreement Form 866 and Form 906

8.6.4.7 Collateral Agreements

8.6.4.8 Informal Agreements as Determinations

8.6.4.8.1 Form 2198 Agreement - Personal Holding Company Tax

8.6.4.8.2 Form 2259 Agreement - Mitigation and Correction of Errors under IRC 1311

8.6.4.8.3 Settlements Which Do Not Become Effective When Form 5402 is Signed

8.6.4.9 Policy for Use of Fax in Taxpayer Submissions

8.6.4.10 Electronic Signature Use on Appeals Letters and Documents

8.6.4.1  
(06-16-2020)  
**Program Scope and Objectives**

- (1) *Purpose:* This IRM section provides procedures for Appeals Technical Employees (ATEs), to follow when a settlement is reached and an agreement form is needed.
- (2) *Audience:* Appeals.
- (3) *Policy Owner:* Director, Case and Operations Support.
- (4) *Program Owner:* Director, Policy, Planning, Quality and Analysis.
- (5) *Contact Information:* Appeals employees should follow established procedures on *How to Contact an Analyst*. Other employees should contact the Product Content Owner shown on the Product Catalog Information page for this IRM.

8.6.4.1.1  
(06-16-2020)  
**Background**

- (1) The Independent Office of Appeals (hereinafter Appeals) is the only administrative function of the Internal Revenue Service (IRS) with authority to consider settlements of tax controversies and has the primary responsibility to resolve these disputes without litigation to the maximum extent possible. Appeals' mission is to resolve Federal tax controversies without litigation on a basis which is fair and impartial to both the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and enhances public confidence in the integrity and efficiency of the IRS. Appeals accomplishes this mission by considering protested and Tax Court cases, holding conferences, and negotiating settlements in a manner which ensures Appeals employees act in accord with the Taxpayer Bill of Rights (TBOR) in every interaction with taxpayers. See IRC 7803(a)(3) and Pub 5170, *Taxpayer Bill of Rights*.

8.6.4.1.2  
(06-16-2020)  
**Authority**

- (1) The authority to settle protested and Tax Court cases is delegated to Appeals Team Managers (ATMs) and Appeals Team Case Leaders (ATCLs) as to their respective cases. This does not include the authority to set aside a closing agreement. For details, see *Delegation Order 8-8 (Rev. 1) IRM 1.2.2.9.8, Authority of Appeals in Protested and Tax Court Cases*, and *IRM 1.2.2.9.1, Appeals Functions, Settlement of Cases Docketed in the United States Tax Court (Updated (10-02-2000) to reflect additional new organization titles required by IRS Modernization, for Delegation Order 8-1*.

8.6.4.1.3  
(06-16-2020)  
**Responsibilities**

- (1) The Director of Case and Operations Support is the executive responsible for designing, developing, delivering, and monitoring short and long-range tax administration policies, programs, strategies, and objectives for the Appeals organization.
- (2) The Director, Policy, Planning, Quality and Analysis (PPQA) is responsible for providing technical and procedural guidance to Appeals employees, establishing and maintaining policies and standard procedures for Appeals work streams.
- (3) The Policy analyst shown on the Product Catalog Information page as the originator is the assigned author of this IRM.

- 8.6.4.1.4  
(06-16-2020)  
**Program Reports**
- (1) The Director PPQA provides trends and data analyses and detailed summary reports for Appeals.
- 8.6.4.1.5  
(06-16-2020)  
**Terms and Acronyms**
- (1) See IRM 8.1.1-1 Exhibit, *Common Terms Used in Appeals*, for common terms and definitions used in IRM Part 8.
- 8.6.4.1.6  
(06-16-2020)  
**Related Resources**
- 8.6.4.2  
(06-16-2020)  
**Fair and Impartial Settlements per Appeals Mission**
- (1) The Appeals mission is to resolve tax controversies without litigation on a basis which is fair and impartial to both the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the federal tax laws, and enhances public confidence in the integrity and efficiency of the IRS. This is Appeals' general contribution towards achieving the Service's mission. (See IRM 1.1.1, *IRS Mission and Organizational Structure*, IRM 1.1.7, *Appeals* and IRM 1.2.1.9, *Policy Statement for the Appeals Process*.) In further support of the Service's mission, Appeals may defer action on or decline to settle some cases, under Policy Statement 8-47 (described at IRM 1.2.1.9.6, *Policy Statement 8-47, Consideration to be given to offers of settlement*), where:
- a. required by other National Office-issued internal management documents, such as those suspending action on cases or those requiring coordination or control of identified matters with widespread impact; or
  - b. such action would produce a greater positive effect on voluntary compliance than would be derived from settlement or other action on the case.
- (2) A fair and impartial resolution is one which reflects, on an issue-by-issue basis, the probable result in the event of litigation, or one which reflects mutual concessions for the purpose of settlement based on the relative strength of the opposing positions where there is substantial uncertainty of the result in the event of litigation.
- (3) It is the experience of Appeals that thorough, reasonable, and objective consideration of all elements of a controversy leads, in a large majority of cases, to resolution of the controversy on a basis agreeable to both the taxpayer and the Government. However, an agreement is not possible in all cases. A taxpayer may not agree with Appeals' conclusion as to the probable result in the event of litigation, or to the extent of mutual concessions required where there is substantial uncertainty of litigating a result, or may prefer to litigate for other reasons.
- (4) In all cases involving the "trading" of issues, the discussion of the hazards must clearly support the conclusion that relative values of the issues being traded are equal. Not all issues are traded.
- (5) Penalty issues are not traded in Appeals. Penalties are settled, but the settlement is based on the merits and hazards surrounding each penalty issue standing alone. See IRM 8.11.1.2.7.5, *Hazards of Litigation*.
- (6) See IRM 8.1.1.3.1, *No Appeals Conference or Concession on Certain Arguments*, for certain arguments that are not given any weight in settlement.

- (7) See IRM 8.7.3, *Domestic and International Operations Programs*, for settlement procedures in the Appeals Coordinated Issue (ACI) Program and the Appeals Industry Specialization Program (ISP).
- 8.6.4.2.1  
(10-26-2007)  
**Mutual-Concession Settlements**
- (1) Case dispositions involving concessions by both the Government and the taxpayer for the purpose of settlement where there is substantial uncertainty in the event of litigation as to how the courts would interpret and apply the law, or as to what facts the courts would find, are designated as mutual-concession settlements.
- (2) Appeals is expressly authorized by Policy Statement 8–47 to enter into such settlements. In such a case there is substantial strength to the position of both parties, so that neither party, with justification, is willing to concede in full the unresolved area of disagreement. See IRM 1.2.1.9.6.
- (3) Resolution of the dispute involves concessions for the purpose of settlement by both parties based on the relative strength of the opposing positions. A Form 870-AD, *Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment*, type of agreement is generally used in mutual-concession settlements.
- (4) Do not use the term “overall settlement” in the discussion of an issue being settled unless there is a clear and precise discussion of the specific concessions being made by both parties.
- 8.6.4.2.2  
(06-16-2020)  
**Split-Issue Settlements**
- (1) Policy Statement 8–48 (Rev. 1) states Appeals may consider and accept proposals for “split issue” settlements. See IRM 1.2.1.9.7, *Policy Statement 8-48 (Rev. 1), Split-Issue and Specific Dollar Settlements permitted Under Certain Circumstances*.
- (2) A split-issue settlement is the settlement of an issue for a percentage or a stipulated amount of the tax in controversy that if litigated, would result in a decision completely for the Government or the taxpayer. The distinguishing feature of a split-issue settlement is that the agreed result would not be reached, if tried.
- (3) Split issue settlements are not appropriate in cases involving issues affecting prior or subsequent tax periods not included in the settlement, such as adjustments to depreciation/depletion, carryovers, carrybacks, or other reoccurring issues.
- (4) It is important the taxpayer has a clear understanding of the effect of the split-issue settlement in terms of tax liability and taxable income. Either a closing agreement or a collateral agreement is advisable.
- 8.6.4.2.3  
(06-16-2020)  
**Specific Dollar Settlements**
- (1) Policy Statement 8-48 (Rev. 1) states that Appeals may consider and accept proposals for “specific dollar” settlements. See IRM 1.2.1.9.7.
- (2) A specific dollar settlement is the settlement of a case for a percentage or stipulated amount of the tax in controversy that approximates the amount that would have been reached by computing the tax.
- (3) Specific dollar settlements are appropriate when:

- The case is a small tax case. The term “small tax case” means a non-docketed or docketed case that would qualify for “S” case procedures, if docketed.
  - There are nonrecurring issues.
  - The settlement only affects years under Appeals’ jurisdiction.
  - There is a single entity/taxpayer.
- (4) Specific dollar settlements are not appropriate in cases involving issues affecting prior or subsequent tax periods not included in the settlement, such as adjustments to depreciation/depletion, carryovers, carrybacks, or other reoccurring issues.
- (5) The following is a list of some of the issues where a specific dollar settlement would not be appropriate:
- Earned Income Credit (EIC) banned for two years
  - Adjustments to SE tax
  - Passive activity and carryovers/carrybacks
  - Contributions carryovers
  - Capital losses and carryovers/carrybacks
  - Net operating losses and carryovers/carrybacks
  - Affordable Care Act (ACA) Marketplace provisions (Premium Tax Credit and the Shared Responsibility Payment)
  - Depreciation/depletion
  - Employment taxes

**Example:** In a simple one-year case where the hazards indicate several issues might be resolved overall for 60% in favor of the Government and 40% for the taxpayer, the Appeals Officer could take the amount of tax at issue in the Revenue Agent’s Report (RAR) and split it 60/40. In this specific dollar settlement, the taxpayer would be charged with 60% of the proposed deficiency.

**Example:** In a multiple year case where the negligence penalty was asserted on the treatment of Schedule C business expenses and the business no longer exists, the Appeals Officer could propose a specific dollar settlement. The penalty issue is nonrecurring and a specific dollar settlement may be appropriate.

- (6) The Appeals Officer should explain to the taxpayer and in the Appeals Case Memorandum (ACM) his/her rationale for using a specific dollar settlement.
- (7) Prepare Form 5402, *Appeals Transmittal and Case Memo*, with special instructions:
- a. Include this statement: **THIS IS AN APPEALS SETTLEMENT FOR A SPECIFIC DOLLAR AMOUNT. THERE IS NO AUDIT STATEMENT OR SCHEDULE OF ADJUSTMENTS, AND THE CHANGE TO AGI AND TXI CAN’T BE DETERMINED.**
  - b. Include the tax settlement amount.
  - c. Include the penalty settlement amount, if any.
- (8) If a Statement of Account and/or an IRC 6404(g) and/or May/Sequa worksheet(s) is needed, submit the case to Technical Support Tax Computation Specialist (TCS). Refer to IRM 8.2.1.8, *Requesting Work from Tax Computation Specialist*, for the procedures for requesting TCS assistance.

- (9) Do not provide Form 5403, *Appeals Closing Record*, instructions to Account & Processing Support (APS). APS will follow guidance in IRM 8.20.7, *Closing Procedures*.
- (10) Submit the case to the ATM for approval.

### 8.6.4.2.4 (10-26-2007) **Nuisance Value Settlements**

- (1) Policy Statement 8–47 states no settlement will be made if it is based on nuisance value to either party. Nuisance value is any concession made solely to eliminate the inconvenience or cost of further negotiations or litigation and is unrelated to the merits of the issues. Appeals neither exacts a concession nor grants a concession solely to relieve either party of such inconvenience or cost.

### 8.6.4.2.5 (06-16-2020) **Judicial Attitude Towards Settlement**

- (1) The judicial attitude is one which reasonably appraises the facts, law, and litigating prospects; uses sound judgment and ability to see both sides of a question; and is objective and impartial. Any approach which contemplates a maximum possible result in favor of the Government or a deficiency in every case is incompatible with a judicial attitude and the Appeals mission.
- (2) Do not take advantage of a taxpayer's lack of technical knowledge. Fully explain the settlement proposal and how the decision was reached. In the absence of an agreement, fully explain the taxpayer's appeal rights.

### 8.6.4.2.6 (06-16-2020) **Burden of Proof**

- (1) The Internal Revenue Service Restructuring and Reform Act of 1998 (“RRA 98”), which was signed into law on July 22, 1998, states under certain circumstances the Internal Revenue Service (“Service”) has the **burden of proof** in any court proceeding with respect to a factual issue if the taxpayer introduces credible evidence to ascertain the taxpayer's income tax liability.
- (2) Congress believed that placing the burden of proof on taxpayers created a disadvantage for them when they litigated against the Service, and that it should be the Government's responsibility to show that a taxpayer's determination of liability is not correct. Congress also felt it was not appropriate in all cases to make the taxpayer disprove unreported income when the Service determined income solely based upon statistical information from unrelated taxpayers. Furthermore, Congress believed during court proceedings the Service cannot rest on the presumption of correctness if it does not provide any evidence relating to penalties.
- (3) The **burden of proof provision**, under IRC 7491, applies to income, estate, gift, and generation-skipping transfer taxes. (For purposes of this provision, self-employment taxes are treated as income taxes.)
- (4) The burden of proof provision applies to court proceedings arising in connection with examinations commencing after the date of enactment (July 22, 1998) of RRA 98. Where there is no examination, the burden of proof provision applies to court proceedings arising in connection with taxable periods or events beginning or occurring after the date of enactment of RRA 98.
- (5) An audit is not the only event considered an examination for purposes of the burden of proof provision. For example, matching an information return to an amount reported on an income tax return is an examination for purposes of

this provision. Also, the review of a claim for refund prior to the issuance of the refund is an examination for purposes of this provision.

- (6) IRC 7491(a) places the burden of proof on the Service in any court proceeding where the taxpayer introduces credible evidence with respect to factual issues relevant to ascertaining the taxpayer's tax liability. To qualify, the taxpayer must:
  - a. Comply with all substantiation requirements of the Code and the regulations.
  - b. Maintain all the records required by the Code and the regulations.
  - c. Cooperate with the Service's reasonable requests, including providing, within a reasonable period of time, access to and inspection of, witnesses, information, documents, meetings and interviews. Cooperation also includes providing reasonable assistance to the Service in obtaining access to and inspection of witnesses, information, or documents not within the control of the taxpayer (including any witnesses, information, or documents located in foreign countries). A necessary element of cooperating with the Service is that the taxpayer must exhaust all administrative remedies, including any appeal rights provided by the Service.
  - d. Meet certain net worth qualifications if they are a corporation, partnership or trust. Taxpayers whose net worth exceeds \$7 million are not eligible for the benefits of these burden of proof provisions.
- (7) IRC 7491(b) places the burden of proof on the Service in any court proceeding where the Service reconstructs a taxpayer's income solely through the use of statistical information of unrelated taxpayers. This rule only applies to individual taxpayers.
- (8) IRC 7491(c) states the Service has the burden of production in a court proceeding with respect to the liability of any individual for any penalties, additions to tax and additional amounts. This rule only applies to individual taxpayers.

**Note:** "Additional amounts" are amounts assessed by the Service which are not considered additions to tax or penalties.
- (9) The burden of proof encompasses both the **burden of production** (also known as the **burden of going forward** with the evidence) and the **burden of persuasion**.
- (10) The burden of production is met if the party who bears it comes forward with evidence supporting its position. The burden of production requires a party to demonstrate it has concrete and positive evidence, as opposed to a mere theoretical argument, that there is substance to their position. Once a party has established this threshold burden, the burden of production (going forward) shifts back to the other party.
- (11) In the past, the taxpayer bore the initial burden of production with respect to both the deficiencies and penalties. By requiring the taxpayer to produce credible evidence sufficient to base a decision if not rebutted, "RRA 98" leaves the burden of production on the taxpayer. However, under IRC 7491(c), the Service now bears the burden of production with respect to the determination that a penalty applies. The Service is required to come forward initially with evidence that it is appropriate to apply a particular penalty to an individual taxpayer. With respect to the liability of an individual for any penalty the burden

of production includes proof of compliance with section 6751(b). *Graev v. Comm.*, 149 T.C. 485 (2017) (“*Graev III*”). Once the Service meets the burden of production, the taxpayer retains the burden of persuading the court that the penalty is not appropriate, by raising defenses to the penalty, such as reasonable cause or substantial authority. *Higbee v. Comm.*, 116 T.C. 438 (2001). Note that IRC 7491 does not apply to the fraud penalty where the IRC specifically places the burden of proof on the Commissioner.

- (12) To say that a party bears the burden of persuasion is to say the party must persuade the court that its position is correct. If the party fails to meet its burden, it loses the case. Stated another way, a party that meets the burden of persuasion persuades the Court that its evidence outweighs the evidence of the other party.
- (13) In the past, the taxpayer bore this burden and had to convince the court the Service was wrong. Based on the legislative history of “RRA 98”, the burden of persuasion shifts to the Government. Since the Government has the burden of persuasion, the Government only prevails if the preponderance of the evidence (more than 50%) favors the Government.
- (14) If the taxpayer complies with the statutory requirements, the Service must now assume the burden of showing to the satisfaction of the court the tax liability as determined is correct, and the taxpayer no longer bears the burden of proof.
- (15) It is critical that examiners now document their workpapers to reflect the degree of taxpayer cooperation. In addition, the examiners must fully describe documents used to support audit conclusions and proposed tax adjustments. Examiners must also prepare documents which fully describe the steps taken and the analysis which supports audit conclusions. Similarly, in unagreed cases, Appeals personnel must **address the degree of taxpayer cooperation** in their ACMs. This confirmation is needed by Counsel in addressing the burden of proof issues during preparation for trial.
- (16) Good auditing and good litigation practice, similar to most determinations in the past, ordinarily produce sufficient evidence to sustain the burden of proof. The Service and Chief Counsel have not, in the past, generally relied upon the taxpayer’s failure of proof to sustain the asserted liability, but rather have affirmatively shown the proper liability. Continued adherence to these practices satisfies the new standard, but it is now extremely important that a thorough examination and documentation of the liability be performed prior to the initiation of litigation.
- (17) The Service **cannot** take the following actions:
  - a. Rely on the taxpayer’s failure to satisfy the burden of proof in court cases where the taxpayer has a reasonable factual dispute with the Service.
  - b. Rely solely on statistical information such as *Bureau of Labor Statistics (BLS)* or *Consumer Price Indexes (CPI)* to determine unreported income.
  - c. Assert penalties arbitrarily and without a firm factual foundation.
- (18) The Service **can** take the following actions:
  - a. Emphasize its examination procedures to further stress good examination techniques. Gather and preserve evidence from the earliest stage of a case, documenting where the taxpayer has cooperated and the extent to

which he or she cooperated and produced information. Explore and document all requirements of the law with respect to the treatment of an item for tax purposes. Similarly, Counsel must emphasize good trial preparation and evidence production practice to satisfy the Government's evidentiary burden.

- b. Use statistical data from unrelated taxpayers to determine a taxpayer's income as a component of its traditional indirect methods of establishing income. There is no reason to abandon the usage of statistical information; rather a thorough examination likely produces other circumstantial evidence to support the income determination. In these instances, the use of statistical information cannot be the sole means to determine income.

**Note:** For clarification, in the past both the IRM and court decisions required the Service to supplement a BLS or CPI reconstruction with direct evidence of the amount and likely source of a taxpayer's income.

- c. Ensure supervisory approval of penalties pursuant to section 6751(b) has been obtained and is documented. See IRM 8.11.1.2.1, *Supervisory Approval of Penalties Before Appeals Consideration*. Objectively apply penalties and document workpapers to demonstrate the applicability of the penalties. Always ask taxpayers to provide an explanation of reasonable cause, if applicable, for a penalty, and document the response.

8.6.4.2.7  
(10-26-2007)

**Case Evaluation for  
Settlement Purposes**

- (1) The settlement approach and elements of evaluation are not affected by the status of the case. An unacceptable settlement in non-docketed status does not become acceptable solely because it is reconsidered in docketed status; nor does it become more acceptable in a trial calendar period than it was in a prior period. This, of course, does not preclude recognition of changes in judicial interpretation of the law and changes in Service position. It is also recognized that in reconsideration of a case or trial preparation, additional facts may arise which could affect evaluation of the case.
- (2) If a trial cannot be recommended on an issue, concede the issue even though it may have some merit.
- (3) Do not make or accept minor concessions on the basis the outcome of litigation is never absolutely predictable.
- (4) Occasionally settlement is required for issues where the "Golsen Rule" is applicable. The "Golsen Rule" originated with the case of Jack E. Golsen, 54 T.C. 742 (1970). In this case, the Tax Court held it would follow the rule of law laid down by the Court of Appeals to which an appeal in the case before it would lie.
- (5) Problems arise when the rule of law laid down by the local circuit conflicts with a Revenue Ruling, Revenue Procedure, or other announcement of Service position in regard to the same issue(s). In cases where the "Golsen Rule" is applicable, consult with Counsel as promptly as possible to determine the amount of litigation activity in other circuits and other relevant information on the Service's posture on the issue(s) involved.
- (6) Exercise care in a case where a tentative agreement was reached with the taxpayer and a change in the position of an applicable authority occurs which affects the agreement in a substantive and material manner. If a tentative

agreement was not finally reflected on Form 870-AD or Form 906, *Closing Agreement on Final Determination Covering Specific Matters*, and signed by a Service official authorized by the Commissioner to approve negotiated settlements, the tentative agreement is subject to modification if the law or legal precedent relied upon to formulate the tentative agreement changes. If the change is substantive and material, the agreement is renegotiated. For purposes of this section, the word “substantive” means the change in law or legal precedent results in a meaningful change to Appeals’ assessment of the hazards of litigation.

- (7) Advise taxpayers that tentative agreements not finalized using Form 870-AD or Form 906, are subject to renegotiation in the circumstances described above.
- (8) When evaluating an issue which was the subject of litigation, it is imperative to check whether an “Action on Decision” (“AOD”) was published when the court ruled adverse to the Service’s position. “AODs” represent the Service’s “litigating posture” on controversial issues in a specific case and provide the legal basis for the Service’s position on those issues. “AODs” are valuable guides for evaluating similar issues, so apply them in resolving cases. However, exercise caution in extending the application of the decision to a similar case unless the facts and circumstances are substantially the same, and consideration is given to the effect of new legislation, regulations, and revenue rulings as well as subsequent court decisions and actions. “AODs” are prepared by the Office of Chief Counsel, and simultaneously made available to the public and Service personnel after litigation is completed.

8.6.4.2.8  
(10-26-2007)  
**Partial Settlements**

- (1) Aim negotiations toward resolution of all issues in a case. If this cannot be done, attempt to reach agreement with the taxpayer on all issues capable of resolution.

8.6.4.2.9  
(10-26-2007)  
**Settlements That Affect  
Later Taxable Years**

- (1) Issues such as reasonableness of salaries, capital gain versus ordinary income on recurring sales of property, hobby losses, etc., are resolved on the basis of the facts and circumstances applicable to each year separately. In such cases, settlement has no effect on later years where a similar issue arises. Be sure the taxpayer understands this.
- (2) Where settlement involves issues such as basis of property, category of income, or amount of income from installment sales, it is desirable to incorporate the effect on later years into the settlement by use of a closing agreement or collateral agreement. See IRM 8.13.1, *Processing Closing Agreements in Appeals*.
  - a. When the disposition involves mutual concessions and the subsequent tax effect is material, a closing agreement is executed. When there are no mutual concessions or when the tax effect is not material, a closing agreement is not required, but it can be executed if in the judgment of Appeals it is desirable or the taxpayer requests it.
  - b. When a closing agreement is not required, obtain a collateral agreement since it expresses in writing the understanding of the parties as to the tax effect in later years.

8.6.4.2.10  
(06-16-2020)  
**Disagreements with  
Appeals Determinations**

- (1) This section provides formal procedures for Compliance to express disagreement with an Appeals case resolution. These procedures are not intended to replace any informal procedures currently in use at the local level. Local management in Compliance and Appeals continue to address and resolve disagreements over case resolutions at the lowest possible level. In circumstances where a settled issue is similarly present on multiple cases, concerns over those settlements should be raised through the advisory boards. Concerns may also be addressed through multi-functional meetings. Discussions must remain generic and non-case specific in accordance with Rev. Proc. 2012-18, Section 2.04, unless the issues before Appeals have been resolved with finality.
- (2) For LB&I cases worked in Appeals by a team leader (either an ATCL or an Appeals Officer assigned as a team leader), at the conclusion of a case and prior to submitting a formal dissent, the Compliance manager must contact the ATM to request a post settlement conference to allow Appeals the opportunity to communicate the resolution of the case. See IRM 8.7.11.13, *Post Settlement Conference*. If Appeals denies a post settlement conference or Compliance disagrees with the disposition following a post settlement conference, then a formal dissent may be appropriate.
- (3) The purpose of a formal dissent is to provide Compliance an opportunity to express in writing its specific disagreement with Appeals' disposition of a case. Dissents serve an important purpose by providing Appeals with valuable feedback for internal quality review.
- (4) Dissents must be in writing and provide more than a mere continuation of advocacy from the Government to be considered. Disagreements may be based on:
  - interpretation of law or procedures or
  - consideration of specific facts or information.

Requests for Appeals to justify its decision or commit to a position regarding future treatment of a particular issue or taxpayer are not appropriate. The dissent must clearly state the reason(s) for the dissent, the rationale supporting the reason(s) for the dissent and whether Compliance requests a conference with the appropriate Appeals Area Director. The rationale for the dissent should include:

- a. Citation of the specific facts that Compliance believes Appeals did not consider.
- b. Citation of the applicable legal authorities (i.e. Code Sections, Regulations, Revenue Rulings, court cases, etc.) that Compliance believes Appeals did not consider or should have considered.

**Note:** Formal dissents by Compliance are not appropriate in an Appeals case where "hazards of litigation" were considered in the settlement of the case. Appeals clearly identifies within the ACM those cases resolved by considering the "hazards of litigation." In such cases, a dissent will not be considered and no response will be provided. Appeals may, however, consider a dissent where Compliance clearly asserts that Appeals either failed to consider specific facts or failed to consider applicable legal authorities.

**Note:** The decision to hold a conference is at the discretion of the appropriate Appeals Area Director. If a conference is held, the parties

must follow the ex parte communication guidelines set forth in Rev. Proc. 2012-18 at Section 2.03(11). Generally, any discussion of the resolution of issues in closed periods is permissible; however, discussions with respect to the same issue/taxpayer or related taxpayer in open cycles would violate the ex parte communication rules unless the taxpayer/representative has an opportunity to participate.

- (5) Dissents should be e-mailed to the appropriate Appeals Area Director via the “\*AP Formal Dissents” centralized mailbox within the following timeframes:
- For team cases (worked by an ATCL or assigned to an Appeals Officer as a team leader), 90 days of the post settlement conference meeting or within 90 days of the case closing if a post settlement conference meeting is denied or is not necessary.
  - For all other LB&I cases, 90 days from receipt of feedback (ACM and Form 5402), (e.g., 90 days from IMS e-mail notification).
  - For non-LB&I cases, 90 days from receipt of ACM.

The appropriate Appeals Area Director will send Compliance an acknowledgment of receipt within 10 days. Requests for extensions should be submitted to the appropriate Appeals Area Director.

- (6) Upon receipt of the dissent, the Appeals Area Director will determine whether Appeals will reply to the dissent. The Appeals Area Director will notify Compliance within 10 days, that no response will be provided. Appeals will provide a response to Compliance within 90 days of receipt of the dissent. If additional time is necessary, the Appeals Area Director will notify Compliance and provide an estimated response time frame.
- (7) Dissents, which occur only on closed cases, may also include a request to reopen a case. Such a reopening would only occur in **extremely rare circumstances**. The Appeals Area Director, guided by Policy Statement 8-3 (formerly P-8-50), and existing statutes and regulations will decide whether the case should be reopened. See IRM 1.2.1.9.3, *Policy Statement 8-3 (Formerly P-8-50), Mutual concession cases closed by Appeals will not be reopened by Service except under certain circumstances*.

**Exception:** Appeals cannot reopen final CDP determinations. However, Appeals does retain jurisdiction of the case under IRC 6330(d)(3). See IRM 8.22.9, *Collection Due Process, Closing and Post Closing Actions*.

- (8) If a Taxpayer Advocate Service (TAS) case is reopened and the determination changed as a result of this process, Appeals must notify TAS of the change.

### 8.6.4.3 (10-26-2007) **Settlement of Related Cases**

- (1) The best overall use of Service resources and the avoidance of whipsaw situations are the primary considerations in deciding whether interrelated cases are assembled and considered concurrently. Interrelated cases are those in which a determination with respect to an issue in one case has a direct tax effect on another case.

- (2) A small related or interrelated case is ordinarily considered on the basis of the record and requests are not made for Compliance to develop further evidence or examine other returns. A fact determination inconsistent with action taken in another small case should not influence the Appeals Officer. See IRM 8.6.4.3.1. Any further action in a related case is a function of Compliance.
- (3) Settlements in related cases should not be made whereby a party - clearly not liable under the facts - agrees to a deficiency of a related taxpayer.
- (4) See IRM 8.2.3, *Related, Whipsaw and Inactive Cases*, for additional information on related cases.

8.6.4.3.1  
(10-26-2007)  
**Settlement Procedure in Whipsaw Cases**

- (1) A whipsaw situation develops when a settlement in one case can have a contrary tax effect in another case and one of the taxpayers may later, when the period of limitations applicable to the other case has expired or is about to expire, file a claim on a basis inconsistent with the prior closing.
- (2) Another whipsaw situation develops when a related party achieves a judicial determination inconsistent with a result already determined by the Service for another related party.
- (3) Additional action may be necessary in order to protect the Government's interest in a whipsaw situation.
  - a. If a material amount of tax is involved and there are litigating uncertainties, the use of a closing agreement is ordinarily warranted.
  - b. In the absence of circumstances stated in (a) above, a collateral agreement is obtained if it is considered useful to express in writing the understanding of the parties. However, a collateral agreement does not have the legal effect of a closing agreement.
  - c. For use of closing agreements and collateral agreements in related cases, see IRM 8.13.1, *Processing Closing Agreements in Appeals*.
- (4) See IRM 8.2.3.13, *Whipsaw Cases*, for additional information on whipsaw cases.

8.6.4.3.2  
(10-26-2007)  
**Settlement of Non-Examined Years Affected by Appeals Settlements**

- (1) In certain instances, resolution of a tax dispute may require incorporating an adjustment into a tax year not currently before Appeals in which a Report of Income Tax Examination Changes (RAR) has not been issued. Examples of situations requiring such action include the disallowance or allowance of tax shelter losses and rollover adjustments resulting from a prior year. Once it is determined such an adjustment is appropriate, make an effort to determine whether any further action by Appeals is permissible.
- (2) In instances where an RAR was not issued with respect to a year affected by an Appeals settlement, determine if the tax return for the affected year is currently under examination.
  - a. If the affected year is not under examination, and the statute of limitations has not expired, notify the Compliance function (which ordinarily has jurisdiction over the related taxpayer) of the proposed action and allow them an opportunity to comment. See IRM 8.2.3, *Related, Whipsaw and Inactive Cases*.

- b. Where there is no pending case on the related taxpayer (and none planned), prepare, for the benefit of Compliance, a Form 5402, containing the appropriate adjustments for the affected year.
- c. Under certain circumstances (when deemed appropriate by the Appeals Officer and agreed to by an Appeals Manager) proceed with a settlement of the affected year by using either Form 870 or a restricted Form 870-AD after first updating the taxpayer's affected year to the AIMS database. See IRM 8.20, *Account and Processing Support (APS)*, for guidance in following the procedures in changing the status of the taxpayer's taxable year. If Form 870-AD is used, the adjustments must be designated by specific restrictions.
- d. If the affected year is currently under the jurisdiction of another IRS office, after contacting that office so that appropriate action can be taken by Appeals, the Appeals Officer may resolve the issue by having the taxpayer provide Appeals with an amended return for the affected year based upon the adjustments to that year's tax liability. The Appeals Officer should immediately forward the amended return to the appropriate Campus and process any payments made by the taxpayer with such return. See IRM 8.7.17, *Appeals Remittance Procedures*.
- e. In the event the statute of limitations has expired for the affected year prior to the filing of an amended return, the Appeals Officer may want to consult with Area Counsel before proceeding with a settlement of the case if offsetting adjustments are to be made involving the years in issue.

8.6.4.4  
(06-16-2020)  
**Agreements Forms  
Secured in Appeals  
Cases**

- (1) Use the general IRS agreement forms except in certain circumstances. Use the special Appeals agreement forms when material mutual concessions are made and in situations when taxpayers request greater finality.
- (2) Special agreement or waiver forms ending in "AD" (for "Appeals Division") are used only by Appeals and include the following:
  - a. Income taxes and gift taxes— Form 870-AD.
  - b. Estate taxes— Form 890-AD, *Estate Tax Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment*. See IRM 8.7.4, *Appeals Estate and Gift Tax Cases*.
  - c. Excise and employment taxes— Form 2504-AD, *Offer of Agreement to Assessment and Collection of Additional Tax and Offer of Acceptance of Overassessment (Excise or Employment Tax)*. See IRM 8.7.10, *Excise Tax Cases and IRA Adjustments* and IRM 8.7.16, *Appeals Employment Tax Procedures*.
  - d. Trust Fund Recovery Penalty— See IRM 8.6.4.6 and IRM 8.25.2, *Trust Fund Recovery Penalty (TFRP), Working Trust Fund Recovery Penalty Cases in Appeals*.
- (3) The following are special agreement forms used for TEFRA cases:
  - a. Form 870-P (AD), *Settlement Agreement For Partnership Adjustments*.
  - b. Form 870-L (AD), *Settlement Agreement For Partnership Adjustments and Affected items*.

- c. Form 870-PT (AD), *Settlement Agreement For Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts.*
- d. Form 870-LT (AD), *Settlement Agreement For Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts, and Agreement for Affected Items.*

**Note:** For information concerning TEFRA agreement forms, see IRM 8.19 *Appeals Pass-Through Entity Handbook.*

- (4) For liability settlements not involving conditions under paragraph (1), see IRM 8.6.4.4.2.

8.6.4.4.1  
(10-26-2007)

**Distinction Between  
General and Special  
Agreement Forms**

- (1) The special agreement forms differ from the non-AD type agreements in several ways. The following table compares the two categories of forms:

Special Agreement Forms	General Agreement Forms
Pledges no reopening	No pledge
Effective upon acceptance by or on behalf of Commissioner	Effective when received.
Suspension interest under IRC 6601(c) is controlled by date form becomes effective.	Suspension interest is controlled by the date received.

8.6.4.4.2  
(06-16-2020)

**Use of Agreement  
Forms 870 and 4549**

- (1) Use the Form 870-type agreement (including Form 4549, *Report of Income Tax Examination Changes*) where a mutual concession settlement is not involved or in a situation where the amount of tax involved in a mutual concession settlement is not material enough to require the finality of the Form 870-AD.
- (2) In joint return cases, agreement forms require the signature of both spouses (or authorized representative, if applicable), unless the deficiency is paid in full. Full payment by the taxpayer is considered an agreement to the deficiency (see Rev. Proc. 2005-18, section 4.03 2005-13 IRB 798). Follow normal deficiency procedures for the non-signing spouse when full payment is not received.
- (3) Form 4549 can be used in income tax cases closed on an agreed basis. This form combines adjustments to income, computation of tax, and waiver of restrictions on assessment and collection of a deficiency or acceptance of an overassessment. It may be used by technical employees, as defined in IRM 8.1.3.3, *Appeals Employees Involved in Settling and Processing Appeals Cases*, with registered access to the *Report Generation System (RGS)* program. Forward the original and one copy of Form 4549 to the taxpayer or taxpayer's representative requesting the original be signed and returned. The copy is for the taxpayer's records. Do not use Form 4549 for the cases listed below:
  - a. Joint Committee
  - b. Partial agreements

- c. Cases requiring agreement forms with modifications or reservations
  - d. Personal holding company cases
  - e. IRC 1311 cases
  - f. Cases where effective date of waiver is postponed.
- (4) Depending on the liability type and issues considered, non-AD type agreements include the following:
- a. Form 870, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*
  - b. Form 870-E, *Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment*
  - c. Form 870-EP, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*
  - d. Form 870-IS, *Waiver of Collection Restrictions in Innocent Spouse Cases*
  - e. Form 870-T, *Waiver of Restrictions on Assessment and Collection of Transferee or Fiduciary Liability*
  - f. Form 890, *Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment - Estate, Gift, and Generation-Skipping Transfer Tax*
  - g. Form 2504, *Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to IRC 7436)*
  - h. Form 2504-E, *Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Excise Tax)*
  - i. Form 2504-S, *Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Employment Tax Adjustments Not Subject to 7436; Worker Classification or Section 530 Issues Not Addressed in this Exam)*
  - j. Form 2504-T, *Agreement to Assessment and Collection of Additional Employment Tax and Acceptance of Overassessment (Employment Tax Adjustments Subject to IRC 7436)*
  - k. Form 2751, *Proposed Assessment of Trust Fund Recovery Penalty*
  - l. Form 13449, *Agreement to Assessment and Collection of Penalties Under 31 U.S.C. 5321(a)(5) and 5321(a)(6)*
  - m. Form 14799, *Agreement to Assessment and Collection of Employer Shared Responsibility Payment (ESRP) IRC §4980H*

8.6.4.4.3  
(10-26-2007)  
**Agreement Used When  
Taxpayer Requests  
Greater Finality**

- (1) If the taxpayer requests greater finality, explain Service policy with regard to reopenings and make an attempt to persuade the taxpayer a Form 870-type agreement is adequate.
- (2) If the taxpayer is not satisfied, explain the provisions of Form 870-AD and attempt to persuade the taxpayer to use it. This is an exception to the general use of these forms, so include appropriate explanation in the ACM.
- (3) If the taxpayer still insists on greater finality and requests a closing agreement, it can be used if the Government sustains no disadvantage. See IRM 8.13.1, *Processing Closing Agreements in Appeals*.

8.6.4.5  
(10-26-2007)  
**Modification of  
Agreement Forms 870  
and 870-AD Types**

- (1) Certain circumstances require modifications of agreement forms. The following information details the procedures required when modifying agreement forms in various situations, including -
- partial agreements;
  - settlements with reservations;
  - carrybacks provided by law;
  - overpayment applied against deficiencies;
  - prepayment credit adjustments;
  - joint committee and proposed joint committee cases.

8.6.4.5.1  
(10-26-2007)  
**Modification of  
Agreement for Partial  
Agreement**

- (1) Occasionally agreement is reached on some issues but not all. Under these circumstances, use a partial agreement. If there are material mutual concessions involved, a Form 870-AD agreement is required; however, make modifications limiting the pledges against reopening to the settled issues. Make a notation on the face of the form "For additional provisions see back of this form," and place detailed descriptions of the agreed matters on the reverse side.
- (2) If a Form 870-type agreement is used, identification of the settled issues is not required but may be added for clarity.
- (3) When overassessments are involved, obtain an agreement for the settled issues but for those issues not settled, advise the taxpayer to consider filing a claim in order to protect the balance of the overassessment against the expiration of the period of limitations. See IRM 8.7.7.3, *Periods of Limitation in Claim and Overpayment Cases*, for information about time limits for allowing a refund or credit of an overpayment.

8.6.4.5.2  
(10-26-2007)  
**Modification of  
Agreement for  
Settlements With  
Reservations**

- (1) The term "settlement - with reservations" applies to a non-docketed case where settlement is reached but the taxpayer or Government wishes to reserve one or more issues and no weight is given to the reserved issue in the settlement.
- (2) If a Form 870-type agreement is used, no modification is necessary. If a Form 870-AD type is used, the agreement must reflect the complete and exact understanding of the parties.
- (3) Add the notation "For additional provisions see back of this form" on the Form 870-AD at the end of the paragraph which begins with "If this offer is accepted  
\* \* \*".

For example, "The taxpayer reserves the right to timely file a claim for refund or credit or prosecute a timely filed claim solely on the grounds" might be typed on the reverse side (then a detailed explanation of the reservation followed by) "This offer of waiver of restrictions is not to be construed as a claim for refund or credit, formal or informal, concerning the matters for which the right to file a claim is reserved."

- (4) Following are other situations where "settlements - with reservations" apply:
- a. Corporations with Foreign Subsidiaries: If it is possible for the taxpayer to subsequently receive a refund of foreign taxes paid, the Government reserves the right on Form 870-AD to recompute the taxpayer's deemed paid foreign tax credit and assess a deficiency as a result.

- b. Potential Competent Authority Issues: Whether or not the taxpayer expresses the intent (or lack of intent) to pursue competent authority consideration of the resulting double taxation, the Government reserves the right on Form 870-AD to adjust (increase or decrease) the potential competent authority issue and related foreign tax credits in the event competent authority consideration is sought by the taxpayer and a mutual agreement is reached with the treaty partner country which is acceptable to the taxpayer. Following the instructions in (3), the notation on the back of the Form 870-AD would read, "In the event that the taxpayer seeks competent authority consideration under the mutual agreement provision of a United States income tax treaty with respect to (describe potential competent authority issues) and the competent authorities reach an agreement which is accepted by the taxpayer, the Commissioner reserves the right to increase or decrease the taxable income and related foreign tax credits of the taxpayer and the earnings and profits of the taxpayer and (insert name of related entity) in accordance with the agreement reached by the competent authorities," or
- c. Taxpayers with a Distributive Share of Partnership Income or Loss on Their Returns: The Government reserves the right on Form 870 or Form 870-AD to adjust the taxpayer's share of partnership income or loss and recompute the partner's tax liability when any related partnership returns are examined or have not yet been examined. For taxpayers having an interest in partnerships and S corporations (with taxable years beginning before January 1, 1997) that come under the provisions of subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level, see IRM 8.19.6.9, *Settlement Computations for TEFRA Partner Cases*, and IRM Exhibit 8.19.6-6.

8.6.4.5.3  
(10-26-2007)  
**Modification of Form  
870-AD for Carrybacks  
Provided by Law**

- (1) Where a carryback from a specific year has been taken into account, modify Form 870-AD to reflect any carrybacks given effect in the settlement.

8.6.4.5.4  
(10-26-2007)  
**Modification of  
Agreement When  
Overpayments Applied  
Against Deficiencies**

- (1) In related cases the taxpayers may ask to have an overassessment offset a deficiency. To do this add a paragraph substantially as follows to the agreement form:

"The undersigned taxpayer also consents and agrees to the application of that part of the overassessment that represents an overpayment, and interest allowable thereon, as a credit to the deficiency, in tax of \$ \_\_\_\_\_, and interest thereon, due from (related taxpayer) for the year \_\_\_\_\_; provided the amount of any overpayment and interest allowable thereon that is in excess of the deficiency and interest is otherwise credited or refunded in accordance with IRC 6402 or corresponding provisions of prior laws."

- (2) Also make appropriate notation in "Remarks" section of Form 5402, *Appeals Transmittal and Case Memo*.

- 8.6.4.5.5  
(10-26-2007)  
**Modification of Agreement for Prepayment Credit Adjustments**
- (1) If there is a prepayment credit adjustment required in an agreed case together with an overassessment or statutory deficiency, the total or the difference is shown as a deficiency or overassessment.
- (2) If considered necessary for an understanding of the agreement, add an explanation similar to the following on the agreement form:

Prepayment credit overstated (understated)	\$ _____
Statutory deficiency	\$ _____
Deficiency (overassessment)	\$ _____

- 8.6.4.5.6  
(10-26-2007)  
**Modification of Footnotes on Agreement Forms**
- (1) When provisions of printed agreements are modified, change the printed footnotes to ensure consistency and clarity.

- 8.6.4.5.7  
(10-26-2007)  
**Modification of Agreement in Joint Committee Cases and in Potential Joint Committee Cases Because of Carrybacks**
- (1) Instructions for modification of agreements in Joint Committee cases (other than potential Joint Committee Cases described below) are contained in IRM 8.7.9, *Joint Committee (JC) Cases*.

- 8.6.4.6  
(10-15-2005)  
**Closing Agreement Form 866 and Form 906**
- (1) Form 866, *Agreement as to Final Determination of Tax Liability*, provides the finality of a closing agreement under IRC 7121 as to tax liability, and Form 906 provides finality with regard to specific matters. Modifications are made to suit an intended purpose. IRM 8.13, *Closing Agreements*.
- (2) A closing agreement determining tax liability can cause the taxpayer to lose reopening rights not contemplated in a settlement. To avoid this possibility, use a closing agreement as to specific matters.
- (3) In rare cases where there is doubt the taxpayer or taxpayer's representative will abide by the finality provisions of Form 870-AD type of agreement, consider using a closing agreement.

- 8.6.4.7  
(10-26-2007)  
**Collateral Agreements**
- (1) Other than in compromise cases under IRC 7122, collateral agreements do not establish statutory finality for the matters covered. They are used only when considered useful to express the understanding of the parties with respect to effect of a settlement. A closing agreement is used if statutory finality is desired. See IRM 8.13.1.2.3, *Collateral Agreements Distinguished*.

- 8.6.4.8  
(10-26-2007)  
**Informal Agreements as Determinations**
- (1) Some informal agreements are used as determinations of liability.

- 8.6.4.8.1  
(10-26-2007)  
**Form 2198 Agreement -  
Personal Holding  
Company Tax**
- (1) Form 2198, *Determination of Liability for Personal Holding Company Tax*, is used by the Service as an informal agreement as to liability for personal holding company tax under IRC 547(c)(3). For authority to enter into such agreements, see Delegation Order 4-1 (formerly DO-8, Rev. 11) in IRM 1.2.2.5, *Delegations of Authority for the Examining Process*. This agreement form is not accepted on behalf of the Service, unless the taxpayer has executed an appropriate agreement form, such as Form 870 or Form 870-AD, covering the proposed adjustments both to the income tax and to the personal holding company tax for the years involved. If Form 870 is used, it contains conditional paragraphs as shown in IRM Part 4. It will ordinarily be unnecessary to insert conditional paragraphs on Form 870-AD because the acceptance of Form 870-AD and Form 2198 are concurrent. See also Rev. Proc. 63-1, 1963-1 C.B. 471. For further information relative to the handling and disposition of Form 2198, see IRM Part 4.
  - (2) For use of closing agreements as determinations under IRC 547(c)(2), see IRM 8.13, *Closing Agreements*, and Rev. Proc. 68-16, 1968-1 C.B. 770.
- 8.6.4.8.2  
(10-15-2005)  
**Form 2259 Agreement -  
Mitigation and  
Correction of Errors  
under IRC 1311**
- (1) IRC 1313(a)(4) provides that a determination under IRC 1311 can be in the form of an agreement between the Secretary or his delegate and any person, relating to the liability of such person (or the person for whom he or she acts) in respect of a tax under Subtitle A of the 1986 Code for any taxable period. Form 2259, *Agreement as Determination Pursuant to Section 1313(a)(4) of the Internal Revenue Code*, has been prescribed for use by Appeals and Compliance employees in executing agreements to effect determinations under IRC 1311 and related regulations. The provisions of IRC 1311 through 1314 and applicable regulations are carefully complied with in the preparation of such agreements. For authority to enter into such agreements, see Delegation Order 4-5 (formerly DO-35, Rev. 15) in IRM 1.2.2.5.5, *Delegation Order 4-5 (formerly DO-35, Rev. 15), Agreements Treated as Determinations (Updated 10-02-2000) to reflect additional new organizational titles required by IRS Modernization*.
  - (2) Inasmuch as Form 2259 does not contain sufficient space for the statements required by *Treasury Regulation section 1.1313(a)-4(b)(2) and (3)*, such information is set forth on a separate sheet, or sheets, of paper which are securely fastened to the form. The attachment has a heading substantially similar to the following: "This statement is attached to, and made a part of, Form 2259 in the case of \_\_\_\_\_." The original and/or executed copies of Form 2259 are associated with the appropriate tax return of each taxpayer involved. A copy of executed Form 2259 is also furnished to each taxpayer. Note the reverse side of Form 2259 for additional instructions.
  - (3) For use of closing agreements as determinations under IRC 1313(a)(2), see IRM 8.13, *Closing Agreements*, and section 4.02 of Rev. Proc. 68-16, 1968-1 C.B. 770.
- 8.6.4.8.3  
(10-15-2005)  
**Settlements Which Do  
Not Become Effective  
When Form 5402 is  
Signed**
- (1) Occasionally settlements of non-docketed cases are made which are conditioned upon approval of a closing agreement: a case pending in another Appeals Office or before the Department of Justice; or the disposition of some other matter not under Appeals jurisdiction. All these cases, of course, require special handling, and generally the Form 5402 is not signed until the settlement has been approved in all respects. In some instances, however, as in the

case of a closing agreement referred to Appeals National Office for final action, the Form 5402 may have been approved conditionally, and in a few instances the transmittal memorandum may possibly have been signed in anticipation of final action by another Bureau or Government agency, or other Appeals Office.

- (2) If Form 5402 is approved conditionally, and Form 870–AD type agreement is secured, acceptance of the agreement form may be deferred until the conditions have been met. It may be preferable in some cases to obtain an agreement form modified to become effective upon termination of the conditions. However, a modified agreement made effective upon acceptance of a closing agreement determining tax liability would be ineffective either as a waiver of restrictions on assessment or for the purpose of suspension of interest. See IRM 8.13, *Closing Agreements*.

8.6.4.9  
(06-16-2020)  
**Policy for Use of Fax in  
Taxpayer Submissions**

- (1) Submissions of documentation, forms, letters, and returns related to post-filing/non-filing inquiries and interactions can be allowed via fax based on taxpayer or IRS request unless there is a specific prohibition.
- (2) If taxpayer contact has been made and the case history documents the date of contact and the desire of the taxpayer to submit the consent by fax, Appeals can accept by fax:
- waivers to assess additional tax (Forms 870 and others) of any amount;
  - closing agreements involving any amount of tax; and
  - consents to extend the time to assess tax (Forms 872, SS-10 and others).
- (3) Documentation, forms, and letters can be received via fax even if a taxpayer signature is required because Chief Counsel has advised that in circumstances where contact with the taxpayer has been made and documented, faxed signatures are legally sufficient.

**Note:** The term “faxed signatures” should be construed to include electronic images of scanned original signatures transmitted by Enterprise Electronic Facsimile (EEFAX) or e-mail.

- (4) Appeals will not acknowledge faxes received from taxpayers in the course of tax administration activities by a return fax.
- (5) Taxpayers are not required to submit any documentation, forms, letters, or returns via fax under this policy, and those adverse to any risk associated with faxing submissions may continue to make submission by mail.
- (6) The Form 2848, *Power of Attorney and Declaration of Representative*, will continue to be accepted by fax in routine operations.
- (7) The following specific documents/forms/letters can be accepted by fax if contact has been made with the taxpayer by phone or in-person and the case activity record is documented with the date of contact and notation is made that the taxpayer wants to send the documentation/form/letter by fax. **The list is not all inclusive:**
- Request for Innocent Spouse Relief (Form 8857)
  - Installment Agreements (Form 433-D)
  - Offers in Compromise (Form 656)

- Collection Information Statement for Wage Earner and Self-Employed Individuals (Form 433-A)
- Collection Information Statement for Businesses (Form 433-B)
- Letter to designate a payment
- Waivers to assess additional tax (Forms 870 and others)
- Closing agreements
- Consents to extend the statute of limitations for assessing tax (Forms 872, SS-10, and other consent forms)

8.6.4.10  
(06-16-2020)  
**Electronic Signature Use  
on Appeals Letters and  
Documents**

(1) This section provides guidance to Appeals employees regarding the appropriate use of electronic signatures on certain Appeals letters and documents. See IRM 8.6.4.10 (4) for applicable documents. Appeals has adopted the following electronic procedures that comply with the *Government Paperwork Elimination Act* (GPEA):

- a. A person (i.e., the signer) must use an acceptable electronic form of signature;
- b. The electronic form of signature must be executed or adopted by a person with the intent to sign the electronic record (e.g. to indicate a person's approval of the information contained in the electronic record);
- c. The electronic form of signature must be attached to or associated with the electronic record being signed;
- d. There must be a means to identify and authenticate a particular person as the signer; and
- e. There must be a means to preserve the integrity of the signed record.

**Note:** See *Implementation of the Government Paperwork Elimination Act* .

(2) As clarification regarding an acceptable and legally sufficient electronic handwritten signature, Appeals will use a method that:

- a. Identifies and authenticates a particular person as the source of the electronic message;
- b. Indicates such person's approval of the information contained in the electronic message; and
- c. Displays the signer's signature pictorially either as a scanned image of the signer's written signature or as the signer's signature captured by use of a signature pad or written stylus device.

**Reminder:** Copies of the signed documents must be included in the case file.

(3) For assistance in creating an electronic handwritten signature, see step-by-step digital signature instructions on *Appeals Guidance, Policy, Research web page* under "**Research Tools.**"

(4) The appropriate Appeals official may use an electronic signature on the following documents:

Document	Description
Form 866	Agreement as to Final Determination of Tax Liability

Document	Description
Form 870-AD	Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment
Form 870-IS	Waiver of Collection Restrictions in Innocent Spouse Cases
Form 890-AD	Estate Tax Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment
Form 906	Closing Agreement on Final Determination Covering Specific Matters
Form 2504-AD	Excise or Employment Tax Offer of Agreement to Assessment and Collection of Additional Tax and Offer of Acceptance of Overassessment
Form 2751-AD	Trust Fund Recovery Penalty - Offer of Agreement to Assessment and Collection
Letter 894	Notice of Deficiency (See IRM 8.17.4.8.1)
Letter 901	Statutory Notice Letter (See IRM 8.17.4.8.1)
Letter 3193	Notice of Determination Concerning Collection Actions Under Sections 6320 and 6330 (See IRM 8.22.9.5.6)

**Note:** In addition to the documents identified above, electronic handwritten signatures may be used on closing letters to taxpayers and internal use documents. For example, Form 5402 and Letter 913, *Agreed Cases - Closing Letter*, would be appropriate for electronic signature use.

- (5) Appeals Team Managers, Appeals Team Case Leaders and Appeals Officers may sign statute extension consent documents (such as the Form 872, *Consent to Extend the Time to Assess Tax*, or Form SS-10, *Consent to Extend the Time to Assess Employment Taxes*) either manually or digitally at their discretion.

**Note:** The authority to use a digital signature to execute statute extension consents is limited to delegated Service officials (e.g., ATMs, ATCLs, AOs) only and **does not** extend to taxpayer's signatures.

- (6) Non-digital signatures are required from the taxpayer on the documents listed below:

Document	Description
Form 872 series	Consent to Extend the Tax to Assess Tax
Form SS-10	Consent to Extend The Time to Assess Employment Taxes
Form 656	Offer in Compromise