



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

8.11.4

NOVEMBER 18, 2021

EFFECTIVE DATE

(11-18-2021)

PURPOSE

- (1) This transmits revised IRM 8.11.4, Penalties Worked in Appeals, Penalty Appeals (PENAP).

MATERIAL CHANGES

- (1) Updated the text to reflect the new formal title of Appeals: the IRS Independent Office of Appeals. See IRM 8.11.4.1 (1), Program Scope and Objectives.
- (2) Incorporated Interim Guidance Memorandum AP-08-1120-0021, Reissuance of Appeals Conference Procedures. See IRM 8.11.4.2 (3), Penalty Appeals (PENAP) Program.
- (3) Updated the Appeals mission statement so it conforms to the language in IRC 7803(e)(3). See IRM 8.11.4.1.1 (1), Background.
- (4) Updated Taxpayer Bill of Rights (TBOR) content based on guidance from the Division Counsel/Associate Chief Counsel (National Taxpayer Advocate Program) and Branch 3 of the Associate Chief Counsel (Procedure and Administration). See IRM 8.11.4.1.1 (2), Background.
- (5) Made editorial changes (including grammar, spelling, and minor clarifications) throughout this IRM.

EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 8.11.4 dated July 1, 2019. This IRM incorporates Interim Guidance Memorandum AP-08-1120-0021, Reissuance of Appeals Conference Procedures, which is dated November 6, 2020.

AUDIENCE

Appeals

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8.11.4

Penalty Appeals (PENAP)

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8.11.4.1
(11-18-2021)
Program Scope and Objectives

- (1) *Purpose:* This IRM section describes the process the IRS Independent Office of Appeals (Appeals) uses to consider certain protested penalties. Specifically, IRM 8.11.4:
 - a. Establishes and provides guidance and procedures for working and processing penalty appeal (PENAP) cases so that these cases are worked in a fair and consistent manner; and
 - b. Recommends IRM resources, including decision tools and other IRM sections.
- (2) *Audience:* The primary users of this IRM section are Appeals Technical Employees (ATEs).
- (3) *Policy Owner:* Policy, Planning, Quality and Analysis is under the Director of Case and Operations Support.
- (4) *Program Owner:* Appeals Policy is the program office responsible for providing technical and procedural guidance to the Appeals organization, and is under the Director of 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.

8.11.4.1.1
(11-18-2021)
Background

- (1) The Appeals mission is to resolve federal tax controversies without litigation on a basis that: (i) is fair and impartial to both the government and the taxpayer; (ii) promotes a consistent application and interpretation of, and voluntary compliance with, the federal tax laws; and (iii) enhances public confidence in the integrity and efficiency of the IRS. IRC 7803(e)(3). Appeals is the only administrative function of the Service with authority to consider settlements of tax controversies, and has the primary responsibility to resolve these disputes without litigation to the maximum extent possible.
- (2) Appeals accomplishes its mission by considering protested and Tax Court-docketed cases, holding conferences, and negotiating settlements in a manner that ensures Appeals employees act in accord with the Taxpayer Bill of Rights (TBOR) in every interaction with taxpayers. The TBOR lists rights that already existed in the tax code, putting them in simple language and grouping them into 10 fundamental rights. Employees are responsible for being familiar with and acting in accord with taxpayer rights. See IRC 7803(a)(3), Execution of Duties in Accord with Taxpayer Rights. For additional information about the TBOR, see <https://www.irs.gov/taxpayer-bill-of-rights>.

8.11.4.1.2
(07-02-2019)
Authority

- (1) See IRM 1.2.1.12.1, Policy Statement 20-1 (Formerly P-1-18), which sets forth the Service's position regarding penalties.
- (2) See IRM 20.1, Penalty Handbook, which provides Servicewide instructions for working penalty cases.

8.11.4.1.3
(07-02-2019)
Responsibilities

- (1) The Policy analyst shown on the Product Catalog page as the originator is the assigned author of this IRM.

8.11.4.1.4
(07-02-2019)

Program Reports

- (1) Policy, Planning, Quality and Analysis (PPQA) provides trend and data analyses and detailed summary reports for Appeals.

8.11.4.1.5
(07-02-2019)

Terms and Acronyms

- (1) See IRM Exhibit 8.1.1-1, Common Terms Used in Appeals, for common terms and definitions used in IRM Part 8. Terms listed in that exhibit are not included in this section.
- (2) The table below lists commonly used acronyms and their definitions:

Acronym	Definition
CR-NR	An automatic entry in ACDS, which the ATE validates, that stands for "Case Received-New Receipt".
PENAP	Penalty appeal

8.11.4.1.6
(07-02-2019)

Related Resources

- (1) This IRM is the primary source of guidance on this program in Appeals.
- (2) This IRM is supplemented by information in IRM 20.1, Penalty Handbook, and its related sections.

8.11.4.2
(11-18-2021)

Penalty Appeals (PENAP) Program

- (1) Penalty appeal (PENAP) procedures generally apply to penalties that have already been assessed. They are commonly referred to as "post-assessed" penalties. In Appeals, these cases are controlled on the Appeals Centralized Database System (ACDS) as "PENAP" cases.
- (2) Appeals centralized the consideration and processing of IRS campus-sourced PENAP cases originating from Compliance primarily in its Ogden Campus Appeals office. IRS field-sourced PENAP cases are generally worked in field Appeals offices.
- (3) PENAP conferences are usually held by telephone or correspondence. If the taxpayer or representative requests an in-person conference, follow the procedures in:
 - a. IRM 8.6.1.5.1, Conference Practice,
 - b. IRM 8.6.1.5.5, Virtual Service Delivery (VSD).

8.11.4.2.1
(07-02-2019)

Identifying a PENAP Case

- (1) The following table identifies the most common Transaction Codes (TC) that may be included in the proposed penalty field at the return level which have an ACDS Type Code of "PENAP". Note that this is **not** an all-inclusive list.

Transaction Code	Type of Penalty	IRM Reference
160 or 166	Failure to File	IRM 20.1.2, Failure To File/Failure To Pay Penalties

Transaction Code	Type of Penalty	IRM Reference
170 or 176	Estimated Tax Penalty	IRM 20.1.3, Estimated Tax Penalties
180 or 186	Deposit Penalty	IRM 20.1.4, Failure to Deposit Penalty
234 or 238	Daily Delinquency Penalty	IRM 20.1.8.3.2.1, IRC 6652(c)(1) - Annual Returns Under Section 6033(a)(1) or 6012(a)(6)
240	Return Related Penalties	IRM 20.1.5, Return Related Penalties
240 or 246	Information Return Penalties	IRM 20.1.7, Information Return Penalties
246	Failure to File Using Electronic Media	IRM 20.1.2.5, Failure to File Partnership Return Using Electronic Media
270 or 276	Failure to Pay	IRM 20.1.2, Failure To File/Failure To Pay Penalties
280 or 286	Bad Check	IRM 20.1.10.7, IRC 6657 - Bad Checks (Dishonored Checks or Other Forms of Payment)

8.11.4.2.2
(10-01-2012)
Sources of PENAP Cases

- (1) Generally post-assessment penalty appeal cases are received from:
 - Wage and Investment (W&I),
 - Small Business/Self-Employed (SB/SE), and
 - Large Business and International (LB&I)
- (2) If the taxpayer submits a written protest to an assessed penalty, Compliance forwards the case to Appeals. Information on documents to be included with the case file are found in IRM 20.1.1.3.5.1, Subsequent Requests for Penalty Relief.

8.11.4.2.3
(07-02-2019)
Carding PENAP Cases

- (1) Instructions for carding PENAP cases are now located in IRM 8.20.5.31.6, Penalty Appeal (PENAP) Case Carding.

8.11.4.2.4
(07-02-2019)
Assignment of PENAP Cases

- (1) Depending on the complexity of the penalty issue, the case may be assigned to either an ATE on the centralized Ogden Campus Appeals PENAP team or an ATE in a field office.
- (2) The Appeals Team Manager (ATM) or designated official will assign the case to an ATE on ACDS.

8.11.4.2.5
(07-02-2019)
New Receipt Procedures for ATEs

- (1) Upon receipt of a newly assigned or transferred case (i.e., date of CR-NR), the ATE will follow the procedures outlined in IRM 8.2.1.4, Receipt of New Assignment by an Appeals Technical Employee (ATE). These procedures include, **but are not limited to:**
 - Determining the statute of limitations and validating the statute-related fields on ACDS within **45 calendar days** of receipt of the case. Refer to IRM 8.21.3, Appeals Technical Employees Statute Responsibility. **The statute verification time frame cannot be extended beyond 45 days.**
 - Validating the Case Summary Card (CSC) information and making updates, if necessary, in accordance with IRM 8.11.1.2.6(2) and IRM 8.11.1.2.6(3), New Receipt Procedures for Appeals Technical Employees (ATEs).
- (2) With respect to the CSC, the ATE will, within 45 calendar days of receipt, verify the information on the card, including the following:
 - The **TYPE** code for all Penalty Appeals cases is “**PENAP**”.
 - Each MFT is established as a **separate work unit**.
 - AIMS indicator = E
 - ACDS return field for STATDATE (statute date) or CODE (statute code)
 - The information based on the following table:

Description	Statute Date	Statute Code
Penalties have been assessed	Blank Note: If statute date is blank, then see IRM Exhibit 8.21.2-1, ACDS Statute Codes, for valid statute code.	ASESD
Penalties ARE NOT assessed	Valid statute date	Blank

- PropdPen (proposed penalty) - The total dollar amount of the penalty for each tax period, which is rounded to the nearest whole dollar amount.
Note: If there is more than one penalty for each tax period, total the amount for each period and enter the sum for the respective period to the nearest whole dollar amount.

8.11.4.2.6
(07-02-2019)

PENAP Consideration

- (1) Review the case and contact the taxpayer for further clarification if needed to provide prompt resolution.

Note: No contact is required if the case is fully conceded based upon the information in the file. The closing letter to the taxpayer confirms the decision to fully abate the penalty.

Note: Appeals will resolve campus-sourced PENAP cases worked in a Campus Appeals office as expeditiously as possible, generally within 90 days of receipt.

- (2) Apply reasonable cause criteria when considering a PENAP case. See IRM 8.11.1.2.7.1, Reasonable Cause, for more information on reasonable cause.
- (3) Also consider hazards of litigation to settle PENAP cases. See IRM 8.11.1.2.7.5, Hazards of Litigation.
- (4) Also consider:
 - Statutory exceptions, see IRM 8.11.1.2.7.2;
 - Administrative waivers, see IRM 8.11.1.2.7.3; and
 - Service errors, see IRM 8.11.1.2.7.4.
- (5) See IRM 8.11.1.2.3, Assessed Penalty Settlement Authority.
- (6) Taxpayers may provide new information and/or evidence to Appeals. New information is defined in IRM 8.6.1.7.5, Taxpayer Provides New Information. If the new information or evidence is relevant to the penalty and requires investigative action or additional analysis, then release jurisdiction of the case and return it to the originating function for consideration. See IRM 8.6.1.7.7, Jurisdiction Released, for additional information.
- (7) In resolving disputes, Appeals may consider new theories and/or alternative legal arguments that support the parties' positions when evaluating the hazards of litigation in a case. However, do not develop evidence that is not in the case file to support the new theory or argument. See IRM 8.6.1.7.6, Taxpayer Raises New Theory or Alternative Legal Argument.
- (8) Use a judicial approach in deciding PENAP cases. Provide general guidance to taxpayers on establishing reasonable cause. Do not request specific documents or develop the taxpayer's position.

Reminder: In deciding whether to return a case to the originating function to review new information, remember to consider the exception for certain Campus-sourced cases found in IRM 8.6.1.7.5(2), Taxpayer Provides New Information.

Example: Do not make a written request for a list of specific documents in any letter to the taxpayer.

Example: When requested by a taxpayer in a conference, provide general guidance as to the type of information that might establish reasonable cause given the facts of the case. Refer to IRM 20.1.1.3.2.1, Standards and Authorities.

- (9) Many documents received during consideration of a PENAP may not meet the definition of “new information.” Many penalties are assessed without deficiency procedures, and reasonable cause needs to be established for the abatement of these penalties. Documents received during consideration of a PENAP are generally not voluminous, don’t require additional development, and in many instances, corroborate the taxpayer’s testimony. Consider the probative value of any evidence that does not meet the definition of “new information” above and apply hazards of litigation in making a determination.

8.11.4.2.7
(07-02-2019)

**Closing Actions by the
ATE**

- (1) This section discusses the process used by the ATE to close PENAP cases.
- (2) Use ACDS APGolf to generate all forms and letters.
- (3) Prepare the Appeals Case Memo (ACM). The ACM should outline the facts and circumstances supporting sustention or abatement of the penalty. This could include, but is not limited to:
- Taxpayer’s filing history
 - Citing case law
 - Hazards of litigation
- IRM 8.6.2, Appeals Case Memo Procedures, provides additional information on the preparation of ACMs.
- (4) Prepare the ACDS customized Form 5402, Appeals Transmittal and Case Memo, to:
- Show the affected tax periods included and penalties considered in the case
 - List penalty transaction codes
 - Show Account and Processing Support (APS) how to adjust the taxpayer’s account for each penalty considered in each period based on the case determination. Generally, the ATE will accomplish this task by preparing a separate row on Form 5402 for each penalty considered in each period, adding rows as necessary. This period-by-period and penalty-by-penalty breakdown is needed by APS so they can fully and accurately adjust the taxpayer’s account.

Exception: If the ATE is recommending that Appeals fully sustain all protested penalties in all protested periods, and if all of those penalties have been fully assessed, the ATE may use an optional method to prepare Form 5402. For such cases, the ATE may prepare Form 5402 with only one row for each period considered, regardless of the number of penalties considered in that period. To use this optional method, however, the ATE **must** fully list all penalties considered in each period in the “IRC Sec. Ref. No.” column. If all penalties considered in any period cannot be listed in the “IRC Sec. Ref. No.” field of the Form 5402 generated by APGolf, this optional method **cannot** be used by the ATE.

Example: An ATE considers a case in which an individual taxpayer has protested penalties assessed in two periods for alleged failures to file returns timely, pay taxes due timely, and make estimated tax payments. For 20X1, these assessed penalties

total \$1,500. For 20X2, these assessed penalties total \$2,000. The ATE confirms that all six penalties have been fully assessed.

After considering the taxpayer's arguments, the ATE concludes that none of the penalties should be abated. *Assuming that all penalties considered in each period can be fully shown in the "IRC Sec. Ref. No." field of the electronically generated Form 5402 by APGolf, the ATE may use the optional method for preparing Form 5402 described in the "Exception" paragraph, above.*

If the ATE chooses to use this optional method, her Form 5402 will have two rows—not six rows. In relevant part, and with certain columns omitted because of space limitations, her Form 5402 should resemble the following:

Period(s)	...	IRC Sec. Ref. No.	Amount Appealed	Amount Sustained	Amount Abated	IDRS Reason Code
20X1	...	6651(a)(1)-(2),6654	\$1,500.00	\$1,500.00	\$0.00	41
20X2	...	6651(a)(1)-(2),6654	\$2,000.00	\$2,000.00	\$0.00	41

- Input penalty adjustment amounts on the Form 5402 using exact dollars and cents when making full and partial abatements
- Include special instructions related to processing the case
- Notate in the Remarks section of the Form 5402 when a certified claim disallowance letter had been issued (e.g., Letter 1363, Appeals Partial Disallowance of Refund Claim - Certified Letter, and/or Letter 1364, Appeals Full Disallowance of Refund Claim - Certified Letter), instructing APS to enter this information in the **Notes** field on ACDS. The reason for this requirement is to ensure duplicate certified letters are not issued, which may erroneously extend the two-year period to file suit with the applicable court.
- Enter proper reason code on the Form 5402:
40 - Complete removal of penalty,
41 - Appeals sustains penalty, or
42 - Appeals partial abatement of penalty.
- Sign the Form 5402 in the **AO/SO Signature** field.

(5) The **Closing Codes** for PENAP cases are:

Determination Made	Closing Code
Sustained (penalties are not removed)	14
Abated (penalties are fully removed)	15
Partially Abated (only part of the penalties are removed)	16

(6) Prepare the appropriate closing letter in ACDS:

- Letter 1277, Penalty Appeal Decision, if the taxpayer's penalty abatement request is not fully granted. Use the narrative section to provide the reason for denying the abatement request in full or in part; or
- Letter 1278, Penalty Appeal Abatement, if the taxpayer's penalty abatement request is fully granted.

Reminder: If a taxpayer's authorized representative has requested copies of notices sent by IRS to the taxpayer, remember to also prepare Letter 937, Transmittal for Power of Attorney.

- (7) The closing letter prepared by the ATE should be left undated and should contain the **ATM's** signature block.
- (8) Route the case to the ATM. After the ATM approves the ATE's recommended settlement, the ATM will countersign the Form 5402, sign the closing letter, and route the case to APS. See IRM 8.20.7.13.2, Closing Letter, for more information about the process of sending closing letters.

Note: After the ATM signs the closing letter, if the ATE mails his/her own closing letters, then a signed, dated, and stamped **copy** of the closing letter **must** be placed in the administrative file.

- (9) In rare situations, resolution of the case will involve a specific matter closing agreement. See IRM 8.13.1, Processing Closing Agreements in Appeals.

8.11.4.2.8
(07-02-2019)
**APS' Closing
Procedures**

- (1) APS' Closing Procedures have been moved to IRM 8.20.7.50, Penalty Appeal (PENAP) Case Closing Procedures.