



# Appeal Procedures

## Employee Plans Examinations

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### Appeal rights

You have a legal right to disagree with the proposed disqualification of your qualified retirement plan by the Internal Revenue Service. The IRS has an administrative appeal system. Most differences can be settled by appeal without a court trial. This publication explains:

- What to do if you agree to the proposed plan disqualification.
- The steps to take to appeal to the IRS Office of Appeals if you don't agree with the examination findings.

These instructions apply to proposed actions in a revocation letter, nonqualification letter or discrepancy adjustment report for:

1. Form 5500-series annual return of employee benefit plans information examinations relating to:
  - a. Revocations - if a favorable determination letter was previously issued by the IRS, and
  - b. Nonqualifications - if the employer hasn't received a favorable determination letter from the IRS;
2. Form 1040/1120 Income tax discrepancy adjustments resulting from these revocations or nonqualifications that are included on Form 4549-E, *Income Tax Discrepancy Adjustment*;
3. Form 5330, *Return of Excise Taxes Related to Employee Benefit Plans*, for minimum funding deficiencies, prohibited transactions and other employee plans excise taxes under Internal Revenue Code Chapter 43; and
4. Form 990-T, *Exempt Organization Business Income Tax Return*, reporting the unrelated business income tax liability of the employee plan's trust.

### If you agree

If you agree to the proposed plan disqualification, you must file Form 1041, *U.S. Fiduciary Income Tax Return*, and pay any income tax due for the tax year in which the plan is disqualified and all subsequent tax years in which the statutes of limitations are open and the trust assets remain undistributed.

If you received an income tax discrepancy adjustment report containing Form 4549-E, you can agree to the amount of tax and penalties by signing the form and returning it to the person who sent it to you. You may also pay the tax, penalties and interest with the signed form. If you don't pay with the form, you'll receive a notice from IRS Campus Compliance Services for the tax, penalties and interest due.

If you received a report on Form 5330 or 990-T, you can agree to the tax, penalties and interest by signing the enclosed Form 870-EP, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*, and returning it to the person who sent it to you. You may also pay the tax, penalties and interest with the signed form. If you don't pay with the form, you'll receive a notice from IRS Campus Compliance Services for the tax, penalties and interest due.

Please make your check or money order payable to the United States Treasury. Your payment should include the tax, penalties and the interest as shown in the examination report. Be sure to include your Social Security number or employer identification number on your check or money order. Please don't send cash.

Generally, if the tax isn't paid by the date stated in the report, additional interest will accrue. You'll receive a notice from IRS Campus Compliance Services requesting payment of any interest that wasn't fully calculated in the report. If you pay the amount due within 10 days after the notice date, no additional interest or penalties will be charged. If the examination results in an overpayment, you'll receive interest on the amount of the overpayment.

## If you don't agree

If you don't agree with the examiner's findings, you may request a meeting with the examiner's supervisor to discuss the findings, or you can appeal to the IRS Office of Appeals, an independent organization within the IRS that helps taxpayers and the government resolve tax disagreements. Appeals **does not** take sides in a dispute. Most differences can be resolved in an Appeals conference. You can't request an Appeals conference if you disagree solely on moral, religious, political, constitutional, conscientious or similar grounds. You can find more information about the IRS Appeals Office at [www.irs.gov](http://www.irs.gov). Enter the keyword "Appeals" in the search bar.

If your case involves an income or excise tax adjustment and you don't want to appeal your case within the IRS, you can take it directly to the United States Tax Court. However, if your case involves an IRS determination that the plan is not qualified, you must appeal your case with the IRS Office of Appeals before petitioning for the Tax Court to review your case under declaratory judgment procedures. See Plan Qualification Issues below.

## Appeal to the IRS Office of Appeals

You may appeal an IRS decision to the independent IRS Office of Appeals by filing a written protest. They'll arrange a conference or telephone meeting at a convenient time and place, and an Appeals officer will discuss the disputed items with you or your representative. You should be prepared to discuss all issues you don't agree with at this meeting. Most differences are resolved at this conference.

## Written protests

You may file the written protest with the Director, Employee Plans Examinations at the address shown on the letter you received with the examination report within 30 days from the date of that letter.

This written protest must contain:

1. Your name, address and a daytime telephone number.
2. A statement that you want to appeal the IRS findings to the IRS Office of Appeals.
3. A copy of the letter you received that shows the proposed change(s).
4. The tax period(s) or year(s) involved.
5. A list of each proposed item with which you disagree.
6. The reason(s) you disagree with each item.
7. The facts that support your position on each item.
8. The law or authority, if any, that supports your position on each item.
9. The penalties of perjury statement: "Under the penalties of perjury, I declare that the facts stated in this protest and any accompanying documents are true, correct, and complete to the best of my knowledge and belief."
10. Your signature under the penalties of perjury statement.

If your representative prepares and signs the protest for you, he or she must substitute a declaration of penalties of perjury statement that includes:

1. That he or she prepared the protest and accompanying documents, and
2. Whether he or she knows personally that the facts stated in the protest and any accompanying documents are true and complete.

## Small case request

If the total amount for any tax period is \$25,000 or less, you may make a small case request. The total amount includes any proposed increase or decrease in tax (including penalties) or claimed refund. For an offer in compromise, the total amount includes total unpaid tax, penalty and interest. For a small case request, send a letter requesting Appeals consideration indicating the changes you don't agree with, and the reasons you don't agree.

## Plan qualification issues

The Director, Employee Plans Examinations will issue a proposed revocation or nonqualification letter when the IRS examines a Form 5500-series return and determines the plan isn't qualified. If you want to dispute the qualification issue(s) before the United States Tax Court, you must first exhaust the administrative remedy of appeal within the IRS Office of Appeals before petitioning the United States Tax Court for a declaratory judgment.

You are "deemed" to have exhausted your administrative remedies once the IRS has issued its final letter even if you don't pursue the administrative IRS appeals procedure. If you don't appeal, the IRS Commissioner will issue the final letter of revocation or nonqualification and the trust will no longer be tax exempt under Internal Revenue Code Section 501(a) as of the first day of the plan year of disqualification.

## Representation

You may represent yourself at your conference, and you may bring another person with you to support your position. If you want someone to represent you, the person must be an attorney, certified public accountant, enrolled actuary, enrolled agent, enrolled retirement plan specialist or other person authorized under Circular 230, *Regulations Governing Practice before the Internal Revenue Service*, to practice before the IRS. If you want your representative to appear without you, you must provide a properly completed power of attorney, [Form 2848](#), *Power of Attorney and Declaration of Representative*.

## Tax Court declaratory judgment cases

If after the examination of your plan, you receive a final letter of revocation or nonqualification, you may petition the United States Tax Court for a declaratory judgment on the qualification of your plan by the 91st day after the date of the letter. An employer, plan administrator, employee who qualifies as an interested party or the Pension Benefit Guaranty Corporation may petition the Tax Court for declaratory judgment.

## Tax Court deficiency cases

If you disagree over whether you owe income taxes as a result of a discrepancy adjustment because your plan isn't qualified, unrelated business income tax from the plan trust, additional income taxes or Chapter 43 excise taxes, you may go to the United States Tax Court after the IRS has issued a Statutory Notice of Deficiency. You have 90 days from the date of the notice to file a petition with the Tax Court (or 150 days if addressed to you outside the United States). If you don't file the petition within this time, the IRS will bill you for the deficiency. **If you discuss your case with the IRS during the 90 (or 150) day period, it won't extend the time in which you may file a petition with the Tax Court.**

The Court will schedule your case for trial at a location convenient to you. You may represent yourself or anyone permitted to practice before that Court can represent you.

If you dispute \$50,000 or less for any one-tax year, you may elect to use the Tax Court's simplified tax case procedure. In the case of an IRS Notice of Deficiency, the \$50,000 maximum applies to the total tax and penalties for any year. You can get information about these procedures and other matters relating to the Court by writing the Clerk of the Tax Court, 400 Second St. N.W., Washington, DC 20217 or visiting [www.ustaxcourt.gov](http://www.ustaxcourt.gov).

## District Court and Claims Court refund suits

Instead of going to Tax Court, you may take your income or excise tax case to the United States District Court or to the United States Court of Federal Claims. The District Court and the Claims Court hear tax cases only after you have fully paid the tax and filed a timely claim for refund. You can get information about procedures for filing suit in either court by contacting the Clerk of your District Court, or the Clerk of the United States Court of Federal Claims. You must file a claim for refund with the IRS within 2 years of payment of the tax or 3 years of the filing of the return submitting the payment, whichever is later. If the IRS doesn't act on your claim within 6 months from the date you filed it, you can then file suit for refund. If the IRS disallows your claim, you must file a suit for refund in the U.S. District Court or Claims Court no later than 2 years from the date of the disallowance. (However, if you are a nonresident alien taxpayer, you can't take your case to a United States District Court.)

Note: Additional information on your rights regarding tax deficiency cases can be found in [Publication 5](#), *Your Appeal Rights and How to Prepare a Protest If You Don't Agree*, and [Publication 556](#), *Examination of Returns, Appeals Rights, and Claims for Refund*.

## Recovering administrative and litigation costs for Tax Court deficiency cases and refund suits

You may be able to recover your litigation and administrative costs in Tax Court deficiency cases and refund suits if you are the prevailing party and:

1. You exhaust all administrative remedies with the IRS (in other words, take your case to the IRS Office of Appeals),
2. Your net worth is below the net worth requirement (see below), and
3. You provide all requested documents and you don't unreasonably delay the administrative and court proceedings.

### Prevailing party

You are the prevailing party if:

1. You can show that the IRS position wasn't substantially justified,
2. You substantially prevailed on the amount in controversy, or on the most significant tax issue(s) in question, and
3. You meet the net worth requirement.

Although the court will generally decide the prevailing party, the IRS makes the final determination of liability at the administrative level. Therefore, you may receive administrative costs from the IRS without going to court.

### Reasonable litigation costs

Reasonable litigation costs generally include:

1. Reasonable amounts for court costs;
2. Expert witness expenses;
3. The costs of studies, analyses, engineering reports, tests, or projects which the court agrees were necessary for the preparation of your case; and
4. Attorney fees that generally may not exceed \$125 per hour. However, this amount can be higher in limited circumstances depending on the difficulty of the issues in the case and the local availability of tax expertise and is adjusted for the cost of living under Internal Revenue Code section 1(f)(3).

### Reasonable administrative costs

Reasonable administrative costs generally include the costs listed under litigation costs, except court costs, and any administrative fees or similar charges made by the IRS. Administrative costs include costs incurred on or after the date you receive the Appeals decision letter or the date of the notice of deficiency, whichever is earlier. For administrative attorney fees, include the fees of individuals licensed to practice before the IRS or the Tax Court.

### Net worth requirement

You may be able to recover litigation and administrative costs if your net worth was \$2,000,000 or less when the litigation began or when administrative costs become recoverable. To qualify, the net worth of the owner of an unincorporated business, or a partnership, corporation, association, unit of local government, or organization can't be more than \$7,000,000 and can't have more than 500 employees when the litigation began. Measure net worth for administrative costs recoveries from the beginning of the administrative proceeding not from the point when the costs become recoverable.

## Penalty

If the Tax Court determines that you instituted or maintained proceedings before the court primarily for delay or that your position in the proceedings is frivolous or groundless, you may be assessed damages of up to \$25,000 to the United States by the Tax Court.

# Appeal Procedure for Employee Plans Examinations

At any stage of the process:

- You may arrange for agreement and payment of tax or for corrective action.
- You may ask for issuance of a notice of deficiency to allow petition to the Tax Court.
- You may pay the tax and file a refund claim.

