

**Office of Chief Counsel
Internal Revenue Service
memorandum**

date: October 21, 2019

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(Tax Exempt & Government Entities)

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from: Kyle N. Brown
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subject: Advice requested from P&A

Please see the attached memorandum from P&A discussing whether I.R.C. § 7521 applies to the Employee Plans and Exempt Organization determination process.

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:06:KCummiskey

date: 10/18/19

to: Kyle N. Brown
Division Counsel
(Tax Exempt & Government Entities Division Counsel)

from: Joy E. Gerdy Zogby
Senior Technician Reviewer, Branch 6
(Procedure & Administration)

subject: Whether I.R.C. § 7521 Applies to the Employee Plans and Exempt Organization Determination Process

This memorandum responds to your request for advice concerning whether Internal Revenue Code (I.R.C.) section 7521, which requires Internal Revenue Service (Service) employees in select circumstances to permit audio recording and provide taxpayers certain explanations of IRS procedures, applies to the Employee Plans (EP) and Exempt Organization (EO) determination letter process.

It is our conclusion that section 7521 does not apply to discussions pertaining to the EP and EO determination process because 7521 only applies to in-person interviews with a taxpayer relating to the determination or collection of any tax, and the EP and EO determination process is not related to the determination or collection of any tax. Any determination or collection of any tax would take place in a separate proceeding depending on the outcome of the EO and EP determination process.

BACKGROUND

Section 7521(a) permits a taxpayer, upon request, to make an audio recording of “any in-person interview . . . relating to the determination or collection of any tax”

Section 7521(b) requires Service employees to provide an explanation of the audit or collection process (as the case may be) and the taxpayer’s rights under such process as well as the right of consultation during such process.

In an EP or EO determination process, a favorable or an adverse determination letter is issued after reviewing the proposed plan or organization for compliance with I.R.C. § 401(a) or I.R.C. § 501, respectively.

The Service does not issue any oral EP determinations. See Rev. Proc. 2019-4 § 3.06. The Service may discuss substantive issues with the applicant, but such discussions “will not bind the Service or the Office of Associate Chief Counsel, and it cannot be

relied upon as a basis for obtaining retroactive relief under the provisions of § 7805 (b).” Id. An applicant can request an in-person status conference at which “any issues relevant to the processing of the application may be addressed, but the conference will not involve substantive discussion of technical issues. No tape, stenographic, or other verbatim recording of a status conference may be made by any party.” Rev. Proc. 2019-4 § 10.16. Therefore, any potential in-person discussions pertaining to an EP application would not have any impact on whether the final determination is favorable or adverse.

In the EO determination process, all determinations are based on the administrative record. See Rev. Proc. 2018-5 § 3.05. “Any oral representation of additional facts, or modification of facts, as represented or alleged in the request, must be reduced to writing and signed by the taxpayer under a penalty of perjury statement” Id. Therefore, any oral discussions pertaining to an EO application would not have any impact on whether the final determination is favorable or adverse.

It is our understanding that not all EO or EP determinations will require oral communications. For the EP and EO determination applications that do involve oral communications, it is our understanding that a significant portion of oral communications that may take place in the EP or EO determination process are telephonic communications as opposed to in-person discussions.

In Keene v. Comm’r, 121 T.C. 8 (2003), the Tax Court held that collection due process hearings with the Appeals Office are subject to 7521. The Tax Court held that Appeals Office hearings are subject to section 7521 for six reasons: (1) the hearing allows a taxpayer to raise challenges to the Commissioner’s determination, and therefore is an in-person interview; (2) Appeals Office hearings are an integral part of the tax collection process; (3) not allowing a taxpayer to record an Appeals Office hearing would undermine safeguards in the Service’s collection actions; (4) the Tax Court is charged with reviewing Appeals Office hearings; (5) recording Appeals Office hearings would facilitate Tax Court review by completing the administrative record; and (6) the decision was not inconsistent with established regulations.

ANALYSIS

In the event of an adverse determination for an EP or an EO, there is no determination of any tax owed or any efforts to collect a tax. No determination or collection of any tax is automatically triggered upon issuing an adverse determination. Therefore, the EP and EO determination process is not subject to section 7521 as it does not relate to the determination or collection of any tax.

The Service has historically interpreted section 7521 not to apply to taxpayer conferences which involve the issuance of determination letters. See 1991 LGM GL-17 (February 12, 1991) (the LGM). Although the 1991 LGM laying out that historic policy is obsolete due to a change in how we provide legal advice, the logic of the LGM still applies. The EO and EP determination process is not subject to section 7521 because

any in-person interviews that may take place are not related to the determination or collection of any tax.

The Tax Court's considerations in Keene are inapposite to the EP and EO determination process. As to the first consideration, regarding whether the interview allows a taxpayer to raise challenges to the Commissioner's determination, any in-person discussions conducted in the EP or EO determination process would not affect whether a determination is favorable or adverse. Unlike an Appeals Office hearing which may consider and resolve a taxpayer's claims, any in-person discussions in the EP or EO determination process would not pertain to substantive issues that potentially affect the outcome of the determination process. Second, the EP or EO determination process is entirely distinct from any determination or collection of any tax. The determination is not an "integral part" of a determination or collection process as Appeals Office hearings are part of the collection process. Rather, any potential determination or collection of tax would be completed through a separate process after a determination letter is issued.

Third, the EO and EP determination process was not created with the same safeguards that Congress created for Appeals Office hearings. As was relevant in Keene, I.R.C. § 6330(b)(1) grants a taxpayer the right to a hearing with the Internal Revenue Service Independent Office of Appeals. "The determination of the appeals officer is to address whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that the collection action be no more intrusive than necessary." Internal Revenue Serv. Restructuring & Reform Act of 1998, 1998-3 C.B. 537 (I.R.S. 1998). Congress's purpose for enacting I.R.C. § 6330 is to permit a taxpayer to challenge the Service's proposed levy actions in an independent venue. The EP and EO determination processes, however, are not designed as "formal procedures designed to insure due process where the IRS seeks to collect taxes" Id. As discussed above, the EP and EO determination process is distinct and separate from any effort to determine or collect any tax.

Fourth, similar to the collection process, an applicant can seek judicial review of the EP and EO determination process under section 7476 or section 7428, respectively. However, to the fifth consideration, any-in person meeting would not help develop the administrative record for judicial review of the determination process. No substantive facts or issues could be raised for consideration at an in-person interview in the EP or EO determination process. Unlike an Appeals Office hearing, any in-person discussions in the EP or EO context would not aid the court in developing an administrative record. To the contrary, any information used in the determination process would be submitted in writing. Sixth, unlike with the Appeals Office discussed in Keene, there are no regulations directing procedural requirements for the determination letter process. See Treas. Reg. § 601.201(m). However, the Revenue Procedures for the EP and EO processes, which may receive some deference, indicate that any EP or EO determination would not be affected by in-person discussions. See Taproot Admin. Servs., Inc. v. Comm'r, 133 T.C. 202, 208–09 (2009), aff'd, 679 F.3d 1109 (9th Cir. 2012); Rev. Proc. 2019-4; Rev. Proc. 2018-5.

There is an additional reason why section 7521 will not apply to a sizable portion of EP and EO interviews with taxpayers. As mentioned above, it is our understanding that if there are oral communications in the EP and EO determination process, those communications are largely telephonic. By its very terms, the provision applies only to in-person interviews. The Tax Court has previously concluded that telephonic interviews are not considered in-person interviews for the purpose of section 7521. See Calafati v. Commissioner, 127 T.C. 219 (2006) (construing “in-person interview” to require a face-to-face interaction, one with “bodily presence,” and excluding telephonic contacts). Accordingly, the obligations under section 7521 to permit audio recording or provide a taxpayer with their rights during the process do not apply to taxpayer interviews conducted telephonically.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[REDACTED]

For these reasons, we conclude that the EO and EP determination process is not subject to section 7521. If you have further questions, please call Kevin Cummiskey at 202-317-5471.