

LAW OFFICES  
**DAVID L. SILVERMAN, J.D., LL.M.**

2001 MARCUS AVENUE  
LAKE SUCCESS, NEW YORK 11042  
(516) 466-5900

SILVERMAN, DAVID L.  
NYTAXATTY@AOL.COM

TELECOPIER (516) 437-7292

AMINOFF, SHIRLEE  
AMINOFFS@GMAIL.COM

**TAX LITIGATION MEMORANDUM**

**TO:** CPAs, Clients & Associates

**FROM:** David L. Silverman, Esq.

**DATE:** April 9, 2010

**RE:** IRS Audit Procedures

---

The process used to select returns for audit is not a random one. The oft-repeated phrase "audit lottery" is in many ways misleading since certain items, such as claiming a loss on the sale of rental property which was recently converted from a personal residence, will greatly increase the probability of being subjected to a tax audit. The IRS may not, however, examine returns which are more than 3 years old, unless the taxpayer has committed fraud, in which case the statute of limitations never runs. One type of examination, the "office examination," involves an interview with the taxpayer at the office of the District Director. The other type of examination, which usually involves more complex issues, is the "field examination," in which a revenue agent actually visits the taxpayer at his business or residence.

In any examination, the taxpayer may be called upon to furnish various records and books to substantiate deductions or transactions reported on the return. The IRS will seldom, however, request audit workpapers prepared by the taxpayer's accountant. Although revenue agents have no formal settlement authority, factual disputes can be resolved, and areas of disagreement can be narrowed during the examination process. In the event closure cannot be reached, the taxpayer may wish to avail himself of informal conferences with supervisors. At the conclusion of the examination, the IRS may be satisfied with the accuracy and propriety of the taxpayer's return, and accept it as filed. Alternatively, the IRS may propose a "deficiency," and in so doing issue an

"examination report," along with a letter requesting that the taxpayer accept its findings by executing, and returning within 30 days, a consent to assessment and collection.

The taxpayer has two options after receipt of this "30 day letter": First, he may simply ignore the 30 day letter (thereby bypassing the Appeals Office process) and, at the expiration of 30 days, expect to be issued a formal "notice of deficiency" (see below). Second, the taxpayer may, in combination, seek to (a) submit additional evidence, (b) request a conference with a senior examiner, or (c) request a conference with an appeals officer. An appeals office conference request often must be accompanied by a written protest containing a statement of facts, a statement of challenged adjustments, and a statement of pertinent law. Appeals officers, who, unlike revenue agents, have authority to settle issues of fact and law, will generally consider any settlement offer made in good faith. Although they will not settle a case to avoid the nuisance of litigation, appellate officers are permitted to consider litigation hazards. If negotiations produce no settlement the taxpayer will be issued a "notice of deficiency," also known as a "90 day letter".

A 90 day letter issued in response to a written protest will preclude further Appeals Office involvement, but only after taxpayer has actually filed a petition in Tax Court (see below). On the other hand, a 90 day letter issued in response to taxpayer inaction upon receipt of a 30 day letter will not preclude Appeals Office attempts to settle the matter until 4 months have elapsed from the time when a Tax Court petition was filed. A taxpayer in receipt of a 90 day letter has two choices: He must either (1) pay the tax (and file a claim for refund) or (2) not pay the tax and petition the Tax Court for a redetermination of the proposed deficiency. Tax Court jurisdiction is predicated upon a "deficiency." Therefore, if the taxpayer pays the tax, there is no deficiency, and no further recourse to the Tax Court may be had.

If, after having paid the deficiency, the taxpayer files a claim for refund which is rejected by the IRS, the taxpayer may then sue the IRS in the U.S. District or Claims Court for refund. However, these courts are without jurisdiction unless the deficiency has been paid. Thus, the

---

Any advice herein is not intended or written by our firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code, nor does such advice constitute legal advice for a particular case, since state laws vary as do factual circumstances. Advice from our firm relating to Federal tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.

taxpayer who chooses to "pays first" will go to District (or Claims) Court, while the taxpayer who prefers to "litigate first" will go to Tax Court. Choosing the appropriate forum in which to litigate requires a careful analysis of all facts.

---

Any advice herein is not intended or written by our firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code, nor does such advice constitute legal advice for a particular case, since state laws vary as do factual circumstances. Advice from our firm relating to Federal tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.