

The Art of Preparing a Successful Written Protest

By William P. Wiggins

William P. Wiggins describes the art of preparing a successful formal written protest challenging the findings of the examining agent.

Introduction

Your client receives a letter from the IRS. The letter informs your client that as a result of a recent IRS examination, her tax liability has increased for the year under review. The letter goes on to explain the various options available to your client. One option is to agree with the proposed increase in tax liability. If this option is chosen, the letter instructs your client to sign and return the enclosed agreement form. The second option is to disagree with the proposed change. This option affords your client the opportunity to “protest” the changes proposed by the examining agent. In the case of a protest, your client must submit a request asking for an appeals hearing within 30 days from the date of the letter.

Not surprisingly, the letter your client received from the IRS is commonly referred to as a 30-day letter. Depending on the nature of your client’s case, the 30-day letter may require your client to prepare a formal written protest as part of challenging the findings of the examining agent. This article describes the art of preparing a successful written protest. The first part provides an overview of the IRS Appeals process. The second part presents and illustrates five proven techniques for preparing an effective and successful written protest.

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Part I: Overview of the IRS Appeals Process

Background

Taxpayers in the United States have enjoyed some form of tax appeal rights since 1789.¹ More recently, Congress revisited the appeals process in the Restructuring and Reform Act of 1998, which provides in part:

The IRS is directed to revise its mission statement to provide greater emphasis on serving the public and meeting the needs of taxpayers. The IRS Commissioner is directed to restructure the IRS by eliminating or substantially modifying the three-tier geographic structure and replacing it with an organizational structure that features operating units serving particular groups of taxpayers with similar needs. The plan is also required *to ensure an independent appeals function within the IRS*. As part of ensuring an independent appeals function, the reorganization plan is to prohibit ex parte communications between appeals officers and other IRS employees to the extent such communications appear to compromise the independence of the appeals officers.² [Emphasis added.]

As emphasized in the above language, an independent appeals function within the IRS represents an essential part of having an efficient and effective tax administration system. The IRS reinforces this need in its INTERNAL REVENUE MANUAL (IRM): “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 and in a manner that

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will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service."³ What does this mission statement mean for taxpayers and those who represent them? In general terms, it means an independent professional within the IRS (an Appeals Officer) will take a fresh look at a taxpayer's case and work with the taxpayer (and representative) in search for a fair and impartial resolution to the tax controversy. In approximately 90 percent of all cases, a fair and impartial resolution is achieved. Indeed, the IRS reports on its Web site that over 100,000 cases each year are successfully resolved through the appeals process.

What Can I Expect When Working with an Appeals Officer?

According to the IRM, Appeals Officers (AO) are expected to exhibit the following characteristics when meeting with taxpayers and their representatives:⁴

- Confidence in their job knowledge
- Responsible action
- A judicial attitude when applying tax law in a reasonable and impartial manner
- Uniformity and consistency with respect to taxpayers in similar circumstances and achieving the primary goal of resolving the dispute
- A courteous manner when conducting conferences, providing an atmosphere of openness that fosters cooperation in the resolution of disputes
- Good listening skills

What does this definition mean for you and your client? It means you will have an experienced, competent and skilled tax professional working with you to help find a fair resolution to your dispute. Typically, AOs have "come up through the system" and have many years of experience in handling complex tax issues. AOs often possess advanced degrees and may be attorneys or certified public accountants. The IRM's definition of an "Appeals Office" also means that you will be working with an IRS employee who shares a common goal with you: to resolve tax disputes in an informal manner as quickly and efficiently as possible. As noted in the IRM: "Experience has shown that when an AO is able to enlist the cooperation of taxpayers and representatives, cases are resolved on a mutually satisfactory basis with minimum expense, delay, and inconvenience to taxpayers."⁵

AOs come from a variety of backgrounds and experiences. Not surprisingly, their styles and the approaches they use to settle tax controversies vary. However, there are certain basic attributes

we can expect from all AOs. For example, they are expected to:

- have an open mind and genuine interest in achieving a mutually acceptable agreement;
- set realistic target dates for the taxpayer and/or the representative to submit additional information, including proposals for settlement;
- complete the conference in a timely manner and make accurate and prompt decisions;
- initiate frank discussions and not consider ideological kinds of arguments; and
- conduct conferences in an open atmosphere that fosters cooperation in the resolution of disputes.⁶

Appeals conferences are informal. The discussion with the AO is usually open and direct, yet sometimes unstructured. There is much give and take. Unlike a court setting, the AO will not ask that your testimony be taken under oath. However, the AO may request that statements alleged as facts be submitted in the form of an affidavit or otherwise declared to be true under the penalties of perjury. Given the informality of an Appeals conference, meetings often occur in the AO's office. If space is needed to present documents or other kinds of visual materials, it is wise to contact the AO in advance of the meeting to request a larger room, often a conference room with a table.

During the conference, the AO will review the strengths and weaknesses of your client's case. You should assume the AO is very familiar with the case. The discussion may start with the AO asking you questions. Alternatively, the AO may invite you to make an opening statement about the case. Because there is no particular protocol for discussing a case, you should be ready to follow the lead established by the AO or be ready to take the lead if offered the opportunity. There is always the question about whether the AO will raise a new issue or reopen an old issue during the conference. Typically, this is not done unless the ground for such action is a substantial one and the potential effect upon the tax liability is material.⁷

Taxpayers are allowed to represent themselves at an Appeals conference. Alternatively, they are allowed to have another person (a qualified representative) represent them. In general, a qualified representative is an enrolled agent, a certified public accountant, or an attorney authorized to practice before the IRS. Before a qualified representative is allowed to talk with an AO, the representative must complete a power of attorney (Form 2848—*Power of Attorney and Declaration of Representative*) and deliver it to the AO.

How Do I Request a Conference with an AO?

Because appealing a case is a voluntary process, you must make a request to have the case heard. There is no filing fee. The IRS offers several options for making a request. For example, you may make an oral request for Appeals consideration in (1) all office interview or correspondence examination cases; or (2) a field examination case if the total amount of proposed additional tax including penalties, proposed over-assessment, or claimed refund (or, in an offer in compromise, the total amount of assessed tax, penalty, and interest sought to be compromised) is \$2,500 or less for any taxable period.

In these situations, you are not required to file a written protest.⁸

On the other hand, taxpayers are required to prepare a brief written statement (a formal written Protest is optional) to obtain Appeals consideration in a field examination case if the total amount of the proposed deficiency exceeds \$2,500 but does not exceed \$10,000 for any taxable period.⁹

Finally, a formal written protest is required in the following situations:

- If the total amount of the proposed deficiency exceeds \$10,000 for any taxable period¹⁰
- In all employee plan and exempt organization cases¹¹
- In all partnership and S corporation cases¹²

In some circumstances, you are allowed to make a *small case request* if the total amount for any one tax period is \$25,000 or less by completing IRS Form 12203. This form serves as an alternative to the requirement of submitting a written protest.

The IRS may refuse to hear a case on appeal in certain situations. For example, the Appeals Office will not hear a case involving a deficiency based solely on the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscientious or similar grounds; and the IRS may refuse to hear an appeal where a preliminary review of the written protest indicates that it requires further work or development.¹³

A taxpayer may, of course, choose not to request an Appeals hearing. In this case the taxpayer will receive a 90-day letter, which allows the taxpayer

to file a petition in the U.S. Tax Court. Finally, it is important to remember that making a request for an Appeals conference does not stop interest and penalties from accruing. Interest and certain penalties will continue to accrue during the Appeals process. Under certain circumstances, you may make a request to stop the accrual of interest and penalties on proposed adjustments.¹⁴

How Long Does the Appeals Process Take?

According to the IRS Web site, once you have submitted a written Protest, you will usually hear from the applicable Appeals Office within 90 days. If more than 90 days have passed, you should contact the office where you sent the protest. The IRS employees at this office should be able to tell you when they sent your case to the Appeals Office. If, for some reason, they were delayed in sending your protest to

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Appeals, you should expect to hear from someone in the Appeals Office not later than 90 days from when the protest was forwarded to Appeals. If more than 90 days have passed from this date, you should contact the original office where your written protest was sent and ask for the name and contact information of the AO assigned to the case. Once your protest has been received by an AO, it generally takes anywhere from 90 days to a year to resolve the dispute.

What Results Can I Expect from the Appeals Process?

If after consideration of the case by an AO a satisfactory settlement is reached between the taxpayer and the government, the taxpayer will be asked to sign Form 870-AD (or a similar agreement form depending on the circumstances). By signing Form 870-AD, the taxpayer agrees to waive restrictions on the assessment and collection of any deficiency, and agrees to accept any over-assessment resulting from the agreed settlement.¹⁵ On the other hand, if a satisfactory settlement is not reached, a statutory notice of deficiency will be issued. Once this process has occurred, the taxpayer has the right to file a petition with the U.S. Tax Court for a redetermination of the deficiency. The filing must occur within 90 days of the mailing of the statutory notice of deficiency.¹⁶

Part II: The Art of Preparing a Successful Written Protest

Is There Official Guidance on How to Prepare a Written Protest?

The IRS provides minimal guidance regarding the preparation of a written protest. Unlike many other IRS procedures, the IRS does not require the completion of a form when filing a protest. The regulations provide that “instructions for the preparation of written protests are sent to the taxpayer with the transmittal (30-day) letter.”¹⁷ The current set of instructions included with the 30-day letter takes the form of IRS Publication 5.¹⁸ The instructions include in Publication 5 are relatively straightforward and include the following basic requirements:

- Taxpayer’s name and address, and a daytime telephone number
- A statement that the taxpayer wants to appeal the IRS findings to the Appeals Office
- A copy of the letter showing the proposed changes and findings the taxpayer doesn’t agree with (or the date and symbols from the letter)
- The tax periods or years involved
- A list of the changes that the taxpayer doesn’t agree with, and why the taxpayer doesn’t agree
- The facts supporting the taxpayer’s position on any issue that the taxpayer doesn’t agree with
- The law or authority, if any, on which the taxpayer is relying
- The taxpayer’s signature on the written protest, stating that it is true, under the penalties of perjury as follows: “Under the penalties of perjury, I declare that I examined the facts stated in this protest, including any accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete.”

While the simplicity of these instructions is refreshing, particularly when compared with other IRS forms and publications, its brevity leaves taxpayers and representatives with virtually no guidance on the actual preparation of a written protest. Consequently, a wide range of approaches are available, with no one method trumping the other.

The remainder of this article presents and discusses a set of proven techniques for preparing a successful written protest. While recognizing that not all aspects of preparing a successful written protest can be covered in one article, the five techniques presented in Table 1 should be considered whenever preparing a written Protest.

Prepare a Roadmap and Remember That Presentation Matters¹⁹

Don’t spend all your time meeting with the client, gathering facts and conducting legal research. This is a mistake many taxpayer representatives make when preparing a written Protest. Too often, not enough time is spent on planning and presentation. Let us remember that a 30-day letter imposes a tight timetable. Good planning is essential. As the saying goes, “plan the work; work the plan.” And, as you plan the work, be sure to leave enough time for writing (developing an effective presentation). Many hours dedicated to discovering facts and finding relevant legal authorities can be obfuscated quickly if you don’t have sufficient time to prepare a polished product. Remember, the first impression an AO will have regarding the representation of your client’s case is *your* written protest. Preparing a polished written protest does not simply happen. It requires good planning, organization and writing.

Table 1. Five Techniques for Preparing a Successful Written Protest

Prepare a roadmap and remember that presentation matters
Focus on facts
Develop logical and convincing arguments
Critique the report of the examining agent
Revise, revise again and revise one more time

A few classic statements about planning and presentation:

Matter and manner—we cannot escape them. When they are at one, when what is said has a perfect correspondence with the way of saying it, we have good writing (or speech) on any level. But when this law of appropriateness is broken, writing (or speech) becomes in varying degrees bad.²⁰

The law of attention requires that all writing should reach the comprehension of the reader in the easiest way and with instant clearness. Writing may be likened to a window through which the writer shows the reader a view without. If the glass is poor it will distort the view and irritate

the beholder. Glass made ornate with jewels will draw to itself a part of the attention, and thus impair interest in the view. The best window-glass is plate, a strong and highly finished product so clear that one looking through it is unconscious of its presence.²¹

Let's consider the following illustration to reinforce the point about planning and preparation. If you were planning a trip to a city located a thousand miles from your home, would you simply get into your car and start driving? Not likely! Most of us would prepare an itinerary, prepare a list of items to bring with us, and chart our course by using a roadmap. In other words, we would spend a fair amount of time planning the trip before starting the engine.

Likewise, before you start to write a protest, take time to organize your thoughts. Prepare a rough outline, a roadmap. Although different structures exist for preparing a written protest, the following topical headings are customary:

- Issue(s)
- Proposed Adjustment(s)
- Facts
- Law
- IRS Examination
- Argument
- Conclusion

Under each of these headings, develop subheadings. For example, let's assume that one of the issues raised by the examining agent involves excessive compensation. Under the *Facts* heading, how would you organize your presentation? Would you have a subheading focusing on the biographical descriptions of key employees? Would you have another subheading describing the company and the nature of its business? Would you have yet another subheading dealing with financial data about compensation paid to key employees?

These are the types of questions you must ask and answer before you begin to write. Otherwise, your presentation will be confusing at best, incoherent at worst. In the end, it doesn't matter how you organize the different components of your written protest; what matters is that you have a plan for structuring and organizing your protest (a roadmap), and that you use this plan consistently throughout your presentation.

Finally, remember that a good presentation requires more than good planning and organization. It also requires good writing. Bad writing is distracting. It distorts what otherwise might be a fine product. For

an AO who knows the rules of grammar, it is highly annoying to see fundamental grammatical errors in a Protest. Beyond the annoyance factor, however, is a far more serious problem. Bad writing has the potential of diverting the AO's attention from the point you are trying to make. What to do? Successful and accomplished writers have a good handbook at their sides whenever they write. As you prepare your written protest, have a handbook at your side. If you are unsure about the punctuation of a particular sentence (e.g., do these sentence parts call for a comma or a semicolon), look it up. Don't guess.

Focus on Facts

Regardless of what factual information you decide to include under each topical heading and subheading, you must also determine the order in which to present the facts. Consider the following illustration. If you plan to drive from Boston to Chicago, it is unlikely that you would drive first to Baltimore, then to Nashville and finally to Chicago, unless of course time and money were of no concern. Likewise, an AO will expect to see some logical order to the presentation of the facts in your written Protest. Don't confuse the AO by driving from Boston to Chicago *via* Nashville!

Fortunately, a variety of techniques exist for ordering the presentation of facts: there is the chronological approach (e.g., emphasizing the timing and sequence of key events); there is the biographical approach (e.g., describing key individuals along with facts associated with them); and there is the transactional approach (e.g., focusing on the transfer of resources from one taxpayer to another). Again, it doesn't matter what approach you use in ordering the presentation of facts in your protest; what matters is that you have an approach and you employ it consistently throughout your presentation.

Your statement of facts should also tell your client's story. James W. McElhaney makes the following point in his article, "Humans always have used the story to understand facts and resolve issues. Everything in the law is a story. Every case, every motion, every brief is a story. The winning brief needs to tell a persuasive story. Lots of thoughtful judges admit they start to take sides—lean one way or another—as soon as they read statements of facts. The statement of facts is the most important part of the brief because it points the way to elemental justice."²²

According to McElhaney, there are lots of ways to write a statement of facts; however, a good statement passes two essential tests.

1. It stands alone. Anyone reading your statement of facts should understand what the case is about without having to look at anything else.
2. The statement of facts should make the reader take your side. It should be persuasive without being argumentative.²³

The point here is that facts, not opinions, will convince the AO to look favorably upon your client's case.

We need also to consider the unique role that facts play in an IRS Appeals case. As Table 2 demonstrates, the taxpayer's representative enjoys certain strategic advantages over the AO. How? The representative controls the facts in ways that the AO does not. For example, AOs do not prepare their own cases. AOs are not fact-finders. They are dependent on the examining agent for the discovery, presentation and analysis of the facts in a case.

As suggested by Table 2, there are certain unique characteristics of the IRS Appeals process that may work in the taxpayer's favor. For example, if a particular examining agent possesses inadequate investigative skills, the development of the facts in the agent's report is likely to be of low value. Nonetheless, the AO must deal with that which has been delivered by the examining agent. On the other hand, the representative is not dependent on the abilities and skills of another person. If the representative has strong investigative skills, the statement of facts in the protest is likely to be of high quality.

The process by which an examining agent discovers facts also has the potential of impairing an AO's understanding of a case. Typically, an agent discovers facts through the use of an Information Document Request.

This process can be slow and cumbersome, usually resulting in the examining agent being highly selective in the fact-gathering process. Budget constraints may also limit the extent to which an agent discovers facts, particularly given that most IRS audits are limited in terms of time, scope and budget. On the other hand, a representative enjoys unlimited access to a client's records and other forms of evidence, allowing for a robust discovery and development of relevant facts.

In the end, it is important to remember that AOs receive facts from two sources: the examining agent's report and the written protest prepared by the taxpayer's representative. Accordingly, don't miss this unique opportunity to tell your client's story in a way that makes the AO take your side. Remember—facts, not opinions, represent the ingredients of a successful written protest.

Develop Logical and Convincing Arguments

Developing a logical argument requires the repetitive application of the following model:

- Present the questions (issues) raised by the examining agent
- Present your answers to the questions
- Present the reason(s) for your answer

When considering this model, it is useful to think about the reasons why we are sometimes ineffective in developing logical and convincing arguments.

First, we include facts in the argument that are unconnected to the question being asked. In any given case, many facts exist. During the discovery process, we unearth all kinds of interesting facts. Unfortunately, not all interesting facts are relevant facts.

Table 2. The Unique Role That Facts Play in an IRS Appeals Case

Appeals Officer	Taxpayer's Representative
Not a fact-finder; must rely on the examining agent's report	Is a fact-finder; not bound by facts presented in the examining agent's report
Dependent on the investigative skills, training and abilities of the examining agent	Relies on own skills and abilities
Does not prepare the factual presentation	Prepares independent factual presentation
Discovery limited by the scope (and budget) of the examination	Discovery not limited by scope (or budget) of the examination
Burden of proof "advantage" may diminish the quantity and quality of the fact gathering done by the examining agent	Burden of proof "challenge" may enhance the quantity and quality of the fact gathering done by the taxpayer's representative

Discipline is essential. We must constantly remind ourselves to include only those facts that are required to answer the question asked (issue raised) by the examining agent. Nothing more, nothing less!

Secondly, we inject irrelevant law into the argument. Too often we are enamored with the law. We read an interesting case and become fascinated by it. However interesting, some cases or other legal authorities have little bearing on the argument being developed. Including unnecessary legal authorities in your argument is a mistake. It serves only to distract the attention of the AO, thus weakening your argument. Again, discipline is essential here.

Finally, we fail to make logical connections between issues, facts and law. We might be diligent in including only those facts and law that are essential to answering the question posed; however, we don't take the next step of connecting them. To develop a convincing argument, we need to connect the facts to the law in such a way as to create a coherent "whole,"

not just a presentation of relevant, but unconnected fragments of facts and law. Look for the thread that ties issues, facts and law together. Test the plausibility of your argument. Is your response to the question asked supported by underlying facts, or have you made assumptions that cause your argument to be vulnerable? Have you adequately applied the law to the facts, or does your presentation of legal authorities appear to serve no other purpose other than filling the page? Frequently, we spend too much time gathering legal authorities, but then fail to "put the law to work" in developing the argument. Every statute, case, regulation and ruling included in your protest should work to support your argument. If certain cases or rulings are not "working" to support your argument, get rid of them.

The traditional method for making connections in a legal argument is through the use of analogical reasoning. In general, analogical reasoning is a form of reasoning that allows us to connect issues with facts

Example 1. Analogical Reasoning*

Suppose, for example, that a court faces a case in which the defendant, a contractor, found buried money under the plaintiff's garage. The court surveys past cases having to do with things lost and found and finds the following:

- Several cases in which someone found money on the floor of a shop or similar premises and the courts held that the finder was entitled to retain possession as long as the owner of the lost property was not known
- Several cases in which someone found money on a table in a shop or on a chair in a bank safe deposit room and the courts held that the owner of the place where the money was found was entitled to possession
- A case in which someone found a brooch on a window ledge in a house temporarily requisitioned by the government and the court held that the finder was entitled to possession

The court might then propose the following analogy—warranting rule: when property is found in circumstances that suggest its owner set it down deliberately and then forgot it, the right to possession should go to the owner of the place where the property was found. If, however, it seems that the owner dropped the property inadvertently, possession should go to the finder. This rule leaves one possibly recalcitrant case (the case of the brooch), but the rule appears to be justified by a broader analogy—warranting rationale—that owners who have set property down and then forgotten it are more likely to return to the site than those who have dropped their property inadvertently. The more likely the owner is to return, the less appealing it is to award the property to finders who are comparatively more difficult for the owner of the lost property to trace. These ideas in turn can be tested at higher levels of generality: a rule designed to return lost property to its owner will make property rights more secure, secure property rights contribute to general prosperity, and so forth. The analogy-warranting rule can also be tested against hypothetical future cases to see if it produces satisfying outcomes. If the results of testing are acceptable, and if we assume that the prior decisions were correct, we may now have some reason to believe that the money found under the garage should stay with the owners of the house.

* This example is from Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999), at 1182–83.

and legal authorities. The basic idea is that through the use of analogies judges (and other decision-makers, e.g., AOs) will follow the course suggested by the analogy and thus conform their decisions to the existing body of law.²⁴

How does analogical reasoning work? As commonly practiced, it works something like this: “Confronted with an unsettled question, the judge surveys past decisions, identifies ways in which these decisions are similar to or different from each other and the question before her, and develops a principle that captures the similarities and differences she considers important. This principle in turn provides the basis for the judge’s own decision. Whatever one may think about the merits of analogical decision-making, there is little question that judges writing opinions and lawyers addressing judges often cast their analysis in this form.”²⁵ Example 1 illustrates analogical reasoning.

What lessons can we learn from Example 1? First, every argument in your written protest must have a logical flow that uses analogies to connect the facts in your case with the legal authorities you have cited. Secondly, make the AO’s job easier by providing a survey of past decisions and other relevant legal authorities. Thirdly, point out the ways in which these authorities are similar to or different from each other, and relate them to the issues and facts in your case. Finally, show the AO the logical conclusion that should be reached through the use of the analogies.

Critique the Report of the Examining Agent

Our discussion about the art of preparing a successful written protest would not be complete without a discussion about the need to critique the report of the examining agent. Preparing a convincing and compelling argument on behalf of our client is not enough. Why? The examining agent may have prepared an equally strong argument on behalf of the government. If this is the case, the AO may have to decide between two equally strong arguments. Your job in preparing the protest is to help make the decision easier for the AO. You can accomplish this task by critiquing the case as developed by the examining agent. Based on our earlier discussion about how to develop a successful written protest, consider the following methods for critiquing the examining agent’s report.

First, review the agent’s development of the facts. Is the development complete? Are the stated facts relevant to the issue raised by the agent? Are there inconsistencies

in the agent’s presentation of the facts? Are there inconsistencies in the agent’s presentation of the facts when compared to your presentation of the facts? Has the agent used the facts to tell a story? Is there a logical flow to the presentation of the facts, and so forth? In other words, don’t allow the agent’s presentation of the facts to go unchallenged. If the presentation is incomplete, point it out. If the facts are inconsistent, point it out. If the presentation of the facts fails to tell a convincing story, point it out. Don’t leave it to the AO to make these observations. By showing inconsistencies and other problems with the facts, as developed and presented by the examining agent, you begin to win the confidence of the AO.

Secondly, scrutinize the quality and quantity of the legal research conducted by the examining agent. Determine if the agent identified all relevant legal authorities. Assess whether the agent used the cited legal authorities correctly. Did the agent properly interpret the law? Did the agent correctly apply the law to the issue and the facts in the case at hand? Did the agent include legal authorities in the report, but not use them in the analysis or argument? Don’t leave these questions unanswered. If there are flaws in the legal research conducted by the agent, or flaws in the ways by which the agent used the cited legal authorities, point it out. Again, don’t leave it to the AO to make these observations.

Finally, test the examining agent’s arguments. Has the agent adequately connected the issues with the facts and the law? Have convincing analogies been developed by the agent? Has the agent adequately answered the questions asked (issues raised) in the agent’s own report? If there are flaws in the agent’s argument, point them out. Obviously, AOs will draw their own conclusions. They are at liberty to accept or reject the points you make in your written Protest. However, by conducting a review of the examining agent’s report, you will have achieved the goal of inviting the AO to consider the quality of the work done by the agent.

Revise, Revise Again and Revise One More Time

There is no such thing as good writing. There is only good rewriting.²⁶

Justice Brandeis was known for revising his opinions 15 or more times before he was satisfied with the final product. I am not suggesting that the average person preparing a written protest revise it 15 or more times. However, you should revise it at least three times, more if time and money permit. Sometimes, by

investing several hours to review and revise your protest, you protect the many hours you spent in gathering facts, conducting legal research and preparing your arguments. Excessive use of the passive voice, timid phrases, vague words and other examples of poor writing are often found in first drafts. After all, a first draft is a rough draft. It is not a finished product. You will have (and the AO will enjoy) a finished product after you have revised it at least three times.

Conclusion

Despite the many hours taxpayer representatives often invest in preparing a written protest, they may fail

to convince an AO to view their case more favorably than the government's case. This result may occur because the representative accepted an inherently weak case. For example, the facts or legal authorities may fail to support the client's position on a particular issue. On the other hand, the representative may have a strong case with which to work, but nonetheless fails to develop a successful written protest. Sometimes, there is not much that can be done when handling an inherently weak case. However, as this article demonstrates, regardless of the inherent strengths or weaknesses of a given case, there is much that can be achieved by mastering the art of preparing a successful written protest.

ENDNOTES

¹ The Act of 1789 that created the Treasury Department in the newly established United States of America gave the right to appeal adverse tax decisions to the comptroller of the United States.

² Restructuring and Reform Act of 1998 (P.L. 109-171).

³ IRM 8.1.1.1(1) (Oct. 23, 2007).

⁴ IRM 8.1.3.4(1) (Oct. 23, 2007).

⁵ IRM 8.1.3.4(5) (Oct. 23, 2007).

⁶ IRM 8.6.1.3 (Nov. 6, 2007).

⁷ IRM 8.6.1.6 (Nov. 6, 2007).

⁸ Reg. §601.106(a)(1)(iii)(a).

⁹ Reg. §601.106(a)(1)(iii)(b).

¹⁰ Reg. §601.106(a)(1)(iii)(c).

¹¹ Reg. §601.106(a)(1)(iii)(d).

¹² Reg. §601.106(a)(1)(iii)(e).

¹³ Reg. §601.106(b).

¹⁴ See Notice 1016, *How to Stop Interest*. For an explanation on how to stop interest from accruing on an unpaid balance, refer to IRS Publication 594.

¹⁵ Reg. §601.106(d)(2)(i).

¹⁶ Reg. §601.106(d)(2)(ii).

¹⁷ Reg. §601.105(d)(2)(v).

¹⁸ IRS Publication 5 (Rev. 01-1999), Catalog Number 460741.

¹⁹ Many of the recommendations presented in this section of the article are based on ideas developed from a close reading of THE

ELEMENTS OF LEGAL STYLE BY BRYAN A. GARNER (Oxford UP: 2002).

²⁰ G.H. Vallins, *THE BEST ENGLISH* 199 (1960).

²¹ W.C. Morrow, *THE LOGIC OF PUNCTUATION* 14 (1926).

²² James W. McElhaney, *Legal Writing that Works*, 93 A.B.A.J. 31 (2007).

²³ *Id.*, at 31–32.

²⁴ Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999).

²⁵ *Id.*, at 1179–80.

²⁶ Justice Louis Brandeis (George W. Pierce, *The Legal Profession*, 30 THE TORCH 5, at 8 (1957) (quoting Justice Brandeis).

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