CHAPTER 12—Summary of Declaratory Judgment, Administrative Record, and Building a Case for Litigation.

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TAX EXEMPT AND GOVERNMENT ENTITIES

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I. Guidance

I.R.C. Section 7476

Employee Plan Declaratory Judgment

Tax Court Rules 210 – 218;

Revenue Procedure 2001-6; Revenue Procedure 2001-17

INTRODUCTION

OVERVIEW

The Service's determination with respect to application cases (i.e., requests for determination letters) and examination cases (i.e., Forms 5500) may be challenged in the US Tax Court through a declaratory judgment proceeding. See IRC section 7476. In application cases, the Tax Court's Rules of Practice & Procedure (Rules) require the case to be adjudicated on the basis of the administrative record. In examination cases, if the parties agree, the case may be adjudicated on the basis of the administrative record. There is no trial if adjudicated on the basis of the administrative record. The administrative record is filed with the Tax Court and the Tax Court sets a briefing schedule for the parties. In essence, when a declaratory judgment action is resolved on the basis of the administrative record, the Tax Court merely reviews the administrative process.

Although the Tax Court's Rules specify certain items that are required to be included in the administrative record, there is a general principle that guides the determination of whether an item can be included in the administrative record. Thus, all items exchanged between the parties incidental to the application or examination are includible in the administrative record.

Generally speaking, in application cases this presents no problem since most of the administrative consideration of plan qualification is conducted by mail. Various documents mailed between the parties incidental to the consideration of the application for a determination letter are included in the administrative record. There is a paper trail. Such documents include, for example: the application, the plan and trust, interested party comment letters, a power of attorney, which are all mailed to the Service.

In examination cases the compilation of the administrative record may be a little trickier because a Form 5500 examination is not necessarily conducted by mail. Thus, in examination cases, care should be taken to maintain a paper trail for the relevant documents that support the Service's determination. A paper trail can be maintained through the use of Information Document Requests (IDRs) or though the use of brief letters memorializing the receipt of certain documents or information.

Although all documents exchanged between the parties are includible in the administrative record, the Court's rules permit the parties to stipulate only to those documents that they deem relevant to the plan qualification issues. Thus, the paper trail need is especially important with respect to documents that support the Service's determination.

PURPOSE

Declaratory judgments are decisions of the Tax Court in an action with respect to the initial or continuing qualification of a retirement plan as provided for in Internal Revenue Code (Code) section 7476. In an application case, a declaratory judgement action is tried on the administrative record. The administrative record is the sole evidence the Service relies on to support its determination in an application case before the Court. The administrative record may also be used to adjudicate an examination case.

The inclusion of documents and information in the administrative record is the responsibility of the EP Specialist working the case. The documentation and correspondence in your administrative file is the foundation of the administrative record. However, the administrative or case file is different from the administrative record. Certain items in your administrative file are not part of the administrative record under the Tax Court's definition. Thus the judge doesn't get to see these items. Therefore, it is essential that any documents or information supporting the Service's position in an application or examination case be included in the administrative file in a *manner* such that it can become part of the administrative record.

This lesson focuses on building a case for litigation in a declaratory judgement action and creating an administrative record to support the Service's position from items in an administrative file. **The term declaratory judgement is limited to the issue of qualification.** Tax liability will never be an issue in a declaratory judgement action, and a declaratory judgment action will not stay the running of any statute of limitations.

II. RULES GOVERNING DECLARATORY ACTIONS ON THE ADMINISTRATIVE RECORD

A. TAX COURT RULES 210 THROUGH 218

TAX COURT RULE 210. GENERAL

(a) Applicability: The Rules of this Title XXI set forth the special provisions which apply to declaratory judgment actions relating to:

- the qualification of retirement plans,
- the status of certain governmental obligations, and
- the initial or continuing qualification of certain exempt organizations or the initial or continuing classification of certain private foundations.

Except as otherwise provided in the Title, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to such actions for declaratory judgment.

(b) Definitions:

(10) "Administrative record" includes:

1. the request for determination,
2. all documents submitted to the Internal Revenue Service by the applicant in respect of the request for determination,
3. all protests and related papers submitted to the Internal Revenue Service,
4. all written correspondence between the Internal Revenue Service and the applicant in respect of the request for determination of such protests,
5. all pertinent returns filed with the Internal Revenue Service, and
6. the notice of determination by the Commissioner.

See section 3001(b) of the Employee Retirement Income Security act of 1974, 29, U.S.C. sec. 1201(b). This section provides the statutory basis for interest party comments.

(A) In the case of a determination relating to a retirement plan, the administrative record shall include:

- the retirement plan and any related trust instruments,
- any written modifications thereof made by the applicant during the proceedings in respect of the request for determination before the Internal Revenue Service, and
- all written comments (and related correspondence) submitted to the Internal Revenue Service in those proceedings.

TAX COURT RULE 213. OTHER PLEADINGS

(a) Answer

(1) Time to Answer or Move: The Commissioner shall have 60 days from the date of service of the petition within which to file an answer, or 45 days from that date within which to move, if the parties cannot agree with respect to the petition.

(3) **Index to Administrative Record**: In addition, the answer shall contain an affirmative allegation that attached is a complete index of the administrative record to be filed with the Court. See Rule 217(b).

TAX COURT RULE 217. DISPOSITION OF ACTIONS FOR DECLARATORY JUDGMENT

(a) General:

Disposition of an action for declaratory judgment, which does not involve either a revocation or the status of a governmental obligation, will ordinarily be made on the basis of the administrative record, as defined in Rule 210(b)(10). Only with the permission of the Court upon good cause shown will any party be permitted to introduce before the Court any evidence other than that presented before the Internal Revenue Service and contained in the administrative record as so defined. Disposition of an action for declaratory judgment involving a revocation may be made on the basis of the administrative record alone only where the parties agree that such record contains all the relevant facts and that such facts are not in dispute. Disposition of a governmental obligation action will be made on the basis of the administrative record, augmented by additional evidence to the extent that the Court may direct.

(b) Procedure:

(1) Disposition on the Administrative Record:

Within 30 days after service of the answer, the parties shall file with the Court the entire administrative record by stipulation (or so much thereof as either party may deem necessary for a complete disposition of the action for declaratory judgment), stipulated as to its genuineness.

In view of Tax Court Rule 217(b)(1) the administrative record does not have to contain everything in the administrative file. The administrative record need only contain those items that the parties deem necessary for a complete disposition of a declaratory judgment action.

Even though Counsel uses the administrative file to complete the index and produce the administrative record, the EP Specialist should ensure that the files are properly organized prior to closing the case and administrative file to Counsel.

Proper maintenance of the administrative file will assist Counsel in expediting the review of the contents, aid in the preparation of the index to the administrative record, and also facilitate locating the items for inclusion in the administrative record.

III. PURPOSE OF A DECLARATORY JUDGEMENT ACTION

Code section 7476 provides a statutory basis under which the Tax Court determines either:

- the qualified status of a plan submitted to the Service on an application for a determination letter (application case) or
- the qualified status of a plan that has been the subject of a Form 5500 examination (examination case).

A pleading may be filed by:

1. a petitioner who is the employer,
2. the plan administrator, or

3. an employee who has qualified under regulations prescribed by the Secretary as an interested party for purposes of pursuing administrative remedies with in the Internal Revenue Service as set forth under IRC section 7476(b)(1). See Regulation section 1.7476-1(b) for guidance on the identification of interested parties.

The action filed by the petitioner or interested party in the Tax Court tells the Court why the petitioner believes that the Service was wrong in the issuance of a determination letter in an application case, or the issuance of a final letter in a Form 5000 examination. In certain cases a petition may be filed before a final letter is issued.

Note: In an examination case, there are no rights for interested parties. Only an application case gives rise to the rights of interested parties. Therefore, an interested party can petition the Tax Court whether a final letter is favorable or adverse.

The petitioner must file the petition before the 92nd day after the date of certified mailing of the final letter. IRC section 7476(b)(5).

IV. CASES SUBJECT TO A DECLARATORY JUDGEMENT

Code section 7476(b)(3) provides that the Tax Court shall not issue a declaratory judgment until the petitioner has exhausted the administrative remedies available within the IRS. As a general rule, in order to exhaust administrative remedies, an employer petitioner in an application case must have taken the following steps.

- File an application for an initial or continuing qualification
- Send notices to all the appropriate interested parties of the application
- Timely, complete all requests for additional information by the Service, and
- Take all administrative appeals available within the Service - protest and appeal procedures

Requesting or obtaining an Appeal conference is not part of this process when Headquarters has issued a Technical Advice Memorandum.

An applicant is not deemed to have exhausted its administrative remedies merely because the Service has failed to make a determination before the 270th day following the request for such determination in an application case. *Prince Corporation v. Commissioner, 67 T.C. 318 (1976). Also see B.H.W. Anesthesia Foundation, Inc. v. Commissioner, 72 T.C. 681 (1979), Tipton and Kalmbach, Inc. v Commissioner, T.C. Memo. 1982 - 260.*

The 270-day period of IRC section 7476(b)(3) is a minimum, permitting the EP Specialist to consider an application or complete an examination without judicial interference. However, based on the facts and circumstances, the case may be able to be petitioned to Tax Court. For example, if during the consideration of an application, the consideration of such application is suspended because of a revenue procedure which provides that the case is subject to a mandatory technical advice request, such suspension does not stop the running of the 270-day period. Thus, after the elapse of the 270-day period, the case could very likely be successfully petitioned to Tax Court.

If on the contrary, the 270- day period elapses and the parties are actively engaged in the application process, it is less likely that such case could be successfully petitioned to the Court.

In an examination case, the 270-day period begins when the organization protests the Service's proposed adverse ruling. *Gladstone Foundation v. Commissioner, 77 T.C. 221 (1981).* The petitioner is deemed to have exhausted all administrative remedies when a final letter is issued. The exhaustion requirement promotes the completeness of the administrative record.

Note: If there is a successful petition to the Tax Court after the elapse of 270 days and prior to the issuance of a final letter, the administrative record closes on the date of petition. “Closing” means that after that date, no other items may be included in the administrative record.

An interested party can only be a petitioner in an application case and must have exhausted administrative remedies by either:

- timely filing a comment with the Service or
- requesting that the Administrator of Pension and Welfare Benefit Programs at the Department of Labor file a comment with the Service on behalf of the interested party.

See, Regulation section 601.201(o)(5) for guidance on the administrative remedies of an interested party.

Interested parties are entitled to a copy of any final letter issued incidental to the application. See, Regulation section 601.201(o)(7). Where an interested party filed a comment, the interested party petitioner may raise only those issues before the Court that were contained in the comment.

Pursuant to Tax Court Rule 215(a), joinder of parties is permitted in IRC section 7476 declaratory judgment actions in a case brought by an interested party pursuant to Rule 211(c)(4). The employer should always be joined as an indispensable party.

V. WHY IS AN ADMINISTRATIVE RECORD REQUIRED

Congress created the declaratory judgment remedy to enable the US Tax Court to give a speedy review to IRC section 401(a) issues. Not wanting to overburden the Tax Court, Congress designed the law with an emphasis on developing the case by exchanging documents at the administrative level. If the Tax Court were to consider testimony or facts not otherwise in the administrative record, the proceedings would change from a judicial review of administrative action into a trial de novo involving the Court's independent examination of facts. Thus, the Tax Court's function in declaratory judgment proceeding, (i.e. adjudicating on the basis of an administrative record) is only to review reasons provided by IRS in its final letter and not to make a general examination of provisions of a plan. The briefs filed by the parties with the Tax Court are solely based on the facts contained in the administrative record.

Although the administrative record is similar for application and examination cases, the critical difference is that an application case is decided exclusively on the basis of the administrative record, with no additional evidence to be submitted to the Court.

The general rule is that all application cases are resolved on the basis of the administrative record. The administrative record as filed is based upon the assumption that the facts as represented in the administrative record as so stipulated or so certified are true for purposes of the pending declaratory judgment action only. However, the Tax Court Rule 217(a) provides that only with the permission of the Court, upon good cause shown, will any party be permitted to introduce before the Court any evidence other than that presented before the IRS and contained in the administrative record. This refers to supplementing the administrative record in an application case only.

An examination case may be tried on the administrative record alone only when the parties agree that such record contains all the relevant facts and that such facts are not in dispute. If the parties don't agree that the case will be decided on the basis of the administrative record, then there will be a trial and the Court may look at evidence outside the administrative record. In general, whenever a trial is required in an action for declaratory judgment, such trial shall be conducted in accordance with the US Tax Court's Rules. See, Rule 217(b)(3), Disposition Where Trial is Required.

Therefore, in an examination case where the parties do not agree to submit the case for adjudication on the basis of the administrative record, no declaratory judgment expedited procedure is available. There will be a trial.

STIPULATED ADMINISTRATIVE RECORD

In IRC section 7476 declaratory judgment actions, Counsel is required to attach an "index to the administrative record" to the answer filed with the Court. (The answer is IRS's response to the petition.) This index is a list of documents that puts the petitioner on notice as to what the Service considers to be the documents includible in the administrative record. Then, Rule 217(b)(1) requires that the parties get together, sort out the contents of the administrative record, and file the stipulated administrative record within 30 days after the answer. The filed administrative record will contain copies of all the documents to which the parties have stipulated.

FAILURE TO STIPULATE AN ADMINISTRATIVE RECORD

In the event the parties cannot agree, Counsel will file the entire record with a Notice of Filing of the Administrative Record and a Certificate as to the Genuineness of the Entire Administrative Record. This is filed not sooner than 30 days or later than 45 days after service of the answer.

VI. CONTENTS OF THE ADMINISTRATIVE RECORD

TAX COURT RULE 210(B)(10)

The administrative record in an application case consists of:

1. Application for determination with exhibits and demonstrations

2. Retirement plan and any related trust instruments, and any written modifications made during the proceedings before the Service

3. Notice of final determination

4. All protests and related papers submitted to the Service

5. All written interested party comments (and related correspondence) submitted to the Service

6. All correspondence between the Service and the applicant

See, Regulation section 601.201(o)(8) for guidance on administrative record contents.

STANDARD ITEMS IN AN EXAMINATION ADMINISTRATIVE FILE THAT MAY BE EXCHANGED TO CREATE DOCUMENTS INCLUDIBLE IN AN ADMINISTRATIVE RECORD TO SUPPORT THE SERVICE'S POSITION:

- Third party documents – if relevant
  e.g. financial records
  bank statements
  records obtained pursuant to a subpoena

- Oral Communications – if relevant, phone conversation; something stated

These are items that may be in your administrative file that under the Court's definition is not part of the administrative record. The only time to get these or other items suitable for inclusion in the administrative record is during the examination or application period. To be sure that the judge gets to see an item, we need it in the administrative record, and the way to get it in there is to **EXCHANGE THE DOCUMENT** with the taxpayer with a brief cover letter.

The exchange of documents is between who ever filed the application in an application case, or in an examination case, whoever filed the Form 5500. Generally, computations in the work papers, such as Code section 415 issues, will be reflected in an interim or a final letter when there is an examination and where that is the issue. That inclusion satisfies the exchange requirement. However, for example, if work paper computations are essential to the Service's determination, and are not included in an interim letter, consideration should be given to sending a copy of the computations to the taxpayer with a request for comment.

The EP Specialist working either an application case or an examination case should always question relevancy when considering including an item to support the Service's position. This includes analyzing how an item might impact a form defect or an operational failure in furthering the legal analysis to support the action taken by the Service.

As a general rule, if a document is related to the declaratory judgment issue and the Employee Plan (EP) Specialist isn't sure whether it can be included in the administrative record, the EP Specialist should mail the document to the appropriate party with a cover letter asking for comments.

Not all documents in the administrative file become part of the administrative record. It is the trial attorney's responsibility to make sure that the index is complete, accurate, and in proper form for filing with the Tax Court. See CCDM (35)(23)30(3)(i). But, it is also the responsibility of the EP Specialist to organize the files in a way that is logical; and facilitates locating items in the record.

VII. BUILDING A CASE FOR LITIGATION IN A DECLARATORY JUDGEMENT ACTION

A. EXAM CASES

The EP Specialist has the primary responsibility to identify issues of substance and to adequately develop these issues so that the Service's strongest position is presented. Emphasis should be placed on raising and pursuing only those issues that have merit.

Proper case development by an EP Specialist and making impartial and reasonable determinations will result in more resolutions at the EP Specialist's level and earlier resolutions in those cases that are appealed.

1. FACTORS IN DETERMINING WHETHER A CASE WILL GO UNAGREED THE "5 W'S" AND MORE:

- Who is impacted by the noncompliance
- What failures occurred during the year?
- Where are the qualification failures

  plan document 401(a); 403(a)),

  operational (failure to follow the plan provisions),

demographic failure 401(a)(4); 410(b), or

employer eligibility failure 403(b)

- When did the failure first occur?
- Why was there inconsistency?
- How did the failure occur?
- Minimal expense to the plan sponsor verses the cost of litigation
- Required returns such as, Form 1120, Form 1040, and Form 1041 must have at least one year left on the statute of limitations before being transferred to the Review Staff
  Note: Form 5500 is an information return. However, the Form 5500 controls the statute of limitations for IRC section 4975 prohibited transactions.

Revocation of a Plan

A plan should be considered for revocation when the:

- Taxpayer does not want to enter into a closing agreement
- Violation is egregious
- Violation is not eligible or Employer/Plan Sponsor does not to utilize the Employee Plans Compliance Resolution System (EPCRS) Revenue. Procedure 2001-17

At the first indication that a case will be unagreed, the agent should consult the problem with the group manager. The EP Specialist should develop an unagreed case carefully and completely. The facts and law must be clearly stated and adequately documented, with relevant copies of documents exchanged with the taxpayer (with a cover letter where appropriate). While working an unagreed case file in an examination, an EP Specialist should always be aware that the taxpayer has the right to challenge the Service in Tax Court. There is no difference between an unagreed and agreed case for purposes of the administrative record.

In an application case, an interested party can petition the Tax Court whether the Service determines a plan is or is not qualified. Therefore, the administrative record is essential in an application case.

After considering all issues in an examination case, the EP Specialist should present a written proposal to the taxpayer, giving the taxpayer an opportunity to:

- agree with the EP Specialist's proposal,
- suggest appropriate modifications to resolve the issue,
- present additional facts for consideration, or
- to present his or her position.

The taxpayer should be advised that additional facts or comments regarding his or her position will not be considered as part of the administrative record if such facts or comments are not reduced to writing and provided to the Service. An EP Specialist should reduce to writing and exchange all pertinent and substantive information to be considered as part of the administrative record to support the Service's position.

2. DOCUMENTATION

In an examination or application, the EP Specialist should indicate:

- the date on which the plan failed to qualify and
- an explanation of why the Closing Agreement Program was not used.

It is important to note on documents received from taxpayers when the document was received and who sent it. The official "received " date stamp can be used for this purpose.

The EP Specialist should also not deface by writing, doodling, noting, or scribbling on original documents received from taxpayers, interested parties, or third parties. Documents, which are part of the administrative record, will be evidence in litigation.

If the case chronology record contains summaries of telephone conversations or conferences, that is relevant to plan qualification as such, the information should be noted in a letter to the proper party asking for comments or confirmation.

Appeals Officers depend primarily upon the written record developed during an examination. A declaratory judgment action depends on the same written record with an emphasis on EXCHANGING THE DOCUMENTS to develop an administrative record. The documents upon

which a final determination is based should be contained in the administrative file and be includible in the administrative record. Thus, it is not enough for EP Specialists to simply summarize in the Agent's Report or Explanation of Items their finding of facts and state their conclusions, which is furnished to the appropriate party and thus is part of the administrative record.

B. EXAMPLES OF DOCUMENTS INCLUDED IN AN ADMINISTRATIVE RECORD

1. Applications for determination and attachments and demonstrations in application cases

2. Copies of all pertinent information returns or tax returns.

   Generally tax returns are not relevant in an application case. However, they may be relevant in an examination. For example, in a Form 5500EZ examination, a Form 1040 may be relevant for a section 415 analyses, but such return is not automatically a part of the Form 5500 examination because it has not been exchanged by the parties incidental to that Form 5500 examination. Such return will have to be exchanged by short cover letter to make it part of the administrative record.

3. All letters and attachments exchanged with the plan sponsor by the EP Specialist relating to the **current** application or examination.

   Letters, e.g., a no change advisory letter or other information provided to the plan sponsor during a prior examination, are not included in the administrative record until exchanged. Such information can also be exchanged between parties at a conference, but this fact should be memorialized in writing and mailed to such plan sponsor.

4. All letters and attachments received by mail from the plan sponsor by the EP Specialist relating to the current examination or application.

5. A copy of the power of attorney for the plan sponsor submitted to the EP Specialist

6. Copies of payroll records provided to the EP Specialist by the plan sponsor related to the qualified status of the plan incidental to a Form 5500 examination.

   For example: payroll records may relate to the qualified status of the plan if an IRC section 415 issue is involved in an examination. Payroll records are generally relevant in an examination case only.

7. The plan sponsor provides the EP Specialist during an examination with all of its bank statements and cancelled checks.

The EP Specialist makes copies of 10 of the cancelled checks, back and front. The copies of the 10 cancelled checks should be included as part of the administrative record if considered relevant to a qualification issue. Thus, the EP Specialist should identify the 10 copied checks and mail this information to the plan sponsor.

8. In answer to the EP Specialist's questions concerning a major qualification issue, the plan sponsor sends a letter to the EP Specialist containing false information. The EP Specialist should mail a letter to the plan sponsor refuting the false information.

   Both letters may be included in the administrative record because the parties exchanged them and they affected a major qualification issue. Otherwise, disregard this information if it is not relevant to a form defect or an operational failure.

9. The plan sponsor submits a copy of identical document to the EP Specialist by letter on several different occasions during the examination.

   It is only necessary that one of the copies of this document be includible in the administrative record.

10. All items provided in writing to the taxpayer by the Service whether, its supports the Service's position or misinterpreted it.

    The Service always acknowledges mistakes and when it's in writing and sent to the proper parties, it becomes part of the administrative record as correspondence exchanged between parties.

Note: Incorrect computations, misinterpretations of law (IRC, regulations, Revenue Rulings, etc.) or incorrect conclusions made in writing to the taxpayer should be clarified in subsequent correspondence. Any information has provided to the taxpayer becomes a part of the administrative record.

To correct the mistake, the document **should not** be removed from the administrative record. Rather, the EP Specialist should admit a mistake has been made and submit a corrected statement to the taxpayer in writing.

EXAMPLES OF DOCUMENTS NOT INCLUDED IN THE ADMINISTRATIVE RECORD AND SOLUTIONS FOR GETTING THE DOCUMENTS OR INFORMATION INCLUDED

1. EP Specialist's case chronology record (CCR).

   Solution: If the CCR reflects information such as notes from a telephone call that were relied on by the EP Specialist in the decision making process, the information should be incorporated in a letter to the plan sponsor with a request for confirmation or comments.

   Note: Any oral communications, such as telephone conversations or interviews between an EP Specialist and the taxpayer, cannot be included in the administrative record unless this information is reduced to writing and provided to the taxpayer. Thus, any important information communicated or issues resolved orally should be confirmed in writing with the taxpayer. Since this procedure in writing can be used or misused against the Service, EP Specialists must be prepared to rebut erroneous assertions made by the taxpayer.

2. Notes taken by the EP Specialist during interviews or conferences with the plan sponsor.

   Solution: Reduce the interview or conference to writing and provide a copy to the plan sponsor with a cover letter or IDR requesting confirmation of the contents. If the information is hand delivered to the plan sponsor with an IDR, the person receiving the IDR should be asked to sign the IDR acknowledging receipt.

3. A letter sent to the Service by the plan sponsor a week after the final adverse determination letter was mailed to the plan sponsor.

   Solution: None – Documents received after the issuance of the final adverse determination letter is excluded from the administrative record. However, the letter should be forwarded for association with the administrative files in the case.

4. Documents that substantiate an application case and enhance the Service's chances of sustaining the issue that were submitted to the Service by a third party the day after a final adverse determination letter was mailed to the plan sponsor.

   Solution: None. There is no way to include documents received after the issuance of the final adverse determination letter in the administrative record. The information should be collected and attention called to it by memo or otherwise.

5. Work papers and computations prepared by the EP Specialist.

Solution: Generally, these are not found in an administrative record. To the extent that these items are relevant, they are generally included in the 30-day or final letters, which are both part of the administrative record.

6. An EP Specialist's hand copied or summary version of any document.

   Solution: For example, if items in the plan sponsor's minutes are important to the Service's position, transmit a copy of the minutes to the plan sponsor and request confirmation of the accuracy. A machine-copied facsimile mailed to the plan sponsor will also accomplish this. Try to avoid making handwritten copies or summaries of documents. It is better to collect the documents themselves.

7. The EP Specialist's handwritten or typed summary of the taxpayer's bank records.

   Solution: EP Specialist 's handwritten or typed summary of any records is not included in the administrative record unless it can be shown that the summary was provided to the taxpayer.

   The EP Specialist should **always** collect copies of any documents summarized, e.g., bank records, checks, ledgers, financial statements, ending trial balances. Copies of original documents are always preferred.

8. EP Specialist 's notes concerning records the plan sponsor failed to produce.

   Solution: The EP Specialist should use an IDR to request the documents. The EP Specialist's IDR would then be part of the administrative record. If the taxpayer does not furnish the documents requested pursuant to an IDR, a short letter or another IDR should inform the taxpayer of what documents were not received.

   Remember that the EP Specialist 's notes are not part of the record unless they are shared with the taxpayer. It is helpful to Area Counsel for the EP Specialists to make notes to the file, especially of things like missing attachments to documents. However, if there is some extraordinary aspect of a submission that is not clear on the face of the record and the EP Specialist thinks that the facts should be made part of the record, the EP Specialist should write to the taxpayer noting the extraordinary circumstance in order to make it part of the record. Just because an item is "in the record" does not mean that the court will give it any weight. But if the item is not in the record, it will not be given any weight at all.

SUMMARY

This chapter illustrates how important it is to gather information during the application and examination stages of the process and to properly preserve it so that it can be used as part of the Administrative Record and proves the government's position in Court.

Please note that an item should be included if you are in doubt about whether an item should be included. The attorney reviewing the case will make a final determination on questionable items.