

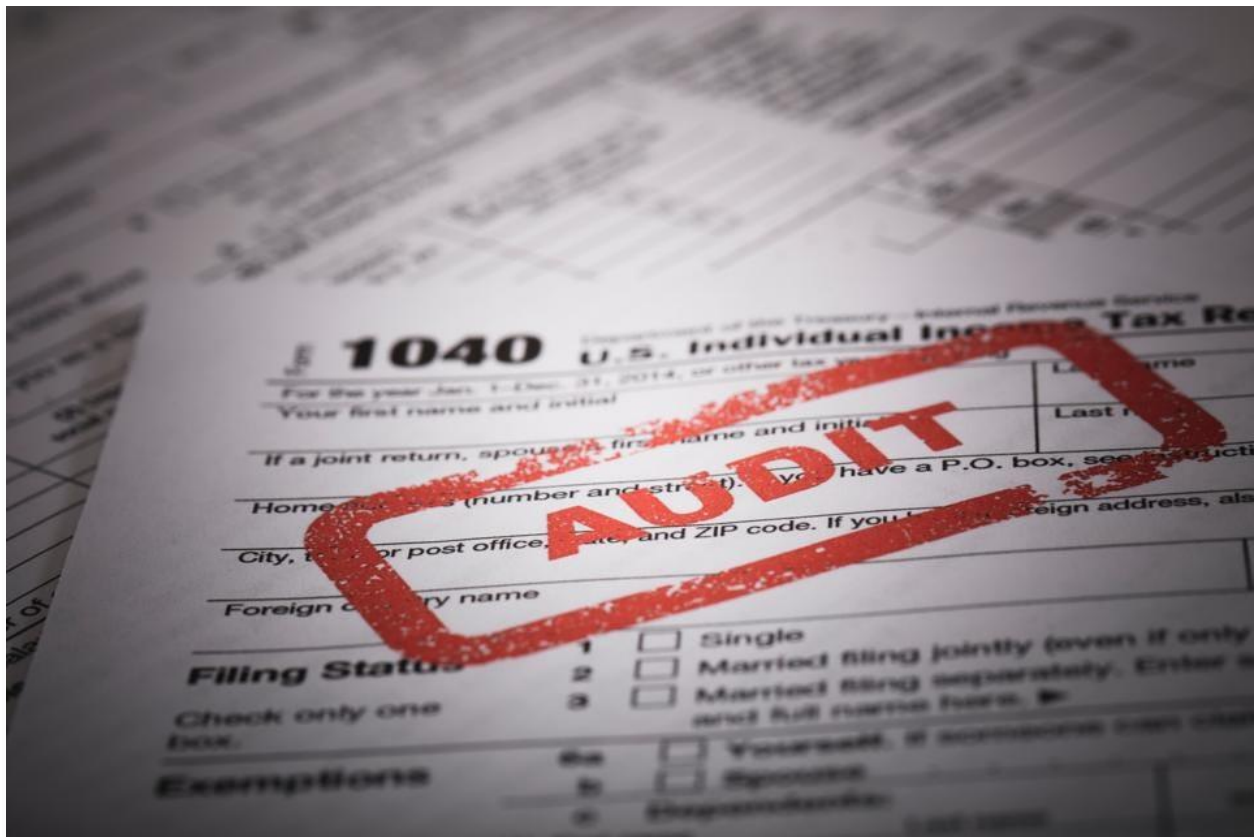


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Seven Reasons To Get A Tax Opinion Before You File With IRS



Many taxpayers and tax advisers have trouble saying exactly *why* one should get a tax opinion or how to use it. A tax opinion can be about almost any tax issue. A good tax opinion discusses the facts, legal arguments, and pertinent

authorities. One portion of the opinion says, "it is our opinion that...." But the vast majority of the opinion should analyze the facts and the law, presenting an even-handed assessment. Tax opinions do not bind the IRS, but are worth the investment. Here's why.

1. Tax Opinions Give Penalty Protection. The most commonly stated reason to get a tax opinion is to avoid penalties. Just about everyone in the tax business says this at one time or another. But I do not believe most tax opinions are primarily for purposes of penalty protection. [It's one of the myths about tax opinions](#). No client wants or expects the claimed tax position to fail. If all the opinion accomplishes is preventing penalties, the client won't be happy. Clients want their tax position to be upheld, or at least to compromise it on an acceptable basis.

2. Tax Opinions Evaluate Your Facts and Apply the Tax Law. Clients may like an opinion that is one-sided (in their favor) rather than wishy-washy. The tax opinion's bottom line may be that there is substantial authority (or some other level of confidence) for the position. But it should be accompanied by a thorough examination of the relevant authorities, both positive and negative.

3. Tax Opinions Express the Strength of Your Position. A tax opinion must conform to one of the following levels of confidence:

- Not frivolous = There's a 10% to 20% chance your argument will prevail.
- Reasonable Basis = There's a roughly 20% or 25% chance you'll win.
- Substantial Authority = There are cases both ways, but there's probably about a 40% chance you'll win.
- More Likely Than Not = The odds are better than 50% that you'll win.
- Should = It's about 60% likely that you'll win.
- Will = Your tax treatment is nearly assured.

Under IRS standards, the tax opinion must *assume* there *will* be an audit in every case. That is just one of the [uneasy topics about tax opinion standards](#). That way, the opinion is not based on audit lottery, In reality, of course, audits really occur only rarely.

4. It is Too Late to Get an Opinion if You're Audited. There is rarely time to get a good and thoughtful opinion at the audit stage. Even if there were, the legal impact is not the same as one done before tax return filing. Opinions should be written before the tax return is filed. Not only should an opinion be done before the tax return is filed. When possible, the opinion should be done in parallel with the event or transaction. That is the best way to help shape the transaction or issue. And in any event, you want the opinion in hand before you file taxes. That way, you are relying on the opinion when you file.

5. Opinions Are Valuable, But Not To Give to the IRS. A legal opinion is a sensitive document, usually prepared by a lawyer for a client, subject to attorney client privilege. As such, it is worth asking who should receive it and to whom it should be disclosed, both then and later. The client will receive it, but be careful who you copy, since that simple act may waive the privilege. You do not want to waive privilege, since you rarely want to give it to the IRS.

6. Opinions Give Directions to Tax Return Preparers. Tax return preparers usually do not need the whole opinion. Most accountants are satisfied with a short directive letter telling them there is a written opinion protected by attorney client privilege. That way, the accountant is not ever tempted to give the opinion to the IRS during an audit. If the accountant is not satisfied with this procedure, the accountant can be brought within the attorney client privilege with a [Kovel letter](#). The attorney hires the accountant and remains subject to the direction of the attorney as part of the representation.

7. Opinions Help In a Dispute. Tax opinions are *extremely* helpful in an audit or tax dispute. Although I have written large numbers of tax opinions across many years, I have never handed an opinion to the IRS. The only reason one would do so is for penalty protection, and once again, I do not think tax opinions are primarily about penalty protection. Tax opinions are of enormous value as a resource for cutting and pasting. For the small percentage of tax cases that ultimately end up in controversy, there will be deadlines.

In an audit, there is rarely enough time to prepare thorough and targeted responses that will be convincing to the IRS. A thorough legal opinion is a luxury. You can use the opinion's best facts and best arguments to draft advocacy letters or briefs, targeting the issues the IRS is raising. And if you can address the tax issues and resolve them favorably, you may not need to talk about penalties.

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