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T³: *Taxing Times* Tidbits Changes to IRS Appeals Conference Procedures May Increase the Role of Actuaries

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There has been a significant recent development in the procedures for IRS Appeals conferences. In May 2017, the IRS Appeals Division announced that Appeals Team Case Leaders (ATCLs) who volunteer for a pilot program will permit IRS examination personnel and chief counsel attorneys to attend Appeals conferences in all cases the participating ATCLs handle.[1] Under the program, the examination team personnel who proposed the issue, and IRS chief counsel attorneys if requested by the examination team, may attend and participate in the ATCL's conference with the taxpayer, although they may not attend the actual settlement negotiations unless the taxpayer consents. There has been some grumbling by tax practitioners that this procedure impinges on the independence of the Appeals function, and there is something to this complaint.[2] Nevertheless, the program presents an opportunity for the taxpayer to demonstrate the strength of the issue to the examination team and counsel and, possibly, to narrow the issues and project settlements on ongoing issues forward into subsequent cycles.

This is not to minimize the scope and significance of the change in procedure that the pilot program entails. As far as scope is concerned, most large insurance company taxpayers that are still being audited by the IRS likely will encounter the new procedure at some point in the near future. This is because ATCLs are the most experienced and seasoned appeals officers and typically handle the appeals for large life insurance companies. The program is only a pilot program for now, but it is understood that approximately 40 percent of ATCLs have volunteered for the program. A recent FAQ release by the Appeals Division clarifies that taxpayers will not be permitted to avoid the program by seeking a reassignment of the case to another ATCL who has not volunteered for the program.[3] Furthermore, these types of pilot programs in the IRS almost inevitably become required procedure in one form or another. Thus, no one should be surprised one or two years from now when IRS Appeals makes the program mandatory for all cases before ATCLs.

The change in the procedure and practice indicated by the pilot program is also significant. Under the traditional, existing procedures, appeals officers hold two formal meetings for each appeal. The first meeting is called a "pre-conference" and, although it is attended by both parties, its purpose is to allow the IRS examination team to present its position in person to the appeals officer and clarify matters not addressed in the Revenue Agent's Report or Rebuttal to the taxpayer's protest.[4] The pre-conference is the examination team's meeting and taxpayers are allowed to attend only because of the *ex parte* communication rules that do not permit substantive conversations between Appeals and the examination division unless the taxpayer is present or waives its right to be present.[5] Accordingly, taxpayers typically just listen to the examination team's presentation at the pre-conference without much active participation. In more high-profile issues, chief counsel attorneys may also attend the pre-conference, and sometimes they present the examination division's position. Even though the pre-conference is the examination team's meeting and the taxpayer's team is there only by virtue of the *ex parte* rules, most ATCLs will allow the taxpayer to ask a few questions of the examination team and counsel to clarify points of agreement and disagreement. This practice can be very useful in narrowing issues and obtaining agreements that are understood by the examination team and the ATCL, even though it is not specifically contemplated in the existing procedures for the pre-conference.

The pre-conference is followed by the second meeting with the appeals officer, which is called the "conference" and up to now has been attended only by the taxpayer's team. At this meeting, the taxpayer's team responds to the points made by the examination team and counsel in the pre-conference and presents its position to the appeals officer. At the conclusion of the taxpayer's presentation in the conference, the taxpayer typically engages in settlement negotiations with the appeals officer. In the recently published FAQ, IRS Appeals correctly points out that ATCLs historically have had the authority under the *Internal Revenue Manual* to invite examination personnel to attend the conferences before settlement negotiations begin,[6] but, in reality, this rarely occurred. Thus, the pilot program represents a significant change in practice and procedure. In the traditional setting, the taxpayer is permitted to state its position without any interference from the examination team or counsel, whereas the pilot program meetings likely will be more free-wheeling sessions that are more like mediation sessions where the two parties engage in legal arguments with each other in front of the mediator. The FAQ specifically

acknowledges that the Appeals Division already has mediation type programs such as the Rapid Appeals Process (RAP) and states that the pilot program is not intended to convert the conference to a mediation session or a RAP proceeding, but it leaves open the possibility for a mediation approach in the conference if the taxpayer consents.[7] In the Appeals Division's mediation-type proceedings, usually there is first an extended meeting at which both sides present their positions, followed by an attempt to find common ground and an agreeable settlement, with the appeals officer's help as a mediator. Assuming the two sides can agree on a settlement, the appeals officer then exercises the Appeals Division's settlement authority to resolve the case.[8] The full participation of both parties and the back-and-forth dialogue the new pilot procedure will feature is similar to mediation, although examination personnel and IRS counsel will not participate in the settlement unless the taxpayer judges this in its best interest and consents to it.

Nevertheless, even if the taxpayer does not consent to engage in a type of mediation and have the examination team and counsel present during the actual settlement negotiations, the back-and-forth dialogue between the taxpayer and IRS examination/counsel and the questions and responses from the ATCL likely will clarify to the examination team, counsel and the taxpayer the strengths and weakness of the case as perceived by the ATCL, and this is the aspect of mediation that is useful for settling cases. This is an important point for tax actuaries to consider for insurance company cases. Life insurance company tax disputes often involve technical reserve issues that are the province of tax actuaries, and there may be more of a need for actuaries to attend and actively participate in the Appeals conference. In traditional cases, the IRS actuaries typically attend the pre-conference either in person or by telephone and state their case. In this setting, there is not much opportunity for interaction with the IRS actuaries outside of the limited dialogue that some ATCLs allow to occur during the pre-conference. In the pilot program conferences, on the other hand, the IRS actuaries who proposed the adjustment will attend the conference and likely will be more engaged in a dialogue with the taxpayer in order to influence the appeals officer. Moreover, the IRS actuaries likely will be backed up by IRS counsel who will be there to place a legal framework on the IRS actuaries' points. In this setting, it may be more important for taxpayers to have their own tax actuaries there to make sure that the ATCL is fully apprised of the taxpayer's position regarding the actuarial issues.

According to the recent FAQ issued by IRS Appeals, the stated purposes of the pilot program are to make Appeals conferences more efficient, identify and narrow factual and legal differences and assist appeals officers in evaluating litigation hazards.[9] As structured, the pilot program should accomplish these things, although it may make experienced practitioners uncomfortable to have to contend with the examination team and IRS counsel during the conference and may be one step toward less Appeals independence. The silver lining for taxpayers may be a more efficient process where some issues are quickly dispensed with and that results in settlements that can be applied to future years. Even though there is a procedure under which Appeals' settlement authority can be delegated to the examination team for subsequent years,[10] examination teams are often reluctant to do this for various reasons and end up proposing issues over and over again in subsequent audit cycles. The FAQ asserts that the pilot program may help avoid this because "the insight that all parties may gain from an open discussion of positions could facilitate resolution of the same or similar issues in subsequent cycles."[11] This may seem like wishful thinking, but in practice, it can only help in future cycles to have the examination team and the taxpayer both fully aware of how their respective positions are received by a neutral, independent appeals officer. For this reason, there are some advantages that may emerge as the pilot program evolves. ■

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ENDNOTES

1 *See* IRS, *Appeals Team Cases Conferencing Initiative: Frequently Asked Questions about Compliance Attendance at Conferences*, available at *http://www.irs.gov/pub/irs-utl/atclfaqs.pdf* ("Conferencing Initiative: Frequently Asked Questions").

2 See American Bar Association Section of Taxation, Comments on Recent Practice Changes at Appeals (May 9, 2017), available at *https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/050917comments.authcheckdam.pdf* ; Alison Bennett, *Concerns Rise on IRS Letting Examiners Attend Appeals Talks*, Bloomberg BNA Daily Tax Report, at G-2 (Aug. 29, 2017).

3 *Conferencing Initiative: Frequently Asked Questions*, FAQ 6.

4 I.R.M. 8.7.11.8 (03-16-2015), et seq.

5 I.R.M. 8.1.10.3 (06-21-2012).

6 *Conferencing Initiative: Frequently Asked Questions*, FAQ 12 (citing I.R.M. 8.6.1.4.4 (10-01-2016)).

7 *Id*. at FAQs 2 & 4. The Rapid Appeals Process and Fast Track Appeals are two types Alternative Dispute Resolution procedures in which the appeals officer functions as a mediator. *See* I.R.M. 8.26.1 (09-24-2013); I.R.M. 8.26.11 (07-01-2017).

8 Policy Statement 8-47, I.R.M. 1.2.17.7 (04-06-1987). This is necessary because the examination division does not have the authority to settle based on litigation hazards.

9 *Conferencing Initiative: Frequently Asked Questions*, FAQ 1.

10 Delegation Order 4-24 (formerly DO-236, Rev. 3), I.R.M. 1.2.43.22 (08-25-1997).

11 *Conferencing Initiative: Frequently Asked Questions*, Introduction.