



PROGRAM MATERIALS
Program #29187
November 5, 2019

Uncommon Strategies for Dealing with the IRS Appeals Office from a Tax Litigator's Perspective

**Copyright ©2019 by Charles E Hodges II, Esq., Antoinette
Ellison, Esq. and Aditya Shrivastava, Esq. - Jones Day
All Rights Reserved.
Licensed to Celesq®, Inc.**

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

UNCOMMON STRATEGIES FOR DEALING WITH THE IRS APPEALS OFFICE FROM A TAX LITIGATOR'S PERSPECTIVE

November 5, 2019

Speakers:

Chuck Hodges, Esq.

Antoinette Ellison, Esq.

Aditya Shrivastava, J.D.



CHUCK HODGES, TAX (ATLANTA)



cehodges@jonesday.com

+1.404.581.8636

Chuck Hodges focuses his practice on federal tax controversies and litigation and assists U.S. taxpayers facing tax disputes around the world. He has been involved in more than 125 cases against the IRS in the U.S. Tax Court; U.S. Court of Federal Claims; U.S. District Courts in Georgia, South Carolina, Florida, Texas, Delaware, Mississippi, and Arizona; and Courts of Appeals for the Fifth, Sixth, Ninth, and Eleventh Circuits. Among his reported cases are *Caracci v. Commissioner*, 456 F.3d 444 (5th Cir. 2006) (intermediate sanctions/excise taxes) and *Wright v. Commissioner*, 809 F.3d 877 (6th Cir. 2016) (foreign currency contracts). By combining his tax law background with his master's degree in economics, Chuck also advises clients on transfer pricing issues and the global taxation of intellectual property.

For more than 20 years, Chuck has handled every stage of a tax controversy from examination (including the CAP program) through court proceedings and all alternative dispute resolution options, including post-IRS Appeals mediation. He represents *Fortune* 500 companies and their executives, privately held businesses, estates, high net worth individuals and their family offices, as well as exempt organizations.

Chuck is an international tax columnist for the *Journal of Taxation* and serves as chair of the Federal Bar Tax Section for Atlanta, and is a former chair of the Georgia Bar Tax Section. He is also a Fellow of the American College of Tax Counsel and a Fellow of the American College of Trusts & Estates Counsel (for tax controversies and litigation). Chuck has been listed in *Chambers USA* guide to best lawyers since 2005 with clients describing him as well known for “his significant contentious tax work”, and “a very energetic, impassioned advocate” and a “very skilled tax litigator.” *Chambers USA* (2018 & 2019).



ANTOINETTE L. ELLISON

PARTNER

Atlanta

aellison@jonesday.com

(T) 1.404.581.8801

Antoinette Ellison, an accomplished lawyer with more than 15 years of experience, represents taxpayers in all aspects of tax controversies and litigation involving the IRS and state and local tax authorities. She regularly resolves tax examinations by the IRS and state and local jurisdictions as well as successfully represents taxpayers in administrative appeals including before the IRS Office of Appeals. She handles civil tax litigation matters in trials in the U.S. Tax Court and U.S. District Court.

Antoinette represents a broad range of taxpayers including multinational corporations, financial institutions, closely held businesses, and high net worth individuals. She has experience representing clients involved in the IRS Collection Process in negotiating offers in compromise and installment agreements and requesting collection due process hearings to appeal IRS lien and levy actions.

She is an active member of the State Bar of Georgia Tax Section and is the current chair-elect. She is also a columnist for the Journal of Taxation, IRS Rulings column.

Antoinette strongly believes in civic engagement and is proud to serve on the Special Olympics Georgia board.

EDUCATION

Georgetown University (LL.M. in Taxation 2016); Columbia University (J.D. 2002; Harlan Fiske Stone Scholar; Archie O. Dawson Prize for Proficiency in Oral Advocacy; Editor, National Black Law Journal); Claremont McKenna College (B.A. magna cum laude 1999; Phi Beta Kappa)

BAR ADMISSIONS

Georgia, New York, U.S. Tax Court, U.S. Courts of Appeals for the Ninth and Tenth Circuits, and U.S. District Courts for the Southern and Eastern Districts of New York

AREAS OF FOCUS

Tax

HONORS & DISTINCTIONS

The National Bar Association — Nation's Best Advocates: 40 Lawyers Under 40 (2016)

Lawyers of Color magazine's "Hot List" (2013)

ADITYA SHRIVASTAVA, TAX (ATLANTA)



ashrivastava@jonesday.com

+1.404.581.8717

Aditya Shrivastava focuses his practice on federal tax litigation. Aditya has experience as a litigator throughout multiple stages of the controversy process, including audit procedures, IRS Appeals negotiations, tax court petitions and proceedings, post-IRS Appeals mediation, and federal court actions.

His recent experience includes authoring an 11th circuit brief, multiple tax court petitions, as well as a motion to quash which successfully brought an end to an IRS dispute for an international client. He is also currently assisting associates and partners in our Business & Tort Litigation department by preparing witnesses for deposition, drafting necessary discovery motions, and responding to all discovery requests.

Outside of work, Aditya serves as a department editor on the Journal of Taxation contributing continuous updates on newly released IRS regulations.

Finally, Aditya maintains an active pro bono practice. Most notably, Aditya works closely with the Atlanta Humane Society and was honored as an Atlanta Humane Hero by the organization in 2017.



AGENDA

- I. Overview of IRS Appeals & Taxpayer First Act of 2019
- II. Procedures for Uncommon Cases Heard by Appeals
- III. Overview of the IRS Appeals Judicial Approach & Culture (AJAC) Project
- IV. When to go to Appeals: *docketed versus non-docketed*
- V. *Ex Parte* Rules in Appeals
- VI. Considerations for preparation of a Protest
- VII. Preliminary matters before Appeals conference
- VIII. Strategies for handling Appeals conference
- IX. Post-Appeals Mediation



TAXPAYER FIRST ACT OF 2019

TAXPAYER FIRST ACT OF 2019

- TITLE I — “PUTTING TAXPAYERS FIRST”

Subtitle A — Independent Appeals Process

Subtitle B — Improved Service

Subtitle C — Sensible Enforcement

Subtitle D — Organizational Modernization

Subtitle E — Other Provisions

TAXPAYER FIRST ACT OF 2019 – INDEPENDENT APPEALS PROCESS

- Renames the IRS Office of Appeals:

There is established in the Internal Revenue Service an office to be known as the “***Internal Revenue Service Independent Office of Appeals***”. IRC § 7803(e)(1).

- Creates a new statutory official:

The Internal Revenue Service Independent Office of Appeals shall be under the supervision and direction of an official to be known as the “***Chief of Appeals***”. IRC § 7803(e)(2).

TAXPAYER FIRST ACT OF 2019 – INDEPENDENT APPEALS PROCESS

- *Codifies the IRS Office of Appeals' mission:*

It shall be the function of the Internal Revenue Service Independent Office of Appeals to resolve Federal tax controversies without litigation on a basis which —

- (A) is fair and impartial to both the Government and the taxpayer,
- (B) promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and
- (C) enhances public confidence in the integrity and efficiency of the Internal Revenue Service. IRC § 7803(e)(3).

TAXPAYER FIRST ACT OF 2019 – INDEPENDENT APPEALS PROCESS

- Establishes a “right” to administrative appeal generally available to all taxpayers:

The resolution process described in paragraph (3) shall be generally available to all taxpayers. IRC § 7803(e)(4)

- Right is not absolute:
 - Designation of cases as not eligible for referral
 - Parameters for denial of referral following notice of deficiency
 - Written notice:
 - Description of facts
 - Basis for denial
 - Application of the basis to the facts
 - Protest procedures
 - Annual report to Congress

TAXPAYER FIRST ACT OF 2019 – INDEPENDENT APPEALS PROCESS

- Provides easier access to case files for “specified taxpayers”:

In any case in which a conference with the Internal Revenue Service Independent Office of Appeals has been scheduled upon request of a specified taxpayer, the Chief of Appeals shall ensure that such taxpayer is provided access to the nonprivileged portions of the case file on record regarding the disputed issues (other than documents provided by the taxpayer to the Internal Revenue Service) not later than 10 days before the date of such conference. IRC § 7803(e)(7).

TAXPAYER FIRST ACT OF 2019 – INDEPENDENT APPEALS PROCESS

- Sets forth rules for access to Staff of Office of the Chief Counsel:

The Chief of Appeals shall have authority to obtain legal assistance and advice from the staff of the Office of the Chief Counsel. The Chief Counsel shall ensure, ***to the extent practicable***, that such assistance and advice is provided by staff of the Office of the Chief Counsel ***who were not involved in the case*** with respect to which such assistance and advice is sought and ***who are not involved in preparing such case for litigation***. IRC § 7803(e)(6)(B).



OVERVIEW OF IRS APPEALS



OVERVIEW OF IRS APPEALS

- The Appeals mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to the IRS & taxpayer and in a manner that will enhance voluntary compliance. IRM 8.1.1.1(1).
- Appeals accomplish its mission by ensuring Appeals:
 - i. Acts in accordance with the Taxpayer Bill of Rights (TBOR).
 - ii. Provides a “prompt” conference and decision. IRM 8.1.1.1(2).

OVERVIEW OF IRS APPEALS

- Appeals must apply a “hazards of litigation” standard in resolving each case—i.e., what would the result be if the matter went to court.
- Unlike Exam, Appeals can enter into settlements based on a percentage or stipulated amount of tax in dispute (i.e., 70/30, etc.) based on hazards of litigation. IRM 8.6.4.1.2.
- When there is substantial uncertainty in the event of litigation, Appeals may settle based on mutual concessions. IRM 8.6.4.1.1.
- No nuisance settlements permitted for either party (i.e., 15% to go away). IRM 8.6.4.1.3.



OVERVIEW OF IRS APPEALS

- Penalty issues are not “traded” in Appeals—resolution must be based on hazards. IRM 8.6.4.1.3. In such case, reasonable cause should be demonstrated with declaration from tax advisor.
- Most Appeals cases are resolved based on basis of facts and authority relevant to the applicable tax year at issue. Any settlement would have no impact on future years.
- Where settlements involve basis of property, category of income, or amount of income from installment sales, a closing agreement or collateral agreement may be requested to incorporate impact on later years. IRM 8.6.4.1.8.

OVERVIEW OF IRS APPEALS

- At the end of an unagreed audit, Exam will either:
 - i. issue a statutory notice of deficiency (SNOD) under IRC 6212, or
 - ii. issue “30-day letter” with the Revenue Agent’s Report (RAR).
- Upon receipt of 30-day letter, the taxpayer may ask Exam to issue the SNOD, still preserving appeals rights (with only limited exceptions).
- Taxpayer may also submit a protest in response to the 30-day letter. Reg. 601.105(d).



PROCEDURES FOR UNCOMMON CASES HEARD BY IRS APPEALS



IRS APPEALS GUIDANCE ON BBA

- The new Bipartisan Budget Act of 2015 (BBA) partnership audit procedures apply for tax years after 2017.
- Unlike TEFRA, the new partnership audit regime generally provides for determination of adjustments, assessment, and collection of tax attributable to such adjustments at the partnership level.
- The preamble to the final BBA regulations states that Appeals consideration would come prior to the mailing of a NOPPA. Thus, Appeals would be able to consider substantive partnership issues.
- In March, 2019, the IRS issued guidance to Appeals on resolving partnership cases coming under the BBA.



IRS APPEALS GUIDANCE ON BBA

- BBA cases are Appeals Coordinated Issues & need 365 days left on statute.
- The Appeals TEFRA teams will handle BBA cases.
- A qualified partnership with 100 or fewer partners may elect out of the BBA. If that occurs, IRS guidance states Appeals should follow IRM 8.19.9 “Non-TEFRA Procedures.”

APPEALS DOMESTIC & INTERNATIONAL OPERATIONS

- Appeals Domestic & International Operations (DIO) attempts to ensure nationwide uniform and consistent settlement of issues. IRM 8.7.3.1.
- DIO reviews:
 - i. Compliance Coordinated Cases (CCI)
 - ii. Appeals Coordinated Issues (ACI)
 - iii. Appeals Emerging Issues (EM)
 - iv. Abusive Tax Avoidance Transactions.
- As of May, 2018, items (ii) & (iii) are now combined to be ACI.
- The Appeals International Program provides coordination and expertise for international issues and “economist” issues in Appeals. *Id.*

APPEALS DOMESTIC & INTERNATIONAL OPERATIONS

- An ACI is an issue with Service-wide impact, requiring coordination to ensure uniformity & consistency nationwide. IRM 8.7.3.2.2. Usually industry-wide or IRS perceives as tax avoidance scheme.
- An EM is an issue that has surfaced, not coordinated, but may be in proposed coordination stage. IRM 8.7.3.2.3.
- Technical specialists develop Appeals settlement guidelines (ASGs) for CCIIs and ACIs. *Id.*
- The Appeals Settlement Guidelines are published on IRS website under “Appeals Settlement Guidelines.” Issues include basis shifting transactions, contingent liability, & transfer of stock options to related person.

COMPETENT AUTHORITY & IRS APPEALS

- The mutual agreement procedure in tax treaties grant taxpayers the right to request U.S. competent authority (US CA) assistance when taxpayer may be subject to taxation not in accordance with treaty.
- US CA will try to resolve competent authority issues through consultation with foreign competent authorities, or unilaterally. Rev. Proc. 2015-40, p. 12.
- The two IRS offices to which a taxpayer may present a U.S.-initiated action for administrative review of competent authority issues are IRS Appeals & U.S. Competent Authority (US CA).
- Competent authority issues accepted by US CA can not be concurrently reviewed by Appeals. Rev. Proc. 2015-40, p. 42.

COMPETENT AUTHORITY & IRS APPEALS

- For a competent authority issue at Appeals, US CA will decline assistance unless taxpayer severs the issue from its protest and timely files request. Rev. Proc. 2015-40, p. 44.
- A taxpayer that initially presents competent authority issues to Appeals may request US CA assistance if the taxpayer: (i) files request within 60 days of opening conference; (ii) the request shows the issue has been severed from protest; (iii) no ADR requested; and (iv) no closing agreement, Form 870-AD, or similar agreement on the competent authority issue. Rev. Proc. 2015-40, p. 46.
- Taxpayer may, however, request simultaneous appeals procedure (SAP) whereby Appeals works jointly with US CA and taxpayer toward development of US position.

COMPETENT AUTHORITY & IRS APPEALS

- In summary, do not (unintentionally) go down the path with Appeals and lock yourself out of competent authority relief.
- For example, if the taxpayer has any issues involving permanent establishment, transfer pricing, or any other issue that could result in double taxation, taxpayers want to consider how to get competent authority assistance while in Appeals on other issues.



APPEALS JUDICIAL AND CULTURE (AJAC) PROJECT

APPEALS JUDICIAL AND CULTURE (AJAC) PROJECT

- The AJAC Project clarifies the distinction between the role of Compliance (Exam) and Appeals.
- AJAC emphasizes a quasi-judicial approach so that Appeals officers can focus on their core mission: ***fair and impartial decision-making free from influence.***
- AJAC asserts taxpayers must fully address issues with Exam and only come to Appeals when reached an impasse (versus “surviving an exam” in order to get to Appeals for a resolution).
- AJAC focuses on two items: fully developed issues & independence.

APPEALS JUDICIAL AND CULTURE (AJAC) PROJECT

- Appeals will settle, rather than remand, an undeveloped case.
- Appeals will not raise new issues. IRM 8.6.1.6.
- No new issue can be raised by Exam during the Appeals process.
- A taxpayer can raise a new issue, but Appeals will remand the issue to Exam for development who may issue new IDRs. IRM 8.6.1.6.1.
- Either party may rely on new legal authority for their position as well as raise new theories and new legal arguments.
- Counsel may raise a new issue when reviewing the SNOD. *Id.*

PREPARATION FOR APPEAL

- Plan for IRS appeal when know exam issue going unagreed, but no later than issuance of draft NOPA.
- Review IDR responses—need to supplement?
- Avoid raising new issue or providing new information at Appeals by sharing with Exam at least by Protest.
- What issues to concede & when? One determination or two?
- Acknowledgement of Facts (AOF) IDR: ignore or utilize?

ACKNOWLEDGMENT OF FACTS (AOF) IDR

- Relatively recent process.
- AOF IDR should contain the facts and documents, and possibly mixed legal and factual issues, that are not in dispute at the end of an unagreed exam.
- **Goal:** only fully-developed issues proceed to Appeals & so the parties should be able to agree to relevant and undisputed facts and documents.
- The AOF IDR is often ignored by taxpayers who are going to Appeals as the IDR is not enforceable by summons.
- In certain instances, a well-developed AOF IDR could assist in the Appeals conference that includes Exam.

AOF IDR – Language from Pro-Forma IDR (IRM Exhibit 4.46.4-3)

The purpose of this [AOF IDR] is to ***ensure that all relevant facts necessary to arrive at an accurate tax determination have been identified and considered before the Form 5701, Notice of Proposed Adjustment, is issued.*** Responding to this IDR presents the taxpayer an opportunity to provide additional relevant facts and may lead to the resolution of the issue at the examination level.

Another potential benefit of a thorough response to this IDR is preventing a delay in your case should it be returned from Appeals. ***The presentation of new facts in Appeals generally will require that the case be returned to Examination.*** Therefore, it is beneficial to ensure that all relevant facts are provided to the LB&I issue team before the Form 5701 is issued. Taxpayers are not prevented from providing additional facts in their written protest or in Appeals, but the expectation is that all relevant facts will be presented during the audit so that LB&I can make an accurate tax determination. ***While the interpretation of the law or the amount of the proposed adjustment may be unagreed, all relevant facts should be included in the attached draft Form 886-A.***

AOF IDR – Language from Pro-Forma IDR (IRM Exhibit 4.46.4-3)

Additional Information

The issue manager has the responsibility to ensure that any additional or disputed facts are appropriately considered and will ensure the response is reviewed timely. Any specific concerns raised will be discussed before a final Form 886-A, Explanation of Items, is prepared.

This AOF IDR is not subject to the IDR enforcement process; however, the response or lack of response to the IDR will be referenced as part of the final Form 886-A when the Form 5701, Notice of Proposed Adjustment, is issued. It is the taxpayer's responsibility to ensure all relevant facts have been identified and presented to support the tax position taken on their return. For additional guidance see IRM 4.46.4.10 and IRM 8.6.1.6.5, Taxpayer Provides New Information.

AOF IDR – RESPONSE

- Whether to respond?
- When to respond, i.e., before or after NOPA?
- How to respond?
 - Facts; not legal arguments unless mixed matters of fact and law
 - Characterization of facts
 - ***Missing relevant facts***
 - Good faith errors; further investigation; and changes in IRS theories of adjustment

ACKNOWLEDGMENT OF FACTS (AOF) IDR

- AOF IDR should contain all undisputed, relevant facts of both parties.
- If examiner fails to incorporate taxpayer's undisputed facts and documents, taxpayer should consider elevating issue.
- AOF IDR could be comprehensive if the parties took a quasi-stipulation of facts approach. Under Tax Court Rule 91:

The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents ... and all evidence that should not be in dispute.



PATH TO APPEALS: DOCKETED OR NON-DOCKETED

DOCKETED OR NON-DOCKETED PATH TO APPEALS

- Going to Appeals through a protest or after petition filed in Tax Court may turn on these considerations:
 - i. Desire to complete administrative process.
 - ii. Wish to avoid litigation at all cost.
 - iii. How well developed the SNOD would be after audit.
 - iv. Need for involvement by counsel to show hazards of litigation to Appeals.
 - v. Desire to develop your case further.

STATUTE EXTENSIONS IN NON-DOCKETED CASE

- Exam may ask for statute extension if taxpayer plans to go to Appeals via Protest. See Form 872.
- Consider whether taxpayer should give Exam extension **only** to provide adequate time for Appeals process and not to extend Exam.
- Taxpayer should confirm in writing the reason for the granting of the extension.

GOING TO APPEALS IN A DOCKETED CASE

- Taxpayers may forego protest route and demand SNOD. IRC 6212.
- In that case, taxpayer files petition in U.S. Tax Court. IRC 6213.
- As taxpayer has not exhausted appeal rights, taxpayer should still be able to obtain Appeals consideration. See Rev. Proc. 87-24.
- Timing of appeals process is limited & docketed cases are priorities.
- After the filing of petition, Appeals *generally* has exclusive jurisdiction to settle case for 4 months (prior to receipt of trial calendar). Reg. 601.106.
- Letter brief submitted to Appeals and could be shared with IRS counsel.
- Tax Court discovery & other deadlines still imposed without continuance

GOING TO APPEALS IN A DOCKETED CASE

- Counsel can determine an issue should not be considered by Appeals. IRM 8.4.1.4.
- If IRS raises new issue after SNOD, IRS has the burden of proof and Appeals must take that into account. IRM 8.4.1.15.3.
- If the taxpayer raises a new issue, Appeals informs Counsel and without returning the issue to Exam, reviews the issue for hazards. *Id.*
- Appeals prepares all computations for settled cases. IRM 8.4.1.18.



EX PARTE COMMUNICATIONS

- Appeals may not participate in ex parte communications with other IRS functions to the extent such communications appear to compromise the independence of Appeals. Rev. Proc. 2012-18.
- Prohibited ex parte communications include those communications, without the involvement of the taxpayer, that go beyond ministerial discussions. IRM 8.1.10.1.5.
- The communications are not ex parte if taxpayer was given the opportunity to participate, but declined. IRM 8.1.10.2, 8.1.10.5.

EX PARTE COMMUNICATIONS

- Ex parte communications not prohibited include:
 - i. ministerial discussions (i.e., database inquiries, number of related cases, calculations, status of case),
 - ii. discussions among Appeals employees,
 - iii. discussions with IRS employees other than the “originating functions” (i.e. Exam),
 - iv. communications with other government entities,
 - v. communications if taxpayer given opportunity to participate (& confirmed), and
 - vi. legal advice from Counsel (which Appeals can ignore).

Rev. Proc. 2012-18.

EX PARTE COMMUNICATIONS

- Examples of prohibited ex parte communications include:
 - i. discussion with Exam on accuracy of facts by taxpayer,
 - ii. discussion about merits or alternative legal interpretation of authorities in protest or in RAR,
 - iii. discussions regarding Exam's perception of credibility of taxpayer and/or representative,
 - iv. discussions regarding level of cooperation by taxpayer during exam,
 - v. discussions whereby Exam advocates for a particular result.

Rev. Proc. 2012-18.



EX PARTE COMMUNICATIONS

A confirmed ex parte communication gives the taxpayer no substantive rights (i.e., issue concession, etc.).

Once ex parte communication is discovered, Appeals must notify taxpayer & give the taxpayer opportunity to respond and participate in possible remedy.

A remedy to “cure” an ex parte communication includes: (i) sharing the ex parte communications with the taxpayer, (ii) reassigning the case to new Appeals officer, and/or (iii) allowing the taxpayer to provide response to the ex parte communications.



THE PROTEST



PROTEST IN NON-DOCKETED CASE

- The protest should be prepared taking the following into consideration:
 - Know your audience.
 - A protest is a persuasive “brief” & Exam will prepare written rebuttal.
 - One page summary.
 - Hazards of litigation standard.
 - Facts should be supported by documentation and/or declaration.

PROTEST IN NON-DOCKETED CASE, CONT.

- The protest should be prepared taking the following into consideration:
 - Appeals may not have all documents & information from exam.
 - You will see Exam again at the conference.
 - Incorporate AOF IDR responses and/or RAR concessions.
 - But, can raise affirmative issues. IRM 8.6.1.6.4.
 - Appeals will prepare appeals case memo (ACM). IRM 8.6.2.

PROTEST IN NON-DOCKETED CASE, CONT.

- ACM contains 4 parts (IRM 8.6.2.2.1):
 - *Summary and Recommendation*: The first section that summarizes the issue and the recommendation. This section should “contain enough information to cover all the most important matters, yet still be concise enough that the reader doesn’t feel bogged down in details.”
 - *Brief Background*: Optional section used to describe general info on entire issue. Think of this section as a way to give the reader *just the basic facts*.
 - *Discussion and Analysis*: This is the main section for a detailed discussion of the issue. “In a complex issue discussion, good structure is essential.”
 - *Evaluation*: Serves as recap of the relevant factors and the weight assigned to each. This section illustrates the settlement rationale and important on complex issues & those with hazards of litigation settlements.

PROTEST IN NON-DOCKETED CASE, CONT.

- Incorporated into the ACM is also the following (IRM 8.6.2):
 - Information that explains and supports basis for settlement.
 - Any follow up action for Compliance personnel. See IRM 8.6.2.8.
 - Information for Counsel to prepare for trial and & settlement proposal.
 - Discussion (as deemed appropriate) about material received during Appeals' consideration. See IRM 8.2.1.7.2.
 - Separately frame each new issue raised by the taxpayer.
 - Address the taxpayer's position, the government's position, and Appeals' analysis and final determination, including including "*review and concurrence*" requirement and management approval.



PRE-CONFERENCE CALL

STRATEGIES FOR THE PRE-PLANNING CONFERENCE CALL

- The Appeals team should set up a pre-conference planning call to lay out the ground rules for the opening conference. IRM 8.7.11.7.3.
- The taxpayer should take a proactive approach to the pre-conference call.
- The call will discuss the issues that will be addressed at the conference, the taxpayer's protest and Exam's rebuttal, as well as administrative rules. IRM 8.7.11.8.1.

STRATEGIES FOR THE PRE-PLANNING CONFERENCE CALL

- For purposes of the pre-conference call, the taxpayer should:
 - i. Confirm who will be in attendance at the conference.
 - ii. Confirm how the Appeals team plans to conduct the conference—i.e., opening statements, each party make presentation, rebuttal, etc.
 - iii. If Appeals has no *set* process, the taxpayer should suggest opening statements, presentations (need screen), rebuttal, resolving whether new issue raised by Exam, and resolving unagreed material facts.



IRS APPEALS CONFERENCE

THE APPEALS CONFERENCE

- On May 1, 2017, Appeals implemented an initiative (2017 Initiative) in which Appeals Team Case Leaders (ATCLs) will hold Appeals conferences with Exam teams in attendance. *“Appeals Team Cases Conferencing Initiative”*, irs.gov (2017).
- The Manual now states Appeals has discretion to invite IRS Counsel and/or Exam to the Appeals conference. IRM 8.6.1.4.4.
- Ex parte communication prohibitions must not be violated, but generally not with taxpayer present. Rev. Proc. 2012-18.
- Appeals can also ask other experts for Exam or the taxpayer to attend the conference.



THE APPEALS CONFERENCE

- The goal of the 2017 Initiative is to “improve conference efficiency, reach case resolution sooner, and offer earlier certainty for issues in future years.”
- The 2017 Initiative relies on both parties participating in joint discussions to identify and narrow factual and legal differences, to assist Appeals in evaluating hazards of litigation.
- According to the 2017 Initiative, the insight all parties may gain from an open discussion of positions could facilitate resolution of the same issues in subsequent audit cycles.

THE APPEALS CONFERENCE

- The 2017 Initiative states that, even though the taxpayer has already met with Exam, all parties “actively participate [in the conference] to ensure a full understanding of any factual disagreements and the parties’ legal positions.”
- Through active participation, Appeals will “more rapidly focus on the most significant aspects of the dispute and aid in Appeals’ evaluation of the hazards of litigation.”
- However, Exam will be asked to leave before settlement discussions begin, unless the taxpayer consents.



THE APPEALS CONFERENCE

- The advantage to Exam remaining in the room once settlement discussions begin is to help with the resolution of future audit cycles and if Exam adopts a settlement option, so too should Appeals.
- The disadvantages include Exam could hinder any settlement and challenge any settlement options presented by the taxpayer.
- If Exam remains in the room, taxpayer should ask for follow-up conference if little accomplished in initial conference.

IRS APPROACH TO APPEALS CONFERENCE: TRANSFER PRICING EXAMINATION PROCESS (TPEP)

- In 2018, LB&I released the “Transfer Pricing Examination Process” or TPEP.
- TPEP addresses how Exam should assist in preparation with the Appeals process. See *TPEP Publication*, irs.gov (8-2018).
- Under TPEP, Exam’s issue team will begin preparing the pre-Appeals presentation “***immediately after***” closing the case.
- After the case has been assigned, TPEP states the issue team should:
 - Request a pre-Appeals conference using Forms 3198 and 4665;
 - Contact the Appeals Officer and request examination’s presence at the taxpayer’s portion of the presentation; and
 - ***Hold mock presentations to prepare for the pre-conference meeting.***

STRATEGIES FOR THE APPEALS CONFERENCE

- Depending on the methodology utilized by the ATCL, the Appeals conference is now an arbitration or a mediation.
- Taxpayers should consider the following strategies:
 1. Do not ignore the Acknowledgement of Facts (AOF) IDR; rather utilize it to reduce disputed issues.
 2. Scrutinize who goes to the conference based on: (i) mediation/litigation skills, (ii) whether the exam was contentious, (iii) will taxpayer with extensive knowledge be asked substantive questions or asked to settle.
 3. Do mock conference/presentation.

STRATEGIES FOR THE APPEALS CONFERENCE

- At the conference, taxpayers should consider these approaches:
 - Bring decision maker to the conference ... unless you shouldn't.
 - Make opening statement with slides. Invite response by Exam.
 - Listen to Exam—new issues? Incorrect statement of facts?
 - Bring all relevant documents at issue.
 - Have multiple methods for resolution.
 - What does Exam really want?
 - Prepare summary after conference to Appeals.



POST-APPEALS MEDIATION

POST-APPEALS MEDIATION: OVERVIEW

- Mediation is a nonbinding ADR process that fosters dispute resolution without a trial by allowing a neutral mediator to assist parties in negotiating a settlement that addresses the interests of each party.
- Useful tool after unsuccessful negotiations with Appeals.
- But both parties must be willing to appreciate true hazards of litigation.
- Most successful when process looks and feels like mediation in non-tax civil litigation matters.

POST-APPEALS MEDIATION – OVERVIEW

- Rev. Proc. 2014-63 provides guidelines for mediation procedure, updating Rev. Proc. 2009-44.
- Rev. Proc. 2014-63 consolidates mediation procedures for exam and collection cases.
- Post-Appeals mediation involves the taxpayer, IRS Appeals officer (& manager) who handled the appeals process, an (unrelated) IRS Appeals Officer serving as mediator, and possibly an independent mediator.
- Actual mediation usually limited to one day.

POST-APPEALS MEDIATION: SHOULD I STAY OR SHOULD I GO?

- Mediation is usually advantageous when:
 1. Both parties agree;
 2. Parties have negotiated in good faith and resolved legal & factual issues;
 3. One or only a few issues, including weighing of evidence or legal authority, remain that could resolve the case; and
 4. Litigation for both parties is unpredictable and should be avoided.

POST-APPEALS MEDIATION: MISPERCEPTIONS

- The most common misperceptions of mediation are:
 1. Mediation is always an option.
 2. Mediation is a waste of time if parties too far apart (i.e., tax adjustment).
 3. The IRS Appeals Officer serving as mediator will always side with the IRS during negotiations.
 4. Only IRS Appeals Officers can serve as mediators.
 5. Mediation is just another Appeals conference.

SUMMARY

1. Complete unagreed exam with Appeals process in mind.
2. Decide at end of exam when & how to go to Appeals. One size does not fit all cases.
3. Structure the appeal in light of the AJAC project.
4. Prepare protest or letter brief with ACM in mind.
5. Proactively plan for the opening conference.



Any presentation by a Jones Day lawyer or employee should not be considered or construed as legal advice on any individual matter or circumstance. The contents of this document are intended for general information purposes only and may not be quoted or referred to in any other presentation, publication or proceeding without the prior written consent of Jones Day, which may be given or withheld at Jones Day's discretion. The distribution of this presentation or its content is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of Jones Day.