If at First You Don't Succeed, Try Appeals Mediation

By Maxine Aaronson and Steven C. Salch

The IRS has adopted a number of mediation and alternative dispute resolution programs in response to a 1998 Congressional mandate. Maxine Aaronson and Steven Salch present a table identifying and comparing the post-examination programs available to taxpayers.

Practitioners seeking to resolve tax controversies prior to trial now have multiple ways to accomplish this goal. One increasingly popular option is through the use of what are known as alternative dispute resolution techniques. Code Sec. 7123, enacted as part of the Tax Reform Act of 1998, requires the Secretary of the Treasury to adopt mediation and arbitration programs at the Internal Revenue Service. In response to this directive, the IRS has adopted a number of alternative dispute resolution programs. The accompanying chart identifies the post-examination programs available to taxpayers and compares the salient points of each in a simple and concise manner. It is intended as a guide for tax practitioners to assist them in determining the most appropriate juncture and the most appropriate program for each controversy.

Important differences to note between the processes are the types of cases that can be brought into each, the targeted time frame for resolution once you begin the process, and whether the neutral will be an IRS employee or whether an outside co-mediator is available. In Fast Track Settlement and Fast Track Mediation, the Appeals Officer will typically propose a settlement that the parties can accept or not. The process at Appeals is more facilitative, especially where co-mediators are involved.

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Another important issue is who has control of the case during the process—the Compliance Division or the Office of Appeals. This will have an effect on how you approach the presentation of your case and will also affect the role of the Appeals Officer who is acting in the role of neutral. Ask who will be involved at each stage.

Practitioners should remember that these processes occur while the statute of limitations on assessments is open. Thus, if there are untouched potential adjustments that will increase tax liability, the practitioner and client should evaluate the prospect that the latent issue or issues will surface either during a Fast Track process in Compliance or during Appeals consideration or post-Appeals mediation. The downside risk of the assertion of a new issue may outweigh the perceived likelihood of a favorable resolution of the adjustments already proposed.[1]

These processes have been proven effective to resolve cases expeditiously. Appeals reports that for 2006, approximately 90 percent of the cases that were the subject of a Fast Track Settlement process at LMSB were resolved as a result of FTS, with an average time to close of 100 days.[2] The SB/SE Fast Track Settlement program is a pilot program initially rolled out as a test program in three cities (Chicago, Houston and St. Paul). The IRS anticipates extending the SB/SE program nationwide in Spring 2007.[3] On the other end of the spectrum, and consistent with what one would expect of cases further down the road to litigation, Post Appeals Mediation has a lower resolution rate, ranging from 45-60 percent depend-

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APPEALS MEDIATION POCKET GUIDE

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Note: The following types of issues are generally excluded from all processes:

Those designated or considered for designation for litigation; those in the Competent Authority process, issues with potential for whipsaw; those covered by closing agreements, *res judicata* or controlling Supreme Court precedent. If any issue in the case is not eligible, the entire case is not eligible for these programs.

	Fast Track Settlement (LMSB and SBSE, may be available for TEGE)	Fast Track Mediation (SBSE)	Fast Track Mediation (Tax Exempt Bond)	Appeals Mediation
Authority:	Rev. Proc. 2003-40, IRB 2003-25, 1044, 2003-1 CB 1044 (LMSB); Announcement 2006-61, IRB 2006-36, 390 (SBSE and limited TEGE)	Rev. Proc. 2003-41, IRB 2003-25, 1047, 2003-1 CB 1047	Announcement 2003-36, IRB 2003-25, 1093, 2003-1 CB 1093	Rev. Proc. 2002-44, IRB 2002-26, 10, 2002-2 CB 10
Neutral:	IRS Appeals Personnel only	IRS Appeals Personnel only	IRS Appeals Personnel; Non-IRS Co-Mediator at issuer's expense	IRS Appeals Personnel; Non-IRS Co-Mediator at taxpayer's expense
Additional excluded issues:	LMSB FTS - None; SBSE FTS- Collection Appeals, CDP, OIC, and Trust Fund Recovery cases, correspondence audits, TEFRA partnership cases	Docketed cases (use Chief Counsel Mediation program instead); conflicts between courts of appeal; campus and correspondence audits; ACS cases; Collection Appeals (CDP and OIC are eligible); methods of accounting; Technical Advisor Program and Appeals Technical Guidance Program cases	Docketed cases, cases where proposed adverse determination letter is already issued	Docketed cases (but see CCDM (35)2(20)0 regarding the Chief Counsel Mediation program; see also IRM 35.5.5); collection cases
Time to Request:	LMSB: After issuance of Form 5701, Notice of Proposed Adjustment and taxpayer's written response but before the first 30 day letter issues SBSE: At any time after the issues have been fully developed and preferably before a 30 day letter has issued	Conclusion of examination	After issuance of preliminary adverse determination letter and issuer's written response	After Appeals has considered the issue and failed to reach an agreement with the taxpayer
Length of process:	LMSB: 120 days SBSE: 60 days	30-40 days	60 days	60 days
Jurisdiction:	Compliance	Compliance	Compliance	Appeals

Other available ADR options:

Appeals Arbitration - *see* Rev. Proc. 2006-44, IRB 2006-44, 800, which makes permanent the test arbitration project at Appeals. *See also* IRS News Release, IR 2006-163, October 18, 2006. Arbitration at Appeals is limited to arbitration of factual issues only.

ing on the year.[4] With that level of success on the toughest cases, practitioners should always consider Post Appeals Mediation for cases that have failed to resolve through the regular Appeals process.

One often overlooked benefit of these processes may be the reality check that they provide, on both sides of the table. The ability of the neutral to validate the risks previously set forth by counsel should not be overlooked. This is especially true where co-mediators are used, but the phenomenon occurs with government mediators as well. Indeed, sometimes just asking to use one of these processes can have a positive effect

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on how the other side perceives your case. Requesting an ADR process can force an honest evaluation of the hazards of litigation because of the various levels of consent within the IRS that must be obtained before the government agrees to participate.

Perhaps the best part of these processes is their iterative nature. They are not mutually exclusive and were in fact designed to allow taxpayers to use more than one of them to resolve all or a portion of the dispute at different times in the life-cycle of the case. In short, you can take multiple bites of the proverbial apple. Tax cases are somewhat unique in that they frequently contain a number of unrelated issues that are grouped together in the case solely due to the fact that they were reported on the same return. Even if trial is inevitable on some issues, settling the rest of the issues before trial reduces risk and that is a service to the client. If our job is to get the best result for the client at the earliest possible time and at the least possible cost, the broad array of alternative dispute resolution techniques are tools we all can use.

Endnotes

[1] In such cases, the best strategy may be to pay the tax and file a refund claim shortly before the expiration of the statute of limitations. Note, however, the practitioner's ethical obligations to the client regarding undisclosed errors or omissions under Circular 230.

[2] Remarks of Sarah Hall Ingram, Chief, Appeals Division, speaking to the Administrative Practice Committee of the American Bar Association Section of Taxation, October 20, 2006.

[3] *Id.*

[4] *Id.*

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