

MSP #7 APPEALS: The Inclusion of Chief Counsel and Compliance Personnel in Taxpayer Conferences Undermines the Independence of the Office of Appeals

RESPONSIBLE OFFICIAL

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TAXPAYER RIGHTS IMPACTED¹

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PROBLEM

The Office of Appeals' (Appeals) emphasis on including Counsel and Compliance in certain conferences fundamentally alters the role of Appeals and runs counter to the congressional priority of an independent Appeals process.² Currently, Appeals is not gathering sufficient quantitative and qualitative data to adequately evaluate the success of a pilot program to study the effects of this inclusion. However, anecdotal reports of tax practitioners participating in the pilot validate the National Taxpayer Advocate's prior reservations about the involvement of Counsel and Compliance in conferences.³

IMPACT ON TAXPAYERS

The Participation of Counsel and Compliance in Certain Appeals Conferences Fundamentally Alters the Role of Appeals and Runs Counter to an Independent Appeals Process

Beginning in October 2016, Appeals undertook a concerted effort to expand the participation of IRS Counsel and Compliance personnel in appeals conferences.⁴ In May 2017, Appeals expanded this approach with a pilot initiative designed to make the inclusion of representatives from the Large Business and International (LB&I) examination audit team a matter of "routine," without requesting taxpayer

- 1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).
- 2 The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, Title III, Subtitle E, § 3465(b) (July 22, 1998). This priority was recently reinforced by Congress when it established Appeals as an independent organization within the IRS. Taxpayer First Act, Pub. L. No. 116-25, §1001, 133 Stat. 981 (2019). As stated by one member of Congress, "I am proud that the Taxpayer First Act also includes a provision that I had in my bill that I introduced with a Republican colleague, Jason Smith, the Preserving Taxpayers' Rights Act. This provision establishes an independent office of appeals within the IRS and gives taxpayers a legal right to impartial, timely, and efficient dispute resolution." H.R. REP. Vol. 165, No. 61 (2019) (statement of Rep. Sewell). See also H.R. REP. No. 116-39, pt. 1, at 29 (2019).
- 3 These reservations, which were shared by the National Taxpayer Advocate, were discussed in the National Taxpayer Advocate 2017 Annual Report to Congress 203-210 (Most Serious Problem: *Appeals: The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*).
- 4 Internal Revenue Manual (IRM) 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016).

consent.⁵ This pilot, which applies to large cases run by Appeals Team Case Leaders (ATCLs), negatively impacts affected taxpayers and does not give taxpayers the ability to object to the inclusion of others in the Appeals conference.⁶ Currently, smaller cases are excluded from the pilot, and Appeals has indicated that it has no plans to expand coverage of the program to these cases.⁷ Nevertheless, Appeals will not rule out inclusion of Counsel or Compliance in specific smaller cases if Appeals believes that such participation will be beneficial.⁸

By definition, Appeals cases arise only when taxpayers and Compliance reach an impasse.⁹ Appeals' mission is to facilitate resolution of these cases on a basis that is fair and impartial to both taxpayers and the IRS.¹⁰ In order to minimize litigation and maximize future tax compliance, taxpayers must feel that they have had the opportunity to effectively present their cases in an independent and unbiased venue.¹¹

Prior to the 2016 guidance changes, Counsel and Compliance were typically granted their say via the case file and a pre-conference, if the case was particularly large or complex.¹² The Appeals conference itself generally was devoted to presentation of the taxpayer's case and settlement negotiations between the taxpayer and the Appeals Technical Employee (ATE). Counsel and Compliance rarely attended such conferences, leaving taxpayers and ATEs free to develop rapport, seek common ground, and pursue case resolution.¹³

Appeals' new emphasis on including third parties, however, allows Counsel and Compliance to reiterate and even expand their positions, converts Appeals to a more adversarial forum, and limits negotiation between taxpayers and ATEs.¹⁴ As one practitioner observed, "Adding IRS employees to the Appeals conference turns the Appeals conference into more of a trial setting as opposed to the historic conduct of most Appeals conferences."¹⁵ Appeals finds authority for this approach within the Internal Revenue Manual — guidance that Appeals itself created.¹⁶

Counsel and Compliance are not technically a party to the actual settlement discussions, which occur near the conclusion of the conference.¹⁷ Nevertheless, when Counsel and Compliance are given an opportunity to present an oral argument setting forth their case, this inevitably drives taxpayers and

5 IRS, Appeals Team Cases: All Parties Conferences, <https://www.irs.gov/pub/irs-utl/atclfaqs.pdf> (last visited Nov. 20, 2019).

6 ATCLs manage a team of Appeals Officers who together conduct an appeal for the often-complex cases that originate in the LB&I operating division. IRM 8.7.11.3, Appeals Team Case Leader (ATCL) Position (Sept. 4, 2018).

7 Appeals response to TAS fact check (Oct. 18, 2019).

8 *Id.*

9 Appeals response to TAS information request (June 9, 2017), Tab 3. This category of cases is known as nondocketed Appeals. The other category, docketed Appeals, consists of cases that bypass Appeals on their way to the U.S. Tax Court and then are remanded to Appeals for further consideration.

10 IRM 8.1.1.1, Accomplishing the Appeals Mission (Oct. 1, 2016).

11 Congress recently reaffirmed the importance of an unbiased and objective administrative appeal for taxpayers and enacted provisions to facilitate and protect this independence. See Taxpayer First Act, Pub. L. No. 116-25, §1001, 133 Stat. 981 (2019).

12 Michael I. Saltzman & Leslie Book, IRS PRACTICE AND PROCEDURE 9.06 (2016); IRM 8.7.11.8.1, Purpose of Pre-Conference Meeting (Mar. 16, 2015).

13 Chelsea Looper-Stockwell, *Sitting Down with Appeals Chief, Donna Hansberry*, APPEALS QUARTERLY NEWSLETTER, Feb. 2017, at 1-2.

14 Under the pilot, Compliance can raise additional arguments or present new information no later than 45 days prior to the conference. *IRS Outlines Procedures for Appeals Conference Program*, 2019 TNT 175-27 (Sept. 9, 2019).

15 Marie Sapirie, *IRS Appeals Chief Clarifies Policy Changes in Open Letter*, 2016 TNT 215-5 (Nov. 14, 2016).

16 See IRM 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016).

17 Appeals response to TAS information request (June 19, 2019).

their representatives to respond in kind.¹⁸ This dynamic fundamentally changes the role of appeals conferences and runs the risk of poisoning the environment for the meaningful dialogue between taxpayers, representatives, and ATEs, which can facilitate resolution.

Further, as TAS cautioned when the pilot was first initiated, inviting Counsel and Compliance to attend conferences makes it difficult for Appeals to serve as an unbiased participant in the case resolution process.¹⁹ Compliance is placed in a position to put pressure on ATEs to adopt and sustain the prior asserted outcome and has an opportunity to directly counter the arguments of taxpayers. Additionally, ATEs may be reluctant to override the views of Counsel when Counsel actually has a seat at the table.²⁰ An ATE may lack the personal confidence or the institutional support necessary to stand firm in exercising independent judgment in the face of opposition from Compliance regarding the strengths and weaknesses of a case, or the assessment of Counsel regarding hazards of litigation.²¹ By inviting these parties to conferences as a routine matter, Appeals is undermining its own independent mechanisms for case resolution.

In order to minimize litigation and maximize future tax compliance, taxpayers must feel that they have had the opportunity to effectively present their cases in an independent and unbiased venue.

Additional IRS participants cannot help but alter taxpayers' perceptions of the proceedings and the fairness of the outcomes. Taxpayers may not feel they are going before an objective and unrelated party to seek a resolution to their cases; instead, it may seem that they are simply continuing their disagreements with the IRS as an institution, this time with an extra party or two added to the conversation. Such an appearance is a far cry from the independent arbiter envisioned by the IRS Restructuring and Reform Act of 1998: "With this legislation, we require the agency to establish an independent Office of Appeals — one that may not be influenced by tax collection employees or auditors."²²

Congress reiterated this desire and created the institutional structure necessary to safeguard the availability of objective appeals for taxpayers when it passed the Taxpayer First Act, which was signed into law in July 2019.²³ In establishing Appeals as an independent function within the IRS reporting directly to the Commissioner, Congress recognized that Appeals is taxpayers' last, and sometimes best,

18 Nina E. Olson, *Appeals Should Facilitate Mutual Respect and Trust by Allowing Taxpayers a Choice in the Expanded Participation of Counsel and Compliance in Appeals Conferences*, NTA BLOG, (June 21, 2017), <https://taxpayeradvocate.irs.gov/news/appeals-should-facilitate-mutual-respect-and-trust-by-allowing-taxpayers-a-choice-in-the-expanded-participation-of-counsel-and-compliance-in-appeals-conferences?category=Tax%20News>.

19 National Taxpayer Advocate 2017 Annual Report to Congress 203-210 (Most Serious Problem: *Appeals: The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*).

20 Rev. Proc. 2012-18, § 2.02(3)(b), 2012-10 I.R.B. 455.

21 The National Taxpayer Advocate has previously suggested steps that would enhance Appeals' independence, such as locating at least one Appeals Officer and Settlement Officer in every state, the District of Columbia, and Puerto Rico, and maintaining separate office space and communication facilities from other IRS personnel. National Taxpayer Advocate 2009 Annual Report to Congress 348, 346-350 (Legislative Recommendation: *Strengthen the Independence of the IRS Office of Appeals and Require at Least One Appeals Officer and Settlement Officer in Each State*). This independence could be further strengthened if, as also recommended for TAS, Appeals were provided with an independent Counsel to help Appeals evaluate positions adopted by IRS Counsel. National Taxpayer Advocate 2002 Annual Report to Congress 198 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).

22 RRA 98, Pub. L. No. 105-206, Title III, Subtitle E, § 3465(b) (July 22, 1998); 144 CONG. REC. S7622 (1998) (statement of Sen. Roth).

23 Taxpayer First Act, Pub. L. No. 116-25, §1001, 133 Stat. 981 (2019).

hope to resolve their cases within the IRS.²⁴ Such case resolutions, however, depend on the ability of taxpayers to receive unbiased and objective case reviews from Appeals. Despite this strong affirmation of the need for Appeals' independence, Appeals continues to conduct business as usual and, by emphasizing the inclusion of Counsel and Compliance in conferences, is disregarding the intention of Congress.

The Anecdotal Reports of Tax Practitioners Included in the Pilot Validate Prior Reservations About the Inclusion of Counsel and Compliance in Conferences

Often, parties bring hard feelings developed during the examination into Appeals and they spill over into the proceedings. "Counsel and Compliance just end up arguing across the table with taxpayers and the debate only muddies the waters."²⁵ The impressions and experiences of practitioners participating in the Appeals pilot confirm this contentious relationship. Under the pilot, conferences have become increasingly adversarial and ATEs appear to lack either the ability or the willingness to rein in Counsel and Compliance.²⁶

According to Appeals, a primary goal of the pilot is to increase the efficiency of the proceedings.²⁷ However, the opposite may be occurring. Even though the IRS is hampered by limited resources, conferences conducted under the pilot are extremely large, often involving multiple representatives of Counsel, Compliance, and Appeals, sometimes outnumbering taxpayers and their representatives by a ratio of five to one.²⁸ Moreover, the proceedings are anything but smooth: "Exam often keeps interrupting the taxpayer's presentation and pushing its own points... Counsel and Compliance say whatever they want and stay as long as they want. The ATE looks helpless, like a parent refereeing a fight."²⁹ According to one practitioner, some time savings did occur in a case when a discouraged taxpayer walked out in the middle of an appeal and took the case directly to court.³⁰ Otherwise, some practitioners report that conferences conducted under the pilot are taking longer.³¹

Further, these cases are being resolved in ways that trouble practitioners and that should worry Appeals. According to one practitioner who had several cases in the pilot, "I was not able to reach settlement on a single case where Counsel and Compliance were involved."³² Multiple practitioners report taking pilot cases to both the U.S. Tax Court and the Court of Federal Claims, where they enjoyed significant success in resolving those cases, typically via pretrial settlement.³³

In large part, this failure to resolve cases is attributable to the circumstance that, under the pilot, Appeals loses actual and perceived independence. One practitioner related a scenario in which Counsel, Compliance, and Appeals representatives all had breakfast together immediately before the conference commenced and then went out for lunch together, leaving the taxpayer to wonder about the nature of

24 H.R. REP. NO. 116-39, pt. 1, at 29 (2019).

25 TAS conference call with participants from the American Bar Association (ABA) (May 23, 2019).

26 Stephanie Cumings, *IRS Open to Appeals Pilot 'Ground Rules' Checklist*, 2018 TNT 188-6.

27 Chelsea Looper-Stockwell, *Sitting Down with Appeals Chief, Donna Hansberry*, APPEALS QUARTERLY NEWSLETTER, Feb. 2017, at 1-2.

28 Stephanie Cumings, *Appeals Process Getting Crowded Under New Procedures*, 2018 TNT 150-1; TAS conference call with participants from the ABA (May 23, 2019).

29 TAS conference call with participants from the ABA (May 23, 2019).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* While these favorable outcomes are beneficial for taxpayers, they demonstrate that the cases should have been resolved administratively in the first instance. Moreover, such cases subject both taxpayers and the IRS to unnecessary expenditures and case delays.

the relationships and what was being discussed. Another described a Counsel representative begging the ATE not to provide a favorable settlement.³⁴ Likewise, practitioners have observed that ATEs are unwilling to challenge Counsel's assertions regarding hazards of litigation. Instead, as was explicitly admitted in one case, they seek "buy-in" from Counsel and Compliance regarding the proposed resolution.³⁵ Given this lack of independence, some practitioners included in the pilot are losing confidence in Appeals. "Previously I found Appeals to be very important in helping to avoid Tax Court. Now these conferences are a waste of time and money."³⁶

Appeals has issued guidance that it hopes will reduce these negative experiences and alleviate the continuing concerns of taxpayers and practitioners.³⁷ This guidance outlines the processes, procedures, and general expectations surrounding pilot conferences. While the procedural clarity provided by these guidelines is welcome, the guidelines do not, in and of themselves, guarantee the preservation of Appeals' independence or the protection of taxpayer rights, and only time will tell the extent to which they are effective.

IMPACT ON THE INTERNAL REVENUE SERVICE

Appeals Is Not Gathering Sufficient Data to Adequately Evaluate the Pilot

The pilot was originally designed to run for two years, until May 2019. However, it was extended for a third year through May 2020.³⁸ The primary quantitative datapoints used to evaluate the pilot will be cycle time and average hours per case.³⁹ Given that the pilot has already been running for over two years, TAS sought to obtain an initial look at the efficiency of pilot proceedings by requesting a limited amount of data from Appeals. TAS planned to compare cycle times and hours per case in pilot cases against those measures in traditional ATCL cases. Appeals refused to provide this data, stating, "The ATCL pilot is in process and expected to run through May 2020. At this point, it would be premature to provide the data requested... Appeals will evaluate the results of the pilot following its completion."⁴⁰

Currently, cycle times and case hours are the only quantitative measures that Appeals intends to use to evaluate the effectiveness of the pilot.⁴¹ In order to fully gauge the impact of Counsel and Compliance participation, Appeals should also compare outcome data from pilot cases against the results of traditional ATCL cases. Appeals states that it does not track this information, as, in its view, every case is different and comparisons could be misleading.⁴² Nevertheless, to adequately evaluate the pilot, Appeals, taxpayers, and their representatives must have some way of verifying that taxpayers are not significantly disadvantaged by the inclusion of Counsel and Compliance in conferences.

34 Andrew Velarde, *Appeals May Seek Taxpayer Feedback on Conference Procedures*, 2018 TNT 121-7.

35 TAS conference call with participants from the ABA (May 23, 2019).

36 *Id.*

37 *IRS Outlines Procedures for Appeals Conference Program*, 2019 TNT 175-27 (Sept. 9, 2019).

38 Appeals response to TAS information request (June 19, 2019).

39 Appeals response to TAS fact check (Oct. 18, 2019). Cycle time is defined as the period between when a case is opened in Appeals and when it is closed out of Appeals. "Average hours per case" reflects the time spent on a case by Appeals personnel. Appeals indicates that it also will be considering the results of the Customer Satisfaction Survey distributed to pilot participants. Although potentially valuable, TAS views these results and the data they generate as qualitative, rather than quantitative.

40 Appeals response to TAS information request (June 19, 2019).

41 Appeals response to TAS fact check (Oct. 18, 2019).

42 Appeals response to TAS information request (June 19, 2019).

Notwithstanding Appeals' reluctance to compile and publish even high-level outcome data, this comparative information can be developed and circulated in a way that is meaningful and helpful to taxpayers and their representatives. For example, TAS tracks outcome data from a taxpayer perspective by measuring the percent of cases receiving full or partial relief based on the type of assistance requested by the taxpayer. If taxpayers and their representatives reach the conclusion that Counsel and Compliance participation makes it unduly difficult to obtain relief in their cases, they likely will begin to bypass Appeals and go directly to court, resulting in delayed case resolutions and increased costs for the IRS.

As one way of gaining insight into the impact of Counsel and Compliance participation in appeals conferences, TAS attempted to compare the ratio of statutory notices of deficiency (SNODs) issued in pilot cases versus SNODs issued in ATCL cases between fiscal years 2014 and 2016. While this inquiry does not directly analyze outcome data on an individual case basis, it would provide a useful snapshot of how case resolutions are potentially affected by Counsel and Compliance participation. If, for example, a high proportion of pilot cases conclude with the generation of a SNOD, this data would correspond with and tend to confirm the anecdotal experiences of tax practitioners, discussed above. Appeals has refused to provide TAS with the requested SNOD data.⁴³ Moreover, it does not intend to consider such data when evaluating the pilot.⁴⁴

If the pilot study is to be meaningful, Appeals must rely on quantitative data to assess its results. This means looking not only at efficiency data, such as cycle time and hours per case, but also at statistical measures that would allow taxpayers to know whether they are advantaged, disadvantaged, or unimpacted when Counsel and Compliance attend appeals conferences.

Additionally, the reports received from tax practitioners underscore the need for Appeals to systematically obtain evaluations and comments from taxpayers and tax practitioners whose cases are included in the pilot. Appeals is collecting such comments via a survey, but the information to be sought in that survey and whether the results will be made public have not been disclosed.⁴⁵

Appeals must define its constituency, not just as the IRS and Appeals employees, but also as taxpayers and their representatives. Appeals should take very seriously the opinions of taxpayers and practitioners included in the pilot and distribute the results of the follow-up survey. Doing so would evidence willingness to engage with the tax community and understand all aspects of the current pilot; failure to do so would raise the question of whether Appeals is more concerned with cycle time than with its independence and would run the risk of eroding the foundations of objectivity and trust on which Appeals' success depends.

43 Appeals response to TAS information request (June 19, 2019).

44 Appeals response to TAS fact check (Oct. 18, 2019).

45 Cumings, Stephanie, *IRS Guidelines Provide Insight on Appeals Conference Initiative*, 2019 TNT 175-7 (Sept. 9, 2019); Appeals response to TAS information request (June 19, 2019).

CONCLUSION

The credibility of Appeals hinges on its ability to undertake direct and unbiased settlement negotiations with taxpayers and their representatives. This credibility and the independence of Appeals, bolstered by the recently passed Taxpayer First Act, are undermined by the participation of Counsel and Compliance in appeals conferences. The ATCL pilot is reportedly giving rise to conferences that are contentious, chaotic, lengthier, and that impact taxpayers' ability to resolve their cases without going to court. This hurts taxpayers by forcing them to incur extra costs and delays, and likewise damages the IRS in the long run by generating additional litigation and associated resource burdens. Appeals should carefully consider the negative impact of these unintended consequences potentially flowing from the inclusion of Counsel and Compliance in conferences. Further, when evaluating the pilot, Appeals should examine a range of data and pay careful attention to the comments and experiences of taxpayers and their representatives.

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that Appeals:

1. Compile quantitative data regarding the efficiency and outcomes of pilot proceedings and publish that data when the pilot is complete.
2. Carefully consider and publish the reactions of taxpayers and tax practitioners who participate in the pilot.
3. Regardless of the pilot's outcome, only include Counsel and Compliance in appeals conferences with taxpayers' consent. To the extent taxpayers do not agree to this participation, offer the parties the possibility of nonbinding mediation as a means of resolving or narrowing their differences through collaborative exploration of factual and legal disputes prior to an appeals conference.
4. If the participation of Counsel and Compliance continues after the pilot, restrict this participation to ATCL cases, other than in exceptional circumstances.