

Area of Focus #12 IRS Policies Are Limiting Taxpayers' Access to Quality Appeals

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*

DISCUSSION

A robust administrative dispute resolution program represents an indispensable element of effective tax administration. To the extent successful, it enhances voluntary compliance and inspires public confidence in the integrity and efficiency of the IRS.² A fundamental aspect of the IRS Office of Appeals' (Appeals') mission is to reach mutually acceptable settlements with taxpayers so that the greatest number of cases can be closed without resort to litigation.³ Appeals represents taxpayers' last, and sometimes best, opportunity to negotiate an administrative resolution of their cases. As previously discussed by the National Taxpayer Advocate, however, this role goes unserved and this mission unmet any time taxpayers perceive that their access to a quality appeal has been curtailed.⁴

Accordingly, the National Taxpayer Advocate remains concerned that:

- Appeals continues to limit the availability and geographic proximity of in-person conferences;
- Some Appeals Technical Employees (ATEs) are going through the motions of furnishing appeals in form, while failing to provide quality, substantive case reviews;⁵
- IRS Office of Chief Counsel (Counsel) and Compliance personnel can be invited to participate in Appeals proceedings against the wishes of taxpayers; and
- IRS Counsel can rely on the vaguely defined concept of sound tax administration to deny taxpayers the right to an appeal.⁶

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Internal Revenue Manual (IRM) 8.1.1.1(1), *Accomplishing the Appeals Mission* (Oct. 1, 2016).

3 IRM 8.1.1.1(2), *Accomplishing the Appeals Mission* (Oct. 1, 2016).

4 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem #17: *The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*) 195–202, (Most Serious Problem #18: *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*) 203–210; National Taxpayer Advocate 2016 Annual Report to Congress 203–210; National Taxpayer Advocate 2015 Annual Report to Congress (Most Serious Problem #8: *The Appeals Judicial Approach and Culture Project Is Reducing the Quality and Extent of Substantive Administrative Appeals Available to Taxpayers*) 82–90.

5 Appeals Technical Employee is an umbrella term used to refer to any Appeals employee who is assigned a case for settlement consideration. IRM Exhibit 8.1.1-1, *Common Terms Used In Appeals* (Oct. 1, 2016). See also IRM 8.1.3.3(3), *Appeals Employees Involved in Settling and Processing Appeals Cases* (Oct. 1, 2012).

6 As discussed in more detail below, Counsel has the authority to bypass Appeals while a case is still within IRS jurisdiction (see IRM 33.3.6, *Designating a Case for Litigation* (Aug. 11, 2004)) or to prevent a case from being returned to Appeals once it has gone to tax court (see Revenue Procedure 2016-22, 3.03).

Appeals Continues to Limit the Availability and Geographic Proximity of In-Person Conferences

In October 2016, Appeals adopted a default rule favoring telephone conferences and allowing in-person conferences only under certain defined circumstances.⁷ In response to objections from a range of stakeholders and the National Taxpayer Advocate, Appeals reinstated its prior policy of allowing in-person conferences in field cases.⁸ The National Taxpayer Advocate commends Appeals for responding to stakeholder concerns, but continues to believe that in-person conferences should also be available with respect to campus cases and those who feel their issues will benefit from being heard by an Appeals employee who is geographically proximate to the taxpayer.⁹

The outcry resulting from Appeals' October 2016 guidance points out the importance taxpayers and practitioners place on in-person conferences as a vehicle for the effective and efficient presentation of cases, especially those involving complex factual or legal issues or requiring ATEs to assess the credibility of witnesses. Toward that end, Appeals should not only expand the formal availability of in-person conferences, but also should increase the physical accessibility and geographic proximity of those conferences. A greater presence within the taxpayer community would allow ATEs to better understand and address the local economic and social issues faced by the taxpayers who come before them.¹⁰

The ability of taxpayers to receive a thorough, fair, and unbiased case review at Appeals is essential to the successful functioning of the voluntary tax compliance system.

Appeals could, by leveraging attrition from the campuses, increase staffing in local field offices with ATEs of various grades and designations such that the office could cover cases ranging from Earned Income Tax Credit to itemized deductions to Schedule C controversies.¹¹ This step would not only expand Appeals' geographic footprint and facilitate the accessibility of in-person appeals to taxpayers, but would allow Appeals to implement the call for an ATE permanently located in every state, the District of Columbia, and Puerto Rico currently proposed in the Grassley-Thune bill, a policy which the National Taxpayer Advocate has long recommended.¹²

7 IRM 8.6.1.4.1, *Conference Practice* (Oct. 1, 2016).

8 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem #17: *The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*) 195–202; IRS, Interim Guidance Memorandum (IGM) AP-08-1017-0017, *Appeals Conference Procedures*, (Oct. 13, 2017).

9 Over the last ten to 15 years, the IRS has gradually consolidated many of its Compliance and Appeals operations away from geographically dispersed field offices and into large campus locations. Treasury Inspector General for Tax Administration (TIGTA) Audit Ref. No. 2010-10-021, *Appeals Has Made Considerable Progress in its Campus Centralization Efforts, But Some Opportunities Exist for Improvement* (Feb. 19, 2010).

10 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem #17: *The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*) 198.

11 As attrition occurs in campus locations, new hires and more senior personnel who seek such transfers can gradually be distributed among local field offices. Those cases that are assigned to campus locations should, however, be made eligible for a transfer to the field to accommodate an in-person appeal. Alternatively, Appeals could find a way to provide in-person Appeals at campus locations.

12 Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Congress. National Taxpayer Advocate 2014 Annual Report to Congress (Most Serious Problem #4: *The IRS Lacks a Permanent Appeals Presence in 12 States and Puerto Rico, Thereby Making It Difficult for Some Taxpayers to Obtain Timely and Equitable Face-to-Face Hearings with an Appeals Officer or Settlement Officer in Each State*) 46–54; National Taxpayer Advocate 2014 Annual Report to Congress (Legislative Recommendation #2: *Require that Appeals Have At Least One Appeals Officer and Settlement Officer Located and Permanently Available within Every State, the District of Columbia, and Puerto Rico*) 311–314.

Some Appeals Technical Employees Are Going Through the Motions of Furnishing Appeals in Form, While Failing to Provide Quality, Substantive Case Reviews

Beyond physical accessibility and geographic proximity, Appeals must perpetuate a culture of providing high-quality dispute resolution. The National Taxpayer Advocate is aware of several situations in which ATEs have conducted an appeal in name only, in that they complied with most of the technical requirements for such a proceeding, but displayed a reluctance to carefully consider the factual and legal arguments presented to them. For example, some ATEs have attempted to treat scheduling calls and other ministerial interactions as the basis for precipitously closing Appeals cases.¹³ Likewise, the Taxpayer Advocate Service has received reports from tax practitioners of situations in which ATEs indicated that they had already formed an IRS-friendly view of the case that was unlikely to change, regardless of any additional material submitted.¹⁴

The ability of taxpayers to receive a thorough, fair, and unbiased case review at Appeals is essential to the successful functioning of the voluntary tax compliance system. Generally, people who feel they have been treated in a procedurally fair manner by an organization are more likely to trust that organization and are more willing to accept even a negative outcome.¹⁵ Further, “people value respectful treatment by authorities and view those authorities that treat them with respect as more entitled to be obeyed.”¹⁶ Conversely, taxpayers who do not believe they have received a quality appeal may be more likely to take their case to court and could be less compliant in the future.¹⁷

Counsel and Compliance Can Be Invited to Participate in Appeals Proceedings Against the Wishes of Taxpayers

Also in October 2016, Appeals revised its Internal Revenue Manual guidance to encourage the inclusion of Counsel and Compliance in conferences.¹⁸ This emphasis generated significant concern within the tax practitioner community and on the part of the National Taxpayer Advocate.¹⁹ Among other things, stakeholders expressed fears that the inclusion of Counsel and Compliance in Appeals conferences would fundamentally change the nature of those conferences and would jeopardize Appeals’ independence, both real and perceived. The National Taxpayer Advocate further warned that adding Counsel and Compliance to Appeals conferences could generate additional costs for the government and taxpayers in the form of fewer case resolutions, additional litigation, and reduced long-term compliance.²⁰

13 TAS conference call with practitioners associated with the American Bar Association (ABA) (Jan. 25, 2018).

14 TAS conference call with practitioners associated with the ABA (Apr. 28, 2016).

15 Melinda Jone and Andrew J. Maples, *Mediation as an Alternative Option in Australia’s Tax Disputes Resolution Procedures*, 27 *AUSTL. TAX F.*, 525, 531 (2012).

16 *Id.*

17 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem #18: *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*) 208–09; National Taxpayer Advocate 2016 Annual Report to Congress (Most Serious Problem #15: *The IRS Is Failing to Effectively Use ADR As a Means of Achieving Mutually Beneficial Outcomes for Taxpayers and the Government*) 214.

18 IRM 8.6.1.4.4, *Participation in Conferences by IRS Employees* (Oct. 1, 2016).

19 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem #18: *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*) 203–210; *IRS Reform: Resolving Taxpayer Disputes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 225th Cong. (2017) (statement of Chastity K. Wilson, Am. Inst. Cert. Pub. Accts.).

20 National Taxpayer Advocate 2017 Annual Report to Congress (Most Serious Problem #18: *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*) 203–210.

Subsequently, Appeals clarified that, although Counsel and Compliance would be involved in Appeals proceedings, their participation would end prior to the commencement of settlement negotiations.²¹ Nevertheless, if Counsel and Compliance are still allowed an additional opportunity for advocacy, the dynamic of the Appeals conference is changed, and the ATE's role as independent decisionmaker is jeopardized. Accordingly, the increased involvement of Counsel and Compliance in the Appeals process continues to trouble both tax practitioners and the National Taxpayer Advocate, particularly given that Appeals has so far been unwilling to condition participation on the consent of taxpayers.

In its response to our recommendations in the 2017 Annual Report to Congress, Appeals emphasizes that this initiative is currently being implemented only as part of "a limited pilot focused on a very small population of large, complex cases involving well-represented taxpayers."²² Mandating the inclusion of Counsel and Compliance, however, even as part of a pilot in large cases where taxpayers may be well represented, fundamentally disregards the very purpose of the Appeals conference and jeopardizes Appeals' long-term effectiveness. As a result, Appeals should consult with the National Taxpayer Advocate, tax practitioner groups, and other stakeholders when evaluating the results of the pilot and determining what subsequent measures, if any, to adopt.

IRS Counsel Can Rely on the Vaguely Defined Concept of Sound Tax Administration to Deny Taxpayers the Right to an Appeal

IRS Counsel has authority to bar cases from Appeals' consideration if, in Counsel's view, the loss of this right would be "in the interest of sound tax administration." For example, under the terms of Revenue Procedure 2016-22, Counsel can prevent a case docketed in the U.S. Tax Court from being returned to Appeals for settlement negotiations by making such a determination, which, once made, cannot be appealed either within the IRS or to the Tax Court.²³ This step is intended to be taken primarily with respect to cases possessing a significant issue common to other cases in litigation for which it is important that the IRS maintain a consistent litigating position.²⁴ Few actual parameters exist, however, to circumscribe this authority, and, although it requires signoff from Counsel executives, it is potentially subject to overzealous application.²⁵

Likewise, IRS Counsel can accelerate a case or category of cases from Compliance directly past Appeals and into court by designating such cases for litigation, also on the basis of sound tax administration.²⁶ From a broad perspective, this practice may have some justification where cases present virtually identical factual and legal issues, and where the IRS is convinced that it has no hazards of litigation. For example, industry-wide or tax shelter issues may, in limited circumstances, be appropriate for this type of resolution.²⁷

21 Nina 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>.

22 National Taxpayer Advocate FY 2019 Objectives Report to Congress vol. 2, *infra*.

23 Rev. Proc. 2016-22, 3.03.

24 *Id.*

25 *Id.* Further, Facebook is currently challenging Counsel's use of this power in the District Court for the Northern District of California on the grounds that it violated the taxpayer's *right to appeal an IRS decision in an independent forum* of IRC § 7803(a)(3)(E). *Facebook, Inc. & Subsidiaries v. Commissioner* (Dkt #021959-16).

26 IRM 33.3.6, *Designating a Case for Litigation* (Aug. 11, 2004).

27 See IRM 33.3.6.1(1), *Purpose and Effect of Designating a Case for Litigation* (Aug. 11, 2004).

Nevertheless, the National Taxpayer Advocate has recently received complaints regarding this practice and such designations have been occurring with increased frequency.²⁸ In all but the most unusual circumstances, taxpayers should be allowed to exercise their *right to appeal an IRS decision in an independent forum*,²⁹ and, at a minimum, be able to argue that their cases are distinguishable from another group of cases being judicially challenged by the IRS. The right to an appeal protects the integrity of the voluntary tax compliance system and preserves the resources of both taxpayers and the IRS. As a result, the National Taxpayer Advocate urges the IRS to exercise great restraint in its use of this non-statutory power to override one of the ten fundamental taxpayer rights enacted by Congress.

In a bipartisan vote, the House of Representatives recently passed major IRS reform legislation that creates a statutory office of Appeals and specifies that all taxpayers will generally have the right to an appeal.³⁰ As part of this legislation, the House requires that the IRS Commissioner provide taxpayers with a precise and detailed description of why a request for an appeal was denied due to sound tax administration or any similar basis. Likewise, the Commissioner must furnish taxpayers with the procedures for protesting to the Chief Counsel the decision to bar an appeal in these circumstances. This legislation recognizes the importance of an independent Appeals process, which should not be threatened by indiscriminate use of the sound tax administration mechanism.

FOCUS FOR FISCAL YEAR 2019

In fiscal year 2019, TAS will:

- Encourage and work with Appeals to expand its geographic footprint;
- Advocate for taxpayers who do not receive a high-quality independent appeal by maintaining close contact with the tax practitioner community, entering into issue- and case-specific dialogues with Appeals, and issuing taxpayer assistance orders where appropriate;
- Monitor the impact of Appeals' emphasis on including Counsel and Compliance in conferences; and
- Determine the extent to which Counsel is designating cases for litigation based on the doctrine of sound tax administration, and whether this designation is limited to appropriate cases.

28 Marie Sapirie, *The Increase in Cases Designated for Litigation*, 150 TAX NOTES 1223 (Mar. 14, 2016).

29 IRC § 7803(a)(3)(E).

30 Taxpayer First Act, H.R. 5444, 115th Cong. § 101 (2018).