

STRENGTHEN TAXPAYER RIGHTS BEFORE THE OFFICE OF APPEALS

Legislative Recommendation #36

Require That at Least One Appeals Officer and One Settlement Officer Be Located and Permanently Available in Each State, the District of Columbia, and Puerto Rico

PRESENT LAW

IRC § 7803(e) establishes the Internal Revenue Service Independent Office of Appeals (Appeals) to resolve controversies between taxpayers and the IRS without litigation.

Section 3465(b) of the Internal Revenue Service Restructuring and Reform Act of 1998 provides: “The Commissioner of Internal Revenue shall ensure that an appeals officer is regularly available within each State.”

REASONS FOR CHANGE

Twelve states and Puerto Rico currently have no Appeals or Settlement Officers with a post of duty within their borders.¹ These states are Alaska, Delaware, Idaho, Kansas, Maine, Montana, North Dakota, New Mexico, Rhode Island, South Dakota, Vermont, and Wyoming. The IRS takes the position that its current staffing satisfies the statutory requirement by providing for “circuit riding” on at least a quarterly basis to states lacking a permanent Appeals field office.

As a practical matter, however, “circuit riding” does not provide taxpayers who request in-person hearings with timely service and does not ensure that Appeals and Settlement Officers are familiar with local conditions. Taxpayers and their representatives regularly complain about the difficulty of obtaining convenient and timely in-person access to Appeals and Settlement Officers. During fiscal year 2018, for example, non-docketed cases involving in-person conferences remained in Appeals’ inventory for more than twice as long (394 days) as Appeals cases overall (194 days).²

In addition, Appeals’ ability to effectively pursue administrative case resolutions often depends on the Appeals or Settlement Officer’s familiarity with prevailing economic circumstances and other local factors impacting taxpayers in a given geographic region. Appeals and Settlement Officers who live elsewhere and visit a state for an occasional hearing often do not have this familiarity.

¹ Generally, Appeals Officers are assigned to cases associated with the IRS Examination function, whereas Settlement Officers are assigned to Collection cases.

² Appeals response to TAS fact check request (Nov. 21, 2018).

RECOMMENDATION

- Amend IRC § 7803(e) to require that at least one Appeals Officer and one Settlement Officer be located and permanently available in each state, the District of Columbia, and Puerto Rico.³

³ For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1793, 115th Cong. § 502 (2017).

Legislative Recommendation #37**Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences****PRESENT LAW**

Although the IRS had long operated an Office of Appeals under its administrative authority, Congress codified the office and retitled it the “Internal Revenue Service Independent Office of Appeals” (Appeals) as part of the Taxpayer First Act of 2019.¹ The intent of the provision was to “reassure taxpayers of the independence” of Appeals.²

Present law does not directly address the inclusion of personnel from the IRS Office of Chief Counsel or IRS compliance functions in conferences held by Appeals.

REASONS FOR CHANGE

Historically, Counsel and Compliance provided input into Appeals conferences via the case file and, if the case was particularly large or complex, at a pre-conference. The Appeals conference itself generally was devoted to presentation of the taxpayer’s case and settlement negotiations between the taxpayer (or the taxpayer’s representative) and the Appeals Officer. Counsel and Compliance personnel rarely attended such conferences, leaving taxpayers and Appeals Officers free to develop rapport, seek common ground, and pursue case resolution.³

In October 2016, Appeals revised provisions of the Internal Revenue Manual to allow Appeals Officers to include personnel from Counsel and Compliance in Appeals conferences as a matter of routine. Counsel and Compliance are not a party to the actual settlement discussions, which occur near the conclusion of the conference, but they are typically given the opportunity to present an oral argument and question taxpayers and their representatives.

Under the revised procedures, an Appeals Officer may invite the additional participants regardless of whether taxpayers agree or object to their presence. Including Counsel and Compliance personnel over taxpayer objections contravenes the purpose of an independent Appeals conference, which is neither to give Compliance personnel another bite at the apple nor to transform Appeals into a mediation forum. Instead, the mission and credibility of Appeals rests on its ability to undertake direct and unbiased settlement negotiations with taxpayers and their representatives, independent of the Counsel and Compliance functions.

1 Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019) (codified at IRC § 7803(e)).

2 H.R. REP. NO. 116-39, pt. 1, at 29 (2019) (accompanying H.R. 1957, which was enacted into law without change to this provision as H.R. 3151). In 2012, the IRS published Revenue Procedure 2012-18, which, among other things, places parameters around *ex parte* communications between Appeals and other representatives of the IRS, such as Counsel and Compliance. This guidance is premised on the recognition that Appeals must be unbiased and impartial, both in fact and in appearance.

3 For a more detailed discussion of this topic, see National Taxpayer Advocate 2019 Annual Report to Congress 62-68 (Most Serious Problem: *Appeals: The Inclusion of Chief Counsel and Compliance Personnel in Taxpayer Conferences Undermines the Independence of the Office of Appeals*).

This change in conference procedures in some cases is having far-reaching negative consequences for Appeals' effectiveness in resolving cases with taxpayers. Taxpayers are less likely to feel that their cases have been fully heard, that they have been treated fairly, and that the outcome of the proceedings ought to be respected. As a result, taxpayers are more likely to come away disillusioned with the Appeals process, more likely to pursue their cases in court, and potentially less likely to comply voluntarily with the tax laws in the future. Over time, practitioners may be less likely to advise clients to pursue the Appeals process.

In addition, the expansion of Appeals conferences to routinely involve Counsel and Compliance personnel alters the relationship between taxpayers and Appeals Officers. It makes interactions less negotiation-based and transforms the conference into a more contentious and one-sided proceeding. This approach is also seemingly inconsistent with Congress's intent to "reassure taxpayers of the independence" of Appeals.

RECOMMENDATION

- Amend IRC § 7803(e) to provide: "A taxpayer shall have the right to a conference with the Independent Office of Appeals that does not include personnel from the Office of Chief Counsel or the compliance functions of the Internal Revenue Service unless the taxpayer specifically consents to the participation of those parties in the conference."⁴

4 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 601 (2018). This recommendation is not intended to limit the ability of Appeals to obtain legal assistance and advice from the Office of Chief Counsel, as permitted by IRC § 7803(e)(6)(B).