

STRENGTHEN TAXPAYER RIGHTS BEFORE THE OFFICE OF APPEALS

Legislative Recommendation #35

Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences

SUMMARY

- *Problem:* The IRS Independent Office of Appeals (Appeals) has adopted a policy, particularly in large cases, of including Counsel and Compliance personnel in taxpayer conferences, even if the taxpayer objects to their participation. Taxpayer rights are jeopardized and the independence of Appeals is compromised when Counsel or Compliance are permitted to attend conferences over the objections of taxpayers whose cases are nondocketed.
- *Solution:* Codify the right of taxpayers whose cases are nondocketed to an administrative appeal without the presence of personnel from Counsel or Compliance.¹

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” as part of the Taxpayer First Act of 2019.² The intent of the provision was to “reassure taxpayers of the independence” of Appeals.³

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.⁴

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.⁵

1 We are not recommending this change for cases that have been in the Tax Court. In docketed cases, the taxpayer has already filed a petition in the Tax Court seeking judicial review of an adverse IRS determination, and the Office of Chief Counsel has already become involved with the case in defending the IRS’s position.

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

3 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.

4 IRC § 7803(e)(6)(B) provides the Chief of Appeals with authority to obtain legal assistance and advice from the staff of the IRS Office of Chief Counsel.

5 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*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_MSP_07_APPEALS.pdf.

In October 2016, Appeals revised provisions of the Internal Revenue Manual (IRM) to allow Appeals Officers to include personnel from Counsel and Compliance in Appeals conferences as a matter of routine.⁶ 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. Appeals has agreed to solicit and consider the views of taxpayers before inviting Counsel and Compliance to attend a conference but has stopped short of making taxpayer consent a prerequisite for such attendance.⁷ Including Counsel and Compliance personnel in nondocketed cases without the consent of taxpayers 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.

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 that 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 IRS in cases that have not been docketed in the Tax Court unless the taxpayer specifically consents to the participation of those parties in the conference.⁸

⁶ IRM 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016).

⁷ IRS Independent Office of Appeals, Appeals Team Case Leader Conferencing Initiative: Summary of Findings and Next Steps (Sept. 2021).

⁸ 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).