

TAX SECTION

New York State Bar Association

Comments On Announcement 95-2

Proposed Mediation Procedure for Appeals

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# TAX SECTION

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March 15, 1995

### FEDERAL EXPRESS

Hon. Margaret Richardson  
Commissioner  
Internal Revenue Service  
Room 3000  
1111 Constitution Avenue, NW  
Washington, D.C 20220

### Re: Proposed Appeals Mediation Procedure Announcement 95-2

Dear Commissioner Richardson:

On behalf of the Tax Section of the New York State Bar Association, I am enclosing our comments on the proposed appeals mediation procedure set forth in Internal Revenue Service Announcement 95-2.

We commend the Internal Revenue Service for this initiative. We believe that mediation can serve a very important function in the resolution of tax disputes, and our report makes a number of suggestions that we believe will strengthen this pilot program.

If you have any questions or would like to discuss our comments further,

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please do not hesitate to call me at (212) 903-8761 or Stanley I. Rubenfeld, the principal author of the report, at (212) 848-4118.

Very truly yours,

Carolyn Joy Lee  
Chair

cc: Mr. James A. Dougherty  
National Director of Appeals  
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Attn: CC:AP:IT&D  
Room 235  
Washington, D.C. 20024

New York State Bar Association Tax Section  
Comments On Announcement 95-2  
Proposed Mediation Procedure for Appeals<sup>\*/</sup>

These comments are submitted in response to Announcement 95-2 setting forth notice of a Proposed Test of a Mediation Procedure for Appeals.

We strongly support the Internal Revenue Service ("IRS") proposal for a test of a mediation procedure to resolve taxpayer disputes with the IRS. We believe that mediation, if effectively publicized and implemented, has the promise of reducing delay and expense in resolving controversies between taxpayers and the IRS.

We have the following comments and recommendations which we believe would improve the prospects for the success of the mediation procedure:

(1) Availability of Mediation

- (a) It is extremely important that the mediation procedure be given a fair trial. Sufficient time must be given to permit the mediation procedure to be adequately implemented, used and evaluated. Given the start-up time required to organize and implement the mediation procedure, it will be difficult to assess the mediation procedure in just a one-

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<sup>\*/</sup> The principal authors of these comments are Stephen D. Gardner, Carolyn Joy Lee, Stanley Schaefer, and Stanley I. Rubinfeld. Helpful comments were provided by Evelyn K. Gilbert, Harold R. Handler, Michael Hirschfeld, Robert A. Jacobs, Richard O. Loengard, Jr., Richard L. Reinhold, Deborah H. Schenk, and Michael L. Schler.

year test period. Accordingly, we recommend the time frame for the mediation test be at least two years and preferably three years. Furthermore, we urge that the IRS confer with other bodies (e.g., United States District Courts) that have implemented mediation procedures to gain the benefit of their experience. Also, it is crucial to the success of the test of the mediation procedure that the IRS ensure that taxpayers are aware of the availability of mediation. The IRS should, for example, furnish eligible taxpayers with forms giving them information about the mediation procedure at the time they receive a 30-day letter; and Appeals Officers should specifically apprise eligible taxpayers of the availability of the mediation procedure.

- (b) Since the taxpayer and Appeals must both agree to mediation, the availability of mediation should not be subject to the additional consent of the Assistant Regional Director of Appeals -- Large Case ("ARDA -- LC"). The requirement of ARDA -- LC approval in addition to Appeals approval will discourage taxpayers from seeking mediation and, at the very least, delay the process. If consent of the ARDA -- LC to mediation continues to be required, we suggest that written criteria be established and published stating the basis for ARDA -- LC denial of requests for mediation.
- (c) The proposed mediation procedure should also be available for cases docketed in the Tax

Court so long as Appeals retains settlement authority. Because of the start-up time required to organize and implement the mediation procedure, this recommendation is subject to the mediation test period being at least two years.

(2) Mediation Process

- (a) Consideration should be given to requesting that bar associations, accounting associations, and industry groups submit to the IRS lists of those of their members who have expressed an interest in and an availability to serve as mediators for the mediation procedure. Some groups will no doubt have concerns about appearing to endorse particular individuals as mediators. It should be made clear that the IRS is neither requesting endorsements nor representing the named individuals as endorsed, but is merely collecting the names of interested parties from whatever sources are available. In this connection, the IRS should also maintain lists of individuals who, although not members of any particular organization, volunteer themselves as available for service as mediators. The IRS should also compile a list of mediators available from Appeals. These lists would be available to taxpayers as a reference source, but taxpayers and Appeals would be free to choose a private mediator other than from the lists.

(b) Section eleven of the mediation procedure states that under IRC section 7214(a)(8) IRS employees must report information concerning the violation of any revenue laws. This reporting requirement would apply to Appeals personnel who act as mediators. Taxpayers need to have a clearer understanding of the scope of this "reporting requirement"; otherwise, taxpayers may be reluctant to select a mediator from Appeals.

(c) Section four of the mediation procedure states:

"A mediator shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties, and all parties agree that the mediator may serve."

The integrity of the mediation process does not permit a prospective mediator who has an actual official, financial, or personal conflict of interest to act as a mediator, even if the taxpayer and Appeals consent. We note that Title 28 of United States Code section 455(b) (disqualification of justice, judge, or magistrate), which applies to mediators in the United States District Courts for the Eastern and Southern Districts of New

York and which, according to the Federal Judicial Center in Washington, DC, applies to mediators in most federal district courts, would prohibit a mediator from serving in most, if not all, of the circumstances that would fall under section four, even if the parties consent.

- (d) Section twelve of the mediation procedure contains a mandatory disqualification provision. Section twelve states:

"The mediator(s) and his or her (their) firm(s) will be disqualified from representing or otherwise participating in any pending or future action substantially related to the subject matter of the mediation, including those between persons or entities not parties to the mediation."

The scope of this disqualification provision is much too broad, and must be revised if the mediation procedures are to attract a broad group of qualified mediators. The following factors should be considered in establishing disqualification rules:

- (i) Special knowledge or confidential information acquired by the mediator in the course of mediating a tax



dispute should not be used in any proceeding against the taxpayer or the United States government.

- (ii) The public has an interest in establishing a disqualification procedure that does not unnecessarily deter an individual from acting as a mediator for a tax dispute.
- (iii) Under the procedure, outside mediators and IRS mediators will be subject to the confidentiality and disclosure provisions of IRC Sections 6103, 7213 and 7431.
- (iv) The disqualification rules for mediators should be no more restrictive than the rules which apply to IRS employees who leave the IRS and act for taxpayers, and no more restrictive than the rules which apply to lawyers who represent taxpayers in disputes which are mediated.

We believe the following disqualification rules appropriately address both

taxpayer and government  
interests and concerns:

- a. An individual and his or her firm shall not accept employment in connection with a matter which is the same or substantially related to a matter in which the individual acted as a mediator in a tax dispute with the Internal Revenue Service unless there is full disclosure of the prior mediation and all parties to the mediation consent in writing.
  
- b. The prohibition stated in paragraph (a) shall not apply to a disqualified mediator's firm if the disqualified mediator is screened from any form of participation in the matter or representation and from sharing in any fees resulting therefrom.

(3) Assessment of the Mediation Procedure

It is important to establish a methodology for assessment of the mediation procedure. Computer software should be developed to track and analyze all aspects of the program. The program might be analyzed by such factors as dollar size, length of time, parties involved, mediator, issues, cost, outcome, etc. Also, questionnaires might be given to all participants upon conclusion of a mediation to obtain feedback and ideas for improving the procedure.