

TAX SECTION

New York State Bar Association

IRS-Taxpayer Mediation Proposal

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Mediation of Unagreed Audit Cases

Dear Stu:

As you may know, an ad hoc committee of the Tax Section, chaired by Stanley Rubenfeld, has been studying the possibility of mediation of unagreed IRS audit cases. I enclose a draft of an outline of one possible approach that has been developed by the committee. When Stan returns from vacation in mid- October, he will be calling you to arrange a meeting to discuss the concept of mediation and the issues and problems relating to implementation of a pilot mediation program.

The NYSBA Tax Section has neither considered nor endorsed the concept of mediation or the specific proposal. Nevertheless, I believe it will be useful for you to have the attached outline as a basis for further discussion.

Please also note that the U.S. District Court for the Southern District of New York has established a mediation program for cases filed in that court. We understand that under their approach, there is a panel of trained but unpaid volunteer mediators, and cases are assigned to mediators at random. Usually mediators take on two or three cases a year. Mediation is required for cases in which only money damages are sought, excluding social security, tax, prisoners civil rights and pro se cases.

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Please feel free to give me a call if you have any questions before Stan returns from vacation. I hope that our work on this subject proves useful to you.

Sincerely,

Michael L. Schler
Chair, Tax Section

IRS-Taxpayer Mediation Proposal

The following are key points for discussion relating to a proposed mediation program:

1. Objective

To enable the IRS and taxpayers to reduce delay and expense.

2. Pilot program

A pilot mediation program could be established in one District Office to permit assessment of the value of establishing a comprehensive mediation program for unagreed audit cases.

3. Eligible cases

We believe mediation should be available for Coordinated Examination Program (CEP) cases and other large cases under the IRS classification system. We believe the greatest delay and expense for taxpayers and the IRS occurs in large cases. The CEP program is used for large corporate cases. Gross assets and gross receipts of the taxpayer are two factors used to identify CEP cases. For smaller cases we believe that appeals is an adequate resolution mechanism.

4. Election to mediate

Mediation would be elective by the taxpayer. We believe it would be unwise to force taxpayers to mediate at least until

the IRS can assess the experience with the pilot program. A taxpayer electing mediation might be required to elect mediation as to an entire case, or alternatively might be permitted to elect as to a single issue (or sub-issue) in a case.

A taxpayer electing mediation might have a right to mediation. Alternatively, the mediation process might apply in a particular case only if the IRS consented to mediation in that case.

5. Timing of election to mediate

The taxpayer would have 30 days to elect mediation after filing a protest in response to receipt of a 30-day letter.

6. Creation of pool of mediators

Eligible mediators would include tax lawyers, tax accountants, former revenue agents and others enrolled to practice before the IRS. State and local bar and CPA groups would compile a list of mediators in each district, subject to disapproval by the IRS. The IRS might be permitted to add its own names to the list. All mediators would be required to have mediation training.

7. Selection of the mediator

One possibility would be for the taxpayer to select three choices from the approved list of mediators for the district, with the IRS selecting one of those choices as the mediator. Alternatively, the taxpayer and the IRS could be required to agree on the mediator in order for mediation to become effective.

8. Conflicts of interest

The mediator would investigate whether his or her participation as a mediator would involve an actual or potential conflict of interest, and would disclose such actual or potential conflict to the IRS and the taxpayer. In the case of a conflict unacceptable to either party, a new mediator would be selected.

9. Activities of mediator

The mediator would attempt to settle the controversy between the taxpayer and the IRS. The mediator would have joint and separate meetings with the IRS and the taxpayer. The mediator would analyze the facts and the law as presented to the mediator by the parties and would make recommendations as to a fair and equitable resolution of the case or the issue. The recommendations would not be binding unless agreed to by both the taxpayer and the IRS.

The mediator would initially have available the Examination Letter, the 30-day letter and the Protest. The taxpayer could furnish whatever information it wished to the mediator, and presumably the taxpayer would be required to consent in advance to the disclosure by the IRS of taxpayer information to the mediator. As we understand it, information gathered from third party taxpayer returns could not be disclosed by the IRS to the taxpayer or the mediator without third party consent, under Section 6103.

10. Costs

Mediators would be compensated at a fixed hourly rate, plus travel and incidental expenses. The fees would be paid by

the taxpayer, since the taxpayer would be electing mediation. The assumption is that large and complex cases will require a great deal of mediator time. Alternatively, the cost of the mediator might be shared by the taxpayer and the IRS, or mediators might be asked to serve pro bono.

11. Duration of mediation

The initial time frame for the mediation process should be 60 days. This should provide ample time for the mediator to review the IRS file and the taxpayer protest and to meet with the parties. At the end of 60 days the mediator could with the agreement of the parties request a 30-day extension if the mediator and the parties believed additional meetings could achieve a resolution of the case.

12. Confidentiality

Any information given to the mediator by the taxpayer or the IRS would be held in confidence by all parties unless the party providing the information (and in any event the taxpayer as to return information) consents to disclosure. The parties might agree in advance that no aspect of the mediation would be admissible evidence in a subsequent court proceeding. However, presumably factual information provided by the taxpayer in the mediation could subsequently be used by the IRS. Mediators would not be available as witnesses or experts in related court proceedings.

13. Mediator recommendation

If the taxpayer and the IRS agree to a settlement, in appropriate circumstances the mediator would address a statement

to the IRS and the taxpayer stating that, in the mediator's view, the settlement is a fair and equitable resolution of the case. We believe that such a recommendation might be the kind of "blessing" that would assist both sides in obtaining the necessary approvals of the settlement. If the parties did not reach agreement, there would be no mediator recommendation, the mediator would report that the mediation had failed to reach a settlement, and the appeals process would resume.