

LITC Workshop Series

Monday December 10, 2007 1:00pm

A Practical Primer on Appeals

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The focus of this panel is to provide an overview of the Appeals Division, including its history, its current configuration and “jurisdiction”, when a taxpayer and her representative might choose to invoke the Appeals Division “jurisdiction”, the current resource limitations that impact the Appeals Division procedures, and the future of appeals, including concerns about appeals independence.

I. History of the IRS Appeals Division

The IRS Appeals Division (“Appeals”) was created as a separate division in 1927 as a way to try to resolve tax disputes without litigation. While the mission of Appeals continues to be to resolve cases at the lowest level and to consider hazards of litigation, recent expansion of Appeals “jurisdiction” over disputes has expanded the focus and mission of Appeals.

After the 1998 Reform Act, Appeals was set up in the organizational structure of the new IRS as a nationwide, functional division (like Criminal Investigation, Communications and the Taxpayer Advocate Service) that reports to the Commissioner of Internal Revenue. This is important because Appeals in exercising its function may not sustain cases from the operating divisions and if it reported to the heads of those operating divisions it might be pressured not to reverse operating division determinations.

Recently, however, due in large part to the tremendous increase in volume of cases stemming from Collection Due Process (“CDP”) hearing requests, Appeals had announced a move to centralize, discussed in more detail below. What this means is that Appeals has started to try to even out the case loads of its various offices and has created Appeals’ offices connected to IRS Campuses (previously

referred to as “Service Centers”), reassigning cases among the various offices. What this means for LITCs is that your cases may be assigned to an Appeals office that is many miles from you and your client. While you may expressly request assignment to an Appeals office near your client as well as an opportunity for a face-to-face meeting, in the experience of our clinic this is increasing disregarded or missed. This has had a serious impact on granting of the face-to-face hearings and has caused the American Bar Association (“ABA”) Tax Section to be concerned with Appeals’ impartiality and adherence to its mission. The ABA Tax Section recently conducted a survey of its members to obtain a reading on this issue. (A copy of this survey is included in this panel’s materials.)

The mission of Appeals is set forth in the Internal Revenue Manual:

I.R.M. 8.1.1.1

Appeals Mission

1. The Appeals mission is accomplished through a program of considering protested cases, holding conferences, and negotiating settlements in a manner which ensures:
 - A. A prompt conference and a prompt decision in each case. —A prompt conference and decision enable the taxpayer to know with the least amount of delay, the final decision of the Service as to the amount of tax liability, or other issue in contention, and results in getting into the Treasury additional revenue involved at the earliest practicable date.
 - B. A high-quality decision in each case. — A decision of high quality is required in each case and should represent judicious application of Service policy and sound legal principles.
 - C. A satisfactory number of agreed settlements.— It is a fundamental purpose of the Appeals function to effect settlement of contested cases — on a basis fair to both the Government and the taxpayer— to the end that the greatest possible number of nondocketed cases

are closed in that status and the greatest possible number of docketed cases are closed without trial.

2. The Appeals mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service. The Appeals program is designed to effectively carry out the Appeals mission.
3. An integral part of accomplishing the Appeals mission is to schedule conferences on dates and at locations reasonably convenient to taxpayers and representatives. We also offer to schedule telephone conferences, and taxpayers may use correspondence as a method of having a conference, at their convenience.

After the IRS Reform and Restructuring Act of 1998 (RRA 98), the IRS issued Policy Statement P-8-1 reaffirming the Appeals mission:

Appeals Policy Statement P-8-1

Section:	Part I - Administration
Title:	Handbook 1218 Policies of the Internal Revenue Service
Appeals:	Appeals Function
Status:	Approved 11-4-98

Appeals Administrative Dispute Resolution Process

Pursuant to the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, and Treasury Directive 63-01, this Policy Statement reaffirms the principles of the Appeals administrative dispute resolution process. Since 1927, when the Internal Revenue Service established an administrative appeal to resolve tax disputes without litigation, taxpayers and Appeals have reached mutual agreement in the vast majority of disputed cases.

As the Service shifts toward becoming a more customer-oriented agency, the Internal Revenue Service's commitment to the Appeals administrative dispute resolution process is reaffirmed by the following principles: Taxpayers are generally entitled to appeal many disputes arising under the Internal Revenue Code, regulations and procedures. They are also entitled to an explanation of the Appeals process, and to have a timely conference and resolution of their dispute.

1. Local Appeals offices are separate from and independent of the IRS office that proposed the adjustment. Issues should be fully developed by compliance functions before an administrative appeal.
2. The Appeals Office is the only level of appeal within the IRS, and generally is the principal administrative function that exercises settlement authority to resolve tax disputes for cases that are not docketed in the U.S. Tax Court. Revenue Procedure 87-24 or subsequent procedure, describes when cases docketed in the U.S. Tax Court are referred by District Counsel to Appeals for consideration of settlement. The National Director of Appeals, as the administrative dispute resolution specialist in tax matters for the Commissioner, has line authority over the Appeals field operations throughout the United States.
3. The Service supports the development and use of alternative dispute resolution techniques by Appeals to create an administrative forum, independent of compliance functions, to efficiently prevent or resolve disputes. Appeals is encouraged to survey its customers and expand alternative dispute resolution techniques test programs to enhance taxpayer service.

In an effort to ensure independence of Appeals, Congress as part of the RRA of 1998 prohibited ex parte communications between Appeals and other parts of the IRS. RRA 1998 Sec. 1001(a)(4). Congress was concerned with allegations that Appeals rubber stamped exams determinations or talked to exams agents and did not report everything they found out. As enacted, the RRA 1998 provision prohibits ex-parte communications **“to the extent such communications appear to compromise the independence”** of the Appeals Office. An appeals officer may be in contact with the operating division for a number of reasons- to get a file, to understand what a revenue agent/officer did on a case. How does an Appeal Officer or a representative determine when contact with another division constitutes an ex-parte communication?

The IRS issued Revenue Procedure 2000-43 in which it outlined rules for making that determination. Specifically, communications addressing the substantive issues in a case are prohibited unless the taxpayer is given an

opportunity to participate. Communications that are entirely ministerial, administrative or procedural are permitted. See Rev. Proc. 2000-43, attached as Appendix #1.

Examples of prohibited communications: (1) discussions about the accuracy of facts presented by a TP and the relative importance; (2) discussion of the relative merits or alternative of the facts to the determination, legal interpretations of authorities cited in the protest, or in a report prepared by the originating function; and (3) discussions of the originating function's perception of the demeanor or credibility of the taxpayer or the taxpayer's representative.

Under the Revenue Procedure, communications that are administrative, ministerial, or minor procedural matters are not treated as ex parte communications. The Tax Court recently considered a case (reproduced in edited form below) involving this issue and concluded that even if there were other grounds to sustain an Appeals Officer's determination in a CDP case, the ex parte communications required a cure and remanded the case to the Appeals office to be reassigned.

T.C. Memo. 2006-171
UNITED STATES TAX COURT
J. JEAN MOORE, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent
Docket No. 11634-05L. Filed August 17, 2006.

* * *

MEMORANDUM FINDINGS OF FACT AND OPINION

SWIFT, Judge: Petitioner seeks review of respondent's notice of determination sustaining a notice of Federal tax lien filing relating to petitioner's outstanding 1997 through 2002 individual Federal income taxes. The issue for decision is whether respondent's Appeals Office conducted prohibited ex parte communications, and if so what remedy is appropriate.

* * *

FINDINGS OF FACT

This case was submitted under Rule 122, but other than establishing the residence of petitioner in San Diego, California, the stipulation of the parties relates only to exhibits.

* * *

On September 23, 2003, respondent filed a Federal tax lien against petitioner relating to petitioner's assessed and unpaid through 2002 cumulative total tax liability of approximately \$1 million, and on September 26, 2003, respondent mailed to petitioner a notice of tax lien filing with regard to the tax lien that respondent had filed.

On October 24, 2003, petitioner timely requested a section 6320 collection due process (CDP) hearing with respondent's Appeals Office for the purpose of securing the release of respondent's filed tax lien against petitioner.

* * *

On March 11, 2004, during the CDP hearing, petitioner submitted to respondent an offer-in-compromise (OIC). In her OIC, petitioner offered to make a payment of \$258,000 in full settlement and compromise of her cumulative total then accrued and outstanding approximate \$1.8 million in Federal income taxes, additions to tax, and interest for 1992 through 1995 and for 1997 through 2002.

With the filing of her OIC, petitioner did not make any payment to respondent, but petitioner did offer to pay the \$258,000 within 90 days of respondent's acceptance of her OIC. [fn. omitted.] Petitioner planned to sell assets in order to obtain the \$258,000.

On April 15, 2004, petitioner paid respondent the final \$79,166 she owed relating to her criminal conviction, and petitioner asked that the \$79,166 be credited toward the \$258,000 she would owe under the pending OIC.

In connection with the Appeals Office's consideration of petitioner's OIC, a number of communications about petitioner occurred among respondent's Appeals officer, an offer specialist assigned to work on petitioner's OIC, and two of respondent's revenue officers, one of whom worked in California and one of whom worked in Oregon. Before petitioner's CDP hearing with respondent's Appeals officer, both of these revenue officers had been involved in attempting to collect petitioner's outstanding taxes for the years in issue. The communications between respondent's Appeals officer and the offer specialist, on the one hand, and respondent's two revenue officers, on the other, occurred in person, over the telephone, and via e-mail and without petitioner's participation.

Among other communications, the revenue officers in California and Oregon communicated to the Appeals officer concern about assets that petitioner may have transferred to a nominee.

Also, the revenue officer in Oregon suggested to the Appeals officer and to the offer specialist that they should “probe and inquire if there were any links or money stream to * * * [petitioner]” relating to a home in Oregon.

On May 27, 2004, the offer specialist recommended that the Appeals Office reject petitioner’s OIC, explaining that petitioner had paid insufficient individual estimated taxes and that the eldercare business had paid insufficient payroll taxes. The offer specialist also explained that petitioner’s OIC should be rejected because the outstanding taxes petitioner owed related to what the offer specialist described as “nominee, transferee, fraud issues — case is filled with them as it is the basis of the assessments.”

May 26, 2005, the Appeals Office issued a notice of determination (notice) sustaining the tax lien filed against petitioner. Attached to the notice was the Appeals officer’s general statement that petitioner’s OIC was not in the best interest of the Government because of, among other things, alleged nominee transfers of petitioner’s real property and assets.

Petitioner timely petitioned the Tax Court for review of the notice.

OPINION

When underlying taxes are not in dispute, as in the instant case, we review respondent’s adverse CDP determinations for abuse of discretion. Speltz v. Commissioner, 454 F.3d 782, 784-785 (8th Cir. 2006), affg. 124 T.C. 165 (2005); Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Respondent will be regarded as abusing his discretion when he acts without a sound basis in fact or law. Freije v. Commissioner, 125 T.C. 14, 23 (2005); Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

In prior years, and with a great deal of effectiveness and propriety, respondent’s Appeals officers generally were allowed to communicate with respondent’s revenue agents and officers concerning a taxpayer’s outstanding taxes.

In 1998, however, after a series of hearings relating to respondent’s collection practices,⁴ Congress enacted and the President signed into law the

⁴ For news reporting on the 1997 and 1998 congressional hearings on tax collection reform, see *Taxes at the Top*, *The Newshour with Jim Lehrer* (PBS television broadcast Jun. 4, 2004) (transcript available at http://www.pbs.org/newshour/bb/business/jan-june04/tax_6-04.html).

Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (RRA 1998).⁵

In RRA 1998, Congress provided, among other things, in new section 6320 that respondent's Appeals officers conducting CDP hearings are to be impartial and are not to have had prior involvement in a taxpayer's outstanding taxes for the years involved in a CDP hearing. See sec. 6320(b)(3). The language of section 6320(b)(3) provides as follows:

SEC. 6320(b). Right to Fair Hearing.--

* * * * *

(3) Impartial officer.--The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6330. A taxpayer may waive the requirement of this paragraph.

In RRA 1998 sec. 1001(a)(4), 112 Stat. 689, Congress also directed that respondent's Appeals officers should exercise independent judgment, and Congress prohibited respondent's Appeals officers from engaging in ex parte communications with other employees of respondent that would appear to compromise the Appeals officers' judgment. The relevant language of RRA 1998 sec. 1001(a) provides as follows:

(a) In General.--The Commissioner of Internal Revenue shall develop and implement a plan to reorganize the Internal Revenue Service. The plan shall--

* * * * *

(4) ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.

Under authority of the above flush language of RRA 1998 sec. 1001(a), respondent promulgated Rev. Proc. 2000-43, 2000-2 C.B.

⁵ See generally 144 Cong. Rec. 14688-14689, 14694-14717, 14719-14722, 14726-14727, 14730-14733, 14735-14737, 14739, 14789-14795 (1998).

404, effective for administrative CDP appeals initiated after October 23, 2000. *Id.*, sec. 4, 2000-2 C.B. at 409. Therein *ex parte* communications are defined as written or oral communications that occur between Appeals officers and other employees of respondent without the taxpayer, or his or her representative, being able to participate in the communications. *Id.*, sec. 3, Q&A-1 and 2, 2000-2 C.B. at 405. Rev. Proc. 2000-43, sec. 3, Q&A-5, 2000-2 C.B. at 405-406, makes it clear that *ex parte* communications about substantive matters, such as a taxpayer's credibility and the accuracy and importance of alleged facts, are to be treated as improper *ex parte* communications and are prohibited under RRA 1998 sec. 1001(a)(4).

Rev. Proc. 2000-43, *supra*, specifies that respondent's Appeals officers should not communicate with respondent's revenue agents and officers if the communications would, or would appear to, compromise the independent judgment of the Appeals Office. *Id.* sec. 3, Q&A-29, 2000-2 C.B. at 409.

An exception is provided to the prohibited *ex parte* communications rule of Rev. Proc. 2000-43, *supra*, for communications that relate only to administrative, ministerial, or minor procedural matters. Communications between an Appeals officer and a revenue officer about the location of missing file documents are listed as an example of *ex parte* communications that would be allowed. *Id.* sec. 3, Q&A-5.

In *Drake v. Commissioner*, 125 T.C. 201, 210 (2005), we remanded a CDP case to respondent's Appeals Office because of documents that were regarded by the Court as *ex parte* and prohibited.

Herein, the Appeals officer and the offer specialist should have carefully restricted the communications they had with the revenue officers relating to the collection of petitioner's taxes to mere administrative, ministerial, or minor procedural matters.

The suggestions by the California and Oregon revenue officers to the Appeals officer and to the offer specialist to consider a nominee theory and to look at petitioner's "money stream" were substantive in nature and clearly constituted prohibited *ex parte* communications that were *per se* prejudicial to petitioner.

Respondent argues that grounds independent of the *ex parte* communications would support the Appeals Office's adverse determination (namely, petitioner's conviction for tax evasion and noncompliance by petitioner's eldercare business with certain Federal employment tax laws). These alleged grounds do not overcome or render moot the prohibited *ex parte* communication rules, as respondent appears to argue.

Respondent also argues that because petitioner eventually learned from the Appeals officer the content of the ex parte communications, petitioner was not kept in the dark with regard thereto and was not harmed. Nothing, however, in either RRA 1998 or Rev. Proc. 2000-43, supra, allows respondent's Appeals officer to avoid the rule against prohibited ex parte communications by later informing the taxpayer about the communications.

Respondent characterizes the ex parte communications as "routine factual investigation." We disagree. Although the ex parte communications may have been in good faith and intended to assist in the development of relevant facts, they were ex parte and substantive, and they were covered by the prohibition discussed above.

Respondent points out that Rev. Proc. 2000-43, sec. 3, Q&A-10, 2000-2 C.B. at 406, allows Appeals officers to pass on to respondent's other employees new information received by an Appeals officer. Q&A-10, however, addresses new information "presented by the taxpayer," not new information obtained by the Appeals Officer via ex parte communications from other of respondent's employees. Respondent misreads Q&A-10.

We recognize that under section 7122(a) respondent is given broad discretion to consider and to reject offers-in-compromise, and we defer to respondent's discretion when it is properly exercised. Mailman v. Commissioner, 91 T.C. 1079, 1082 (1988). However, the communications before us clearly constituted prohibited ex parte communications.

* * *

Also, the revenue procedure prohibits communications between Appeals and Office of Chief Counsel. Rev. Proc. 2000-43 advises that an Appeals Officer may not have an ex parte communication with an IRS attorney who gave advice on an issue in a case during the examination process. Counsel are not to provide advice about the range of settlement for an issue pending before Appeals or for the case as a whole.

Recently, Chief Counsel issued a Chief Counsel Advice addressing ex parte communications between Chief Counsel and Appeals with respect to CDP

cases that are remanded by the United States Tax Court. See CC-2007-006, attached as Appendix #2.

II. The Appeals Division: The IRS Workhorse

Given its very broad, and very important, mission, Appeals tends to be the workhorse of the IRS. Understanding when you and your client have the opportunity or right to go to Appeals is important. Appeals functions are listed in Internal Revenue Manual 8.1.1.3,

Appeals' Functional Authority and Jurisdiction

1. Appeals is the Internal Revenue Service's dispute resolution forum. The Commissioner has granted Appeals authority to consider and negotiate settlements of internal revenue controversies. (See Delegation Order No. 66, as revised, in IRM 1.2.47, Delegation of Authorities for the Appeals Process and Policy Statement P-8-47 in IRM 1.2.1, Policies of the Internal Revenue Service.)
2. Appeals' responsibility includes but is not limited to:
 - the administrative determination of liability for income, estate, gift, employment and excise taxes, plus additions to tax, additional amounts and penalties;
 - collection due process;
 - collection appeals program;
 - offers-in-compromise;
 - penalty appeals;
 - abatement of interest;
 - administrative costs under IRC Section 7430;
 - jeopardy levies;
 - recommendations concerning settlement offers in refund suits
 - IRC 534(b) letters;
 - refund claims including Joint Committee cases; and
 - overassessments in which a taxpayer appeals the decision of a compliance Area Director, or a Campus Director.
3. Appeals jurisdiction includes, but is not limited to, cases that are subject to notice of deficiency procedures or that involve a tax liability. In most cases, a preliminary (30 or 60 day) letter has been issued to the taxpayer by the compliance Area Director or Campus Director. In general, taxpayers request an Appeals conference and, when required, file a protest against the proposed deficiency, overassessment, or

determination (See IRM 8.6.1, Conference and Settlement Practice for protest requirements).

The following is a description of the typical instances when a low income taxpayer may have a matter before the Appeals division.

A. Appealing an adjustment made through an “audit”.

Generally, the IRS can adjust the tax of your client through an examination (the euphemistic term used by the IRS to refer to an audit), through a math error, or through a matching of information returns with your client’s tax return or account, referred to as Automated Underreporter, AUR. See IRS Publication 3498, *The Examination Process*. Each time the IRS makes proposed adjustments, the taxpayer has the opportunity to request a review by Appeals of the proposed adjustment. When the IRS has examined a return, this is usually done after the IRS sends the taxpayer a letter outlined the proposed adjustments (Form 4549, also referred to as a Revenue Agent Report, RAR). This letter is commonly referred to in practice as a 30-day letter because it gives the taxpayer 30 days to request review by Appeals.

If the taxpayer does not exercise her right to request an appeal conference the adjustment is proposed through the issuance of a Notice of Deficiency. While the taxpayer may continue to work with appeals or the IRS before the deadline for filing a Tax Court petition, if the taxpayer does not resolve the matter she can file a petition with the United States Tax Court (“Tax Court”) within the time allowed (90 days from the date of the Notice of Deficiency unless the taxpayer is outside the U.S., in which case the time is 150 days.)

If the taxpayer does not file a petition with Tax Court, then the taxpayer may at a latter day invoke the discretion of the IRS to reconsider the adjustment. This is referred to as an Audit Reconsideration. See IRS Publication 3598, The Audit Reconsideration Process. If the IRS does not accept the proposed change through audit reconsideration, the taxpayer may appeal the denial to Appeals.

Finally, if the IRS matches reported income to a taxpayer's account because it was not reported to the taxpayer, the taxpayer is given a chance to appeal the proposed change to Appeals. Recently, however, the AUR units have not processed appeals timely, rushing instead to the issuance of a Notice of Deficiency thereby effectively denying a taxpayer the right to go to Appeals.

B. Appealing Denial of Penalties.

Generally, a taxpayer may contest the assertion of a penalty by the IRS by filing a written claim. If that claim is denied, then the taxpayer has a right to contest it by filing a protest with Appeals.

C. Appealing Preliminary Denial of Innocent Spouse Relief.

Currently, most innocent spouse claims are handled by the centralized Innocent Spouse unit. Under current operating procedures, if that unit determines to preliminarily grant Innocent Spouse relief to the requesting spouse, the nonrequesting spouse has the right to request a review by Appeals. Also, if the unit determines to preliminarily deny Innocent Spouse relief to the requesting spouse, that taxpayer has the right to appeal the preliminary denial to Appeals.

Recently, our clinic had a case where a client appealed a preliminary denial of innocent spouse relief by the centralized unit. Despite asking for the appeal at

our local Appeals office and requesting a face-to-face hearing, the case was assigned to the Appeals Office located at the Service campus where the centralized Innocent Spouse unit is located. It is not clear if this was an oversight of our request or whether Appeals is also trying to centralize the appeals of Innocent Spouse denials.

D. Collections.

Taxpayers have the right to contest certain IRS collection action or rejection of certain collection alternatives through Appeals. See IRS Publication 594, *What You Should Know About the IRS Collection Process*.

1. Collection Appeal Process (CAP).

If the IRS threatens to file a lien or levy funds outside of the CDP context, a taxpayer may request a Collection Appeal Process hearing with Appeals. See IRS Publication 1660, *Collection Appeal Rights*.

2. Collection Due Process Hearings.

By statute, the first time the IRS files a tax lien or notifies a taxpayer of its intent to levy, a taxpayer has the right to request a collection due process hearing before Appeals through which a taxpayer can offer an alternative to the filed lien or propose levy. See IRS Publication 4165 *An Introduction to Collection Due Process Hearings*. As discussed below, currently Appeals has centralized this process leading to concern by LITCs that face to face hearings may be limited.

3. Rejection of an Offer in Compromise.

If an Offer in Compromise is submitted to one of the two centralized OIC units and is rejected, a taxpayer has the right to request a review by Appeals.

4. Rejection of an Installment Agreement

If the IRS rejects a proposal by a taxpayer to a proposed installment agreement, the taxpayer has a right to appeal that denial to Appeals.

E. Tax Court Docketed Cases.

Once a case is docketed at Tax Court, through the filing of a petition, the IRS Area Counsel usually determines whether a case is appropriate for settlement. If so, the Area Counsel may involve Appeals which will meet and make a recommendation with respect to any proposed settlement to the IRS attorney assigned to the case. Any settlement, however, must ultimately be accepted by the Tax Court.

F. Fast Track Mediation.

Appeals has had a lot of success alternative dispute resolution programs, including Fast Track Mediation. See IRS Publication 4167, *Appeals - Introduction to Alternative Dispute Resolution*. This is an alternative dispute process whereby Appeals personnel act as mediators with the exams division and the taxpayer to try to settle factual disputes and to resolve cases at the exams level. See IRS Publication 3605 *Fast Track Mediation-A Process for Prompt Resolution of Tax Issues*. Unfortunately, many of the cases of low income taxpayers do not qualify for this process.

However with the advent of Appeals Offices located at the Service Campuses, it seems to me that Appeals might reconsider allowing fast track mediation of correspondence exams. This could be done through video or audio conferencing.

III. Resource limitations and the current impact on Appeals

“From 1927 to today, Appeals employees have been proud of their role in tax administration. From a function with less than 50 employees and an inventory of approximately 5,000 cases, Appeals has grown to over 1,800 employees, with an inventory of over 68,000 cases.”

Appeals-at-a-Glance, <http://www.irs.gov/irs/article/0,,id=96750,00.html>

As a result of the tremendous growth in work, Appeals has decided to adopt a strategy, which includes creating Appeals offices at the IRS Campus centers. This is one of several strategic moves by Appeals.

Strategic Priorities:

- Address the changing and growing inventory.
- Reduce the length of the Appeals process.
- Improve quality of referrals to Appeals.
- Implement Appeals tax shelter resolution strategies.
- Improve stakeholder and customer awareness of Appeal rights and processes.
- Promote employee productivity, engagement and satisfaction.
- Implement Appeals presence in campus environments.

Id.

Further, Appeals has begun to encourage taxpayers and their representatives to communicate by telephone or correspondence, in lieu of face-to-face hearings. Recently, the Treasury Inspector General for Tax Administration (“TIGTA”) examined the use of Appeals offices at campus locations. The Office of Appeals Needs To Improve the Monitoring of its Campus Operations Quality, issued on May 10, 2007 Report Number: 2007-10-071. The following is an executive summary of the report:

IMPACT ON TAXPAYERS

The centralization of certain types of cases into the campus operations is a major Office of Appeals (Appeals) strategy for improving service to taxpayers and reducing case processing time. The Appeals Quality Measurement System, which is used by Appeals to monitor and report on the overall quality of casework, was not modified to produce a statistically valid evaluation of the quality of casework performed within specific campuses or specific work streams. As a result, Appeals may not detect areas needing improvement within the campuses or be able to determine if its strategy for improving quality is successful.

Campus personnel did not always follow the correct procedures or make the correct determinations on taxpayer appeals, which could result in increased taxpayer burden, reduction of taxpayer rights and entitlements, reduction of taxpayer privacy and security, and lost revenue to the Federal Government.

WHY TIGTA DID THE AUDIT

The centralization of the Appeals casework was a major new initiative that affected the quality of casework as well as the length of time cases were processed in Appeals. Significant new initiatives were undertaken by Appeals to implement the campus operations. TIGTA's audit objective was to evaluate the quality and effectiveness of the centralized campus operations.

WHAT TIGTA FOUND

Appeals was not monitoring the quality of work performed within the campuses in a statistically valid manner, Appeals did not always offer face-to-face hearings, campus employees made incorrect determinations, and proper notifications were not provided in Innocent Spouse cases. There were unnecessary delays when the campuses processed Collection Due Process and Offer in Compromise cases and long periods of inactivity during the processing of Penalty Appeals cases and Innocent Spouse claims.

WHAT TIGTA RECOMMENDED

The Chief, Appeals, should revise the methodology used to select statistically valid samples of cases closed by the campus operations to measure and report on the quality of casework; provide updated guidance and training sessions to ensure employees adhere to legal notification requirements when processing Innocent Spouse cases; communicate clarifications of

the penalty abatement policies as well as emphasize the need for proper case research and application of penalty abatement criteria; and implement a review process to ensure campus employees make the correct decisions on statute of limitations claims. The Chief, Appeals, should also adopt consistent language for Uniform Acknowledgment Letters issued for Innocent Spouse, Non-Docketed, and Offer in Compromise cases to adequately inform taxpayers of the opportunity for requesting face-to-face hearings; revise the methods used to monitor the aging of Penalty Appeals cases and Innocent Spouse claims; and establish a timeliness standard for issuing Uniform Acknowledgment Letters for all Appeals casework.

Management agreed with our recommendations and is evaluating the options for measuring and evaluating campus case quality. Appeals plans to update Innocent Spouse case procedures and revise the notification letters used for these types of cases, conduct random sample reviews of refund claim cases to ensure proper decisions are being made, adopt consistent language in the Uniform Acknowledgment Letters to inform taxpayers of their options for requesting a face-to-face hearing, use real-time data to identify and address potential over-age cases, update the Internal Revenue Manual for the new processes, implement new action codes to track timely issuance of the Uniform Acknowledgment Letters, and update the procedures to document the new timeliness standard.

IV. Practice considerations for taxpayers and their representatives when choosing to appear before Appeals.

When should your client consider asking for a review by Appeals and more specifically, when should you counsel your client to request a face to face conference? In the experience of most of the LITCs, it is rare that a client's case can be accurately portrayed and "negotiated" through correspondence. As can be imagined, if you send in documentation that you believe supports your case, but the Appeals officer finds it ambiguous or has other questions, the period of time spend corresponding or trading telephone calls can actually be longer than if you had a face-to-face conference.

Of course, in some instances it is impractical and unaffordable for a taxpayer or the taxpayer's representative to attend a face-to-face conference at an Appeals office. This is especially true if the taxpayer or the taxpayer's representative is located in a rural area and the closest Appeals office is located in an urban area hundreds of miles away. While courts have addressed this with video conferencing, it does not appear that Appeals has introduced such a procedure.

Face-to-face conferences are desirable when your client has a story that is crucial to the relief you want and it can best be told in person. It is also desirable when you need to walk an Appeals officer or Settlement officer through lots of documentation. However, are you always entitled to a face-to-face conference?

Recently, LITCs have had difficult times getting face-to-face conferences despite clearly asking for one. Many requests for face-to-face conferences from AUR notices or CDP hearing notices seem to go unheeded. Our advice to you is to be diligent in following up and not to settle for a telephonic conference if you firmly believe that a face-to-face conference is best. Of course for academic LITCs whose mission is educational, it is almost always best to request a face-to-face conference to give students an opportunity to think on their feet and to hone advocacy skills.

V. The Future of Appeals (To be discussed.)

Appendix #1

Prohibition of Ex Parte Communications Between Appeals Officers And Other Internal Revenue Service Employees

Rev. Proc. 2000-43

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SECTION 4. EFFECTIVE DATE

SECTION 1. PURPOSE AND SCOPE

Section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (RRA 98), states that “The Commissioner of Internal Revenue shall develop and implement a plan to reorganize the Internal Revenue Service. The plan shall:

- (4) ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.”

Notice 99-50, 1999-40 I.R.B. 444 (October 4, 1999), set forth a proposed revenue procedure concerning the ex parte communication prohibition. The proposed revenue procedure provided guidance in the form of a series of questions and answers that address situations frequently encountered by the Service during the course of an administrative appeal and invited public comment. The Department of the Treasury and the Internal Revenue Service have considered all comments received, and the proposed revenue procedure has been modified to take into account the concerns raised. Specifically, the scope of permissible communications has been clarified, limitations have been placed on communications between Appeals and certain employees in the Office of Chief Counsel, concerns about communications that take place in the context of multi-functional meetings have been addressed, and other questions and answers have been modified. In addition, new questions and answers have been included to define key terms and clarify responsibilities of the parties, permit taxpayers/representatives to waive the prohibition, and to address certain management issues.

SECTION 2. BACKGROUND

1927, the Internal Revenue Service established an administrative appeal process to resolve tax disputes without litigation. The Appeals mission is to resolve tax controversies, without litigation, on a basis that is fair and impartial to both the Government and the taxpayer. Local Appeals Officers have traditionally reported to different managers than the Service officials who proposed the adjustment. Appeals has historically been able to settle the vast majority of the cases that come within its jurisdiction.

The inventory of cases handled by Appeals falls into two major categories — nondocketed and docketed B determined by whether the case is pending in the United States Tax Court. Nondocketed cases typically involve an administrative protest by the taxpayer of the findings and conclusions of the Examination, Collection, or other IRS function that initially considers a taxpayer's case. The taxpayer's protest is typically followed by a conference, or series of conferences, with the taxpayer or the taxpayer's representative, during which Appeals and the taxpayer attempt to reach resolution of the issues in dispute. Docketed cases involve disputes where the taxpayer has filed a petition in the U.S. Tax Court, contesting a determination made by the Service in a statutory notice of deficiency. Following the filing of the petition, taxpayers who have not previously availed themselves of the opportunity for an Appeals conference generally are afforded an opportunity to resolve their case with Appeals before the case proceeds further in the litigation process. See *generally* Rev. Proc. 87-24, 1987-1 C.B. 720. In both types of disputes, Appeals has broad authority to negotiate settlements by applying a "hazards of litigation" standard.

Proceedings before Appeals have traditionally followed a much less formal course than court proceedings. While proceedings before Appeals are designed to be fair and impartial, they are not subject to judicial rules of evidence or procedure. Some early legislative proposals during 1998 would have required Appeals to adopt more formal and less flexible processes. S. Rep. No. 1669, 105th Cong., 2nd Sess., § 304(a) (Feb. 24, 1998), would have established an independent Office of Appeals in the Internal Revenue Service, the head of which was to be appointed by and report directly to the Oversight Board. Further, this proposal would have barred Appeals from considering issues not "raised" by the originating function and prohibited "any communication" with the originating function unless the taxpayer or taxpayer's representative had an opportunity to be present. As ultimately enacted, § 1001(a)(4) of RRA 98 did not impose a comprehensive overhaul of Appeals' processes. Instead, that section requires the IRS, as part of its reorganization plan, to establish an independent Office of Appeals "within the Internal Revenue Service." The plan must prohibit ex parte communications "to the extent such communications appear to compromise the independence" of Appeals. When the evolution of § 1001(a)(4) of RRA 98 during the 1998 legislative process is considered in light of Appeals longstanding methods of operation, it can be fairly concluded that Appeals must be accorded a significant degree of independence from other IRS components, and should be mindful to avoid ex parte communications with other IRS functions that might appear to compromise that independence. The statutory provision cannot, however, be interpreted as mandating a major redesign of the fundamental processes Appeals has traditionally followed to carry out its dispute resolution mission. The procedures set forth in this Revenue Procedure are designed to accommodate the overall interests of tax admin field attorneys who have previously provided advice on that issue in the case to the IRS employees who made the determination Appeals is reviewing. Counsel will assign a different attorney to provide assistance to Appeals. If an Appeals employee believes it is necessary to seek advice from any Counsel field attorney who previously provided advice to the originating function regarding that issue in the case, the taxpayer/representative will be provided an opportunity to participate in any such communications. Appeals' requests for legal advice that raise questions that cannot be answered with a high degree of certainty by application of established principles of law to particular facts will be referred to the Chief Counsel National Office and will be handled as requests for field service advice or technical advice, as appropriate, in accordance with applicable procedures. The response of the National Office to Appeals will be disclosed to the taxpayer in

accordance with § 6110. Appeals employees are cautioned that, while they may obtain legal advice from the Office of Chief Counsel, they remain responsible for independently evaluating the strengths and weaknesses of the specific issues presented by the cases assigned to them, and for making independent judgments concerning the overall strengths and weaknesses of the cases and the hazards of litigation. Consistent with this assignment of responsibility, Counsel attorneys will not provide advice that includes recommendations of settlement ranges for an issue in a case pending before Appeals or for the case as a whole. The foregoing limitations on ex parte communications do not apply to cases docketed in the United States Tax Court. Docketed cases will be handled in accordance with Rev. Proc. 87-24, 1987-1 C.B. 720, and the Tax Court Rules of Practice and Procedure.

Q-12 Appeals is required to submit certain cases to the Joint Committee on Taxation for review. On occasion, the Joint Committee (or its staff) will question a settlement or raise a new issue. Are communications with the Joint Committee (or its staff) covered by the ex parte communications prohibition?

A-12 No. The prohibition applies only to communications between Appeals and other Internal Revenue Service employees.

Q-13 Does the prohibition on ex parte communications have any impact on the requirement that Industry Specialization Program (ISP) issues in cases in Appeals jurisdiction be reviewed and approved by the Appeals ISP Coordinator?

A-13 No. Existing procedures for review and approval remain in place. The Appeals ISP coordinator serves as a resource person for the Appeals organization. The purpose of the review is to ensure consistency of settlements and adherence to approved settlement guidelines. Communications between Appeals employees and the Appeals ISP Coordinator are entirely internal within Appeals, and consequently, the ex parte communications prohibition does not apply.

Q-14 Delegation Order 247, 1996-1 C.B. 356, gives Examination case managers limited settlement authority to resolve ISP coordinated issues which have Appeals Settlement Guidelines, provided that they secure the review and approval of both the Examination and Appeals ISP Coordinators. Would such communications constitute a violation of the ex-parte communications prohibition?

A-14 No. The purpose of the review is to ensure that the resolution by Examination fits within the guidelines developed by Appeals and that the application of the guidelines is consistent. The role of the Appeals ISP coordinator is directive in nature and has no impact on the independence of Appeals.

Q-15 Does the prohibition on ex parte communications apply in the context of meetings which include representatives from Appeals, Counsel, Collection and Examination (ACCE meetings), industry wide ISP coordination meetings, or meetings of Compliance Councils or the Large Case Policy Board?

A-15 Generally, no. Meetings of this type usually involve general discussions of how to handle technical issues or procedural matters. As long as the discussions do not identify specific taxpayers, the prohibition on ex parte communications would not apply. Participants in cross-functional meetings need to remain cognizant of the prohibition on

ex parte communications and ensure that discussions do not appear to compromise the independence of Appeals.

Q-16 Does the prohibition on ex parte communications apply to communications between Appeals and the Commissioner or other Service officials who have overall supervisory responsibility for IRS operations?

A-16 No. In accordance with § 7803, the Commissioner is responsible for managing and directing the administration of the internal revenue laws and tax conventions to which the United States is a party. In the course of exercising that statutory responsibility, the Commissioner and those officials, such as the Deputy Commissioner Operations, who have overall supervisory responsibility for IRS operations may communicate with Appeals about specific cases or issues and may direct that other IRS officials participate in meetings or discussions about such cases or issues without providing the taxpayer or representative an opportunity to participate.

Q-17 Does the prohibition on ex parte communications apply to discussions Appeals employees have with personnel in the IRS competent authority office regarding a taxpayer's request for relief under a tax treaty?

A-17 No. Communications between Appeals employees and IRS officials considering relief under competent authority procedures are not subject to the ex parte prohibitions because the Appeals Officer may assume that the competent authority is acting at the request, and with the consent, of the taxpayer.

Q-18 Does the prohibition on ex parte communications have any impact on Appeals communications with the Taxpayer Advocate Service (TAS) on an open case?

A-18 No. Communications by Appeals with the TAS that are initiated by the TAS are not subject to the prohibition because the Appeals Officer may assume that the TAS is acting at the request, and with the consent, of the taxpayer.

Q-19 Are communications between Appeals and outside consultants or experts under contract to the IRS subject to the ex parte communication prohibition?

A-19 Yes. Under the ex parte rules adopted here, outside consultants or experts under contract to the IRS (other than those employed directly by Appeals) will be treated as "other IRS employees." Therefore, the principles set forth in A-5 will apply. Appeals must give the taxpayer/representative the opportunity to participate in case-specific discussions that concern matters beyond the non-substantive ministerial, administrative or procedural matters described in A-5 above.

Q-20 A number of questions and answers have referred to communications with the "originating function." How is that term defined?

A-20 An "originating function" is an organization within the IRS that makes determinations which are subject to the Appeals process. For purposes of this revenue procedure, the term includes the Examination, Collection, Service Center, International, and Tax Exempt/Government Entities functions, or their successor organizations.

Q-21 Several responses in this document refer to the taxpayer/representative being given an “opportunity to participate.” What does this phrase mean?

A-21 It means that the taxpayer/representative will be given a reasonable opportunity to attend a meeting or be a participant in a conference call between Appeals and the originating function when the strengths and weaknesses of issues or positions in the taxpayer’s case are discussed. The taxpayer/representative will be notified of a scheduled meeting or conference call and invited to participate. If the taxpayer/representative is unable to participate at the scheduled time, reasonable accommodations will be made to reschedule. This does not mean that the Service will delay scheduling a meeting for a protracted period of time to accommodate the taxpayer/representative. Facts and circumstances will govern what constitutes a reasonable delay.

Q-22 May the taxpayer/representative waive the prohibition on ex parte communications?

A-22 Yes. If the taxpayer/representative is given an opportunity to participate in a discussion, but decides that such participation is unnecessary, the prohibition can be waived. Generally, a waiver will be granted on a communication-by-communication basis. However, if the taxpayer/representative so desires, the waiver could encompass all communications that might occur during the course of Appeals’ consideration of a specified case. The Appeals Officer should document the waiver in the Case Activity Record.

Q-23 What if the taxpayer/representative declines to participate or seeks to delay the meeting/conference call beyond a reasonable time?

A-23 Appeals should proceed with the meeting or discussion and document the taxpayer/representative’s declination or the reason for proceeding in the absence of the taxpayer/representative. This could be accomplished by an entry in the Case Activity Record and a letter to the taxpayer/ representative documenting the reason for proceeding.

Q-24 The IRM provides for computational review within 120 days of a team case being assigned. If this review reveals computational errors affecting the proposed tax liability, can Appeals discuss these errors with the originating function without violating the prohibition on ex parte communications?

A-24 It depends on the nature of the error. If the discrepancy is purely mathematical, any discussion would likely be informational only, and no violation of the prohibition is likely. Both the taxpayer/representative and the originating function would be advised before a mathematical correction is made. However, if the error involves the interpretation of a legal principle or application of the law to a particular set of facts, the taxpayer/representative should be afforded the opportunity to participate in any scheduled meetings with the originating function to discuss the discrepancy. In such cases, there may be instances where the best approach is for Appeals to return the case for further development and correction.

Q-25 Does the prohibition on ex parte communications apply to preconference meetings between Appeals and Examination?

A-25 Yes. This is clearly a situation where the intended communications could appear to compromise the independence of Appeals. Pre-conference meetings should not be held unless the taxpayer/ representative is given the opportunity to participate.

Q-26 Does the prohibition on ex parte communications apply to post-settlement conferences between Appeals and Examination?

A-26 No. The post-settlement conference with Examination is intended to inform Examination about the settlement of issues and to supply information that may be helpful in the examination of subsequent cycles. Appeals' objective is to ensure that Examination fully understands the settlement and the rationale for the resolution. In addition, the conference provides an opportunity for Appeals to discuss with Examination the application of Delegation Orders 236 and 247 (*i.e.*, settlement by Examination consistent with prior Appeals settlement or ISP settlement guidelines) to issues settled by Appeals. The tax periods that are the subject of the post-settlement conference have been finalized, and the participants are cautioned to limit discussion to the results in the closed cycle. Discussion of the resolution of issues present in the closed periods does not jeopardize the independence of Appeals. Any discussion that addresses open cycles of the same taxpayer should be postponed, and the guidance provided in this revenue procedure relating to ongoing disputes should be followed.

Q-27 Does the prohibition on ex parte communications alter existing procedures for handling claims filed late in the Appeals process?

A-27 No. There is no change to existing procedure. The claim should be referred to the originating function with a request for expedited examination. Because such a referral is in the nature of a ministerial act and involves no discussion about the strengths and weaknesses of the issue, the referral is not subject to the prohibition.

Q-28 How will the Service monitor compliance with the prohibition on ex parte communications?

A-28 Employees will receive training on the contents of this revenue procedure and will be encouraged to seek managerial guidance whenever they have questions about the propriety of an ex parte communication. Managers will consider feedback from other functions and will be responsible for monitoring compliance during their day-to-day interaction with employees, as well as during workload reviews and closed case reviews. Violations will be addressed in accordance with existing administrative and personnel processes.

Q-29 Are IRS employees assigned to functions other than Appeals responsible for complying with the prohibition on ex parte communication?

A-29 Yes. It is recognized that Appeals cannot always fully control communications from other IRS personnel. Appeals will make every effort to promptly terminate any discussion that verges into matters not permitted by these rules. However, all IRS and Counsel employees share the responsibility to ensure that communications do not appear to

compromise the independence of Appeals. Violations will be addressed in accordance with existing administrative and personnel processes.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for communications between Appeals Officers and other Internal Revenue Service employees which take place after October 23, 2000, the date this revenue procedure is published in the Internal Revenue Bulletin.

Appendix #2

Chief Counsel Notice

CC-2007-006

February 23, 2007

Subject:

Application of the Ex Parte Communication Rules to Remanded CDP Cases

PURPOSE

This notice provides guidance on the application of the ex parte rules to communications between Chief Counsel attorneys and the Office of Appeals when a Collection Due Process case arising under sections 6320(c) or 6330(d) is remanded by the Tax Court. This notice sets forth guidelines to assist Chief Counsel attorneys in striking a balance between the need to ensure compliance with the court's orders and to maintain Appeals' independence.

BACKGROUND

Section 1001(a)(4) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 689 (1998), directed the Commissioner to develop a plan to prohibit ex parte communications between Appeals employees and other Internal Revenue Service employees to the extent that those communications appear to compromise the independence of Appeals. Pursuant to this directive, the Service published Rev. Proc. 2000-43, 2000-2 C.B. 404, which provides guidance, in a question and answer format, regarding ex parte communications. The term "ex parte communications" is defined in Rev. Proc. 2000-43 as communications between Appeals and other Service functions without the participation of the taxpayer or the taxpayer's representative. Ex parte communications are prohibited to the extent they appear to compromise the independence of Appeals. Rev. Proc. 2000-43, Q&A-1. Pursuant to Q&A-11 of Rev. Proc. 2000-43, the following communications between Appeals employees and Counsel attorneys are prohibited:

- Communications between Appeals and a Counsel field attorney who previously provided guidance to the originating function on the same issue in the same case that Appeals is reviewing. In this situation, a different Counsel attorney should be assigned to provide advice to Appeals regarding the issue.
- Communications regarding settlement ranges for an issue in a case pending before Appeals or for the case as a whole. • Communications regarding the demeanor or credibility of the taxpayer or the taxpayer's representative.

These guidelines, however, do not prohibit communications involving ministerial, administrative, or procedural matters. Rev. Proc. 2000-43, Q&A-5. Docketed Tax Court cases are not subject to the guidelines in Rev. Proc. 2000-43, but rather are handled in accordance with Rev. Proc. 87-24, 1987-1 C.B. 720, and the Tax Court Rules. Rev. Proc. 2000-43, Q&A-11. The purpose of Rev. Proc. 87-24 is to develop or dispose of Tax Court cases through use of the administrative Appeals process. Rev. Proc. 87-24 does not specifically limit or otherwise define ex parte communications. Revenue Procedure 2000-43 does not subject remanded CDP cases to the ex parte rules because the cases remain docketed with the Tax Court. When a CDP case is remanded,

however, the Appeals employee resumes the role of an independent officer. Therefore, it is imperative that guidelines similar to those stated in Rev. Proc. 2000-43 be applied to these cases.

GUIDELINES

The following guidelines apply when a CDP case is remanded:

- (1) The Counsel attorney working the docketed case should prepare a written memorandum addressed to the Office of Appeals explaining the reasons why the court remanded the case to Appeals, any special requirements in the order (e.g., whether and to what extent a new conference should be held, and whether the case must be reassigned to a new Appeals Officer), and what issues the court has ordered Appeals to address on remand. A copy of the memorandum should be provided to the taxpayer or the taxpayer's representative. The memorandum should not discuss the credibility of the taxpayer or the accuracy of the facts presented by the taxpayer. The memorandum also should advise the Appeals Officer not to issue a standard notice of determination using Letter 3193, Notice of Determination Concerning Collection Action under Section 6320 and/or 6330. Instead, a Letter 3978, Supplemental Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, should be issued to the taxpayer.
- (2) A request by an Appeals Officer for legal advice in connection with the remanded CDP case may be handled by the Counsel attorney who is handling the docketed Tax Court case, so long as that attorney did not give legal advice to an originating function (e.g., collection) concerning the same issue in the same case. If the Counsel attorney provided such advice, the request should be assigned to another Counsel attorney who has not previously provided advice to a Service office concerning the same issue in the same case. Any legal advice should be carefully tailored to answer the legal questions posed by Appeals and should not opine on the ultimate issues to be addressed by Appeals in the Supplemental Notice of Determination. Requests for advice that raise novel legal issues should be coordinated with Branch 1, Collection, Bankruptcy & Summonses Division. Consistent with Q&A-11 of Rev. Proc. 2000-43, the advice does not have to be shared with the taxpayer or his representative at the time it is rendered. Also, neither the taxpayer nor his representative have a right to participate in any discussions between Appeals and Counsel with respect to the advice.
- (3) The Counsel attorney who is handling the docketed case should review the supplemental notice of determination before it is issued to the taxpayer. This review is for the limited purpose of ensuring compliance with the Tax Court's order.

The following examples illustrate the application of the guidelines set forth in this notice:

Example 1

The taxpayer files a Tax Court petition seeking review of the Appeals Officer's CDP

determination with respect to a proposed levy relating to the taxpayer's 2001, 2003, and 2004 tax liabilities. The taxpayer asserts that the 2001 assessment was barred by the statute of limitations and the payments applied to the 2001 tax year should be reapplied to the 2003 and 2004 tax years. The Tax Court agrees with the taxpayer that the 2001 assessment was barred by the statute of limitations. The Tax Court also finds that the Appeals Officer abused his discretion by not applying the payments as requested by the taxpayer. The Tax Court remands the case to Appeals for purposes of determining, based upon the court's findings, whether the taxpayer owes unpaid tax for the tax years 2003 and 2004 and whether Appeals and the taxpayer can agree on a collection alternative in the event there is any unpaid tax.

In this example, the Counsel attorney handling the case should send a memorandum to the Appeals Officer explaining the Tax Court's opinion. The memorandum should state that the case has been remanded for the purpose of determining whether the taxpayer owes unpaid tax after the payments that were erroneously applied to 2001 are reapplied to 2003 and 2004 and whether Appeals and the taxpayer can agree on a collection alternative in the event there is any unpaid tax. The memorandum also should state that the Appeals Officer is to treat the 2001 assessment as invalid and to reapply the payments erroneously applied to 2001 accordingly. The memorandum should instruct the Appeals Officer to issue the Supplemental Determination using Letter 3978, after review by the Counsel attorney for the limited purpose of ensuring compliance with the Tax Court's order. A memorandum of this nature is not a prohibited ex parte communication because it merely furnishes instructions and legal advice regarding the court's order, and does not address the substance of the issues to be considered by the Appeals Officer on remand. A copy of the memorandum should be sent to the taxpayer.

Example 2

The Tax Court determines that the Appeals Officer abused her discretion by failing to consider certain payments that the taxpayer claims were not properly credited to his account. Accordingly, the Tax Court remands the case to Appeals. The Counsel attorney assigned to the case telephones the Appeals Officer and explains that the case is being remanded and the Tax Court has ordered the Appeals Officer to consider the taxpayer's assertion that certain payments are not properly reflected on his account. During the discussion, the Counsel attorney tells the Appeals Officer that he believes that the taxpayer gave false testimony at trial and that he also believes that the taxpayer did not submit the payments.

In this example, Counsel attorney's statements regarding the payments and the truthfulness of the taxpayer's testimony address the accuracy of the facts presented by the taxpayer and the taxpayer's credibility. Consequently, they violate the ex parte communication rules.

Example 3

The Tax Court remands a Collection Due Process case to Appeals and the Counsel attorney assigned to the case sends a memorandum to Appeals explaining the remand order and issues to be considered. A few weeks later, the Counsel attorney sends the Appeals Officer an e-mail advising the Appeals Officer that the deadline for the proceedings on remand set forth in the Tax Court's order is approaching. See Rev. Proc. 2000-43, Q&A-5.

In this example, the e-mail is not a prohibited ex parte communication because it merely advises the Appeals Officer of the deadline for conducting the proceedings on remand, which is ministerial, administrative, or procedural in nature.

Any questions concerning the matters set forth above should be addressed to Branch 1, Collection, Bankruptcy and Summonses Division, Office of the Associate Chief Counsel (Procedure and Administration), at 202-622-3610.

_____/s/_____
Deborah A. Butler
Associate Chief Counsel
(Procedure and Administration)