August 28, 2020

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on the Appeals Team Case Leaders Conferencing Initiative

Dear Commissioner Rettig:

Enclosed please find comments regarding the Appeals Team Case Leaders Conferencing Initiative. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Joan C. Arnold
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
    Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
    Jeffrey Van Hove, Senior Advisor, Office of Tax Policy, Department of the Treasury
    Hon. Michael J. Desmond, Chief Counsel, Internal Revenue Service
    Douglas O’Donnell, Commissioner (Large Business & International), Internal Revenue Service
    Robin Greenhouse, Division Counsel (Large Business & International), Internal Revenue Service
    Andy Keyso, Chief of Independent Office of Appeals, Internal Revenue Service
    Amalia C. Colbert, Taxpayer First Act Office, Internal Revenue Service
    Lisa J. Beard, Taxpayer First Act Office, Internal Revenue Service
These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation ("Section") and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Matthew Cooper, Brandon King, and Lee Meyercord. Committee review of these Comments was exercised by Mary I. Slonina, Chair of the Administrative Practice Committee, and Alexandra Minkovich and Mitchell I. Horowitz, Chair and Vice-Chair, respectively, of the Court Procedure and Practice Committee. Significant contributions to these Comments also were made by Jeremiah Coder, George Hani, Mary McNulty, Kevin Packman, Kevin Stults, and Zhanna Ziering. These Comments were reviewed by John Colvin of the Committee on Government Submissions and Kurt L. Lawson, Vice Chair for Government Relations for the Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: August 28, 2020
BACKGROUND

On May 1, 2017, the Independent Office of Appeals1 (“Appeals”) of the Internal Revenue Service (the “Service”) implemented an initiative (the “Initiative”) in which some Appeals Team Case Leaders (“ATCLs”) would hold Appeals conferences with representatives from the appropriate Large Business & International (“LB&I”) Examination team (“Exam”) in attendance. This Initiative was a three-year pilot program where Exam, and their Counsel, were invited to attend the “non-settlement” portion of a taxpayer’s Appeals conference to test whether their participation would help Appeals narrow the dispute and resolve complex factual and legal differences.

Appeals began the Initiative to provide an opportunity for Appeals to engage, simultaneously, with the taxpayer, its representatives, and Exam, in order to foster a robust discussion of each side’s positions so that Appeals could determine the hazards of litigation and the appropriate settlement in each case.2 Also, Appeals designed the Initiative to provide for more orderly functioning and productive conversations.3

The Initiative was completed on May 1, 2020. Soon afterward, the Service issued an invitation to the public to provide comments on whether the Initiative helped to facilitate an orderly and productive Appeals conference.4 Appeals management requested that comments be submitted by August 31, 2020, so that Appeals could evaluate the Initiative. The Section appreciates the opportunity to provide input on the Initiative.

Although there are certain benefits from the Initiative, unfortunately some Section members have had counterproductive experiences in conferences held pursuant to the provisions of the Initiative as initially structured, experiences that call into question the efficacy of the Initiative and, potentially affect the independence of Appeals. If the Initiative is to continue, the Section recommends that the program continue only as a voluntary process upon agreement of the taxpayer and Appeals.

Therefore, this letter is presented in two sections, each developed from Section members’ experiences representing taxpayers whose Appeals cases were selected for inclusion in the Initiative. The first section discusses aspects of the Initiative that are

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1 This office was known as the Office of Appeals when the Initiative was established. The “Independent Office of Appeals” was established with the passage of the Taxpayer First Act on July 1, 2019. See Pub. L. No. 116-25, § 1001(a), 133 Stat. 981, 983.


4 Id.
potentially advantageous to the Appeals process. The second section lists areas of concern with the Initiative and provides recommendations to address those concerns.

I. Advantages of the Initiative

By allowing Appeals, Exam, taxpayers, and their representatives to attend Appeals conferences, the Initiative conceptually provides a forum where each party can present a full factual and legal case and ask questions to seek clarity on unresolved questions of fact and law. Additionally, the Initiative seeks to provide the taxpayer a full and fair opportunity to engage in settlement negotiations that take into account the proper hazards of litigation without the undue influence and participation of Exam. Some aspects of the Initiative help accomplish these dual objectives, as discussed below.

Through the use of the Initiative, ATCLs can allow Exam to raise clarifying questions about facts, when appropriate. This can facilitate the ATCL’s review of the case after the taxpayer has submitted its protest, and Exam has submitted its rebuttal. By addressing any lingering factual questions as part of the Appeals conference, the Initiative might improve efficiency and allow the ATCL to resolve the case more quickly, potentially eliminating a need to send the case back to Exam for further factual development. It also is potentially helpful for each of the parties involved to see presentations simultaneously, which can facilitate an active dialogue to resolve points of uncertainty between the parties. In other words, the natural give-and-take, question-and-answer dynamic between Exam and taxpayers can educate ATCLs in real time, without gaps or inconsistencies that might still exist either before, during, or after the opening Appeals conference. However, we believe it is crucial that the ATCL allow the taxpayer a full chance to rebut Exam’s position, or else the presentation might become one-sided.

Additionally, the Initiative potentially encourages Exam to take a “hard look” at its position to determine its strengths and weaknesses. Before the Initiative, Exam had the ability to transfer the issues to Appeals to be resolved. Now, Exam must defend and own its positions in front of Appeals in a more robust manner. The same has always has been true for the taxpayer. When the Initiative operates as intended, and all parties fulfill the requirements of the Initiative, this contributes to a more meaningful dialogue and resolution of issues in dispute. Practitioners have reported several examples of this occurring in recent years, where Appeals has listened meaningfully to the presentations by both sides and has encouraged Exam (and LB&I Counsel where relevant) to modify its positions. Consistent with our recommendations below, this requires the ATCL to maintain control of the meeting and to express his or her views on the merits of each side’s position thoughtfully and frankly.

Finally, the Service has stated the Initiative was meant to apply “only to the largest and most complex corporate tax disputes heard in Appeals” and was not intended to be used for all Appeals cases.5 We appreciate this limitation and believe that, if the

5 Id.
Initiative continues, the procedures should continue to apply only to the largest cases. As larger cases tend to have more issues, and often more complex issues, the risk of uncertainty is most acute in such cases. We do not see the same potential benefit of the Initiative in smaller cases, where the amount at issue is lower and the issues themselves tend to be less complex.

II. Concerns with the Initiative and Recommendations

While we see beneficial aspects to the Initiative, we also have serious concerns with the Initiative as initially structured and its potential impact on the independence of the Appeals process. Practitioners have reported some experiences in which encouraging active engagement between taxpayers and Exam seemed counterproductive to resolving disputes with taxpayers. We believe this can be traced primarily to a few issues, set forth below, with the Initiative as initially structured. If the Initiative becomes permanent, we encourage the Service to consider these issues and adopt the associated recommendations.

- First and foremost, as previously stated, we recommend that the Initiative be revised to allow Exam to participate in the taxpayer’s Appeals presentation only with the taxpayer’s consent. Many taxpayers either are neutral to Exam’s participation or welcome it. For appeals by taxpayers who view Exam’s participation as detrimental to the ATCL’s ability to resolve the case without litigation, in our view Exam should not be allowed to participate.6

- We recommend that the Initiative be revised to require the ATCL to establish ground rules before the conference with the agreement of the parties. Initiative conference guidelines provide that the ATCL is responsible for holding an expectations conference call with all parties to “discuss the role of each participant at the conference” and to “set forth expectations and ground rules for the conference.”7 While this is part of the Initiative conference guidelines, practitioners report that these guidelines are not consistently followed. Some practitioners report that they never have participated in a conference call to discuss expectations with Exam before the Appeals conference. We recommend that, at a minimum, this guideline be converted into a requirement of the Initiative process. Additionally, we recommend that the Initiative be revised to require the ATCL to allocate time for each side to make its opening presentation and allocate time to allow each side to respond to the other side’s presentation, ask follow-up questions, and seek clarification.

6 This recommendation also was made by the Taxpayer Advocate Service. See National Taxpayer Advocate Objectives Report to Congress, Fiscal Year 2021, App. 1 at 160-162 (June 30, 2020).

• We recommend that the Initiative be revised to require the ATCL to exercise direction and control over the conference and enforce the previously agreed upon ground rules, while also ensuring a professional exchange between the parties. Practitioners have reported occasional chaotic proceedings during which Exam has interrupted the taxpayer or failed to follow the ground rules set forth during the expectations conference call. There also have been reported instances of Exam using the conference to disparage taxpayer and its counsel. These detract from the otherwise productive environment of the Appeals conference.

• One of the goals of the Initiative was to “narrow factual and legal differences.” To assist in meeting this goal, we recommend that the Initiative be revised to require Exam and the taxpayer identify the scope of factual and legal differences before the Appeals conference. This will allow the parties to focus their discussion on these differences, which might result in a more productive discussion among the parties. It also could help identify situations in which the disagreement relates solely to how the law is to be applied to the facts, and thus participating in the Initiative might not be particularly beneficial.

• Without proper structuring, both the expectations conference call and the Appeals conference itself can take on the unintended form of a mediation by Appeals, even though the taxpayer has not agreed to the use of the Rapid Appeals Process. The Service has noted that the Initiative was not intended to be a “mediated resolution,” as compared to the Rapid Appeals Process. We believe this is critical to ensuring an independent Appeals process, within the bounds of the Taxpayer First Act and other statutory mandates. Mediation-like procedures do not have the same aim as an independent review of the issue. To that end, we recommend that any future training with respect to procedures derived from the Initiative state that Exam’s participation in the taxpayer’s presentation at the Appeals conference is not equivalent to (or even similar to) the Rapid Appeals Process, and that ATCLs should resist any personal preference for mediation when that is not the process being used. We also recommend that Appeals reaffirm at the outset of any conference that the focus of the Initiative is for Exam to educate Appeals as to Exam’s position, and not to participate or assist in the


9 See generally I.R.M. 8.26.11 (07-01-2017) (“The Rapid Appeals Process is a tool used to improve the efficiency and timeliness of Appeals resolutions. If all parties agree, the pre-conference becomes a working conference where Appeals utilizes mediation techniques to resolve unagreed issues. If the process is unsuccessful, the traditional Appeals process continues.”).

negotiation of a mediated settlement between the parties. This will ensure that all participating parties are clear on the objectives.

- Consistent with Appeals’ conference guidelines,\(^\text{11}\) we recommend that the Initiative not allow Exam to be present for settlement negotiations once both parties have made their presentations and the ATCL’s questions have been answered. Unfortunately, practitioners report instances where Exam has insisted on staying for settlement negotiations, or attempted to engage with the ATCL (and vice-versa) as to what would be regarded as a “fair” settlement. We believe that allowing Exam to participate in any way in settlement negotiations jeopardizes both the perceived and actual independence of Appeals.

- We recommend that the Initiative be revised to require Appeals to compile quantitative data regarding ATCL conferences in which Exam participates. While Appeals now compiles qualitative data from Initiative participants through surveys, these surveys capture only the parties’ perception of the process and not quantitative data like whether there was a pre-conference call to agree on the parties’ expectations, agreed case percentages, and cycle times. Due to its objective nature, we believe that quantitative data, in addition to qualitative data, is necessary to evaluate the efficacy of the Initiative and whether it hinders or assists Appeals with its goal of resolving “tax controversies without litigation” in “a fair and impartial manner.”\(^\text{12}\) A further advantage is that quantitative data can be collected on an ongoing basis, whereas qualitative data is appropriately not solicited until the case is closed, which might allow for more timely feedback to Appeals in evaluating the Initiative.\(^\text{13}\)

- In our experience, the participation of Exam in the Appeals process can extend the duration of the Appeals conference, which we believe is not in line with the goals of the Initiative. Accordingly, more specific to the recommendation to compile quantitative data, we recommend that the Initiative be revised to require Appeals to examine the length of Initiative cases and compare them to the length of pre-Initiative cases or ATCL cases not subject to the Initiative.\(^\text{14}\)

\(^\text{11}\) Id. Question 3 states that “[s]ettlement discussions for cases in this initiative are held between the ATCL and the taxpayer without Compliance present.”

\(^\text{12}\) Treas. Reg. § 601.106(a)(1).

\(^\text{13}\) This recommendation was also made by the Taxpayer Advocate Service. See National Taxpayer Advocate Objectives Report to Congress, Fiscal Year 2021, App. 1 at 160 – 162 (June 30, 2020).

\(^\text{14}\) We acknowledge that such comparisons might be difficult for cases pending during the COVID-19 pandemic.