INTERVIEW WITH DAVID ROBISON

*by Jasper L. Cummings, Jr. and Alan J.J. Swirski**

DAVID ROBISON

INTRODUCTION: David Robison recently retired from the Service, where he served 32 years in a variety of functions. He is currently a Senior Advisor with Skadden, Arps, Slate, Meagher & Flom.

Q Could you tell us about your background?

A Since May of last year I have been with Skadden, Arps, Slate, Meagher & Flom LLP as their Senior Advisor–Tax Resolution Strategies. I ended my 32 year IRS career in May of 2006, spending four years as the National Chief of Appeals. That job started with my leading a major redesign of the Appeals function that is the current operating model for that organization today.

I went to work for the IRS in 1974 as a revenue agent right out of college. I have served in many locations and all of the various exam positions in those years, working in San Jose, Reno, Las Vegas, San Francisco, Boise, Boston, St. Paul, New York, Washington, Jakarta and Riyadh. I received a Master's degree in tax from Golden Gate University in 1978. My Master's thesis was in transfer pricing, so I know everything there is to know about transfer pricing circa 1978. I was a tax attaché overseas for eight years working in Southeast Asia, the Middle East, and Africa. I was responsible for all international issues in those areas, such as double tax cases, tax treaty issues, and competent authority matters.

After I returned from abroad, I was Director of the International District in Washington and moved to New York as the Assistant District Director of the Manhattan District. I was the team leader for LMSB design before we stood up the new organization. When LMSB stood up, I was the first Director of Financial Services in New York, one of the five industry groups in LMSB. It was from that job that I was selected as the National Chief of Appeals in the spring of 2002.

Q So you had no prior Appeals experience before becoming the National Chief?

A In the Internal Revenue Service you have two kinds of people in Exam—people who think Appeals is good and people who think Appeals is bad. I was one of the people that thought Appeals was sometimes Santa Claus, that gave away the good work of the examiner. I did not fully appreciate the role of Appeals as a concept, which is a very common belief in Exam. When I was selected as the Chief of Appeals, it took me a short time to sort out that I had a very narrow and naïve view about Appeals. Appeals has always had a really important role to play and I quickly became a fervent believer in what Appeals does, how they do it and that it is a very important part of the tax administration system.

Q Who asked you to take the National Chief of Appeals position?

A Charles Rossotti was the Commissioner at the time. He and Bob Wenzel, the Deputy Commissioner, made me an offer I could not refuse. So I happily moved over into the organization. As I became more and more immersed in what Appeals did and how they did it, I became quite an advocate of the Appeals organization.

Q For our readers who have never had the pleasure of seeing an Appeals proceeding through to its end, can you describe generally what the Appeals function today is?

A Appeals is the last administrative recourse that a taxpayer has if they are not able to reach an agreement with the Internal Revenue Service. Any other recourse would be judicial. Appeals stands as an independent body—within the Internal Revenue Service, but independent of the Service and not yet a judicial proceeding. It is an informal administrative proceeding that is available for folks who are not able to resolve their disputes. Mostly those disputes are resolved in Appeals. About 85% of all the disputes that go into the Appeals organization are resolved in a way that works. That does not mean that

* Jasper L. Cummings, Jr., Alston & Bird LLP, Washington, DC, Raleigh, NC, and Alan J.J. Swirski, Skadden, Arps, Slate, Meagher & Flom LLP, Washington DC.

the taxpayer leaves happy or the government leaves happy. Generally it means everybody leaves a little unhappy, which is probably a sign of things working correctly.

Q Some practitioners question how "independent" Appeals can be if it reports to the Commissioner. How do you answer those comments?

A Well, Appeals is an administrative body that was never really set up under law. It existed as an administrative convenience to take the load of unagreed cases off of the courts. In RRA-98 for the very first time Congress acknowledged the existence of Appeals and did several things. It established some new processes that it wanted Appeals to be involved in around the collection world. In the RRA-98 hearings, there was a perception of some abuse in the collection world. Congress felt that Appeals did a pretty good job in resolving disputes, so got Appeals involved in collection. So they set up some processes.

They also, for the very first time, put into legislation an edict that the Commissioner of the Internal Revenue Service would ensure an independent Appeals. So for the first time legislatively there was a direction to the Commissioner to ensure that that was true. After Charles Rossotti left, the new Commissioner, Mark Everson, came in and said "As I read the law, one of the few things that I am actually tasked with doing is ensuring that Appeals is independent. So I guess in order to ensure that happens, we are going to have to make Appeals report directly to me," which was new. In the last 75 years of the Internal Revenue Service, Appeals had worked in a number of locations within the IRS, including for Regional Commissioners and Chief Counsel, but they had never worked directly for the Commissioner. With RRA-98, the Commissioner was charged with ensuring the independence of Appeals. He felt it was important enough that I, in my position, would report directly to him with no intervener.

There is a perception that Appeals is not independent, or certainly not as independent as it used to be, or perhaps as it should be. That is actually a very interesting discussion. My view is that it is independent. My view is shared by TIGTA, which is the Treasury Inspector General for Taxes. I asked TIGTA to come in and do a review on Appeals' independence because it had been raised as an issue. When they came in and did a review, we were able to show them and talk to them in ways you cannot talk to the outside. We could show them this is how we do business, this is how it really works. They issued a report about two years ago that said they believed that Appeals was independent, and it was independent just as Congress had envisioned it should be in RRA-98.

What is different now is that there is a lot more internal Appeals control and here is where you have a difference between independence and control. It was important to me, as I looked at the structure of Appeals, that similarly situated taxpayers with similar issues and similar facts should have similar answers. If the taxpayer and their representative were particularly silver tongued, they should not get a much better settlement than someone else who is in exactly the same situation. So within the Appeals organization, they now coordinate many significant issues to ensure uniform treatment. And so taxpayers are now sometimes seeing another person at the table. There is the traditional Appeals officer who has always been there, and the Appeals officer's manager, and now there is this other person often at the table who is a coordinator of some kind. There could be more than one coordinator. If there are three coordinated issues, there could be three coordinators involved in that case with an Appeals officer. The coordinator's job is to ensure that the resolution conforms within some broad ranges of what other similarly situated taxpayers would get, all within the Appeals jurisdiction, all taking hazards into account.

Q Are those broad ranges published for taxpayers to see or is it solely an internal working set of principles?

A Well, it depends. There are about 90 to 110 coordinated issues. Each coordinated issue has a coordinator and has a coordinated issue paper. If there are hazards or risks to the government around that issue, then an Appeals settlement guideline is generated. The Appeals settlement guideline is a public document that is on the website. If you went to the Appeals site, these Appeals settlement positions are there. They lay out all the strengths and all the weaknesses that Appeals see around an issue. They develop these positions by talking with counsel, by talking with Exam, and by talking with taxpayers, their representatives and other interested parties. Frequently, an interested party will come in who is not a party to the transaction to tell Appeals what their views are and why. All those things are taken into account. Appeals gathers information from whatever source they can. Sometimes information comes from an informal confederation. Sometimes formal groups or associations come in and give their views around an issue. Appeals then creates a document that discusses all the strengths and all the weaknesses. They analyze what the impact of those strengths and weaknesses is on where the government should be as a range of results based on the particular situation present in each case.

What is typically missing from the public document is the actual percentage of hazard discussion for each factor. The discussion in that paper

would be based on all these facts and circumstances. The document would present a weighting of all the factors that impact on the case. In an ideal case for the government, you might have a 40% settlement for the taxpayer. In an ideal case for the taxpayer, you may have a 40% settlement for the government. There could be a range of 20 to 40 percentage points between best and worst case depending on how the facts are applied to the different criteria that are significant. That level of detail is not disclosed. Everything else is there and you can build your own risk matrix if that is what you wanted to do.

Q Have those redacted portions of the guidelines ever been produced in response to FOIA requests?

A By accident, once.

Q How does the ability of a revenue agent to settle a case differ from the ability of Appeals to settle a case in terms of the standards of criteria?

A Revenue agents cannot settle cases. They have no authority to settle cases. Only Appeals has the authority within the Internal Revenue Service to settle cases. Settlement means—it is kind of arcane in the IRS world—but settlement means we put on a settlement hat and we assign risks and end up with percentage allowances. What a revenue agent has, and a revenue manager has, is the ability to resolve. They can resolve a case based on facts and the application of those facts to the law, which works most of the time.

No one in the IRS—other than Appeals—has the ability or authority to settle a case based on hazards. So if they do it—and it happens—they have exceeded their authority, and there could potentially be a problem with that resolution. There are two Revenue Procedures that allow Exam to settle based on Appeals Settlement Guidelines. The first is the same issue, same taxpayer, in a later year. The second is the same issue, same general facts, different taxpayer. With Appeals review, an agreement can be reached with the taxpayer while still in Exam.

Q Well, there are a couple of different models that might be applied and I do not hear you speak on any one of them. Appeals could be serving the function of the lawyer for the client who says "okay, I see you taking this position, but as a practical matter we cannot get there and therefore we have to settle here." That is one model. On the other end of the spectrum, Appeals could be a proxy court, saying "here is the way we think this would turn out in the end." I hear you saying there is some model in the middle where they are neither functioning as a proxy court, nor functioning as an advisor to the party, but they are sort of being independent like a court, but on the other hand they are sort of trying to get the best deal they can for the Service, I assume.

A They are not trying to get the best deal for the Service, and that is actually an interesting point. In the large taxpayer universe, often issues that come into Appeals are conceded in full. When you look at the recovery rate that comes out of Appeals, it runs about 30%. Thirty cents on every dollar that is proposed by Exam comes into the Treasury. Appeals does not additionally develop the case that the government has presented, so if Exam has not completed the case in a way so that it is ready to be considered by Appeals it is sent back for further development.

You settle based on the case before you. You are not trying to additionally develop a case for the government; you are trying to identify what are the strengths and weaknesses in this case if it went forward. So the Appeals person is looking at this case, not as an administrative law judge or not as somebody where you can ask these questions to develop the case, but rather based on what is in front of us here assuming no further development, and you end up with an answer.

Sometimes Appeals is applying the law to the facts that had it been done in Exam, Exam would have gotten the same answer. There is in that case no difference between the answer that Exam or Appeals should get with the right law applied to the right set of facts. If new facts are presented, then back it goes if it is something that Exam has not considered. Exam may be consulted, and the taxpayer may participate in that discussion. Exam and Appeals may not have conversations about any case without the taxpayer being advised ahead of time and allowed to sit in on the meeting.

Q There is more than one way to use the services of Appeals for a large taxpayer. Can you describe the various alternative dispute resolution mechanisms available for large taxpayers in Appeals?

A Sure, I will talk about a couple of widely used programs available at front end and back end of the compliance process. A widely used front end program is fast track settlement. Fast track settlement is really an LMSB process. It is an LMSB process where they bring Appeals down into their jurisdiction and Appeals has the authority to put on its settlement hat, its mediator hat, and try to resolve the dispute without it ever leaving LMSB. Right now that process is having about an 85% success rate, so it is very successful. It tends to be successful because all parties going into it want a resolution.

Fast track settlement is the first time ever that Appeals has taken its authority and moved down into the compliance trenches and applied that authority. It works well if the resolution that you want is a hazard-based answer or you have need of a media-

tor. If Exam understands it is a hazard-based answer, then they understand that they do not have the authority to get there. Often it is a situation where Exam knows generally what the answer might look like, they are not averse to going there, but they do not have the authority. The taxpayer wants certainty; they want certainty now and do not want to wait the average three years it would take to resolve in Appeals.

In those cases where a fast track does not work, which is 10 to 15% of the time, taxpayers can then elect to go to Appeals. They have not lost anything. Fast track settlement is an additional bite at the resolution apple. They lose nothing by going there. Typically if you want a resolution, consider fast track. If you do not get it, you then have traditional Appeals. When you go to traditional Appeals, you can if you wish have the same Appeals folks hear the case there, as in fast track. You may, based on the dynamics of the fast track hearing, very well either want or not want that to be the case.

Q Is that within the taxpayer's control to request?

A It is in the taxpayer's control. The taxpayer can say "I want a new team in Appeals" or "I want the old team in Appeals." And if resources allow, that will happen.

Q When they want the old team, is it typically honored?

A Yes. Because that team knows the facts, it is a very effective use of resources for Appeals. Sometimes you know the Appeals team did not like the answer that was on the table and you want a new team for fresh luck and you can do that. Fast track is an excellent program, particularly if you want certainty and if Exam agrees that this is something Appeals can assist in getting to resolution.

I do want to note that at least half the time, the resolution that takes place in fast track is not a risk, is not a hazard-based answer. It is applying the law to the facts. The parties just needed to bring in the calming influence of an outside mediator to help everyone understand what the facts were, what the law was, and then apply that to the situation.

Q What type of case is a bad candidate for fast track?

A If there are unreasonable expectations on the part of the examiner or the taxpayer, you will not get to an answer. Every time there is not a resolution in fast track, there is an analysis done by Appeals about why there was not an answer. In the vast majority of cases, it is because there were unreasonable expectations walking in the door by someone. In a fast track situation, all three parties have to come to an agreement. If one party is not willing to come to an agreement, there is no agreement.

Q So if fast track fails, a person proceeds to so-called normal Appeals and if that fails, what other options does the taxpayer have?

A If you go to Appeals in traditional fashion and you are not able to reach an agreement with the Appeals officer, there is a process called Post-Appeals Mediation.

Post-Appeals Mediation has been a very successful program. There have been several hundred cases that have gone into this mediation process. The process is that you have worked with the Appeals officer, not gotten to an answer, and your next step is the court. Before you do that, you may elect Post-Appeals Mediation. Very often it is a tense environment. The mediator (or the co-mediators, if the taxpayer has elected to hire a mediator) will sometimes travel back and forth—the Appeals folks will be in one room, the taxpayer will be in another room, and the mediators will be in the third room. They do however get to agreement about 80% of the time.

Q Who serves as the mediator?

A An Appeals officer serves as a mediator always. The taxpayer can elect to hire an outside person, an example might be a retired judge, to be a co-mediator with the Appeals mediator. A co-mediator is hired about half the time.

Q And is the other side of the mediation Appeals or Exam?

A It is Appeals. These are failed Appeals cases.

Q Does that set up Appeals as the party opponent?

A Yes, it does, but it is not. It is mediation.

Q The Service is the party if I am not mistaken.

A The Service is the party represented here by the Appeals office. For instance, the Appeals office does not have counsel present. It is strictly within Appeals. Congress actually imposed this on the Appeals organization, and they were very unhappy going there because it was perceived as a questioning of the Appeals officer's judgment, ability, and skills. That resistance is largely gone now because what has happened is, even if you are adamantly opposed to the process, there is an agreement reached overwhelmingly in this process, so it just works. It is hard to say it is a bad process when you get to an agreement so often.

Q Switching gears, some practitioners have sensed that alleged tax shelter participants have run into a different sort of Appeals process in the last five or so years than non-shelter taxpayers. Do you care to comment on that?

A Sure, that is because they have. The process for tax shelters is very different from the traditional Appeals process and what the average unagreed issue might see coming into Appeals. The first difference is they are all controlled. There is a lot of time and energy spent understanding listed transactions. If there is a listed transaction and that listed transaction has been analyzed, then there is an Appeals Settlement Guideline. There is a coordinator at the table. There has been extensive penalty discussions within Appeals. While I would say Appeals is independent of the Service, Appeals has often come to a conclusion that it is a bad transaction, that the penalties are often appropriate, and that you will not have the outcome that you had in the old days. Then, in order to get an agreement, penalties were dropped and you often received out of pocket. Those sorts of things from the mid-80's are not present today. One of the things that need to become clear is that these transactions are often not pretty. I would say the settlements are probably appropriate even though they may have a penalty component and even though they may not have out of pocket as a prelude to trying to get a settlement.

The other thing you need to keep in mind here is that the folks that come in for these listed transactions overwhelmingly reach agreements. A very high percentage of the cases are resolved. Often the only discussion on the table is how large of a penalty is there going to be.

Q Well, if a taxpayer comes to appeal a transaction that Compliance calls a tax shelter, but it is not listed, how similar is the experience you just described for that taxpayer?

A I think it can be very different. As a purported tax shelter becomes more complex and more factually diverse, then the answers can be different. I have seen section 351 transactions that range from a full allowance to almost a full disallowance with maximum penalty. It is the same basic type of transaction, but the facts are so different that they lead to very different outcomes. And those results are based on the complexity of what you have.

Q The Chief Counsel recently suggested that the Supreme Court may have to get involved and resolve what could be brought in a circuit split over economic substance cases and that doctrine. How carefully does Appeals take into account the taxpayer's circuit authority for purposes of resolving a shelter-like case?

A Appeals is very aware of circuits and they take it into account compulsively and precisely. It is a major factor. It is something that Appeals does that Exam cannot. Exam does not have the authority to go there. Appeals does have the authority. In fact all the Appeals officers know that if you live in the Ninth Circuit you might have a very different answer than if you live in the Second Circuit. That is a real factor that you want to be aware of.

Q You alluded to penalty treatment earlier. Without regard to whether a taxpayer is in a shelter or non-shelter like transaction, has the Appeals approach to penalties changed in recent years? If so, how?

A It has. The approach to penalties has changed dramatically. For the first 31 years that I was with the Internal Revenue Service, it was my view that Appeals used penalties as a bargaining chip to resolution. It was actually in the Appeals manual. In the Appeals manual it said "penalties are an issue just like any other issue and may be traded." I stopped that practice and required that penalties be treated as a separate issue to be resolved on the developed merits of the penalty standing alone. ■

TAX BITES WORD SCRAMBLE

Contributed by Gail L. Richmond, Fort Lauderdale, FL

This issue of Tax Bites offers another contest. In keeping with past policy, the winning entrant(s) will be offered a stint as a guest columnist.

ALTERNATIVE MINIMUM TAX

Form as many words as you can by using the letters in "alternative minimum tax." Each of your words can use a letter as many times as it appears in the phrase. Send your answers to: richmondg@nsu.law.nova.edu.

Extra Credit: arrange as many of your words as you can on a Scrabble-like grid.