



Taking Advantage of Second Chances: Considerations and Strategies for IRS Post-Appeals Mediation

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Post-Appeals mediation is generally most effective when the parties attempt to implement the process similarly to a non-tax civil litigation matter.

The words of John Wayne may best summarize how taxpayers and the IRS view post-Appeals mediation: “A man deserves a second chance, but keep an eye on him.” Post-Appeals mediation is all about second chances—for the taxpayer and IRS Appeals; but the process can often run off the proverbial tracks if the alternative dispute resolution (ADR) technique is not conducted properly and each party is there just to “keep an eye on” the adversary without any willingness to view his case through a true hazards of litigation lens. Post-Appeals mediation can be a useful tool to resolve tax disputes after unsuccessful negotiations during the regular Appeals process. However, this form of tax controversy mediation is generally most effective when the parties take as many steps as possible to make the process look and feel like mediation in non-tax civil litigation matters.

This article focuses on a brief overview and history of post-Appeals mediation; the mediation process as outlined in Rev. Proc. 2014-63;¹ and strategies for maximizing the chances of resolving the factual and/or legal issues in dispute that are left undecided at the conclusion of the IRS exam and regular Appeals process.²

Brief History and Overview of Post-Appeals Mediation

Mediation is a confidential ADR process that fosters the resolution of disputes without a trial by allowing a neutral mediator to assist the parties in negotiating a settlement that addresses the specific needs and interests of each party.³ The mediator defines issues, defuses emotions, and suggests possible ways to resolve a dispute, but does not render judgment regarding any issue.⁴ Congress

initially provided statutory authority for mediation as part of the IRS Appeals process in section 3465 of the Internal Revenue Service Restructuring and Reform Act of 1998 (IRSRA). Pursuant to IRSRA, taxpayers may enter into nonbinding mediation under Section 7123 when both the IRS and taxpayers have been unsuccessful at entering into a closing agreement, or to resolve issues after the conclusion of the Appeals process. Rev. Proc. 2014-63 provides guidelines relating to mediation and updating the previous procedures found in Rev. Proc. 2009-44.⁵ Through the years, the IRS conducted various mediation pilot programs for issues in exam and then in collection cases. Rev. Proc. 2014-63 consolidates the procedures for mediation of examination and collection cases.

“Should I Stay or Should I Go?”

The first question is when should a taxpayer end the regular Appeals process and go to post-Appeals mediation. John Wayne and the rock band, The Clash, may rarely, if ever, have been mentioned together before now in a tax discussion, but both have provided valuable considerations for when to consider post-Appeals mediation. Often the decision of when to go to post-Appeals mediation occurs when the taxpayer and Appeals are at a standstill with no possible chance of further negotiations, but at least one party believes the involvement by a neutral party could positively impact the settlement discussions. The neutral party can help the parties reach their own negotiated settlement and the authors have witnessed various tax and non-tax mediation sessions in which no one could have predicted the final settlement terms at the start of the mediation session.

Either a taxpayer or Appeals may request mediation after consultation with each other.⁶ However, it is rare for Appeals to recommend mediation and not often enough, taxpayers are unaware of

the ADR process as unfortunately, few taxpayer representatives appear to have experience with mediation. If the taxpayer reasonably believes the Appeals Officer in charge of its case is no longer open to further negotiations, but the case could (and should) still be resolved amicably, the taxpayer could rely on the advice of The Clash when reaching out to Appeals and asking: “Should I stay or should I go?”⁷ Taxpayers should try to “stay” as long as possible if the standard

send a written request for mediation to the appropriate Appeals Team Manager and send copies of the written request to the appropriate Appeals Area Director.⁸ The request for mediation should include the taxpayer’s name, taxpayer identification number, and address; the name of the Team Case Leader, Appeals Officer, or Settlement Officer; the taxable period(s) involved; and a description of the issue for which mediation is being requested.⁹ Mediation will not



Mediation will not occur unless both the taxpayer and Appeals agree to participate in the process.

Appeals case is moving forward to a possible resolution. Mediation is not an alternative to simply speeding up the case or getting an entire fresh look.

So when should a taxpayer consider mediation in light of the additional costs and time involved? Generally, mediation is advantageous when taxpayers and Appeals are able to agree on many factual and legal issues but cannot settle the case due to a limited number of primary issues the parties simply cannot resolve. The disputes could arise based on how the parties view the evidence or the relevant authority. For example, Appeals could view the potential testimony of the taxpayer as biased and unreliable or an intercompany agreement in a transfer pricing context as not reflective of arms’ length. A neutral party could confirm, however, that a reasonable trier of fact could find the testimony credible or the agreement satisfies the arms’ length standard. In those situations, mediation is a reasonable alternative to costly and unpredictable litigation for both parties because the mediator can outline hazards of litigation from a neutral viewpoint.

Requesting Mediation

Once the taxpayer decides mediation is a viable ADR option, the taxpayer must

occur unless both the taxpayer and Appeals agree to participate in the process.¹⁰ For that reason, taxpayers must carefully consider when to end the regular Appeals process since post-Appeals mediation is not a guarantee. However, a question arises as to whether post-Appeals mediation could be more effective in resolving Appeals cases, *before mediation*, if mediation could be granted in most cases.

Before preparing the request, taxpayers must determine whether the disputed issue can be resolved in mediation. According to Rev. Proc. 2014-63, mediation is available for the following types of issues:

- Legal issues.
- Factual issues.
- Compliance Coordinated Issues (CCI) or Appeals Coordinated Issues (ACI).
- Early referral issue when an agreement is not reached, provided the

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¹ 2014-53 IRB 1014.

² The comments, considerations, and strategies discussed below are for general thought-provoking and discussion purposes to assist readers based on input from a variety of sources and do not necessarily reflect the opinions of the authors.

³ Unif. Mediation Act. Prefatory Note (2003).

⁴ IRM 35.5.5.4.

⁵ 2009-2 CB 462.

⁶ Rev. Proc. 2014-63, section 7.01.

⁷ “Should I Stay or Should I Go”, The Clash (1982).

⁸ Rev. Proc. 2014-63, section 7.02.

⁹ *Id.* at section 7.02(2)(a)-(d).

¹⁰ *Id.* at section 7.01.

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other requirements for mediation are satisfied.

- Issues for which the taxpayer intends to seek, but has not yet filed, a request for competent authority assistance.
 - Issues regarding unsuccessful attempts to enter into a closing agreement.
 - Certain types of offer-in-compromise (OIC).
 - Certain Trust Fund Recovery Penalty issues.¹¹
- Rev. Proc. 2014-63 states that mediation will not be available for:
- Cases that fall under the jurisdiction of an ADR in the administrative process.
 - Issues designated for litigation.
 - Issues docketed in any court.
 - Collection cases (except for certain OIC and TFRP cases).
 - Issues for which IRS Appeals concludes mediation would not be consistent with sound tax administration, (such as issues governed by closing agreements, *res judicata*, or controlling Supreme Court precedent).
 - “Frivolous issues” as determined by Appeals.
 - “Whipsaw” issues, such as issues on a joint return where both spouses do not agree to participate in the same mediation proceeding or where one spouse is claiming innocent spouse treatment.
 - Cases in which the taxpayer did not act in good faith during settlement negotiations.
 - Cases that were previously mediated through a different ADR program within Appeals, such as Fast Track Settlement or Fast Track Mediation.
 - Issues that have been otherwise identified in subsequent guidance issued by the IRS as excluded from the mediation program.¹²
- The exclusions are actually limited. Thus, if a standard legal and/or factual issue is pending in Appeals, under a Protest from an IRS examination, and therefore not in litigation, and the taxpayer reasonably cooperated during the Appeals process, the IRS Appeals Office should seriously consider accepting the

application from the taxpayer, unless a specific exclusion applies. On that score, the taxpayer should include a representation in its application that the requested issue for mediation is not one of the issues expressly prohibited.¹³

The taxpayer’s representative should inform the Appeals Team Manager that the taxpayer plans to submit a mediation request. This will give the representative an opportunity to demonstrate how it can be beneficial to both parties.

After a mediation request is received by Appeals, the Appeals Team Manager will confer with the Appeals Office of Tax Policy and Procedure before deciding to approve or deny a mediation request.¹⁴ Generally, the Appeals Team Manager will respond to the taxpayer and the Team Case Leader or Appeals Officer within two weeks after the request for mediation.¹⁵ If Appeals denies the mediation request, the Appeals Team Manager will promptly inform the taxpayer and the Team Case Leader, Appeals Officer, or Settlement Officer.¹⁶ Although no formal appeal procedure exists for the denial of a mediation request, a taxpayer may request a conference with the Appeals Team Manager to discuss the denial. The denial of a mediation request is not subject to judicial review.¹⁷ For that primary reason, taxpayers need to carefully consider whether to terminate the regular Appeals process too early.

As noted, mediation under Rev. Proc. 2014-63 is not an option if the case is docketed in court. However, that does not mean mediation is not available. For example, once a case is docketed in the

U.S. Tax Court either party may file a joint or unopposed motion to request any issue in controversy be resolved through non-binding mediation.¹⁸ The court can order mediation and set forth any directions it deems appropriate.¹⁹ In these types of mediations, a U.S. Tax Court Judge or a Special Trial Judge may act as mediator.²⁰

The limited disadvantages to mediation include cost, time, and additional disclosure of a party’s positions, which most litigants would like to avoid if mediation has a limited chance of success. However, the cost of mediation can be reasonable due to the considerable time and effort already spent with Appeals on the issues. Mediation may be limited to a one-day session.

In many instances, the IRS may not see the advantage of mediation if the parties are simply too far apart in settlement ranges. However, the range of proposed settlement terms is not listed as a reason to deny mediation. Further, the IRS should ask—what settlement terms would Appeals consider if a neutral party confirmed the taxpayer’s view of the evidence and/or law was stronger than Appeals originally concluded? In that case, the range of settlement should narrow considerably.

Thus, based on the advantages of mediation, the general rule should be that mediation requests are accepted unless a specific exclusion applies. Notwithstanding the general rule, if Appeals rejects the request and the taxpayer believes the rejection was unreasonable, the taxpayer should consider contacting the IRS Taxpayer Advocate Service for assistance.

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¹¹ *Id.* at section 4.03.

¹² *Id.* at section 4.04.

¹³ *Id.* at section 7.02(e).

¹⁴ *Id.* at section 7.03.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tax Court Rules of Practice and Procedure Rule 124(b).

¹⁹ *Id.* at 124(b)(2).

²⁰ *Id.* at 124(b)(1).

²¹ Rev. Proc. 2014-63, at section 8.01.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at section 8.02.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at section 8.03.

²⁹ *Id.*

³⁰ *Id.* at 9.01.

³¹ IRM 8.26.5.4.8.4.

³² Rev. Proc. 2014-63, section 9.01.

³³ *Id.* at section 9.02.

³⁴ *Id.*

³⁵ *Id.* at section 9.01.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

If Appeals approves the mediation request, the taxpayer and Appeals should enter into a written agreement to mediate.²¹ According to Rev. Proc. 2014-63, the agreement to mediate should:

- Be as concise as possible.
- Specify the issue(s) that the parties have agreed to mediate.
- Contain an initial list of witnesses, attorneys, representatives, and observers for each party.
- Identify the location and the proposed date of the mediation session.
- Prohibit *ex parte* contacts between the mediator and the parties.²²

Generally, it is expected that the parties will complete and execute the agreement to mediate within three weeks after being notified that Appeals has approved the mediation request, and will proceed to mediation within 60 days after signing the written agreement to mediate.²³ It is in the best interests of both parties to meet these informal deadlines. A taxpayer's inability to adhere to these timeframes, without reasonable cause, may result in Appeals' withdrawal from the mediation process.²⁴

The written agreement to mediate will set forth the procedures by which the parties inform each other and the mediator of the participants in the mediation, and will set forth any limitation on the number, identity, or participation of such participants.²⁵ The parties are encouraged to include, in addition to the required decision-makers, those persons with information and expertise that will be useful to the decision makers and the mediator.²⁶ To minimize the possibility of a last minute disqualification of the mediator, each party must notify the mediator and the other party of the participants on the party's mediation team no later than two weeks before the mediation.²⁷

To participate in mediation, the taxpayer must consent to the disclosure by the IRS of the taxpayer's returns and return information to the mediator and any affiliated participants.²⁸ The taxpayer must execute a separate consent to disclose the taxpayer's return and return information.²⁹

Choosing a Mediator

Post-Appeals mediation differs from non-tax mediation in a variety of ways, most notably the selection of the mediator(s). In typical mediation, the parties exchange a short list of possible mediators and eventually agree to who will serve as the neutral party. In comparison, an IRS Appeals employee trained as a mediator will serve as the mediator.³⁰ Appeals will pay all expenses associated with the use of an Appeals mediator.³¹ A representative from the Appeals Office of Tax Policy and Procedure may participate in the negotiations to select an Appeals mediator.³² Pursuant to Internal Revenue Manual (IRM) 8.26.5.4.8.34, the taxpayer and the Appeals Team Manager will select the Appeals mediator from a list of

Additionally, at the taxpayer's expense, the taxpayer may elect to use a co-mediator who is not employed by the IRS.³⁵ While more costly, taxpayers should seriously consider engaging a co-mediator, especially in larger cases. According to Rev. Proc. 2014-63, the taxpayer and the Appeals Team Manager will select the non-IRS co-mediator from any local or national organization that provides a roster of neutrals.³⁶ A representative from the Appeals Office of Tax Policy and Procedure may participate in the negotiations to select a non-IRS co-mediator.³⁷ Criteria for selecting a non-IRS co-mediator may include: completion of mediation training; previous mediation experience; substantive knowledge of tax law; or knowledge of industry practices.³⁸ An



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trained employees who, generally, will be located in the same Appeals office or geographical area as the taxpayer, but will not be a member of the same team that was assigned to the case. Other criteria for selecting a mediator from Appeals may include previous mediation experience or knowledge of industry practices. While at first blush taxpayers may balk at mediation with an IRS employee serving as the "neutral" party, taxpayers should realize IRS mediators want cases to settle just like mediators in non-tax cases as that is how mediators ultimately are judged—settlement success rate. Nonetheless, the Appeals mediator addresses the inherent conflict by providing the taxpayer a statement confirming their proposed service as a mediator and stating that: (1) they are a current employee of the IRS; (2) a conflict results from the continued status as an IRS employee; and (3) this conflict will not interfere in the mediator's ability to facilitate the case impartially.³³ This statement will also be included in the written agreement to mediate.³⁴

individual is not eligible to be a non-IRS co-mediator if the individual has an official, financial, or personal conflict of interest with respect to the parties, unless such interest is fully disclosed in writing to the taxpayer and the Appeals Team Manager and they agree that the mediator may serve.³⁹ Based on the fact that an IRS mediator must attend the mediation session, the IRS should refrain from objecting to a mediator selected by a taxpayer unless the individual has an interest in the outcome or other conflict. The co-mediator should not be required to have a tax background, especially in a case that turns on a factual dispute. For example, in a valuation case or transfer pricing dispute, the primary issue may be one of valuation of an asset, not the interpretation of a Code section.

A retired judge may be chosen to serve as the co-mediator to show how a judge may view each party's evidence and legal authority. This will be especially beneficial to the IRS Appeals Office to the extent they must measure the hazards of litigation as described in the IRM as:

A fair and impartial resolution is one which reflects on an issue-by-issue basis the probable result in event of litigation, or one which reflects mutual concessions for the purpose of settlement based on relative strength of the opposing positions where there is substantial uncertainty of the result in event of litigation.⁴⁰

Mediators are effective only to the extent they can be neutral to both parties. Mediators serve as facilitators, assist in defining the issues, and promote settlement negotiations between the parties. Mediators do not have settlement authority and cannot render a decision regarding any issue in dispute.⁴¹ The parties will continue to have settlement authority

Conducting the Mediation

Before the mediation, each party will prepare a "Mediation Statement," which summarizes the factual and legal issues in dispute. The Mediation Statement should be submitted to the mediator and the other party no later than two weeks before the mediation session is scheduled to occur.⁴² The Mediation Statement should not be a copy of the Exam Report or the taxpayer's Protest. Unless the mediator(s) have specialized knowledge about the issues in dispute, the Mediation Statement should be brief and written in plain English that a neutral party, with no prior knowledge of the case, can fully understand. Otherwise,

disputed issues are more factual versus legal in nature.

Like in non-tax cases, the mediation process is confidential as it protected not only by Rev. Proc. 2014-63, but by Federal Rules of Evidence 408, which generally prohibits settlement discussions from disclosure.⁴⁷ Therefore, all information concerning any dispute resolution communication should remain confidential and may not be disclosed by any party, participant, observer, or mediator except as provided by statute.⁴⁸ A dispute resolution communication includes all oral or written communications prepared for the purposes of a dispute resolution proceeding.⁴⁹

The mediation procedure does not create any special authority for settlement by Appeals. During the mediation process, Appeals remains subject to the procedures that would be applicable if the issue were being considered in a standard Appeals process, including procedures in the Manual and existing published guidance.⁵⁰ Rev. Proc. 2014-63 also confirms the mediator does not have settlement authority and cannot render a decision regarding any issue in dispute.⁵¹ Either party may withdraw from the process at any time before reaching a settlement of the issues being mediated by notifying the other party and the mediator in writing.⁵²

As in most disputed matters, the parties can and should expect surprises from either newly discovered information, questions by the mediator that were not previously considered, or surprise testimony from a witness. One

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for all issues considered under the mediation process.⁴² However, both parties should remove their advocacy hat for a few minutes to hear and appreciate the views and comments of the neutral party. This can be extremely beneficial to taxpayers who may be closely attached to their particular version of the facts and law.

As noted above, ex parte contacts with the mediator outside the mediation session are prohibited.⁴³ Thus, the mediator should not receive information or evidence from one party that the other party is unaware of and is unable to respond to or rebut.⁴⁴ In many instances, however, the mediator may ask each party to share a confidential settlement range so the mediator can appreciate how far apart the parties are in the matter. Further, a mediator may contact a party or pose a question to a party outside the mediation session provided that the information furnished to the mediator is made available to both parties so that no party is unaware of or unable to respond to or rebut the information.⁴⁵

the parties may spend a considerable amount of time at the mediation session explaining the relevant evidence and/or authority to the mediator(s).

As noted, the attendees at the mediation generally include the mediator(s), the taxpayer, the taxpayer's representative, and representatives of Appeals, including the Appeals Officer in charge of the case and the Appeals Team Manager. While not done regularly, a party could consider requesting a fact or expert witness to attend a part of the mediation to explain certain disputed issues such as valuation of a business. A mediator could request the attendance of the witness.

In many instances the mediation may last no more than one day. Thus, the mediation process can be intense and involve advocacy skills similar to a litigation proceeding. Further, each party must analyze the hazards of litigation for their positions and be able to articulate how the evidence should be viewed by a judge. For these reasons, taxpayers should have a representative attend the mediation who is experienced in mediation and litigation, especially if the

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⁴⁰ IRM 8.6.4.1.

⁴¹ Rev. Proc. 2014-63, section 9.01.

⁴² *Id.*

⁴³ *Id.* at section 10.03.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at section 10.01.

⁴⁷ *Id.* at section 10.02.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at section 4.02.

⁵¹ *Id.*

⁵² *Id.* at section 10.04.

⁵³ *Id.* at section 11.01.

⁵⁴ *Id.* at section 11.02.

⁵⁵ *Id.*

⁵⁶ *Id.* at section 11.03.

⁵⁷ *Id.* at section 12.06.

way to deal with certain surprises is for the parties to agree to assume, for mediation purposes only, that certain facts are deemed true. If too many basic facts are in dispute, the mediator will not have ample time to get to the underlying substantive factual or legal dispute. The parties may want to discuss what basic facts are not in dispute before the mediation.

The parties could reach a settlement by the end of the mediation session. Regardless, at the conclusion of the mediation process, the mediator will prepare a brief written report and submit a copy to each party.⁵³ If the parties reach an agreement on all or some of the issues through the mediation process, Appeals will use established procedures to close the case, including

preparation of a Form 906, Closing Agreement on Final Determination Covering Specific Matters.⁵⁴ If the parties do not reach an agreement on an issue being mediated, Appeals will generally not reconsider the mediated issues, and a statutory notice of deficiency will be issued with respect to all undecided issues, or the case will be processed using established closing procedures if there is no deficiency.⁵⁵ For certain OIC cases with liabilities of \$50,000 or more, any mediation settlement must be reviewed by the Office of Chief Counsel pursuant to Section 7122(b) before being finalized.⁵⁶ Moreover, a settlement reached by the parties through mediation will not be binding on the parties (or be otherwise controlling) for tax years not covered by

the agreement, except as provided in the agreement.⁵⁷

Conclusion

Post-Appeals mediation can be the most effective dispute resolution technique in tax cases if the parties treat the mediation process more consistent with its non-tax case counterparts where both parties have something to lose and want to avoid litigation. The IRS has to apply a hazards of litigation analysis based on the input of the mediator(s) and taxpayers must be open to listening to the problems that exist with their facts and legal authority. By taking a second chance while keeping an eye on one's own case, the mediation process can be extremely helpful in resolving tax cases without litigation. ●