# *IRS Negotiations-Expert Tips*

## ***THE OKLAHOMA SOCIETY OF ENROLLED AGENTS***

## OCTOBER 2018

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## BIOGRAPHY

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# Introduction

The ability to effectively and successfully "negotiate" with the Internal Revenue Service (IRS) requires specific knowledge, specialized skills and proper application of certain procedures. To do so, tax practitioners must be appropriately prepared to initiate and follow through with "recognized negotiation" procedures to sufficiently represent taxpayers before the IRS.

The IRS has established a group of negotiation & settlement procedures pursuant to the "*Alternative Dispute Resolution*" programs. To achieve the goals of effective negotiation tactics noted above, today's tax practitioner must possibly invoke both IRS recognized negotiation procedures as well as "non-recognized" IRS negotiation procedures. Knowing when to invoke which type negotiation tactic is possibly a professional "judgmental decision", however possessing the "basic & fundamental" knowledge of "practical IRS negotiation techniques" will significantly affect how, when, what and why the practitioner invokes or proceeds with a particular "negotiation" procedure.

This presentation at the very least is designed to review, discuss and recognize various "IRS negotiation procedures" and to explore the application of these procedures with regards to the administration and representation of taxpayers before the IRS.

**Assessment of the Negotiation Tax Matter**

Practitioners should be aware that "each negotiated tax matter" may be extremely different and may require the employment of a particular negotiation approach. Not only will the negotiated tax matter be extremely different, but each different IRS official may have different objectives. These different IRS will not only have different objectives, but they will have different professional backgrounds and level of experience as well.

Therefore the practitioner must "assess" the type negotiation technique that should be employed prior to any formal meeting with the taxpayer or any formal meeting with the IRS.

"IRS Negotiations" involve specific negotiation guidelines and procedures. These guidelines are made apparent via the IRS's "*Alternative Dispute Resolution*" (ADR) programs noted below. These programs are utilized by the IRS to allow the taxpayer or representative to negotiate & settle tax matters in an expedited manner. Thus, while conducting this assessment, the practitioner must also determine if the proper negotiation approach available under IRS established programs or actually "what kind of negotiation" is appropriate as follows:

**Alternative Dispute Programs**

- ❑ Arbitration
- ❑ Mediation
- ❑ Fast Track Mediation, or
- ❑ Fast Track Settlement

Each of the above "negotiation" programs requires different procedures and requirements which are explained in detail below. However, before the specific "IRS Negotiation" guidelines are explained, we will discuss the basic and fundamental negotiation techniques to establish a procedural foundation for negotiation in general.

**Pre-Negotiation Checklist/Guidelines:**

A. *Establishing a Plan* - A "plan" or strategy for the negotiation platform is critical to the negotiation process. Tax practitioner should recognize the objectives of the process and what is required to achieve such objectives. Understanding that each negotiator (IRS & Practitioner) will present different values, concerns and motives although the "tax issue" is the same. Your "negotiation plan" should account for these differences.

B. *Prioritizing Issues & Case Interest* – Although "planning" is a critical element to the success of any IRS negotiations, any issues or goals should be identified and listed in the order of importance (prioritized) which affects the level negotiation of each issue.

C. *Establishing Specific Request* – The practitioner is expected to be assertive and should also be prepared to challenge any IRS position that does not have a "sound basis in law" is not supported by adequate legal precedent.

D. *Listening to the IRS Position* – Successful negotiating includes "listening" to the other side. Encouraging or allowing the "other negotiator" to thoroughly explain their position, which may provide you with unknown exculpatory evidence or information not previously considered.

E. *Maintaining Your Options* – Be prepared to "not agree" or say "no" when necessary. Negotiating is a process of "give & take" for both parties. Don't appear to be to "desperate" during negotiations. Be willing to "stop negotiations" and pursue other avenues if the other party to the negotiations is not willing to negotiate in good faith. Don't forget your "right" to an Appeal continues to be available subsequent to one of the "negotiation" processes noted below.

F. *Comprehensive Review* – A successful negotiation includes an analysis of the other party's position (the pros and cons). Analyze the other negotiator's position and attempt demonstrate your willingness understand the issues presented.

G. *Don't Make it Personal* – Some negotiations fail because one or both of the parties are distracted by personal feelings towards each other or regarding the positions presented by either party. These "unrelated" personal issues can "derail" the negotiation process and injures your client's position. An IRS Negotiator may be perceived as "rude" or "obnoxious", however a professional practitioner should learn how to deal with such distractions.

H. *Remaining Focused* – The other party will attempt to convince the practitioner/representative that their negotiation points are "compelling" and that the practitioner should concede. The practitioner should remain focused on the issues established for discussion and not allow the other parties issues become "overly persuasive". Remain focused on the basics of the meeting, which is "negotiation", not "giving in" or "giving up".

I. *Research, Review & Apply* – Obtain as much pertinent information as possible prior to the expected negotiation. Review & analyze the information to ensure that it is "relevant" and legally sound. If the practitioner has secured "pertinent, relevant & legally sound" documentation, they will be able to make "accurate decisions" during the negotiation process. Additionally, attempt to understand the other party's situation and if possible attempt to obtain information relative to their positions via "disclosure" if appropriate and deemed necessary.

J. *Finally, Give & Take* – If the practitioner approaches the negotiation table with "unilateral concessions", it may prove to be a "self-defeating" approach. Negotiation is a "give & take" approach therefore the practitioner should always remember that whenever they "give something" that they should "receive something" in return. Without such an approach, a true negotiation has not occurred.

## 35.5.5 Arbitration and Mediation[1]

*Voluntary Binding Arbitration*

1. Under T.C. Rule 124, the parties may move that any factual issue in controversy be resolved through binding arbitration. The motion may be made before trial at any time after the case is at issue. Upon the filing of the motion, the chief judge will assign the case to a judge or special trial judge for disposition of the motion and supervision of any subsequent arbitration. The use of the procedure, in appropriate cases, can result in a more efficient use of judicial and Service resources and assist in reducing the Tax Court's inventory. The Executive Order 12988 on Civil Justice Reform encourages the use of all alternative dispute resolution techniques (including binding arbitration where warranted) before utilizing any formal Court proceedings. Field attorneys are encouraged to contact the office of Associate Chief Counsel (Procedure & Administration) for guidance.

2. Cases involving factual issues such as valuation, reasonable compensation, or IRC § 482 should be evaluated for arbitration. Arbitration may be appropriate whether the case involves solely a factual issue or multiple issues where the factual issue can be severed. Arbitration is not appropriate for cases involving the substantiation of expenses under IRC §§ 162 and 274. Also, use of the arbitration procedure may not be appropriate; for example, if a settlement appears imminent, substantial resources have already been expended toward trial preparation, or a decision has been made that the Service must litigate the case because of its importance.

3. For more information on the use of arbitration to resolve disputes, Field attorneys may refer to the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 et seq., and Executive Order 12988 on Civil Justice Reform (effective on May 5, 1996), which encourages the use of all alternative dispute resolution techniques including binding arbitration where warranted before utilizing any formal court proceedings.

[1] Internal Revenue Manual (IRM) §35.5.5

**35.5.5.2 (08-11-2004) Arbitration Selection Guidelines**[2]

1. *Binding Nature*

There must be a stipulation between the parties to be bound by the findings of the arbitrator in respect of the issues to be resolved.

2. *Selection and Payment of the Arbitrator*

The parties must stipulate to a procedure for jointly selecting the arbitrator with each party agreeing to pay one half of the arbitrator's compensation, expenses and related fees and costs. The arbitrator's qualifications and potential bias in favor of the taxpayer should be thoroughly explored prior to hiring. The arbitrator should agree to look solely to each party for one half of his or her compensation, expenses and related fees and costs.

3. *Limitations with Respect to the Arbitrator*

Some purposes of the stipulation are to focus the arbitrator on the prescribed task of finding facts based on a stipulated body of information; to preserve the integrity of the arbitrator's work; and to control and minimize unnecessary contact with the court or the parties with the arbitrator after the arbitrator has been jointly hired and until the arbitrator has made or submitted findings of fact.

**A. *Information to be considered***

The parties' stipulation should precisely describe kind of information and any limitations related thereto that the arbitrator is permitted to consider. Field attorneys may consider placing a deadline in the stipulation for the providing of information to the arbitrator by both parties.

**B. *Contacts with or by the arbitrator***

The stipulation should prohibit *ex-parte* contacts with the arbitrator. The stipulation should also specify the conditions under which the arbitrator may be contacted by the Service and the petitioner, as well as the conditions under which the arbitrator may contact the parties or the court for further guidance.

[2] IRM §35.5.5.2

**C.** ***Scope of arbitrator's work***

The stipulation should normally also reflect that the arbitrator is not permitted to make any findings or provide reasoning that represents an interpretation of the law. The arbitrator is generally limited to the task of finding facts. Field attorneys may consider providing that the arbitrator must find a minimum value (e.g., the amount reported on the estate tax return) so that the arbitrator cannot select a value that would result in a refund to the taxpayer. Attorneys may also consider providing a maximum value for the arbitrator (e.g., the amount stated in the statutory notice).

**D.** ***Legal guidance to arbitrator***

Any applicable legal guidance should be stipulated beforehand, or in extraordinary instances when some guidance has been overlooked or not contemplated beforehand, the parties may upon agreement stipulate to the provision of further legal guidance to the arbitrator and the manner in which it is to be communicated to the arbitrator. The stipulation may also indicate the tax treatment of the arbitrator's findings or clarify any issues which may arise in calculating the deficiency resulting from the arbitrator's fact-finding.

4. *General Supervisory Powers of the Court*

The parties must stipulate to the general supervisory powers of the court. The stipulation should note that the case will be assigned to a particular judge or special trial judge who will have continuing jurisdiction over the case. The court's participation is in the nature of oversight.

**35.5.5.3 (12-14-2010) Arbitration Procedures**[3]

1. If the parties desire to submit a factual issue to arbitration, the attorney should first submit a request for the hiring of an arbitrator by memorandum to the Area Counsel (GLS). After the request has been approved, the Field attorney can then prepare a joint motion to resolve the issue or issues through voluntary binding arbitration. The motion is to be accompanied by a stipulation to be bound by the findings of the arbitrator. Field attorneys should coordinate with Procedure & Administration before seeking or agreeing to seek arbitration of any docketed Tax Court cases. Attorneys are to forward copies of all Tax Court orders pertaining to arbitration procedures to Procedure & Administration. These motions should be filed as soon as possible after the case is at issue. If the case has already been calendared, the motion should request a continuance from the trial session. Motions such as, (1) Joint Motion for Voluntary Binding Arbitration, (2) Joint Motion for Stipulation to be Bound by Findings of Arbitrator, and (3) Joint Motion to Continue for Settlement Purposes.

2. The arbitrator will be appointed by order of the court. The order may contain such directions to the arbitrator and to the parties as the judge or special trial judge considers being appropriate.

3. The parties will report promptly to the court the findings made by the arbitrator and will attach to the report any written report or summary that the arbitrator may have prepared.

4. Field offices are encouraged to make greater use of the procedures under T.C. Rule 124 to resolve factual issues.

[3] IRM §35.5.5.3

**Mediation**[4]

1. Mediation is a confidential process in which a neutral third party directs settlement discussions, but does not render judgment regarding any issue in dispute. A mediator holds meetings, defines issues, defuses emotions, and suggests possible ways to resolve a dispute. In contrast to arbitration, a mediator is not formally presented with evidence. Mediation is a nonbinding process. It should be the goal of the parties to reach an agreement with finality. The mediator will help the parties reach their own negotiated settlement.

2. Although there is no specific Tax Court rule describing the use of mediation, this type of procedure can be utilized by the parties to resolve Tax Court cases with the oversight of the court. General guidance on mediation may be gained from the procedures outlined in Rev. Proc. 2002-44, 2002 I.R.B. 10 and Notice 2001-67, 2001 I.R.B. 544, which announced the Large Business and International (LB&I) Fast Track Dispute Resolution Program. Field attorneys should coordinate with Procedure & Administration before seeking or agreeing to seek mediation of any docketed Tax Court cases.

3. The use of mediation, in appropriate cases, can result in a more efficient use of judicial and Service resources and assist in reducing the Tax Court's inventory. Nevertheless, Counsel should not attempt to use mediation in lieu of established settlement procedures or when use of mediation would unduly delay discovery or trial. Instead, mediation should be utilized when other standard settlement procedures, such as Appeals consideration, have failed and when, in the opinion of the office, it is cost effective and otherwise appropriate.

4. Field attorneys should be aware that mediation must be effected within normal trial preparation time frames since efforts at mediation may not be considered good cause for a continuance.

[4] IRM §35.5.5.4

Thus, although the parties may advise the Tax Court in making any status report that settlement negotiations are proceeding in good faith and that the parties have entered into an agreement to mediate, such an agreement does not guarantee a continuance.

**35.5.5.5 (08-11-2004) Mediation Criteria**[5]

1. Fact-based cases lend themselves more readily to mediation. Accordingly, mediation is generally appropriate for cases involving factual issues. Mediation should generally not be used for any industry-wide issues, Appeals Coordinated Issues, or for cases or issues designated for litigation since the settlements of these issues have been circumscribed by other procedures. Mediation should not be available where it has already been made available to the taxpayer or tried once without success, *e.g.*, at the Appeals level, except in extraordinary circumstances.

2. Mediation is not available for an issue for which the taxpayer has filed a request for Competent Authority assistance, or an issue for which the taxpayer intends to seek Competent Authority assistance. If a taxpayer enters into a settlement with the Office of Chief Counsel (including a settlement through the mediation process), and then requests Competent Authority assistance, the United States Competent Authority will endeavor only to obtain a correlative adjustment with the treaty country and will not take any actions that would otherwise amend the settlement.

**Mediation Process**[6]

1. The following description is a suggested framework. Field Counsel may find it necessary to adjust the process to suit their needs. The parties to the mediation process will be the taxpayer (and his or her representative) and Field Counsel. Each party should have someone with decision-making authority at the mediation or available by telephone.

[5] IRM §35.5.5.5
[6] IRM §35.5.5.6

Participants in the mediation may include the taxpayer's counsel or chief financial officer, the Field attorney in charge of the case and any other members of Field Counsel's litigation team. In this regard, Field Counsel may want to have someone present who can prepare settlement computations. Counsel is encouraged to invite Appeals representatives to participate in the mediation process. It is advisable to have only one spokesperson for Field Counsel's team. Other members of Field Counsel's team may attend all sessions and participate, but not directly. Inasmuch as mediation is an informal process, breaks and sidebars can be taken at any time.

2. The mediation process generally will begin by each party presenting their respective views of the issues to the mediator. During each presentation, the mediator will ask questions of each side in order to clarify the facts. Following the opening presentation, the parties typically move to different conference rooms, and the mediator then meets separately with each party.

3. The mediator will help the parties reach their own negotiated settlement. To accomplish this goal, the mediator will act as a facilitator, assist in defining the issues, and promote settlement negotiations between the parties. The mediator will not have settlement authority in the mediation process and will not render a decision regarding any issue in dispute. The mediator should inform and discuss with the parties the rules and procedures pertaining to the mediation process.

4. The mediator's tasks include encouraging each party to move toward a middle ground. At the end of the mediation session, the parties meet together in a joint session to take notes on their mutual understanding of any possible basis for settlement and of the issues submitted for mediation. Experience indicates that settlement is more likely if there is only one mediation session limited to one day; memorializing the settlement may, however, require additional time.

5. If the parties reach an agreement on all or some of the issues through the mediation process, Field Counsel will draft a stipulation of settled issues or a decision document for the parties' signature and submission to the Tax Court. The stipulation of settled issues or decision documents should be prepared as part of the mediation process or very shortly thereafter in order to prevent later disagreements about the issues that were settled during the mediation. If the parties are not able to reach an agreement on an issue being mediated, the parties will prepare for trial as normal.

**Mediator Selection Guidelines**[7]

1. The taxpayer and Field Counsel should jointly select a mediator. If the parties cannot agree on a mediator, they may agree to a procedure to be used to select a mediator. In addition, the parties may seek the assistance of the Federal Mediation and Conciliation Service (telephone number (202) 606-5445) in selecting a mediator.

2. Consideration should be given to requesting a Special Trial Judge to serve as a mediator. The Tax Court has made judges available for this service.

3. A mediator must have no official, financial, or personal conflict of interest or past or present relationship with respect to the parties, unless such interest or relationship is fully disclosed in writing to the taxpayer and Field Counsel, and they agree that the mediator may serve. It is incumbent upon the Field attorney to thoroughly explore whether a conflict or other circumstance likely to affect impartiality exists with regard to all proposed mediators.

4. The mediator will be disqualified from representing the taxpayer in any pending or future action that involves the transactions or issues that are the particular subject matter of the mediation. This disqualification extends to representing any other parties involved in the transactions or issues that are the particular subject matter of the mediation.

[7] IRM §35.5.5.7

Moreover, the mediator's firm will be disqualified from representing the taxpayer and any other parties involved in the mediation in any actions that involve both the same taxable year and the transactions or issues that are the particular subject matter of the mediation.

5. The mediator's firm will not be disqualified from representing the taxpayer or any other parties in an action that involves the same transactions or issues that are the subject matter of the mediation, provided that such action relates to a different taxable year and the firm through screening procedures precludes the mediator from any form of participation in the matter and does not apportion to the mediator any part of the fee therefrom. While the mediator may not receive a direct allocation of the fee from the taxpayer in the matter for which the screening procedures are in effect, the mediator will not be prohibited from receiving a salary, partnership share or corporate distribution established by prior independent agreement. The mediator and his or her firm are not disqualified from representing the taxpayer in any matters unrelated to the transactions or issues that are the particular subject matter of the mediation.

6. The mediator should be an expert in the negotiated settlement process. Criteria for selecting a mediator may include completion of mediation training, previous mediation experience, a substantive knowledge of tax law, or knowledge of industry practices. Criteria may also include the projected travel costs, hourly fees and other expenses.

7. The hiring of a mediator and the commitment of funds and resources to finance the mediation process must be approved pursuant to normal rules and regulations for government procurement. Each party will usually agree to pay one-half of the mediator's compensation, expenses and related fees and costs, and the mediator should agree to look solely to each party for one-half of his or her compensation, expenses and related fees and costs. A number of Appeals Officers have had sufficient training in mediation techniques to support an Appeals initiative on mediation in certain non-docketed cases.

Consideration should be given to selection of an Appeals mediator, which might reduce costs for both parties and preserve limited Office of Chief Counsel budget resources for expert witnesses and other expenses if settlement is not reached and trial becomes necessary.

**Agreement to Mediate**[8]

1. If the parties desire to submit an issue to mediation, the Field attorney should submit a request for the hiring of a mediator by memorandum to the Area Counsel (GLS). After the request has been approved, the taxpayer and Field Counsel generally will enter into a written agreement to mediate.

2. The mediation agreement and any other documents regarding the mediation should be coordinated with Procedure & Administration prior to execution. It is advisable that the agreement be as concise as possible but include the following elements.

A. The agreement should specify the issue(s) to be mediated by the parties.

B. The agreement should provide how and when each party will present its case to the mediator; e.g., each party will prepare a short discussion summary, along with any pertinent exhibits, of the issues for consideration by the mediator, to be followed by oral discussions on a particular date.

C. The agreement might require each party to submit to the mediator and one another a list of participants expected to be present at the mediator session. It is strongly recommended that the taxpayer or an official with the authority to bind the taxpayer participate directly in the mediation sessions.

[8] IRM §35.5.5.8

D. The agreement should contain an acknowledgment by the taxpayer that all participants in the mediation shall have access to all the taxpayer's returns or return information pertaining to the issues being considered pursuant to IRC § 6103 and the regulations there-under, particularly IRC §§ 6103(c), and 6103(n) and the regulations there-under. (A waiver pursuant to section 6103 should also be obtained from the taxpayer).

E. The agreement should prohibit ex-parte contacts with the mediator outside the mediation session.

F. The agreement should state that the parties to the mediation acknowledge that under IRC § 7214(a)(8), Service employees are required to report information concerning violations of any revenue law to the Secretary of the Treasury.

G. If an Appeals mediator is selected, the written agreement to mediate shall include a statement confirming the employee's proposed service as a mediator, that the mediator is a current employee of the Service and that any conflict resulting from that mediator's continued status as a Service employee is known to and waived by the parties.

H. The agreement should state that mediation is a confidential process, and all participants will be subject to the confidentiality and disclosure provisions of the Internal Revenue Code, including IRC §§ 6103, 7213 and 7431. Additionally, any participants in the mediation process may not voluntarily, or through discovery or compulsory process, disclose any information regarding the mediation process, or disclose any communication made during the mediation process, including the settlement terms.

I. The agreement should provide that either party may withdraw from the mediation process at any time prior to reaching a settlement of the issues to be mediated by notifying the other party and the mediator in writing.

J. The agreement should provide that a settlement reached by the parties through mediation shall not serve as an estoppel in any other proceeding; and such settlement may not be considered in any factually unrelated proceeding and may not be used as precedent.

K. The agreement should include a schedule of dates on or before which each step in the mediation process should be completed. For example, the agreement should specify the date by which the parties should select a mediator, the date by which the parties should submit their discussion summaries to the mediator and each other, and the date by which the parties should submit their list of participants to the mediator and each other.

**Introduction to Post Appeals Mediation (PAM) Procedures for Non-Collection Cases (Mediation)**[9]

1. On October 5, 2009, the Service published Revenue Procedure 2009-44, 2009-40 I.R.B. 462. This revenue procedure updates Revenue Procedure 2002-44, 2002-26 I.R.B. 10 which formally established a mediation procedure for cases in the Appeals administrative process. The most recent revenue procedure expands and clarifies the types of cases that may be mediated in Appeals and supersedes Rev. Proc. 2002-44.

2. Post Appeals Mediation (PAM) is an extension of the Appeals process and will enhance voluntary compliance.

3. PAM is a non-binding process that uses the services of a mediator or mediators, as neutral third parties, to help Appeals and the taxpayer reach their own negotiated settlement. To accomplish this goal, the mediator will act as a facilitator; assist in defining the issues; and promote settlement negotiations between Appeals and the taxpayer. The mediator will not have settlement authority in the mediation process and will not render a decision regarding any issue in dispute.

[9] IRM §8.26.5.1

4. Publication 4167, *Appeals - Introduction to Alternative Dispute Resolution*, explains the PAM process and is included as an enclosure with the Uniform Acknowledgement Letter (UAL) sent by the Appeals Team Manager (ATM) when a case is received in Appeals.

**Substantial Negotiations and Discussions**[10]

Under the 2002 temporary regulations, the presence or absence of "substantial negotiations" or "discussions" regarding an acquisition or a distribution is relevant to the determination of whether a distribution and an acquisition are part of a plan. The 2002 temporary regulations provide that, in the case of an acquisition other than a public offering, substantial negotiations generally require discussions of significant economic terms by one or more officers, directors, or controlling shareholders of Distributing or Controlled, or another person or persons with the implicit or explicit permission of one or more officers, directors, or controlling shareholders of Distributing or Controlled, with the acquirer or a person or persons with the implicit or explicit permission of the acquirer. In addition, the 2002 temporary regulations provide that discussions by Distributing or Controlled generally require discussions by one or more officers, directors, or controlling shareholders of Distributing or Controlled, or another person or persons with the implicit or explicit permission of one or more officers, directors, or controlling shareholders of Distributing or Controlled; and (ii) discussions with the acquirer generally require discussions with the acquirer or a person or persons with the implicit or explicit permission of the acquirer.

[10] Treasury Regulation (Treas. Reg.) §1.355-7(k)

Commentators have requested that final regulations clarify that, where the acquirer is a corporation, substantial negotiations and discussions must involve one or more officers, directors, or controlling shareholders of the acquirer, or another person or persons with the implicit or explicit permission of one or more of such officers, directors, or controlling shareholders. These final regulations reflect those clarifications.

**Fast Track Mediation**

**Fast Track Mediation** allows taxpayers to resolve disputes at the earliest possible stage in the collection process. Once your FTM application is accepted, the goal is resolution **within 40 days**.

With FTM, a trained mediator from the IRS Office of Appeals is assigned to help you and IRS Collection reach an agreement on the disputed issue(s). You retain full control over every decision you make during the FTM process. No one can impose a decision on either you or the IRS.

For your case to be considered for FTM, you must first try to resolve all issues with the IRS. This means working cooperatively with the IRS revenue officer, followed by a conference with the officer's manager, before seeking the services of an Appeals mediator.

When considering FTM, consider what might happen if your case is not settled. Ask yourself:

- Am I prepared for what could be a lengthy appeal?
- What is my risk that litigation would be unsuccessful, and what would the consequences be?

FTM does not eliminate or replace existing dispute resolution options, including your opportunity to request a hearing before Appeals or a conference with an IRS manager. If you cannot resolve your dispute through FTM, you still retain all otherwise applicable appeal rights.

If a resolution is reached through FTM, your overall IRS experience is substantially faster. The benefits of settlement over litigation include:

• Speed
• Cost
• Flexibility
• Control

Certain cases and issues are ***not*** eligible for FTM:

- Collection Appeal Program cases.
- Cases considered by an IRS campus site.
- Frivolous issues, such as those identified in "**Notice 2010-33**" regarding "Frivolous Tax Positions or any subsequent notice or revenue procedure.
- Other issues listed in **Revenue Procedure 2003-41** as follows:
  - ❑ Issues in a taxpayers case designated for litigation
  - ❑ Issues in a taxpayers case under consideration for designation for litigation
  - ❑ Issues for which there is an absence of legal precedent
  - ❑ Issues for which there are conflicts between Circuit Courts of Appeal
  - ❑ Issues included in the Technical Advice Program or in the Appeals Technical Guidance Program
  - ❑ Issues for which the taxpayer has submitted a request fro competent authority assistance
  - ❑ Issues for which the taxpayer has requested the simultaneous Appeals/Competent Authority procedure described in Section 8 of Rev. Proc. 2002-52
  - ❑ "Whipsaw" cases/issues
  - ❑ Cases worked at a Campus site in which a penalty was proposed, except those involving special electronic fund deposit penalties
  - ❑ Cases worked at a Campus site in which an Offer-in-Compromise was made
  - ❑ Collection Appeal cases
  - ❑ Automated Collection system (ACS) cases
  - ❑ Frivolous Issues

- ❑ Issues for which mediation would not be consistent with sound tax administration (issues governed by closing agreements, res judicata or by controlling precedent
- ❑ Cases in which the taxpayer has failed to respond to Service Communications and no documentation has been previously submitted for consideration by the examiner
- ❑ Issues within the scope of Rev. Proc. 2002-18. 2002-1C.B. 678 (methods of accounting), and
- ❑ Issues that have been identified in a "Chief Counsel Notice", or equivalent publication, as excluded from the Fast Track Mediation process.

To apply for the FTM program, the practitioner should send their formal request to the applicable IRS Revenue Officer as follows:

1) Prepare **Form 13369**, *Agreement to Mediate*, and
2) A written statement detailing your position on the disputed issue(s).

The IRS revenue Officer will provide the practitioner with and the Form 13369, and provide them with copies of pertinent work papers to allow them to prepare their written position on the disputed issue(s).

**Fast Track Settlement Program: Time-Saving Option Under Audit**[11]

The Internal Revenue Service announced the nationwide rollout of a streamlined program designed to enable small businesses under audit to more quickly settle their differences with the IRS. The **Fast Track Settlement** (FTS) program is designed to help small businesses and self-employed individuals who are under examination by the Small Business/Self Employed (SB/SE) Division of the IRS. Modeled on a similar program long available to large and mid-size businesses (those with more than $10 million in assets), FTS uses alternative dispute resolution techniques to help taxpayers save time and avoid a formal administrative appeal or lengthy litigation. As a result, audit issues can usually be resolved within 60 days, rather than months or years. Plus, taxpayers choosing this option lose none of their rights because they still have the right to appeal even if the FTS process is unsuccessful.

Jointly administered by SB/SE and the *IRS Appeals* office, FTS is designed to expedite case resolution. Under FTS, taxpayers under examination with issues in dispute work directly with IRS representatives from SB/SE's Examination Division and Appeals to resolve those issues, with the Appeals representative typically serving as mediator.

The taxpayer or the IRS examination representative may initiate Fast Track for eligible cases, usually before a *30-day letter i*s issued. The goal is to complete cases within 60 days of acceptance of the application in Appeals.

SB/SE originally launched FTS as a *pilot* program in September 2006.

[11] IR-2013-88, Nov. 6, 2013

## 8.26.10 Trust Fund Recovery Penalty Mediation Procedures[12]

### Background

On December 1, 2008, Appeals initiated a two-year pilot program in eight cities for post-Appeals mediation for Trust Fund Recovery Penalty cases. On January 24, 2011, Appeals extended the test program without changes through December 31, 2012. This IRM contains procedures for Appeals settlement officers involved in the post-Appeals mediation pilot program.

### Material Changes

(1) This IRM section contains guidance for Appeals settlement officers involved in the post-Appeals mediation pilot program and whose cases are subject to post-Appeals mediation. Fast Track Mediation procedures for all Trust Fund Recovery Penalty cases are also included.

(2) Reflects new organizational terms and titles resulting from the Appeals 2012 Alignment Project.

### Effect on Other Documents

IRM 8.26.10 supplements Revenue Procedure 2009-44 and Announcement 2011-6.

### Audience

Appeals settlement officers involved in the post-Appeals mediation pilot program. Appeals officers were part of a prior pilot and may follow IRM 8.26.5, *Post Appeals Mediation (Non-Collection Cases) Procedures*. The Fast Track Mediation procedures apply to all Appeals technical employees considering Trust Fund Recovery Penalty cases. Appeals Account and Processing Support procedures for both post-Appeals mediation and Fast Track Mediation are also included.

[12] IRM §8.26.10

**Trust Fund Recovery Penalty Mediation - Overview**[13]

The Internal Revenue Service Restructuring and Reform Act of 1998 enacted IRC 7123(b), which requires the Secretary to prescribe procedures under which a taxpayer or Appeals may request non-binding mediation on an issue unresolved at the conclusion of Appeals procedures. IRM 1.2.17.1.1, *Policy Statement 8-1*, affirms Appeals' commitment to the development and use of alternative dispute resolution (ADR) techniques. Revenue Procedure 2002-44, 2002-26 I.R.B. 10 was published on July 1, 2002 and formally established the overall Appeals mediation program. Revenue Procedure 2009-44, 2009-40 I.R.B. 1 was published October 5, 2009, superseding Revenue Procedure 2002-44. Collection cases, including Trust Fund Recovery Penalty (TFRP) cases, are excluded under Revenue Procedure 2009-44 except for those cases eligible under Announcement 2008-111.

Announcement 2008-111, 2008-48 I.R.B. 1224 was published December 1, 2008. It modified Revenue Procedure 2002-44 and established a two-year pilot program for post-Appeals mediation (PAM) for taxpayers whose appeal is considered in one of the following cities:

- Atlanta, Georgia
- Chicago, Illinois
- Cincinnati, Ohio
- Houston, Texas
- Indianapolis, Indiana
- Louisville, Kentucky
- Phoenix, Arizona
- San Francisco, California

Announcement 2011-6, 2011-4 I.R.B. 433 was published January 24, 2011 extending to December 31, 2012 the test program outlined in Announcement 2008-111.

**Note:** During the period of the pilot program, PAM was not available for cases in which the appeal was considered by an Appeals office that was not part of the pilot.

[13] IRM §8.26.10.1

# IRS Negotiations-Expert Tips Punch List

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