

May 13, 2016

The Honorable John Koskinen
Commissioner of Internal Revenue
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

RE: Preserving and Improving Access to Face-to-Face Appeals Conferences

Dear Commissioner Koskinen:

The Texas Society of Certified Public Accountants (TSCPA) is a nonprofit, voluntary professional organization representing 27,000 members. One of the expressed goals of the TSCPA is to speak on behalf of its members when such action is in the best interest of its constituency and serves the cause of CPAs in Texas, as well as the public interest. TSCPA has established a Federal Tax Policy Committee (FTP) to represent those interests on tax-related matters. The FTP has been authorized by the TSCPA's Board of Directors to submit comments on such matters of interest to committee membership. The views expressed herein have not been approved by the Board of Directors or Executive Board and, therefore, should not be construed as representing the views or policies of the TSCPA.

Importance of Face-to-Face Appeals

The appeals process is essential to the fairness of our tax system. The recent implementation of the Appeals Judicial Approach and Culture (AJAC) has significantly reduced taxpayers' ability to meet face-to-face with appeals officers to resolve tax issues. In addition, staffing reductions and reallocation of appeals and settlement officers to IRS service centers has seriously degraded access for in-person appeals conferences. This has resulted in delays and increased costs for both taxpayers and the IRS. Face-to-face communications are the most efficient way to deal with complex issues, allow both sides to evaluate the importance of each other's arguments, focus on and evaluate the strengths and weaknesses of facts and issues, and properly assess litigation hazards. Face-to-face communications are simply more effective than telephone calls, ongoing correspondence or video conferences because it is easier to ascertain if the message sought to be conveyed is effectively communicated to and understood by the recipient.

Virtual Service Delivery and Other Alternatives

Appeals has long been an effective alternative dispute resolution system. We believe the availability of face-to-face meetings is important to the appeals process, but in a large state like Texas, the taxpayer often has to bear substantial costs and burdens in traveling long distances, possibly with multiple trips if the taxpayer is referred back and forth between Appeals and Examinations or Collections. (We note, for those unfamiliar with distances in Texas, that El Paso is closer to Los

Angeles than to Dallas, and Dallas is closer to Chicago than to El Paso.) We appreciate that the IRS is starting to make virtual service delivery (VSD) available in offices distant from major cities like Dallas, Houston, Austin, San Antonio, El Paso, etc. and, of course, this concept is equally true for taxpayers distant from a major city in other states. While we have not observed such a process, we doubt that it is capable of being as effective as face-to-face communications. We do believe it has the potential to be better than handling an appeal only by telephone or correspondence. Many firms have video conferencing facilities, and practitioner groups and organizations might add this capability if the IRS system is a high-quality technology and it promotes VSD availability and procedures. (We note that we have seen the current IRS video conferencing capability and we hope that the quality of the IRS VSD technology is superior to the video conferencing.) Given the clear superiority of face-to-face meetings to settle conflict, we continue to urge the IRS to also consider having Appeals personnel “ride the circuit,” visiting various field offices on a regular schedule to meet with taxpayers and tax practitioners to resolve cases.

Another issue is that VSD is a general IRS system and not specific to Appeals, which impacts its availability. Appeals staff must obtain access to the VSD conferencing room through another department. Many Appeals staff members do not even know the system capabilities at this point. We hope the IRS will implement procedures for taxpayers and their representatives to schedule appointments to use the VSD conferencing rooms to meet virtually with the IRS officers from their remote locations.

AJAC has Hindered Appeals Effectiveness

The IRS intended AJAC to separate the fact-finding function of Examinations and Collections from the negotiation and decision-making function of Appeals. Although we understand the burden that was being placed on Appeals and appreciate the efforts to encourage case resolution at earlier levels in Examination and Collections, we note that appeals officers (and settlement officers) have long had authority to send improperly developed cases back to the field—and that authority extended and extends to cases docketed in Tax Court.¹ These efforts were stimulated because some practitioners were less than forthcoming with agents and revenue officers, at least in part because of perceptions that facts presented and efforts to resolve issues at the field level are frequently met with less than open minds. We suggest that while the goal is admirable, the resolution to impose AJAC is not having the intended effect and is instead resulting in a deprivation of taxpayer rights. In operation, the AJAC approach has been used to manage the age of Appeals’ caseload and, at least in its practical application, has effectively undermined the availability of a fair and efficient appeals system. The National Taxpayer Advocate has described many of the issues, including that AJAC is:

- Being used to intimidate taxpayers and deny their right to an administrative appeal;
- Causing cases to bounce back and forth between Appeals and Compliance; and
- Resulting in curtailed review by appeals hearing officers of IRS Examination and Collection actions.²

¹ Rev. Proc. 2016-22, 2016-15 IRB 577 (March 23, 2016).

² National Taxpayer Advocate’s 2015 Annual Report to Congress, MSP #8, 83.

These problems are fully described in her report, which mirrors the experience of many of our members. For example, if the taxpayer has not submitted all files, Appeals will automatically refer the case back to Examinations or Collections. We believe the appeals officer should be able to independently evaluate the importance of facts and issues and fully develop the case in Appeals if it is determined that is the most efficient way to proceed. Automatically referring the case back to Examinations or Collections results in delays and added costs for the taxpayer (and, we suspect, the IRS). The AJAC process imposes mandatory and unrealistically limiting deadlines in which to resolve facts and issues. Taxpayers have no control over the timing of the assignment of the referred case. Given the lack of adequate field-level personnel, IRS delay can be lengthy. Thus, if the taxpayer, after the case is finally assigned, cannot promptly satisfy Examinations' or Collections' system-imposed tight deadlines for information, the taxpayer could receive a statutory notice of deficiency forcing the dispute into the likely more costly forum of the Tax Court. This is particularly onerous for taxpayers with limited resources and clearly violates the Appeals mission statement that is posted prominently in Appeals' offices. Further complication arises if the case is filed in Tax Court based on the Appeals-generated Notice of Deficiency because referral of the case back to Appeals for settlement is discretionary.³

Automatic application of AJAC procedures reduces the quality of appeals and diminishes the role of appeals officers, allowing Examinations and Collections to judge the reasonableness of document requests with little opportunity for the taxpayer to get a more objective determination of whether an alternative form of substantiation would suffice. In many cases, Appeals could easily review a new fact or argument rather than sending it back to Examinations or Collections and for many years highly trained appeals officers exercised this discretion. Additionally, requiring that the facts be supported by full documentation before Appeals will consider the case seems to contradict the long-standing *Cohan* rule,⁴ which allows taxpayers to produce alternative substantiation in certain circumstances.

Regardless of whether AJAC is being used to pressure the taxpayer to settle, the taxpayer must consider additional costs, procedural delays, and possible hazards of litigation resulting from AJAC procedures. We are concerned this might also be considered by the IRS taking negotiating positions. Some of our members believe appeals officers sometimes seem to apply AJAC procedures in an adversarial way to encourage settlements or to manage their caseload to satisfy internal reporting statistics, forcing settlement without a meaningful review of the facts and issues in Appeals. While the AJAC procedures may reduce the number of pending cases in Appeals, the cost to taxpayers generally increases and the quality of review and fairness generally decreases, clearly in contradiction to Appeals' mission statement.

Conclusion

In separate comments on the "future state" plan of the IRS, we observed the strong need for human interaction with the IRS. This also applies at least equally in cases within the Appeals jurisdiction in which substantial taxpayer rights are at stake.

³ Ibid, Rev. Proc. 2016-22, Section 3.01.


⁴ *Cohan v. Commissioner*, 39 F 2d 540 (2d Cir. 1930)

We believe the National Taxpayer Advocate has done an excellent analysis of face-to-face appeals problems from AJAC procedures and has made recommendations that should be strongly considered. We particularly support the recommendation to give IRS appeals and settlement officers more discretion to develop facts and arguments rather than being required to automatically bounce a case back to Examinations or Collections. This will allow the appeals (settlement) officer to fully develop the case and will add substantially to the quality of the appeals process. If a case is remanded to the field, the rigid and limited time for field action should be significantly relaxed to provide a fair process. The objective should be to resolve a case fairly and efficiently rather than following procedures that automatically limit the authority of Appeals and which will often delay and effectively deny appeal rights of taxpayers.

We recognize the IRS has to prioritize the use of its scarce workforce resources and funding, but an effective and fair appeals process is necessary for a fair tax system; procedures (whether by AJAC, personnel allocation or otherwise) that limit face-to-face meetings or impair a fair process should not be imposed to restrict a fair appeals process. Travel costs are borne by the taxpayer, and face-to-face meetings make the IRS more efficient and cost effective, and lead to a more efficacious approach to achieving the Appeals' mission of fairness. The IRS should encourage rather than discourage in-person appeals.

We appreciate this opportunity to present our comments and would be happy to discuss this further with you. Please contact me at 972-419-8383 or kmh@gpm-law.com if you would like to discuss our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth M. Horwitz". The signature is stylized with a large, sweeping "K" and a cursive "H".

Kenneth M. Horwitz, JD, LLM, CPA
Chair, Federal Tax Policy Committee
Texas Society of Certified Public Accountants

Principal responsibility for drafting these comments was exercised by Kenneth M. Horwitz, JD, LLM, CPA; Christina A. Mondrik, JD, CPA; and Julie Ann Dale, CPA.

cc: Nina E. Olson, National Taxpayer Advocate
Karen Schiller, Commissioner, IRS Small Business/Self-Employed Division
Kirsten B. Wielobob, Chief, Appeals, IRS Office of Appeals