MSP #17 APPEALS: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases

RESPONSIBLE OFFICIALS

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TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

In October 2016, the IRS Office of Appeals (Appeals) formally changed its position regarding the availability of in-person Appeals conferences. Under this policy, the default rule became telephone conferences with in-person conferences only being available in cases meeting certain criteria and where the Appeals Team Manager approved.[2] Although Appeals offered reassurance that "the changes are not intended to shift the paradigm away from in-person conferences as a resolution tool," many taxpayers and their representatives viewed the IRS's new approach as "a major change in long-standing policy that protects taxpayer rights."[3] This perspective is understandable, given that the number of in-person Appeals conferences has dropped by 61 percent between fiscal year (FY) 2013 and FY 2017, while Appeals case receipts have fallen by only 16 percent during this same period.[4]

The shrinking availability of in-person Appeals conferences is problematic because a face-to-face meeting is sometimes essential to properly explaining and settling a controversy.[5] For example, as one tax practitioner has explained, "An experienced advocate will generally adjust his or her presentation based on how it is being received. A look of doubt by the IRS Appeals Officer would generally cause the taxpayer's representative to explain things in a different manner."[6] In particular, cases that involve substantial factual or legal complexity, or that pose significant hazards of litigation to the government, are difficult to adequately communicate remotely.

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 Internal Revenue Manual (IRM) 8.6.1.4.1. *Conference Practice* (Oct. 1, 2016).

3 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016); Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16.

4 Appeals response to TAS information request (Oct. 25, 2017).

5 Lisa Zarlenga, Robert Kovacev, Cameron Arterton and Caitlin Tharp, *Changes to IRS Appeals May Cause Problems for Taxpayers*, Law360 (Oct. 26, 2016), https://www.law360.com/articles/856147/changes-to-irs-appeals-may-create-problems-for-taxpayers.

6 Kevin Johnson, *Face-to-Face Conferences with IRS Appeals Should Be a Taxpayer Right*, Forbes (Mar. 5, 2017). See also National Taxpayer Advocate 2016 Annual Report to Congress 64-71.

As observed by the American Bar Association Section of Taxation, "In order for taxpayers to be amenable to the administrative Appeals process, they must feel that their legal arguments and perspective on an issue have been heard — and for that, there is no substitute for a face-to-face conference."[7] If access to an in-person conference is denied to taxpayers and their representatives when they believe this interaction to be crucial for resolving their case, the result is likely to be disillusionment, less long-term compliance, and a willingness on the part of taxpayers to more quickly seek recourse in the federal courts.[8]

In response to objections from a range of stakeholders, Appeals issued guidance to employees "informing them that Appeals will return to allowing taxpayers to have in-person Appeals conferences in field cases."[9] The National Taxpayer Advocate commends Appeals for its responsiveness to stakeholder concerns and its quick modification of its position. Nevertheless, the ultimate benefit of this new guidance remains uncertain as, rather than formally committing to honor good-faith requests for in-person conferences, Appeals pledges only to use its "best efforts" in this regard.[10] Further, a return to the pre-October 2016 status quo leaves a variety of underlying issues unaddressed. For example, the existing policy continues the prohibition against in-person conferences for Campus Appeals, which raises serious equity and due process concerns, as many Campus cases involve lower-income and unrepresented taxpayers. One of the hallmarks of top-quality customer service is choice, and the choice regarding an in-person conference should be made available to taxpayers regardless of whether their case is assigned to a Campus or Field office.

As a result, the National Taxpayer Advocate remains concerned that:

- The limitations on in-person conferences continue, particularly with respect to Campus cases, even though existing trends indicate these steps to be unnecessary;
- The availability of conference options that often represent unsatisfactory alternatives sometimes obscures the importance of in-person Appeals conferences;[11] and
- The existing restrictions on in-person conferences could harm both taxpayers and the government in the long run.

One of the hallmarks of top-quality customer service is choice, and the choice regarding an in-person conference should be made available to taxpayers regardless of whether their case is assigned to a Campus or Field office.

7 *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

8 Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16; Erich Kirchler, The Economic Psychology of Tax Behavior (2007).

9 Stephanie Cumings, *IRS Appeals Moving Back to In-Person Conferences*, 2017 TNT 179-4 (Sept. 18, 2017); IRS, Interim Guidance Memorandum (IGM) AP-08-1017-0017, *Appeals Conference Procedures*, (Oct. 13, 2017).

10 IRS, IGM AP-08-1017-0017, *Appeals Conference Procedures*, (Oct. 13, 2017).

11 These alternatives include teleconferences, virtual service delivery (VSD), the newly implemented case assistor program, and the WebEx program, which is currently being piloted.

ANALYSIS OF PROBLEM

The Limitations on In-Person Conferences Continue, Particularly With Respect to Campus Cases, Even Though Existing Trends Indicate These Steps to Be Unnecessary

With the October 2016 revisions to the Internal Revenue Manual (IRM), Appeals attempted to alter the playing field regarding in-person Appeals conferences. As Appeals explained, "By putting in place business rules around when Appeals provides in-person conferences, the changes shift the decision from the taxpayer to Appeals."[12] Simply returning to the pre-existing policy regarding Field cases, however, will not necessarily make in-person Appeals conferences significantly more available to good-faith taxpayers than has recently been the case.

For example, Appeals does not offer in-person conferences for Campus Appeals, which can be especially burdensome for low income taxpayers, whose testimony and credibility may be particularly important in the case of missing records or the lack of representation.[13] Further, Appeals will no longer allow taxpayers to seek transfer of a case from the Campus to the Field, one mechanism that previously enabled taxpayers to obtain an in-person conference.[14] Thus, in its effort to reduce the number of in-person conferences, Appeals continues to substantially limit taxpayers' choices and options, not just with respect to these conferences, but also regarding transfers to the Field, which sometimes are based on the reasonable desire of taxpayers to obtain an Appeals Officer with more topical experience or better regional understanding.[15]

These steps, however, appear to be largely unnecessary, given the long-term trends prevailing with respect to in-person conferences. In-person Appeals conferences have dropped by 61 percent between FY 2013 and FY 2017, and requests to transfer cases out of Campuses in order to obtain an in-person Appeals conference have fallen by 58 percent during this same period. These trends are illustrated in Figure 1.17.1.[16]

FIGURE 1.17.1, In-Person Conference Trends

	FY 2013	FY 2017	Percentage change
Total Appeals receipts	123,113	103,574	-16%
Total in-person conferences	14,986	5,832	-61%
Case transfers due to in-person request	5,853	2,461	-58%
Case transfers due to in-person request resulting in in-person conference	2,626	983	-63%

12 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016).

13 This testimony provides the evidentiary basis for application of the *Cohan* rule, developed in the case of *Cohan v. Comm'r*, 39 F.2d 540 (2d Cir. 1930), which allows the decisionmaker to estimate allowable deductions.

14 *Id.*

15 National Taxpayer Advocate 2016 Annual Report to Congress 204-08.

16 Appeals response to TAS information request (Oct. 25, 2017).

Since taxpayers have already been requesting fewer in-person conferences, the motivation for Appeals' new policy restricting taxpayers' right to an in-person conference is unclear. Appeals has in part justified its approach by explaining that taxpayers prefer telephone conferences and that "the overwhelming majority of [Appeals'] cases — more than 87 percent — are effectively handled by phone."[17] If this is so, however, then along with existing data trends, it would argue even more powerfully in favor of allowing taxpayers the maximum range of conference options and reducing the number of in-person conferences by increasing the desirability of alternatives.

Other taxing authorities have concluded that better results are achieved when taxpayers are not forced to pursue pre-selected channels of tax administration or case resolution.[18] Given this reality and the existing data indicating that Appeals is in no danger of being overwhelmed by in-person conferences, Appeals has the opportunity to substantially improve taxpayer service. For example, Appeals could, using attrition from the Campuses, increase staffing in local field offices with Hearing Officers of various grades and designations such that the office could cover cases ranging from the Earned Income Tax Credit (EITC) to itemized deductions to Schedule C controversies. This step would not only expand Appeals' geographic footprint and facilitate the accessibility of in-person Appeals to taxpayers, but would allow Appeals to implement the call for an Appeals Officer and Settlement Officer permanently located in every state, the District of Columbia, and Puerto Rico currently proposed in the Grassley-Thune bill, a policy which the National Taxpayer Advocate has long recommended.[19]

The Availability of Conference Options That Often Represent Unsatisfactory Alternatives Sometimes Obscures the Importance of In-Person Appeals Conferences

Appeals seeks to allay concerns regarding potential limitations on the availability of in-person conferences by reassuring taxpayers that they will still have a range of conference options, including virtual service delivery (VSD), telephone conferences, and the case assistor program.[20] Nevertheless, these alternatives often do not live up to their billing and fail to meet the needs of taxpayers and their representatives.

For example, the IRM paints a rosy picture of VSD, a "teleconferencing technology that permits parties to conduct virtual face-to-face conferences from remote locations." It "is installed in a number of IRS locations known as VSD 'support' sites, including all six Appeals Campus locations… VSD technology is also installed in a number of 'customer-facing' sites, where taxpayers and representatives can go to conduct VSD conferences."[21]

Nevertheless, the reality surrounding Appeals' use of VSD does not measure up to its portrayal. Currently, there are only ten customer-facing VSD locations available to taxpayers and their representatives around the country.[22] Further, there was just one Appeals conference held using VSD throughout all of FY 2017.[23] Outside commentators have noted the limited nature of VSD, as has Kirsten Wielobob, the former Chief of Appeals, who has said, "My personal feeling is that until we can

17 Letter from Kirsten Wielobob, Chief, Appeals, to Tax Analysts (June 23, 2016), 2016 TNT 123-13.

18 National Taxpayer Advocate 2016 Annual Report to Congress 70.

19 Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Congress. National Taxpayer Advocate 2014 Annual Report to Congress 46-54; National Taxpayer Advocate 2014 Annual Report to Congress 311-14.

20 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016).

21 IRM 8.6.1.4.5(1), *Virtual Service Delivery* (Oct. 1, 2016).

22 Appeals response to TAS information request (Oct. 25, 2017).

23 *Id*.

use Skype or something like that that's more commonly available to everyone, we're probably not going to get widespread adoption."[24]

Appeals recently announced a new WebEx pilot program in which taxpayers and Appeals Officers would communicate using WebEx meeting software on their own computers.[25] Taxpayers would also have the ability to use their smart devices for such conferences.[26] WebEx is a promising development and has a number of potential benefits for both taxpayers and Appeals. Nevertheless, the WebEx pilot is still in its formative stages and should be treated by Appeals as an additional means of expanding conference options for taxpayers, not as a further mechanism for limiting taxpayers' right to an in-person conference.

Further, Appeals has evidenced a strong desire to shift taxpayers from in-person conferences to telephone interactions, establishing the latter as the default method in the October 2016 guidance. Although Appeals has now abandoned the "default" language, the extent to which it will continue to push the telephone option on potentially unwilling taxpayers remains an open question. Appeals has expressed the view that 87 percent of its cases "are effectively handled by phone."[27] Many of the potential explanations for this large percentage, however, do not support Appeals' implication that telephone contact can effectively replace the availability of in-person conferences. For example, the Texas Society of Certified Public Accountants has observed that "[e]fficient resolution could very easily include prompt denial of the relief the taxpayer was seeking."[28] In particular, telephone conferences can sometimes present additional obstacles to the ability of low income or unsophisticated self-represented taxpayers to fully understand and adequately present their case.

Additionally, the 87 percent number cited by Appeals may be somewhat misleading given that many cases appropriate for resolution over the phone, by their very nature, include less complex factual and legal controversies than cases involving in-person appeals.[29] Likewise, some taxpayers who may be eligible for an in-person conference may feel compelled to accept a telephone conference simply to obtain timely resolution of their case. For FY 2017, average cycle time was 189 days for cases with telephone conferences, as compared with an average cycle time of 372 days for cases involving an in-person Appeals conference.[30]

As a third alternative, Appeals has developed a new procedure primarily for Campus cases, which are disqualified from eligibility for in-person Appeals conferences.[31] This procedure, known as the case assistor program, teams the assigned Appeals Officer with a local Appeals Officer. The taxpayer travels to the local Appeals office and together with the local Appeals Officer telephones the assigned Appeals Officer to consider the case. Thereafter, the two Appeals Officers discuss proceedings, and the assigned Appeals Officer reaches a decision.

24 Amy S. Elliot, *IRS Appeals to End Case Reassignment Strategy*, 2016 TNT 172-5 (Sep. 16, 2016).

25 Matthew R. Madara, *IRS Addressing Concerns Over Appeals Conference Pilot Program*, 2017 TNT 114-3 (June 15, 2017).

26 Appeals response to TAS fact check request (Nov. 13, 2017).

27 Letter from Kirsten Wielobob, Chief, Appeals, to Tax Analysts (June 23, 2016), 2016 TNT 123-13.

28 Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16.

29 *Id*.

30 Appeals response to TAS information request (Oct. 25, 2017). In this context, the term "cycle time" is defined as the period between when a non-docketed case is received by Appeals and closed by Appeals.

31 IRM 8.6.1.4.1.1, *In-Person Conferences: Case Assistance* (Oct. 1, 2016).

The IRS has described this mechanism somewhat confusingly as "in-person conferences: case assistance."[32] This program, however, combines the effort of travel to the Appeals office with the limitations inherent in a telephone conference, discussed above. Moreover, using two Appeals Officers for every case assistor conference will not only create an odd dynamic among the participants, but also seems to be an inefficient use of Appeals' dwindling personnel. The attractiveness of this option to taxpayers and their representatives remains an open question, as only 15 cases were closed using the case assistor program during FY 2017.[33]

One of the hallmarks of top-quality customer service is choice. The case assistor program, along with telephone conferences and VSD, have their place and can be beneficial in certain situations. They should not, however, be forced on taxpayers as a replacement for in-person Appeals conferences. As stated by one witness in hearings held before the Oversight Subcommittee of the House Committee on Ways and Means, "We believe that taxpayers, if willing to incur the time and cost, should have a fundamental right to meet Appeals face to face."[34]

The Existing Restrictions on In-Person Conferences Could Harm Both Taxpayers and the Government in the Long Run

Several taxpayer representative groups came forward to express disagreement with the October 2016 restrictions on in-person conferences. Many of these objections continue to be applicable, however, as they speak to the importance of in-person conferences as a means of resolving cases, particularly those involving factual or legal complexity, credibility of witnesses, or hazards of litigation settlements. "Our tax system has grown exponentially more complicated since RRA '98 [the IRS Restructuring and Reform Act of 1998], making the historical policy of allowing an in-person conference all the more important in facilitating clear communications between taxpayers and Appeals, allowing resolution of factual misunderstandings, and facilitating prompt resolution of tax disputes."[35]

Restricting the ability of good-faith taxpayers to obtain an in-person conference reduces Appeals' effectiveness and runs counter to Appeals' mission of achieving fair and equitable negotiated settlements. It increases the risk that the parties will fail to adequately understand one another's positions and decreases the likelihood that a fair and equitable settlement will be reached. Further, increasing the availability of in-person conferences in Field cases while continuing the prohibition against such conferences for Campus cases, many of which involve lower income taxpayers, raises serious equity and due process concerns.

As explained by another witness in the hearing held by the Oversight Subcommittee of the House Ways and Means Committee,

> For many taxpayers, the first opportunity to meet someone and talk about their case is at Appeals… In these cases, Appeals is the first opportunity they have to present their case

32 IRM 8.6.1.4.1.1, *In-Person Conferences: Case Assistance* (Oct. 1, 2016).

33 Appeals response to TAS information request (Oct. 25, 2017).

34 *IRS Reform: Resolving Taxpayer Disputes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 225th Cong. (2017) (statement of Kathy Petronchak, Director, alliantgroup LP) 5.

35 Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16. *See also* Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16; *ABA Members Comment on Recent Appeals Division Practice Changes*, 2017 TNT 89-10 (May 10, 2017).

and have a discussion about their particular situation. By limiting face-to-face conferences, taxpayers lose the sense that their tax positions and perspectives are considered impartially.[36]

Many taxpayer representatives have expressed concern that unnecessary restrictions on in-person access could lead to expanded litigation, which would be costly for taxpayers, wasteful for the government, and burdensome for all concerned. "…[W]e suspect that if practitioners perceive that Appeals loses its attractiveness as the next step after a revenue agent's report, recourse to a Tax Court filing with the use of Appeals as a part of that procedure may become more the norm."[37]

A mechanism for resolving disputes that taxpayers view as equitable gives taxpayers a greater stake in the outcomes of their cases and encourages long-term fealty to the tax system.[38] The quality of the contact between taxpayers and the taxing authority correlates closely with long-term trust in that authority and acceptance of its determinations.[39] A program such as Appeals that purports to be impartial for everyone and committed to making "a high quality decision in each case" runs a substantial risk of fostering disillusionment by limiting taxpayers' options for true in-person contact with the organization when taxpayers believe such contact to be essential to the resolution of their cases.[40]

CONCLUSION

Appeals' 2016 policies that established a default telephone conference rule, removed taxpayers' right to choose an in-person conference, and restricted the circumstances under which an Appeals Officer could elect to hold such a conference were puzzling and troubling. After an outcry from stakeholders, Appeals announced that it would return to making in-person Appeals available in Field cases, a step which the National Taxpayer Advocate applauds. Nevertheless, the scope and parameters of this availability remain to be seen, and a number of important restrictions on in-person conferences are still in place, such as in the context of Campus Appeals.

The number of in-person Appeals conferences has dropped by 61 percent between FY 2013 and FY 2017, while Appeals' case receipts have fallen by only 16 percent during this same period. Given this trend, the sheer passage of time and some much-needed improvements to in-person alternatives likely would achieve Appeals' goals in a taxpayer-friendly manner.

36 *IRS Reform: Resolving Taxpayer Disputes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 225th Cong. (2017) (statement of Chastity K. Wilson, Am. Inst. Cert. Pub. Accts.).

37 Letter from Texas Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Jan. 24, 2017), 2017 TNT 16-16. *See also* Letter from California Soc'y of Cert. Pub. Accts. to John Koskinen, Comm'r of IRS (Mar. 8, 2017); Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016), 2016 TNT 197-16.

38 *See generally* Tonya M. Scherer, *Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens Its Doors to Mediation*, 2 J. of Disp. Resol. 215 (1997); National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 138-71; National Taxpayer Advocate 2016 Annual Report to Congress 214.

39 See generally Melinda Jone and Andrew J. Maples, *Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures*, 27 Austl. Tax F. 525, 528, 531 (2012).

40 IRM 8.1.1.1(2)(c), *Accomplishing the Appeals Mission* (Oct. 1, 2016).

The number of in-person Appeals conferences has dropped by 61 percent between FY 2013 and FY 2017, while Appeals' case receipts have fallen by only 16 percent during this same period.[41] Given this trend, the sheer passage of time and some much-needed improvements to in-person alternatives likely would achieve Appeals' goals in a taxpayer-friendly manner.

Nevertheless, taxpayers and their representatives still are left with significant concerns regarding their ability to effectively present and resolve their cases. The alternatives to in-person conferences touted by Appeals (VSD, telephone conferences, and the case assistor program) do not measure up to Appeals' optimistic descriptions. Further, in-person conferences are particularly important for some types of cases, such as those involving factual or legal complexity, or those implicating a hazards of litigation settlement. Restrictions, be they procedural or practical, on the ability of good-faith taxpayers to obtain in-person conferences may well lead to increased litigation, which is costly and inefficient for both parties. Additionally, such limitations run counter to the mission of Appeals and could diminish long-term tax compliance, an unintended consequence that would harm the government and taxpayers.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Honor all good-faith requests for an in-person Appeals conference.
2. Continue improving VSD (or its successor) and telephone conferences so that taxpayers have access to a range of quality options for interacting with Appeals.
3. Through the use of attrition and other strategies, staff local Appeals offices so as to have a permanent Appeals office in every state, the District of Columbia, and Puerto Rico that provides effective in-person coverage for the full range of Appeals cases.

41 Appeals response to TAS information request (Oct. 25, 2017).