DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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AUG 3 I 1999

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SPR-111787-99

MEMORANDUM FOR NATIONAL DIRECTOR OF APPEALS
ATTN: THOMAS LOUTHAN C:AB:AR&CS

FROM: Deborah A. Butler Deborah Butler
Assistant Chief Counsel CC:DOM:FS
(Field Service Division)

SUBJECT: Appeals Arbitration Procedure

By memorandum dated June 29, 1999, we addressed several concerns raised by section 1001(a)(4) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98). In that memorandum, we specifically advised that we do not believe RRA '98 section 1001(a)(4) is implicated when an appeals officer is acting in a nonappeals role, i.e., a third-party neutral in an Alternative Dispute Resolution (ADR) proceeding and that an ex parte waiver clause in the agreements to mediate and arbitrate is probably unnecessary when an appeals officer is acting in that capacity. By e-mail dated July 8, 1999, you clarified that you were seeking advice concerning the effect of RRA '98 section 1001(a)(4) when Appeals is representing the Internal Revenue Service (Service) rather than acting in a nonappeals role (a third-party neutral) in an arbitration or mediation proceeding.

Section 1001(a)(4) of RRA '98 provides that the plan to reorganize the Internal Revenue Service (Service) shall ensure an independent appeals function and the plan will include a prohibition on ex parte communications between appeals officers and other Service employees to the extent that such ex parte communications appear to compromise the independence of the appeals officers. RRA '98 section 1001(b)(1) preserves specific tax rights and remedies and provides that nothing in the plan "shall be considered to impair any right or remedy . . . to recover any internal revenue tax . . . ." RRA '98 section 3465 (new I.R.C. § 7123(b)(2)) codified existing ADR procedures and added a pilot program for binding arbitration. The legislative history acknowledges Congressional awareness of the extent to which Appeals participates in ADR proceedings and the intent to codify that process. H.R. Conf. Rep. No. 105-599, at 290-291 (1998).

As we understand the ADR process, a case will be assigned to Appeals and, if an impasse concerning an issue is reached, the taxpayer can request mediation or arbitration with respect to that issue. We have been informed that appeals officers have represented the Service in mediation proceedings since 1995. We also understand that appeals officers have, in the past, and may in the future, confer with other Service functions from time to time during the ADR process.

We believe that the prohibition of RRA '98 section 1001(a)(4) is limited to circumstances in which appeals officers act in their traditional settlement role capacity. We think that an appeals officer representing the Service in an ADR proceeding essentially becomes an advocate for the Service with respect to the issue being mediated or arbitrated. Thus, RRA '98 section 1001(a)(4) is not implicated because appeals officers are acting as an advocate for the Service in the ADR proceeding rather than in their settlement capacity.

We note that section 7123(b)(2), as enacted, codifies existing ADR procedures for disputes of all sizes, which includes appeals officers representing the Service in ADR proceedings. Although RRA '98 section 1001(a)(4) does not preclude ex parte communications between appeals officers and other Service personnel during an ADR proceeding when the appeals officer is acting as an advocate for the Service, it may operate to prohibit ex parte communications between appeals officers and other Service personnel made subsequent to the conclusion of a mediation proceeding that does not resolve the tax controversy concerning the issue that was mediated. For example, the appeals officer who represented the Service in the mediation proceeding may be disqualified by virtue of ex parte communications with other Service employees during the mediation proceeding from continuing to handle the case if the mediation proceeding is unsuccessful. In this circumstance, the new appeals officer may be prohibited by RRA '98 section 1001(a)(4) from having ex parte communications concerning the mediated issue with the appeals officer that handled the mediation proceeding. Nonetheless, there is no history concerning the interpretation of section 7123(b)(2) and RRA '98 section 1001(a)(4). [redacted] DP

Please contact Peter Reilly at (202) 622-8034 if you have any further questions or wish for us to review the matter further.