

Test of Mediation Procedure for Appeals

Announcement 98-99

SUMMARY: The Service has tested the use of mediation for Coordinated Examination Program (CEP) cases assigned to Appeals Team Chiefs. The Service is now expanding the mediation test to allow taxpayers to request mediation for factual issues involving an adjustment of \$1 million or more that are already in the Appeals administrative process. Under the mediation procedure the taxpayer and Appeals will continue to negotiate a settlement, but an objective and neutral third party mediator will assist them. The mediator has no authority to impose a decision; decision-making authority remains with the taxpayer and Appeals. This procedure is effective for requests for mediation made during the two-year test period beginning on November 16, 1998, the date this Announcement is published in the Internal Revenue Bulletin. Additionally, section 3465 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 (the Act), provides for expansion of mediation below the \$1 million threshold contained in this procedure. Because Appeals intends to expand the availability of mediation as required by the Act, Appeals welcomes comments on the process. Comments should be submitted by February 14, 1999, either to:

National Director of Appeals
901 D Street, SW
Box 68
Washington, D.C. 20024
Attn: C:AP:ADR & CS, Room 236

or electronically via: http://www.irs.ustreas.gov/prod/tax_regs/comments.html (the Service Internet site).

BACKGROUND: Announcement 95-86, 1995-44 I.R.B. 27, and Announcement 97-1, 1997-2 I.R.B. 62, contain the procedure that taxpayers previously used to request mediation. Under these Announcements, mediation only applied to certain issues in CEP cases assigned to Appeals Team Chiefs. A test of the mediation procedure concluded on January 12, 1998.

CHANGES: The mediation procedure has been expanded to allow for additional cases to be eligible for mediation. Mediation is no longer limited to CEP cases assigned to Appeals Team Chiefs; it is now available for factual issues (such as valuation, reasonable compensation and transfer pricing) involving an adjustment of \$1 million or more, arising from examination.

FOR FURTHER INFORMATION CONTACT: Thomas Carter Louthan, Director, Office of Alternative Dispute Resolution and Customer Service Programs, National Office Appeals, (202) 401-4098 (not a toll-free number).

TEST OF MEDIATION PROCEDURE FOR APPEALS

Summary:

Appeals is conducting an additional two-year test of its mediation procedure. This test will allow taxpayers to request mediation for factual issues involving an adjustment of \$1 million or more that are already in the Appeals administrative process. Under the procedure, the taxpayer and Appeals will attempt to negotiate a settlement, assisted by an objective and neutral third party who has no authority to impose a decision. This procedure is effective for requests for mediation made during the additional two-year test period beginning on November 16, 1998, the date this Announcement is published in the Internal Revenue Bulletin.

Overview:

The mission of Appeals is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer. Mediation is an extension of the Appeals process and will enhance voluntary compliance. Mediation is a nonbinding process, and 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 concerning the mediation process.

Scope of Mediation:

The mediation procedure will attempt to resolve factual issues while a case is in the jurisdiction of Appeals. This procedure may be used only after Appeals settlement discussions are unsuccessful, and when all other issues are resolved but for the issue(s) for which mediation is being requested. Mediation is available for:

- Factual issues (such as valuation, reasonable compensation and transfer pricing) involving an adjustment of \$1 million or more, arising from examination.

Mediation will not be available for:

- An issue designated for litigation or docketed in any court; [for the Chief Counsel mediation program involving issues in docketed cases, see Chief Counsel Directives Manual (CCDM)(35)3(20)0]

- An Industry Specialization Program (ISP) issue or an Appeals Coordinated Issue (ACI) [ISP issues are listed in Exhibit 8.7.1-1 and ACI issues are listed in section 8.7.1-3 of the Internal Revenue Manual]; or
- 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. Mediation is also not available for an issue for which the taxpayer has requested the simultaneous Appeals/Competent Authority procedure described in section 8 of Revenue Procedure 96-13, 1996-1 C.B. 616. If a taxpayer enters into a settlement with Appeals (including an Appeals settlement through the mediation process), and then requests competent authority assistance, the U.S. 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. See section 7.05 of Revenue Procedure 96-13.

Mediation process:

1. *Mediation is optional.* A taxpayer and an Appeals Team Chief (or Appeals Officer) may request mediation, after consultation with each other. Such request is initiated by the taxpayer sending a written request seeking approval for mediation to the appropriate ARDA-LC, with a copy to the National Director of Appeals. For cases assigned to an Appeals Officer, the handling of such request will be expedited if the taxpayer also sends a copy of the mediation request to the Appeals Officer and the appropriate Appeals Associate Chief.

*Request approved--*If the ARDA-LC approves the request, the ARDA-LC will inform the taxpayer and the Appeals Team Chief or Appeals Associate Chief and Appeals Officer and schedule a conference to discuss the proposed mediation process.

*Request denied--*If the ARDA-LC denies the request, the ARDA-LC will promptly inform the taxpayer and the Appeals Team Chief or the Appeals Associate Chief and Appeals Officer. Although no formal appeal procedure exists for the denial of a mediation request, a taxpayer may request a conference with the ARDA-LC to discuss the denial.

Generally, the ARDA-LC will respond to the taxpayer and the Appeals Team Chief or Appeals Associate Chief and Appeals Officer within 30 days after the ARDA-LC receives the taxpayer's request for mediation.

2. *Agreement to mediate.* The taxpayer and Appeals will enter into a written agreement to mediate. The agreement should be as concise as possible. See Exhibit

1, below for a model agreement to mediate. The ARDA-LC (in consultation with the Appeals Team Chief or Appeals Associate Chief and Appeals Officer) will negotiate and sign the agreement to mediate on behalf of Appeals. The following sections describe some considerations that the taxpayer and Appeals should take into account in preparing this agreement.

3. Participants. The parties to the mediation process will be the taxpayer and Appeals. Absent an agreement to the contrary, the parties must have participants attending the mediation with decision-making authority. The mediation agreement will set forth the procedures by which the parties inform the other parties and the mediator of the participants in the mediation and will set forth any limitation on the number, identity or participation by such participants. In general, 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. Each party must notify the mediator and the other party, no later than two weeks before the mediation, regarding the participants on their mediation team. See Exhibit 2, below for a model participants list.

4. Selection of mediators, in general. The taxpayer and the ARDA-LC will select a mediator. The test of mediation procedure for Appeals seeks to include cases using both non-IRS and Appeals personnel as mediators. Appeals' decision to mediate may depend upon the taxpayer's acceptance of an Appeals mediator. See sections 5, 6, and 7, below, regarding who can be a mediator. Co-mediators can also be used, and may be suitable for the most complex issues.

The taxpayer and the ARDA-LC can use any local or national organization that provides a roster of neutrals in selecting a mediator. In order to minimize the possibility of a last-minute disqualification of the mediator(s), the taxpayer and the ARDA-LC are encouraged to prepare a list of parties to the transaction and potential participants in the mediation other than employees of the taxpayer and Appeals for presentation to the potential mediators. If the taxpayer and the ARDA-LC cannot agree on a mediator, they may agree to a procedure to be used to select a mediator.

In obtaining the services of a mediator, the IRS will follow all applicable provisions of the Federal Acquisition Regulation. A mediator shall have no 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 ARDA-LC and they agree that the mediator may serve. See 5 U.S.C. § 573.

5. Appeals personnel as mediators, conflict statement and expenses. The taxpayer and the ARDA-LC may select an Appeals representative to be the mediator. The Appeals mediator shall be from another Appeals region, or from National Office

Appeals. The ARDA-LC from the region in which the case is located will coordinate with the ARDA-LC from the region in which the proposed mediator is located.

Due to the inherent conflict that results because the Appeals mediator is an employee of the IRS, Appeals will provide to the taxpayer a statement confirming the employee's proposed service as a mediator, that the person is a current employee of the IRS and that a conflict results from that mediator's continued status as an IRS employee. The written agreement to mediate will include this statement.

If the parties select an Appeals mediator (or Appeals co-mediator), National Office Appeals will pay the expenses associated with the Appeals mediator (or co-mediator).

6. Non-Internal Revenue Service mediator, expenses. The taxpayer and the ARDA-LC may agree on a mediator from outside the IRS. If the parties select a non-IRS mediator or co-mediator, the taxpayer and National Office Appeals will share expenses associated with the mediator (or co-mediator) equally.

7. Criteria for selection of mediators. Criteria for selecting a mediator or co-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, which will be considered subject to rules and regulations for Government procurement.

8. Issues covered. The agreement to mediate will specify the issue(s) that the parties agree to mediate. Each party will prepare a discussion summary of the issues (including the party's arguments in favor of the party's position) for consideration by the mediator. The discussion summaries should be submitted to the mediator and the other party no later than two weeks before the mediation session is scheduled to begin.

9. Site, date, agenda. The agreement to mediate should identify the location and the proposed date of the mediation session. The parties should attempt to select a site at or near the mediator's office, the taxpayer's office or an Appeals office. The parties should also agree upon an agenda in consultation with the mediator.

10. Confidentiality. The mediation process is confidential. As part of the agreement to mediate, the taxpayer will acknowledge in writing that the mediator, the persons invited to participate in these procedures by the taxpayer, and those persons the IRS invites to participate, may have access to all the taxpayer's return or return information pertaining to the issues being considered, pursuant to I.R.C. § 6103 and the regulations thereunder, particularly I.R.C. §§ 6103(c), and 6103(n) and the regulations thereunder. See Exhibit 3, below for a model consent and acknowledgment form regarding the disclosure of returns and return information. IRS employees

involved in any way in the mediation process, the outside mediator and any person under contract to the IRS that the IRS invites to participate will be subject to the confidentiality and disclosure provisions of the Internal Revenue Code, including I.R.C. §§ 6103, 7213, and 7431.

IRS employees, the taxpayer, the outside mediator, and persons invited to participate by the IRS and the taxpayer shall not voluntarily, or through discovery or compulsory process, disclose any information regarding the mediation process or any communication made during the mediation process, including the settlement terms, except as provided in 5 U.S.C. § 574.

11. Section 7214(a)(8) disclosure. Under I.R.C. § 7214(a)(8), IRS employees must report information concerning violations of any revenue law to the Secretary. The agreement to mediate will state this requirement and the parties will acknowledge this duty.

12. Disqualification. 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. Moreover, the mediator's firm will be disqualified from representing the taxpayer or any other parties involved in the transactions or issues that are the particular subject matter of the mediation in any action that involves the transactions or issues that are the particular subject matter of the mediation.

The mediator's firm will not be disqualified from representing the taxpayer or any other parties in any future action that involves the same transactions or issues that are the particular subject matter of the mediation, provided that (i) the mediator disclosed the potential of such representation to the parties to the mediation conducted by the mediator prior to the parties' acceptance of the mediator, (ii) such action relates to a taxable year that is different from the taxable year that is the subject matter of the mediation, (iii) the firm's internal controls preclude the mediator from any form of participation in the matter, and (iv) the firm does not apportion to the mediator any part of the fee therefrom. In the event the mediator has been selected prior to the mediator learning of the identity of one or more of the parties involved in the mediation, requirement (i) will be deemed satisfied if the mediator promptly notifies the parties of the potential representation.

While the mediator may not receive a direct allocation of the fee from the taxpayer (or other party) in the matter for which the internal controls 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 or any other parties involved in the mediation in any matters unrelated to the transactions or issues that are the particular subject matter of the mediation.

This paragraph 12 only applies to representations on matters before the IRS.

The provisions of this paragraph 12 are in addition to any other applicable disqualification provisions including, for example, the rules of the United States Tax Court and applicable canons of ethics.

13. Withdrawal. Either party may withdraw from the process anytime before reaching a settlement of the issues being mediated by notifying the other party and the mediator in writing.

14. Mediator's report. At the conclusion of the mediation process, the mediator will prepare a brief written report and submit a copy to each party. See Exhibit 4, below for a model mediator's report.

15. Appeals procedures apply. If the parties reach an agreement on all or some issues through the mediation process, Appeals will use established procedures, including preparation of a specific matters closing agreement (Form 906). See Statement of Procedural Rules, 26 C.F.R. § 601.106. Delegation Order 236 (Rev. 3) may apply to settlements resulting from the mediation process.

If the parties do not reach an agreement on an issue being mediated, Appeals will not reconsider it, and a statutory notice of deficiency will be issued.

16. Use as precedent. A settlement reached by the parties through mediation will not be binding on the parties (or otherwise control) for taxable years not covered by the agreement. Except as provided in the agreement, such settlement may not be used as precedent by any party.

17. Effective Date. These procedures are effective for requests for mediation made during the two-year test period beginning on November 16, 1998, the date this Announcement is published in the Internal Revenue Bulletin.

For further information contact: Thomas C. Louthan, Director, Office of Alternative Dispute Resolution and Customer Service Programs, National Office Appeals, (202) 401-4098 (not a toll-free number), or Sandy Cohen, Office of Alternative Dispute Resolution and Customer Service Programs, National Office Appeals, (202) 401-4101 (not a toll-free number).

Exhibit 1:

Model Agreement to Mediate

1. The Mediation Process.

The mediation will be an extension of the Appeals process to help **[NAME OF TAXPAYER]** and Internal Revenue Service (IRS)--Appeals (the PARTIES) reach their own negotiated settlement of the issues to be mediated. See (2) below for the participants in the mediation process. 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 inform and discuss with the PARTIES the rules and procedures pertaining to the mediation process. The mediator will not have settlement authority and will not render a decision regarding any issue in dispute. The PARTIES will continue to have settlement authority for all issues considered under the mediation process.

2. Nature of Process, Participants, Withdrawal.

- (a) The mediation process is optional.
- (b) The PARTIES must have participants attending the mediation session with decision-making authority. No later than two weeks before the mediation, each PARTY will submit to the other PARTY and the mediator a list of the participants who will attend the mediation session on behalf of or at the request of the party, including a designation of the person with decision-making authority who will represent the PARTY at the mediation session. Each PARTY's list of participants should contain the participant's name, the participant's position with the PARTY or other affiliation (*e.g.*, a member of the XYZ law firm, counsel to the taxpayer), and the participant's address, [telephone number and fax number]. All participants attending the mediation on behalf of or at the request of a PARTY should be listed on the PARTY's list of participants, including witnesses, consultants and attorneys.

[Insert limitations on the number or types of participants, if any.]

- (c) Either PARTY may withdraw from the 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.

3. Selection of Mediator, Costs.

- (a) **[NAME OF TAXPAYER]** and **[NAME]**, Assistant Regional Director of Appeals-Large Case (ARDA-LC), by mutual agreement, will select a mediator. To facilitate the selection of a mediator, the PARTIES may agree to use any local or national organization that provides a roster of neutrals in selecting a mediator. The mediator may be a non-IRS individual or an Appeals representative, with previous mediation training or experience. Co-mediators may also be selected. A potential mediator must disclose any official, financial, or personal conflict of interest with respect to the PARTIES. Any potential mediator with any such conflict of interest may not serve as a mediator, unless such interest is fully disclosed in writing to the PARTIES and they agree that the mediator may serve. See 5 U.S.C. § 573.
- (b) The costs of a non-IRS mediator or co-mediator will be shared equally by the taxpayer and National Office Appeals, subject to applicable rules and regulations for Government procurement. If an Appeals mediator or co-mediator is selected, National Office Appeals will pay the costs associated with the mediator (or co-mediator). Due to the inherent conflict that results when the Appeals mediator is an employee of the IRS, Appeals will provide to the taxpayer a statement confirming the employee's proposed service as a mediator, that the person is a current employee of the IRS and that a conflict results from that mediator's continued status as an IRS employee.

4. Issues to be Mediated.

The mediation session will encompass the following issues in the IRS audit of **[NAME OF TAXPAYER]**'s federal tax returns:

- (a) Issue #1
- (b) Issue #2

5. Submission of Materials.

Each PARTY will present to the mediator a separate written summation not to exceed 20 pages (exclusive of exhibits consisting of pre-existing documents and reports) regarding each issue. The mediator will have the right to ask either PARTY for additional information before the mediation session if deemed necessary for a full understanding of the issues to be mediated. A copy of any submission a PARTY gives to the mediator will be provided simultaneously to the other PARTY.

6. Place of Mediation.

The PARTIES should attempt to select a site at or near the mediator's office, **[NAME OF TAXPAYER]**'s office, or an Appeals office.

7. Proposed Schedule.

Subject to the approval of the mediator, the mediation session will be conducted according to the following schedule:

Submission of
Materials to Mediator: **A DATE WHICH IS NOT LATER THAN TWO WEEKS BEFORE THE DATE OF MEDIATION SESSION**

Mediation Session: **By MONTH DAY, YEAR and TIME**

8. Confidentiality.

The mediation process will be confidential. **[NAME OF TAXPAYER]** acknowledges that the mediator and the other persons invited by the PARTIES to participate in the mediation, will have access to all of **[NAME OF TAXPAYER]**'s return or return information pertaining to the issues being mediated pursuant to I.R.C. §§ 6103(b), 6103© and 6103(n) and the regulations thereunder. (See attached Consent to and Acknowledgment of Disclosure of Return and Return Information.) IRS employees involved in any way in the mediation process, and any person under contract to the IRS that the IRS invites to participate will be subject to the confidentiality and disclosure provisions of the Internal Revenue Code, including I.R.C. §§ 6103, 7213 and 7431. IRS employees, **[NAME OF TAXPAYER]**, the outside mediator, and persons invited to participate by the PARTIES in the mediation shall not voluntarily, or through discovery or compulsory process, disclose any information regarding the mediation process or any communication made during the mediation process, including the settlement terms, except as provided in 5 U.S.C. § 574.

9. I.R.C. Section 7214 (a)(8) Disclosure.

The PARTIES to this agreement acknowledge that IRS employees involved in this mediation are bound by the I.R.C. § 7214 (a)(8) disclosure requirements concerning violations of any revenue law.

10. No Record.

There will be no stenographic record, no audio or video tape recording or other transcript of the mediation session(s).

11. Report by Mediator.

At the conclusion of the mediation session, the mediator will issue a brief report to the PARTIES identifying each issue described in section 4, above, and whether the PARTIES either agreed to resolve or did not resolve the issue.

12. Appeals Procedures Apply.

If the mediation process enables the PARTIES to reach agreement on the issues, established Appeals procedures will apply. Delegation Order 236 (Rev. 3) may apply to settlements resulting from the mediation process. If the PARTIES cannot reach agreement on an issue being mediated, Appeals will not reconsider it, and a statutory notice of deficiency will be issued with respect to all unagreed issues.

13. Precedential Use. A settlement reached by the parties through mediation will not be binding on the parties (or otherwise control) for taxable years not covered by the agreement. Except as provided in the agreement, such settlement may not be used as precedent by any party.

INTERNAL REVENUE SERVICE,
APPEALS

By: _____
Assistant Regional
Director of Appeals-
Large Case
Date: _____

NAME OF TAXPAYER

By: _____
NAME
Title
Date: _____

Exhibit 2:

Model Mediation Participants List

Case Name: _____

Submitted By: _____

Date: _____

Please list below all participants attending the mediation, including witnesses, consultants, and attorneys. This form must be sent to the other party and to the mediator(s) no later than two weeks before the mediation session. Insert an **asterisk (*)** before the name of the person who has decision-making authority at the mediation sessions:

<u>NAME</u>	<u>POSITION OR AFFILIATION</u>	<u>ADDRESS</u>	<u>TELEPHONE & FAX NUMBER</u>
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Exhibit 3:

**Model Consent to and Acknowledgment of Disclosure Of Return
And Return Information**

Pursuant to I.R.C. § 6103(c) and the regulations thereunder, I, _____, on behalf of _____, (hereafter Taxpayer) authorize the Internal Revenue Service to disclose to _____, a person the Taxpayer has invited to participate in the Taxpayer's mediation with the Internal Revenue Service, all of the Taxpayer's returns and return information, within the meaning of I.R.C. §§ 6103(b)(1)--(2), pertaining to the issues being mediated.

Taxpayer also acknowledges that the Internal Revenue Service may disclose Taxpayer's returns and return information to the mediator or to persons the Internal Revenue Service may invite to participate in the Taxpayer's mediation, pursuant to I.R.C. § 6103, including I.R.C. § 6103(n).

Taxpayer understands that, without this consent to disclosure, Taxpayer's returns and return information would be confidential and disclosable only as authorized by Title 26.

I certify that I am the Taxpayer's _____, and that I have the authority to execute this consent to disclosure on the Taxpayer's behalf.

Taxpayer's Name: _____

Taxpayer's Address: _____

Taxpayer's Identification Number: _____

Tax period(s): _____ through _____, inclusive.

Name of person executing consent:* _____
(Please print or type)

Signature: _____

Date: _____

* If signed by taxpayer's authorized representative, attach a copy of Form 2848, Power of Attorney and Declaration of Representative.

Exhibit 4:

Model Mediator's Report

The parties below agreed to mediate their dispute on **MONTH DAY**, 199X. The parties attended a mediation session on **MONTH DAY**, 199X in an attempt to settle the following issue(s):

ISSUE:

SETTLEMENT: Yes
 No
 Partial

ISSUE:

SETTLEMENT: Yes
 No
 Partial

Settlement documents will be prepared under established Appeals procedures.

DATED this _____ day of _____

/s/ Mediator

/s/ Party

/s/ Party