

# Choosing Wisely:

## When to Use (or Not Use) Mediation to Obtain Cost Effective Closure in Exam & Collection Cases

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# Origins of IRS Interest in ADR

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- Administrative Dispute Resolution Act of 1996 applies to all federal agencies, including IRS
- 1998 IRS Restructuring and Reform Act enacts Code §7123, mandating ADR at the Appeals Division

# Origins of IRS Interest in ADR

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- LMSB FY2004 Currency and Cycle Time Improvement Initiative
- IRS recognized that shortening audit cycle by earlier resolution of recurring issues would result in better use of limited IRS resources
- Agency struggling to do more with less

# Benefit to Taxpayers from IRS Currency Initiative

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- Faster resolution of recurring issues reduces legal and accounting expense to taxpayers
- Certainty of tax treatment
  - no Schedule UTP needed
  - FIN 48 reserves can be reduced
  - Minimizes risk of possible restatement of financial statements if reserve is not sufficient

# Pre Filing Options

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- Private Letter Ruling (traditional method)
  - Not available for issues on “no ruling” list
  - Annual update by first Rev. Proc. of each year e.g., 2017-1
  - Generally issued for prospective transactions
  - Ability to get “comfort rulings” disappearing
  - May hold up your transaction

# Pre Filing Options

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- Pre Filing Agreements (LB & I only)
  - Covers current year return and up to four future years
  - IRS approval required
  - \$218,600 user fee (up from \$50,000 in 2015)
  - Authority is Rev. Proc. 2016-30
  - Transaction must be complete

# Pre Filing Options

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- Pre Filing Agreements (LB & I only)
  - Approximate acceptance rate into Pre Filing Agreement program is 67% since inception
  - IRS Survey indicates TPs believe audit time reduced 48% by using PFA; IRS estimate is 30% reduction in audit time
  - IRS reports high TP satisfaction with PFA (4.7 out on scale of 1 to 5)

# Pre Filing Options

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- Typical Pre Filing Agreement issues are:
  - Worthless stock and bad debts
  - Research credit
  - Cost segregation studies
  - Acquisition or disposition of a subsidiary
  - Deduction of settlement costs, penalties and fines
  - PFA is available for international issues



# Pre Filing Options

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- Pre Filing Agreement Statistics:
  - Total time to required to process a PFA ranges from 9 to 14 months
  - Through May of 2016, there have been 523 applications since program inception; 355 were accepted into the program and 261 of those have been closed with agreements.

# Options During Exam Phase

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- Delegation Order 4-24
  - Available to LB & I taxpayers only
  - Request case manager settle issue in manner that is consistent with a prior Appeals settlement

# Options During Exam Phase

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- Involve Other IRS Personnel on Technical Issues
  - Speak with IRS Field Counsel
  - Consider a request for Technical Advice
  - Seek a consultation with appropriate Issue Practice Groups or International Practice Networks

# Options During Exam Phase

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- Fast Track Settlement
  - Brings an Appeals Officer to Exam
  - Jurisdiction remains with Exam
  - Either party may request; both must agree
  - LB & I required to offer Fast Track Settlement
  - IRS reports 83% settlement rate after Fast Track Settlement
  - Authority is Rev. Proc. 2003-40

# Options During Exam Phase

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- Fast Track Settlement is available for LB & I, SB/SE and TE/GE taxpayers
  - See Ann. 2011-5, Ann. 2008-105, Rev. Proc. 2003-40
  - Initiate FTS with Form 14017
  - Targeted 120 day closure at LB & I
  - Targeted 60 day closure at SB/SE and TE/GE

# Options During Exam Phase

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- Timing of Fast Track Settlement Request
  - After Notice of Proposed Adjustment
  - Before issuance of 30 day letter
  - Taxpayer must prepare a written response to Notice of Proposed Adjustment as part of Fast Track request

# Options During Exam Phase

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- Things to consider when using Fast Track Settlement:
  - Neutral is an Appeals Officer – no option for private co-mediator
  - Taxpayer does not choose the Appeals Officer
  - Appeals Officer does not have settlement authority – that stays with Exam Division
  - FTS can consider litigation hazards through the Appeals Officer's authority

# Options During Exam Phase

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- Things to consider when using Fast Track Settlement:
  - FTS process is mostly facilitative
  - The Appeals Officer may suggest a possible resolution at end of process but either party may reject it
  - Using FTS does not waive traditional Appeals rights but will foreclose Post Appeals Mediation



# Options During Exam Phase

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- Early Referral to Appeals
  - LB & I Taxpayers only
  - Taxpayer must submit written request
  - Use to break logjam and resolve a single issue (repeat with another issue if needed)
  - Settlement authority and jurisdiction is with Appeals

# Comparison

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## Fast Track Settlement

- Jurisdiction at Exam
- Settlement Authority with Exam
- Scope: All unagreed issues
- Timing: After NOPA and before 30 day letter

## Early Referral to Appeals

- Jurisdiction at Appeals
- Settlement Authority with Appeals
- Scope: One issue
- Timing: Available at any time

# Options During the Exam Phase

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- SB/SE Fast Track Mediation - Collection
  - Replaces and obsoletes Fast Track Mediation
  - Authority is Rev. Proc. 2016-57
  - All other collection issues must be resolved first
  - Issues to be mediated must be fully developed
  - Request on Form 13369
  - Litigation hazards cannot be considered
  - Mostly facilitative process

# Options During the Exam Phase

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- Fast Track Mediation - Collection
  - Available for Offers in Compromise and Trust Fund cases
  - OIC cases with liability over \$50,000 must be reviewed by Chief Counsel before being finalized. See IRC §7122(b)
  - Unclear if FTMC is available for other Collection issues, e.g., Installment Agreements

# Options During the Exam Phase

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- Fast Track Mediation - Collection
  - Written submission is required
  - Targeted completion date is 30-40 days
  - Mediator is Appeals Officer, Taxpayer cannot choose the Mediator
  - Cannot request same Appeals Officer at Appeals if FTMC does not succeed
  - Case remains under Collection's jurisdiction

# Options During the Exam Phase

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- Suitable Issues for FTMC
  - Value of assets, projections of future income, shared living arrangements in OIC cases
  - Responsible person and willfulness determinations in TFRP cases
  - Issues relating to whether designated payments were properly made

# Options During the Exam Phase

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- FTMC is not available for:
  - Cases worked at an SB/SE Campus site
  - Collection Appeals Program (CAP) cases
  - Collection Due Process (CDP) cases
  - Cases referred to the Department of Justice
  - Cases where TP has failed to respond to IRS or submit documentation to Collection as required

# Appeals Workloads

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- IRS Data Book indicates that Appeals processes around 110,000 cases per year with about 66,000 open on any given day
- About 30 -40% of Appeals receipts are from Exam; rest are primarily Collection and Collection Due Process cases



# Post Examination Options

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- Appeals
  - Traditional process always available
  - If Taxpayer has been through Fast Track Settlement, they can request same Appeals officer or be assigned a new Appeals Officer
  - Cases unagreed after traditional Appeals conference may use Post Appeals Mediation if they have not used Fast Track processes already

# Post Examination Options

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- New Rapid Appeals Process (RAP)
  - Cycle time for largest cases reportedly 700 days
  - RAP is limited to LB & I cases that are assigned to an Appeals Team Case Leader. See IRM 8.26.11.
  - Uses Fast Track techniques at first conference to try to resolve one or more issues
  - Replaces traditional Appeals conference entirely for those issues; can still use traditional Appeals for other issues.

# Post Examination Options

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- Post Appeals Mediation
  - IRS provides Appeals Officer to mediate
  - Taxpayer may select a private Co-Mediator at taxpayer's expense
  - Appeals Mediator may be from same office location but will report to different manager
  - Taxpayer and IRS must agree to use Post Appeals Mediation

# Post Examination Options

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- Post Appeals Mediation
  - Request after traditional Appeals fails
  - Available to all taxpayers unless issue is specifically excluded or if Fast Track Settlement process has been used already
  - IRS has reported 45 to 60 percent resolution rate on Post Appeals Mediation
  - Targeted completion date is 60 day process

# Post Examination Options

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- Post Appeals Mediation
  - Authority is Rev. Proc. 2014-63
  - Rev. Proc. 2014-63 expands types of cases
  - Most significant change is the addition of Trust Fund and some Offer in Compromise cases
  - Again, OIC cases where the liability exceeds \$50,000 must be reviewed by Chief Counsel before being finalized. See IRC §7122(b)

# Post Examination Options

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- Post Appeals Mediation Not Available
  - Collection cases other than OIC and TFRP
  - OIC cases worked solely at an Appeals Campus/Service Center site
  - Whipsaw issues, including innocent spouse
  - Cases that have already participated in Fast Track Settlement or Fast Track Mediation (presumably will include Fast Track Mediation – Collection)

# Post Examination Options

- Examples of Suitable OIC Cases
  - Asset valuation issues, including assets held by third parties and value of dissipated assets
  - Projections of future income based on calculations that do not include current income
  - Future ability to pay in shared living arrangements where roommate is not liable
  - Deviations from national collection standards
  - Other factual determinations

# Post Examination Options

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- OIC Cases Not Eligible for Post Appeals Mediation
  - OIC submitted as a collection alternative in CDP
  - Cases worked solely at Appeals Campus/Service Center site
  - Cases requiring a level of approval higher than Appeals Team Manager
  - Expenses covered by published IRS guidance



# Post Examination Options

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- Trust Fund Recovery Issues Suitable for Post Appeals Mediation
  - Responsible party issues
  - Willfulness issues
  - Issues regarding Designated Payments
- Trust Fund Recovery Issues Not Eligible for Post Appeals Mediation
  - Collectability of TFRP once assessed

# Post Examination Options

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- Co-Mediator Selection Tips:
  - Mediation requires specialized skills and experience
  - Most common credential is 40 hour course
  - Substantive tax expertise is very important
  - Look for seasoned mediator with experience mediating with governmental entities
  - Prior experience using co-mediation model is very desirable

# Post Examination Options

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- Post Appeals Mediation Statement Tips:
  - Requires a written mediation submission
  - Mediation submission will be shared with Appeals (it will not be confidential)
  - Submission should focus on the risks to the other side and the problems in their case (e.g., don't just pound your chest)
  - Remember that the co-mediators are not the people you need to persuade

# Post Examination Options

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- Other Things to Consider When Choosing Post Appeals Mediation
  - Settlement authority is with the Appeals Manager/Team Leader. This may be good or bad.
  - Probe to make sure that the government really wants to mediate the case and is not just going through the motions to get their ticket punched
  - Possibility of being able to close out issue in other years can be a very good thing

# Post Examination Options

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- Other Things to Consider When Choosing Post Appeals Mediation
  - Post Appeals Mediation can be an excellent option if your Appeals Officer is way off base
  - If the case is settled, Taxpayer will avoid any public disclosure that comes with court filing
  - If the case does not settle, the mediation statement may become the basis of your trial brief

# Selected IRS ADR Statistics FY 2015

- Receipts
  - Fast Track Settlement L B & I: 87
  - Fast Track Settlement SB/SE: 177
  - Post Appeals Mediation: 99
  
- Closures
  - Fast Track Settlement L B & I: 76
  - Fast Track Settlement SB/SE: 182
  - Post Appeals Mediation: 110

# Options in Docketed Cases

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- All federal district courts and the US Court of Federal Claims have adopted ADR programs as a result of the 1998 Alternative Dispute Resolution Act
- In Tax Court, Rule 124 specifically provides for mediation and arbitration
- Can get another bite at the apple if docketed