

Prohibition of Ex Parte Communications Between Appeals Officers and Other Internal Revenue Service Employees

Notice 99-50

This notice provides a proposed revenue procedure that, when finalized, will provide guidance to address, in part, the directive in the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685 (RRA 98), to develop a plan to prohibit *ex parte* communications between officers of the Internal Revenue Service Office of Appeals (Appeals) and other Internal Revenue Service employees that appear to compromise the independence of Appeals Officers.

Section 1001(a)(4) of RRA 98 states that the Commissioner's plan to reorganize the Internal Revenue Service shall ensure an independent Appeals function within the Internal Revenue Service. The Treasury Department and the Internal Revenue Service are developing the reorganization plan. As part of that plan, guidance for Internal Revenue Service personnel and taxpayers is being developed to address the prohibition of *ex parte* communications between Appeals Officers and other Internal Revenue Service employees that appear to compromise the independence of Appeals Officers.

The proposed revenue procedure includes guidance, in the form of a series of questions and answers, that address situations frequently encountered by Appeals Officers during the course of an administrative appeal.

Before issuing final guidance, the Treasury Department and the Service invite comments from the public to aid in the development of this revenue procedure. The prohibition on *ex parte* communications will not take effect until the revenue procedure is issued in final form. In the interim, existing procedures relating to communications in the course of Appeals consideration of disputes remain in effect. Comments should be submitted by December 3, 1999 either to:

Internal Revenue Service
National Director of Appeals

Attn.: C:AP:CIIT
1111 Constitution Ave.
Washington, DC 20224
or electronically via: http://www.irs.gov/prod/tax_regs/comments.html (the Service Internet site).

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.

PROPOSED REV. PROC. 99-XX

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SECTION 1. PURPOSE AND SCOPE

Section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685 (RRA 98), states that "The Commissioner of Internal Revenue shall develop and implement a plan to reorganize the Internal Revenue Service. The plan shall . . .

(4) ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of *ex parte* communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers."

This revenue procedure contains guidance for Service personnel and taxpayers to address the prohibition of *ex parte* communications between Appeals Officers and other Internal Revenue Service employees that appear to compromise the independence of Appeals Officers. The guidance is in the form of a series of questions and answers that address situations frequently encountered by Appeals Officers during the course of an administrative appeal.

SECTION 2. BACKGROUND

In 1927, the Internal Revenue Service established an administrative appeal process to resolve tax disputes without litigation. Local appeals offices have traditionally been separate from the IRS office that proposed the adjustment. However, section 1001(a)(4) of RRA 98 requires the IRS, as part of its reorganization plan, to establish an independent Office of Appeals — one that may not be influenced by tax collection or examination employees through *ex parte* communications with Appeals Officers that appear to compromise the independence of Appeals Officers.

SECTION 3. GUIDANCE CONCERNING THE EX PARTE COMMUNICATIONS PROHIBITION DESCRIBED IN SECTION 1001(a)(4) OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998

Q-1 What is "ex parte communication" and when is it prohibited?

A-1 For the purposes of this revenue procedure, *ex parte* communications are communications that take place in the absence of one of the parties to the controversy — specifically the taxpayer or his or her representative (taxpayer/representative). *Ex parte* communications between Appeals Officers and other Internal Revenue Service employees are prohibited to the extent that such communications appear to compromise the independence of the Appeals Officers.

Q-2 Does the prohibition on ex parte communications extend to discussions between the Appeals Officer and the originating office during the course of preliminary review of a newly assigned case?

A-2 The Appeals Officer may ask general or clarifying questions which do not address the strengths and weaknesses of the issues and positions taken in the case. For example, the Appeals Officer may ask for clarification of a factual description or legal assertion in the file without involving the taxpayer/representative. The Appeals Officer may also ask whether cer-

tain information was requested and whether it was received. The Appeals Officer, however, may not engage in discussions of the strengths and weaknesses of the issues and positions in the case, which would appear to compromise the Appeals Officer's independence.

Q-3 Does the prohibition on ex parte communications change the criteria for premature referrals?

A-3 As a general rule, there is no change to current procedures. In essence, RRA 98 reinforces the instructions in Internal Revenue Manual 8.2.1.2 and reaffirms Appeals' role as the settlement arm of the Service. If a case is not ready for Appeals consideration, the Appeals Officer may return it for further development or for other reasons described in IRM 8.2.1.2. The Appeals Officer may communicate with Examination regarding the anticipated return of the case to the originating function, but may not engage in a discussion of the strengths and weaknesses of specific issues or positions, or the case as a whole, as part of a discussion of whether the premature referral guidelines require further Examination activity.

Q-4 Is there any change to the Appeals new issue policy?

A-4 No. New issues must continue to satisfy the "material" and "substantial" tests of IRM 8.6.1.4 and succeeding sections. The prohibition against ex parte communications does not affect Appeals' existing policy about raising new issues in Appeals. However, any new issue must first satisfy Appeals' new issue policy. If discussions with the originating function are needed in order to evaluate the strengths and weaknesses of the possible new issue, the taxpayer/representative must be given an opportunity to participate in such discussions. Appeals will continue to follow the principles of Policy Statement P-8-49 and the "General Guidelines" outlined in IRM 8.6.1.4.2 in deciding whether or not to raise a new issue.

Q-5 May Appeals Officers continue to have ongoing communication with the originating function during the course of an appeal?

A-5 The prohibition on ex parte communications will affect the manner in which Appeals has traditionally operated during the course of the appeal. The Appeals Officer must give the taxpayer/representa-

tive the opportunity to participate in any discussions with the originating function regarding the strengths and weaknesses of an issue or position in the case.

Q-6 What should the Appeals Officer do if new information or evidence is submitted? Can Appeals still return the new material to the originating function for review and comment?

A-6 There is no change to existing procedures. The principles in IRM 8.2.1.2.2 remain in effect. The originating function should be given the opportunity to timely review and comment on significant new information presented by the taxpayer. "Significant new information" is information of a non-routine nature which, in the judgment of the Appeals Officer, may have had an impact on the originating function's findings or which may impact on the Appeals Officer's independent evaluation of the litigating hazards. Generally, the review can be accomplished by sending the material to the originating function while Appeals retains jurisdiction of the case and proceeds with resolution of other issues. However, if it appears that important new information or evidence was purposely withheld from the originating function, the entire case should be returned to the originating function and jurisdiction relinquished pursuant to IRM 8.2.1.2.2(3). The taxpayer/representative must be notified when a case is returned to the originating function or new material not available during initial consideration has been sent to the originating function. The results of the originating function's review of the new information will be communicated to the taxpayer/representative.

Q-7 Does the prohibition on ex parte communications have any impact on the relationship between Appeals and Counsel?

A-7 Chief Counsel is the legal adviser to the Commissioner of Internal Revenue and his or her officers and employees on all matters pertaining to the administration and enforcement of the internal revenue laws and related statutes. Chief Counsel's authority encompasses the provision of comprehensive legal advice to IRS employees, including employees in the Appeals organization, relating to the enforcement and administration of such laws. The prohibition on ex parte communication does not preclude Chief

Counsel attorneys from advising Appeals Officers of the legal position of Chief Counsel on specific questions of law, assisting Appeals Officers in comprehending or interpreting specific legal authorities or otherwise providing legal assistance to Appeals Officers in the course of their duties. Appeals Officers are cautioned, however, that while they may obtain legal advice from the Office of Chief Counsel, they remain responsible for independent evaluation of the strengths and weaknesses of specific issues or positions in the case, or of the case as a whole, and for making independent judgments concerning the hazards of litigation. The prohibition on ex parte communications will have no impact on the procedures in Rev. Proc. 87-24, 1987-1 C.B. 720, or subsequent procedures relating to the administration of the Appeals process for cases docketed in the United States Tax Court.

Q-8 Appeals is required to submit certain cases to the Joint Committee on Taxation for review. On occasion, the Joint Committee will question a settlement or raise a new issue. Are communications with the Joint Committee covered by the ex parte communications prohibition?

A-8 No. The prohibition applies only to communications between the Appeals Officer and other Internal Revenue Service employees.

Q-9 Does the prohibition on ex parte communications have any impact on the requirement that ISP issues in cases in Appeals jurisdiction be reviewed and approved by the Appeals ISP Coordinator?

A-9 No. Existing procedures for review and approval remain in place. The Appeals ISP Coordinator serves as a resource person for all Appeals Officers. The purpose of the review is to ensure consistency of settlements and adherence to approved settlement guidelines. Communications between the Appeals Officer and the Appeals ISP Coordinator are entirely internal within Appeals, and consequently, the ex parte communications prohibition does not apply.

Q-10 Delegation Order 247 gives Examination case managers limited settlement authority to resolve ISP coordinated issues which have Appeals Settlement Guidelines, provided that they secure the review and approval of both the Examination and Appeals ISP Coordinators.

Would such communications constitute a violation of the ex-parte communications prohibition?

A-10 No. The purpose of the review is to ensure that the resolution by Examination fits within the guidelines developed by Appeals and that the application of the guidelines is consistent. The role of the Appeals ISP coordinator is directive in nature and has no impact on the independence of Appeals Officers.

Q-11 Does the prohibition on ex parte communications come into play in the context of meetings which include representatives from Appeals, Counsel, Collection and Examination (ACCE meetings), industry wide ISP coordination meetings, or meetings of Compliance Councils or the Large Case Policy Board?

A-11 Meetings of this type may include general discussions of how to handle technical issues or procedural matters, but these discussions are generally not case specific. Therefore, the prohibition on ex parte communications would not apply. Similarly, the prohibition would not apply to discussions relating to cases which are not under Appeals jurisdiction. However, if a case-specific discussion arises on a case which is open in Appeals jurisdiction, the discussion should be postponed. Appeals must provide the taxpayer/representative with an opportunity to participate when an Appeals Officer engages in any case-specific discussion with the originating office which addresses the strengths and weaknesses of an issue or position in a specific case that is open in Appeals jurisdiction.

Q-12 Does the ex parte communications prohibition apply to Appeals consideration of cases which originated in the Collection function, e.g., collection due process (CDP) appeals, collection appeals program (CAP) cases, offers in compromise, trust fund recovery penalty cases, etc.?

A-12 Yes. The principles discussed in A-2, A-5 and A-6 above apply to discussions between Appeals Officers and Collection Division employees. The Appeals Officer may inquire about how the originating function reached its decision and the manner in which the law was applied if such information is not clear in the administrative file. The Appeals Officer may also ask whether certain information was requested and whether it was received. The

Appeals Officer, however, may not engage in discussions of the strengths and weaknesses of the issues and positions in the case, which would appear to compromise the Appeals Officer's independence. Any discussion of the strengths and weaknesses relating to the proposed action requires that the taxpayer/representative be given an opportunity to participate in the discussion. Section 3401 of RRA 98, regarding due process in IRS collection actions, states that at a hearing, the Appeals Officer must obtain verification "that the requirements of any applicable law or administrative procedure have been met." Communications seeking to verify compliance with legal and administrative requirements are similar to the general or clarifying inquiries discussed in A-2 above. Therefore, such communications are not subject to the prohibition on ex parte communications.

Q-13 Does the prohibition on ex parte communications have any impact on Appeals Officer communications with the Office of the National Taxpayer Advocate (ONTA) on an open case?

A-13 Communications by an Appeals Officer with the ONTA that are initiated by the ONTA are not subject to the prohibition because the Appeals Officer may assume that the ONTA is acting at the request, and with the consent, of the taxpayer.

Q-14 Is the prohibition on ex parte communications limited to oral communications?

A-14 No. The prohibition is not limited to oral communications. It applies to any form of communication, oral or written (manually or computer generated).

Q-15 Several responses in this document refer to the taxpayer/representative being given an "opportunity to participate." What does this phrase mean?

A-15 It means that the taxpayer/representative will be given a reasonable opportunity to attend a meeting or be a participant in a conference call with the Appeals Officer and the originating function when the strengths and weaknesses of issues or positions in the taxpayer's case are discussed. The taxpayer/representative will be notified of a scheduled meeting or conference call and invited to participate. If the taxpayer/representative is unable to participate at the scheduled time, reasonable accommodations will be made to reschedule. This does not mean that the

Service will delay scheduling a meeting for a protracted period of time to accommodate the taxpayer/representative. Facts and circumstances will govern what constitutes a reasonable delay.

Q-16 What if the taxpayer/representative declines to participate or seeks to delay the meeting/conference call beyond a reasonable time?

A-16 The Appeals Officer should document the taxpayer/representative's declination or the reason for proceeding in the absence of the taxpayer/representative. This could be accomplished by an entry in the Case Activity Record and a letter to the taxpayer/representative.

Q-17 The IRM provides for computational review within 120 days of a team case being assigned. If this review reveals computational errors affecting the proposed tax liability, can the Appeals Officer discuss these errors with Examination without violating the prohibition on ex parte communications?

A-17 If the error involves the interpretation of a legal principle or application of the law to a particular set of facts, the taxpayer/representative should be afforded the opportunity to participate in any scheduled meetings with Examination to discuss the discrepancy. In such cases, there may be instances where the best approach is for Appeals to return the case to Examination for further development and correction. However, if the discrepancy is purely mathematical, any discussion would likely be informational only, and no violation of the prohibition is likely. Both the taxpayer/representative and Examination would be advised before a mathematical correction is made.

Q-18 What impact does the prohibition on ex parte communications have on pre-conference meetings with Examination on team cases?

A-18 This is clearly a situation where the intended communications could appear to compromise the independence of Appeals Officers. Pre-conference meetings should not be held unless the taxpayer/representative is given the opportunity to participate.

Q-19 Does the prohibition on ex parte communications apply to post-settlement conferences with Examination?

A-19 No. The post-settlement conference with Examination is intended to inform Examination about the settlement of issues and to supply information that may

be helpful in the examination of subsequent cycles. Appeals' objective is to ensure that Examination fully understands the settlement and the rationale for the resolution. In addition, the conference provides an opportunity for Appeals to discuss with Examination the application of Delegation Orders 236 and 247 (i.e., settlement by Examination consistent with prior Appeals settlement or ISP settlement guidelines) to issues settled by Appeals. Because the tax periods before Appeals have been finalized, discussion of the resolution of issues present in those periods does not jeopardize the independence of Appeals. As long as there is no discussion of new issues not previously considered by Appeals, the post-settlement communication is not subject to the prohibition on ex parte communications.

Q-20 Does the prohibition on ex parte communications alter existing procedures for handling claims filed late in the Appeals process?

A-20 There is no change to existing procedure. The claim should be referred to the originating function with a request for expedited examination. Because such a referral is in the nature of a ministerial act and involves no discussion by Appeals with Examination about the strengths and weaknesses of the issue, the referral is not subject to the prohibition.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for communications between Appeals Officers and other Internal Revenue Service employees which take place after the date this revenue procedure is published in the Internal Revenue Bulletin in final form.

DRAFTING INFORMATION

The principal author of this revenue procedure is David M. Geber of the Office of Corporate and Individual Income Tax, National Office Appeals. For further information regarding this revenue procedure, contact Mr. Geber at (202) 694-1827 (not a toll free number).