

Rev. Proc. 2003-41

SB/SE — Appeals Fast Track Mediation Procedure

SECTION 1. PURPOSE

This revenue procedure formally establishes the Fast Track Mediation (FTM) program to expedite case resolution and to expand the range of dispute resolution options available to taxpayers. The Small Business/Self-Employed Compliance Division and the Office of Appeals will jointly administer the FTM program. FTM will allow SB/SE personnel and SB/SE taxpayers an opportunity to mediate their disputes with an Appeals Official acting as a neutral party.

SECTION 2. OVERVIEW

.01 In furtherance of the Service's goal of resolving tax controversies on a basis that is fair and impartial to both the government and the taxpayer, the Service imple-

mented a SB/SE Fast Track Mediation program on July 1, 2000. The pilot program demonstrated that the Service can successfully use dispute resolution techniques within SB/SE to promote issue resolution at earlier stages and decrease the overall time from return filing to ultimate issue resolution. The FTM program, which the Service has structured to promote issue resolution within an average of 30 to 40 days from the initial joint discussion between the FTM Appeals Official and the parties, builds on the success of the pilot program.

.02 FTM is optional for the taxpayer. FTM does not eliminate or replace existing dispute resolution options, including the taxpayer's opportunity to request a hearing before Appeals or a conference with a manager. The FTM Appeals Official, serving as a neutral participant, will assist SB/SE and the taxpayer to understand the nature of the dispute and to reach a mutually satisfactory resolution consistent with applicable law. The FTM Appeals Official may also recommend to the parties a resolution on the merits based on the FTM Appeals Official's analysis of the issues. Either party may withdraw from the mediation process at any time by notifying the other party and the FTM Appeals Official in writing of the withdrawal. The FTM Appeals Official also may terminate the mediation process, by notifying the taxpayer and SB/SE in writing, if it is determined that meaningful progress toward resolution of the issues has stopped. If any issues remain unresolved at the conclusion of FTM, the taxpayer retains all of its otherwise applicable appeal rights.

SECTION 3. CASE ELIGIBILITY AND EXCLUSIONS

.01 FTM is generally available for all non-docketed cases and collection source work over which SB/SE has jurisdiction, including offer in compromise (OIC), trust fund recovery penalty (TFRP) and collection due process (CDP) cases. FTM is generally not available for issues for which resolution will depend on an assessment of the hazards of litigation and which require the FTM Appeals Official to use delegated settlement authority.

.02 The following issues and cases are *not* eligible for inclusion in the FTM program:

(1) Issues in a taxpayer's case designated for litigation;

(2) Issues in a taxpayer's case under consideration for designation for litigation;

(3) Issues for which there is an absence of legal precedent;

(4) Issues for which there are conflicts between circuit courts of appeal;

(5) Issues included in the Technical Advisor Program or in the Appeals Technical Guidance Program;

(6) Issues for which the taxpayer has submitted a request for competent authority assistance;

(7) Issues for which the taxpayer has requested the simultaneous Appeals/Competent Authority procedure described in section 8 of Rev. Proc. 2002-52, 2002-31 I.R.B. 242, or the corresponding provision of any successor guidance;

(8) "Whipsaw" issues, *i.e.*, issues for which resolution with respect to one party might result in inconsistent treatment in the absence of the participation of another party;

(9) Cases worked at a Campus site in which a penalty was proposed, except those involving special electronic fund deposit penalties;

(10) Cases worked at a Campus site in which an offer-in-compromise was made;

(11) Collection Appeals Program cases;

(12) Automated Collection System cases;

(13) Frivolous issues, such as, but not limited to, those identified in Rev. Proc. 2001-41, 2001-2 C.B. 173, or any succeeding revenue procedure;

(14) Issues for which mediation would not be consistent with sound tax administration, *e.g.*, issues governed by closing agreements, by *res judicata*, or by controlling precedent;

(15) Cases in which the taxpayer has failed to respond to Service communications and no documentation has been previously submitted for consideration by the examiner;

(16) Issues within the scope of Rev. Proc. 2002-18, 2002-1 C.B. 678 (methods of accounting); and

(17) Issues that have been identified in a Chief Counsel Notice, or equivalent publication, as excluded from the Fast Track Mediation process.

In addition to the cases described in (9) and (10), other cases worked at the Campus sites are generally not eligible for FTM.

.03 Fast Track Mediation should be initiated only after an issue has been fully de-

veloped. The respective managers and taxpayers must evaluate their individual circumstances to determine if the FTM program meets their needs, e.g., whether the number of issues is manageable within a 30 to 40-day time frame.

.04 Application to the FTM process should only be initiated if there is sufficient time remaining on the period of limitations for assessment and collection. Consistent with current Compliance procedures, a case should not be submitted to the FTM program if the failure to resolve any issue in the FTM process would result in Compliance forwarding the case to Appeals with less than 180 days remaining on the statute of limitations.

SECTION 4. APPLICATION PROCESS

.01 Either the taxpayer or the SB/SE Team Manager may suggest participation in the FTM program. If the parties are interested in electing FTM, and need assistance in determining if the issue is appropriate for the FTM process, they may contact the SB/SE FTM Program Manager.

.02 A request to participate in FTM may only be initiated at the conclusion of an examination/collection determination. Parties apply to the program by completing and executing an Agreement to Mediate, attached as Exhibit 1.

.03 SB/SE will prepare a brief “Summary of Issues” and a tentative tax computation to submit with the Agreement to Mediate to the appropriate Appeals Office. The taxpayer may also submit a summary of the issues, but a formal protest is not required. All documents submitted with the Agreement to Mediate are available to the other party.

.04 All applications to the FTM process require the approval of an Appeals Manager before acceptance into FTM. If the Appeals Manager approves the application, the Appeals Manager will notify the taxpayer and the SB/SE Team Manager. If the case is not accepted for FTM, the Appeals Manager will notify the taxpayer and the SB/SE Team Manager and return all paperwork to SB/SE. The decision not to approve an application for the FTM program is final and not subject to administrative appeal or judicial review.

SECTION 5. MEDIATION PROCESS

.01 During FTM, the case remains under SB/SE Compliance jurisdiction.

.02 After the case is accepted into the FTM program, an Appeals Manager will assign the case to the FTM Appeals Official, an Appeals Employee who has been trained in mediation. The FTM Appeals Official will serve as a neutral party. The taxpayer does not have the option of using a non-IRS employee as a mediator under the SB/SE — Appeals FTM program.

.03 The FTM Appeals Official will hold the FTM session at a date and location agreed to by both parties, usually at the local Appeals Office. Prior to the FTM session, the FTM Appeals Official will advise the participants of the procedures and establish ground rules. The FTM Appeals Official may modify the rules and procedures during the session to adapt to changes in circumstances. The FTM session may include joint sessions with all parties, separate meetings, or both, as determined appropriate in the sole judgment of the FTM Appeals Official.

.04 Both the taxpayer and SB/SE will be given ample opportunity to present their respective positions. The FTM Appeals Official may also ask either party for additional information if deemed necessary for a full understanding of the issues being mediated. A copy of any submission a party gives to the FTM Appeals Official will be provided simultaneously to the other party.

.05 The taxpayer and SB/SE representatives will meet with the FTM Appeals Official. The taxpayer’s authorized representative may also participate in the FTM session. At least one representative with decision-making authority for each party must be present at the mediation sessions, or be available for consultation, unless the case is an OIC case over \$50,000 (including tax, penalty, and interest) for which Counsel approval is currently required pursuant to section 7122(b) of the Internal Revenue Code. The FTM Appeals Official may ask the parties to limit the number of participants to facilitate the process. Any person engaged in practice before the Service, as defined in Publication 216, *Conference and Practice Requirements*, must have a power of attorney from the taxpayer (Form 2848, *Power of Attorney and Declaration of Representative*).

.06 The FTM Appeals Official may postpone or terminate the session if: (a) the taxpayer or SB/SE presents new information or new issues during the mediation session; (b) the taxpayer wishes to submit a

substantial amount of documentary information; or (c) the taxpayer wishes to present witnesses, including experts. Any such postponements to allow both parties the opportunity to review and evaluate the new information may result in a longer period for completion of the FTM process. If requested by either party, the FTM Appeals Official may allow a reasonable delay in the proceedings if the FTM Appeals Official determines it is warranted. Any delays will be communicated to, and coordinated with, both parties.

.07 The FTM Appeals Official does not have settlement authority and will not render a decision regarding any issue in dispute. The issues submitted to the FTM process may only be resolved if both the taxpayer and SB/SE reach an agreement.

.08 Communications made during an FTM session are confidential. Employees of the Service, or persons invited by the Service to participate in FTM, must adhere to the confidentiality and disclosure provisions of the Internal Revenue Code, including sections 6103, 7213 and 7431. Employees of the Service, the taxpayers and persons invited by the Service and the taxpayer to participate in FTM shall not voluntarily disclose information regarding any communication made during the FTM session, except as provided by statute, such as in sections 6103 and 7214(a)(8) and 5 U.S.C. § 574.

.09 By signing the Agreement to Mediate, attached as Exhibit 1, the taxpayer consents, pursuant to section 6103(c), to the disclosure of the taxpayer’s returns and return information pertaining to the issues considered in FTM to those persons named on the Agreement as participants or observers. If the Agreement to Mediate is executed by a person pursuant to a power of attorney executed by the taxpayer, that power of attorney must express the taxpayer’s grant of authority to consent to disclose the taxpayer’s returns and return information by the Service to third parties, and a copy of that power of attorney must be attached to the agreement.

.10 The prohibition against *ex parte* communications between Appeals Officers and other Service employees provided by section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 does not apply to the communications arising in the FTM program because Appeals personnel, in facilitating an

agreement between the taxpayer and SB/SE, are not acting in their traditional Appeals settlement role.

SECTION 6. POST-SESSION PROCEDURE

.01 If the parties resolve any of the disputed issues in the FTM session, SB/SE will secure the appropriate closing documents from the taxpayer and will close the case through SB/SE's established case closing procedures.

.02 If applicable, the Service will report a proposed resolution reached as a result of FTM to the Joint Committee on Taxation in accordance with section 6405. The taxpayer acknowledges that the Service may reconsider a proposed resolution upon receipt of comments on the proposed resolution from the Joint Committee on Taxation. If the taxpayer declines to agree with any changes by the Service upon reconsideration, SB/SE will close the case

unagreed and the taxpayer will retain all of the usual rights to request Appeals consideration of any unagreed issues.

.03 Under certain circumstances, the settlement of an OIC case may require a legal opinion from Counsel (7122(b) Counsel) pursuant to section 7122(b). For these OIC cases that are successfully mediated in the FTM program, the case will be forwarded to the 7122(b) Counsel for an opinion after the FTM session and the 7122(b) Counsel shall not be present at the FTM session. Final processing of the OIC case will be subject to the opinion of the 7122(b) Counsel.

.04 If the parties fail to resolve any issue in FTM, the taxpayer retains the option of requesting that the issue be heard through the traditional Appeals process. With respect to any unresolved issues, SB/SE will close the case or issue unagreed in accordance with established case closing procedures.

.05 At the conclusion of FTM, the FTM Appeals Official will prepare a brief written report by completing a Fast Track Mediator's Report on the appropriate form, and submit a copy to each party.

.06 A resolution reached by the parties through FTM will not bind the parties for taxable years not covered by the agreement. Except as provided in the agreement, any such resolution shall not be used as precedent.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective June 3, 2003.

SECTION 8. CONTACT FOR FURTHER INFORMATION

A taxpayer who wants to participate in FTM, or who has questions about the program and its suitability for the taxpayer's case, may contact Jacqueline Harris at (972) 308-7330 (not a toll-free call) regarding the tax year currently under examination.

