

## Tax Pros Fear Erosion Of Independence At IRS Appeals Office

By Joshua Rosenberg

*Law360 (April 14, 2021, 7:25 PM EDT)* -- Resource constraints at the IRS Independent Office of Appeals and a poorly received pilot program has some practitioners concerned that the celebrated independence of the office could become compromised, which could drive more cases to the courts.

Carrying out what has long been considered one of the Internal Revenue Service's most popular functions — and perhaps one of its most important — the appeals office allows taxpayers to challenge determinations and assessments made by revenue agents without resorting to litigation.

Appeals officers are tasked with issuing independent analyses of disputes and assessing the hazards of litigation associated with the government's position. Historically, the officers have earned high marks for their work.

But as the agency grapples with trends that have the capacity to at the very least disrupt the office's appearance of independence, taxpayers may be compelled to take their cases straight to litigation, which could strain the tax administration system.

"If they lose the perception of independence or if they lose the resources to handle the caseload," it could have massive consequences elsewhere, Thomas Linguanti, partner at Morgan Lewis & Bockius LLP, told Law360.

The IRS' budget has been decimated over the course of the past decade. The agency's budget peaked in 2010 at \$13.9 billion, but saw an approximate 20% decline over the next 10 years, adjusted for inflation, according to the Urban-Brookings Tax Policy Center. The budget for 2020 was \$11.5 billion.

Meanwhile, the number of appeals team case leaders, or ATCLs, has diminished. Data the IRS provided to Law360 show that there were 48 ATCLs in 2012. That number has now dwindled to 30.

Overall employment figures have also diminished somewhat at the appeals division. According to the IRS Data Book, at the end of fiscal year 2010, there were 902 appeals officers. By contrast, at the end of 2019, there were 813 appeals officers employed at the agency.

Ensuring that Appeals is adequately resourced is of vital importance to the IRS and taxpayers alike, Linguanti said. An underfunded appeals division that is unable to timely address disputes that shouldn't require litigation would frustrate and overwhelm the system downstream, he said, specifically in

the U.S. Tax Court.

Jean A. Pawlow, partner at Latham & Watkins LLP, told Law360: "I worry sometimes that we're putting a pig through a snake. I'm concerned about the number of resources that Appeals has."

Pawlow added that she believes the office does a fine job of working its caseload.

Andy Keyso, head of the appeals office, said recently during a virtual conference that the agency is in the process of hiring more appeals officers to bolster their ranks.

When asked for comment, the IRS said it was hoping to increase the number of ATCLs by at least 25%. The agency said it was recruiting for the positions both within and outside the IRS.

ATCLs work the "largest, most complex cases that come to Appeals," the agency said.

"Appeals employees work incredibly hard to provide the highest level of service for all taxpayers," the agency said in a separate statement. "They give each issue their fair and full consideration and are passionate about their independent role in tax administration."

Linguanti said the fact that Appeals is hiring is a welcome development. However, those new hires may not be able to hit the ground running as independent-minded appeals officers capable of immediately inspiring confidence in taxpayers, he said.

"If you're a fresh appeals officer learning the tools of the trade — if you've come from within the IRS, especially — I think the natural inclination is you're going to be more impressionable," Linguanti said. "It's going to take some time before you simply feel like you have judgment to say, 'I think Exam is wrong on this.'"

And if taxpayers don't believe they're getting a fair shake at Appeals and opt out of the system, that will kick more cases to the courts, Linguanti said.

"The first people who will be raising heck will be the Tax Court judges if folks feel like they can't get these cases resolved in Appeals," he said, referring to the potential for overcrowded dockets.

Meanwhile, the agency is likely on the cusp of handling significant volumes of appeals related to the 2017 Tax Cuts and Jobs Act and pandemic-era legislation, Linguanti said. Those cases are likely to exert even more pressure on the system.

A separate issue that's hurt the Appeals office's perception of independence is a pilot program the agency rolled out in 2016 that invited examination and counsel representatives to participate in the appeals process, Daniel Rosen, partner at Baker McKenzie, told Law360.

The pilot program, which ended in May after running approximately three years, was designed to help Appeals identify, narrow and resolve factual or legal differences in some of the more complicated cases it received, according to the agency. Some participants criticized the program for promoting an adversarial environment in which the agency was essentially forcing mediation.

The IRS has said it is evaluating whether or not to reinstate elements of the program. Meanwhile, the agency has yet to release the results of a survey that sought feedback from taxpayers and practitioners

who participated in the program.

In a statement provided to Law360, the IRS said that save for the pilot period, the agency "never routinely invited Compliance to attend every Appeals conference, and we have no plans to start doing so." IRS compliance employees work to determine whether taxpayers owe money.

"We trust [the ATCLs'] judgment to determine in which cases they would find it useful to invite Compliance to attend," which is their prerogative, the agency said.

Keyso said at the virtual conference that the accusation that the pilot program undermined the independence of the Appeals office was one he takes very seriously, and that his team will take that into account before making any final decisions on how to implement similar approaches moving forward.

"Since the ATCL conferencing pilot ended, ATCLs have reverted to the longstanding Appeals policy under which they retain the discretion, but are not required, to invite Exam personnel to the nonsettlement portion of the conference," the IRS told Law360. "We continue to assess whether additional policy changes will ensure impartial and fair hearings for taxpayers in Appeals."

As part of the pilot program, "Examination personnel were not invited to participate in settlement discussions (without taxpayer consent)," the IRS told Law360.

But that practice wasn't universally observed, Linguanti said, and seemed to depend upon which Appeals officer was involved.

For his part, Rosen said, he's increasingly discussing with clients the possibility of skipping the appeals process altogether. If more practitioners and taxpayers begin to adopt that mindset and approach, that would harm the entire system, he said.

"Having lots of cases in litigation that shouldn't be in litigation isn't good for the IRS," he said. "It's not good for taxpayers. It's really not good for anybody; there are limited resources. The system operates best when it's allowed to function as the organic process that it is."

--Editing by Robert Rudinger and Neil Cohen.