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IRS May Want To Tweak Appeals Pilot Program If Reviving It

By **Joshua Rosenberg**

Law360 (June 8, 2020, 7:15 PM EDT) -- Should the IRS revive a lapsed pilot program allowing audit representatives to take part in the administrative appeals process, it should consider reforms to preserve the independence of the agency's office of appeals.

Controversy attorneys who spoke with Law360 about the pilot program said experiences differed and expressed a variety of opinions about the effectiveness of the program and how it might be improved.

The Internal Revenue Service recently ended a three-year pilot program that invites examination and counsel representatives to take part in the appeals process in certain cases. (AP)

But one common concern for practitioners was that any program that invites examination officers into the appeals process has the capacity to undermine the independence of the appeals office and to dilute the conferences' effectiveness.

Still, if the Internal Revenue Service does intend to revive the program permanently, then it may want to tweak some components of it, attorneys told Law360. For instance, the agency may want to consider establishing clear boundaries regarding how and when each side presents their positions, they said.

"This pilot program has left a lot of taxpayers and representatives feeling that it had eroded the separation between appeals and exam that was so critically important to allowing a taxpayer to feel that the process was fair and free of conflict," Jennifer Breen, partner at Morgan Lewis & Bockius LLP, told Law360.

The pilot program was launched in 2017 and was designed to help the agency's Independent Office of Appeals identify, narrow and resolve factual or legal differences in some of the more complicated cases it receives. Those assigned to the pilot program could not opt out or request a different appeals officer.

IRS compliance employees, who work to determine whether taxpayers owe money, were not supposed to participate in settlement discussions that took place after the appeals conferences, according to the agency. Outside the pilot program, conferences involve only individuals or businesses and their assigned appeals officers.

The agency announced in May that it would be ending the initiative, which lasted three years, but would take feedback regarding its future.

If the agency decides to revive the program, it may want to take into account some practitioners' concerns that appeals officers' sense of independence may have been undermined by the very presence of exam personnel during settlement negotiations. It may also want to contemplate implementing techniques that could streamline the process.

In practice, it wasn't always clear when examination personnel should exit the room, which projected the sensation that both sides were involved in some kind of mediation, Breen said.

"At times, there was a hard time knowing where you transition from a factual discussion to settlement discussion," she said.

"If we wanted to pursue mediation, then we would have tried to go to fast track and have that experience," she added, referring to an IRS program in which exam personnel work with taxpayers to reach settlements outside of the traditional appeals process.

Mary McNulty, partner in Thompson & Knight LLP's tax practice group, also said it was problematic that there was confusion about whether exam officials should stay in the room during settlement discussions or whether they should leave.

Having examination officials stay in the room during settlement discussions could have a "chilling effect" on the process and could lead to appeals officers "no longer appearing to be independent," she said.

In effect, both sides may also become hesitant to communicate clearly with appeals officers about what they consider to be the hazards of litigation unless they're able to do so in private, Armando Gomez, partner at Skadden Arps Slate Meagher & Flom LLP, told Law360.

"If exam and their lawyers are in the room, I'm not going to equivocate on my client's position," he said. Instead, "I'd have to wait for them to leave the room in order to say, 'Well, on this issue, I could see a little bit of hazard,'" he said, which is a dynamic that could unnecessarily prolong the process.

In that vein, one key change the agency could make if it decides to revive the program is to have petitioners present their case first, have exam personnel present their position next and then have exam leave the room entirely, Gomez said, because it's not the job of appeals officers to mediate between the two sides. The goal for appeals officers should be to objectively present the hazards of litigation, he said.

The IRS could also coordinate pre-conference communications from both sides to get a sense of the issues at hand in order to save time and streamline the process, Gomez said.

"I would recommend they have an agreement before the conference starts in terms of what the issues are," so that the conference itself focuses more on actual disagreements, he said.

Having exam personnel simply reiterate their positions to appeals officials may not be the best use of time, Breen said, because the two sides have already failed to reach consensus. And more than that, it's important that the office maintains its reputation as an independent and unbiased operator, she said.

"Appeals' independence is such a critical component to the role that they play," she said. "So I hope whatever it is that they do, they continue to look for ways to make sure that it's not only fair and free of conflict, but also that it appears to be fair and free of conflict."

--Editing by Tim Ruel and Neil Cohen.