

## PART IV – Items of General Interest

Test of Procedures for Mediation and Arbitration for Offer in Compromise and Trust Fund Recovery Penalty Cases in Appeals

Announcement 2011-6

### SECTION 1. PURPOSE

Section 7123 requires the Internal Revenue Service to prescribe procedures by which a taxpayer or the Office of Appeals may request non-binding mediation on any issue unresolved at the conclusion of Appeals procedures, or unsuccessful attempts to enter into a closing agreement under section 7121 or a compromise under section 7122. Section 7123 also requires the Internal Revenue Service to establish a pilot program by which a taxpayer and the Office of Appeals may jointly request binding arbitration for any issue unresolved under the same circumstances. This Announcement modifies Revenue Procedure 2009-44, 2009-40 I.R.B. 462, Announcement 2008-111, 2008-48 I.R.B. 1224, and Revenue Procedure 2006-44, 2006-2 C.B. 800, by extending the two-year test of the mediation and arbitration procedures for Offer in Compromise (OIC) and Trust Fund Recovery Penalty (TFRP) cases that are under the jurisdiction of the Office of Appeals until December 31, 2012.

## SECTION 2. DESCRIPTION

Alternative dispute resolution (ADR) programs are consistent with the IRS's efforts to improve tax administration and enhance customer service. Appeals will seek appropriate OIC and TFRP cases for both mediation and arbitration during the test period in order to evaluate the effectiveness of alternative dispute resolution for such cases.

During the extended test period, Appeals will continue to offer mediation and arbitration for OIC and TFRP cases for taxpayers whose appeals are considered at an Appeals office located in one of the following cities:

- Atlanta, Georgia
- Chicago, Illinois
- Cincinnati, Ohio
- Houston, Texas
- Indianapolis, Indiana
- Louisville, Kentucky
- Phoenix, Arizona
- San Francisco, California

Appeals may expand the availability of this program to other locations during the two-year extension. Upon completion of the test period, Appeals will evaluate this program, consider necessary adjustments to both the mediation and arbitration components of the program, and determine whether to make the arbitration component permanent.

## SECTION 3. GENERAL SCOPE OF MEDIATION AND ARBITRATION PROCEDURES

01. The general provisions set forth in Revenue Procedures 2009-44 and 2006-44 apply to the mediation and arbitration, respectively, of OIC and TFRP cases under this

program except as specifically stated in this announcement. In accordance with Revenue Procedure 2006-44, arbitration is not available for legal issues.

02. The mediation and arbitration procedures do not create any special authority for settlement by Appeals. During the mediation and arbitration processes, Appeals is still subject to the procedures that would apply if the issue were being considered via the standard Appeals process, including procedures in the Internal Revenue Manual (IRM), found at <http://www.irs.gov/irm/index.html>, and other administrative guidance.
03. The overall determination whether a taxpayer was required to collect, truthfully account for, and pay over income, employment or excise taxes, and/or whether a taxpayer willfully failed to collect or truthfully account for and pay over such tax or willfully attempted in any manner to evade or defeat the payment of such tax are legal issues for which arbitration is not available. These legal issues, however, are based on factual components that are eligible for arbitration.
04. The overall determination whether a taxpayer's offer is acceptable under section 7122 may only be made by the Secretary or his delegate and is not a matter for arbitration. See section 7122(a) (giving the Secretary the discretionary authority to compromise tax liabilities) and Delegation Order 5-1 (delegating that discretionary authority to Appeals). Factual determinations are generally required as part of making the overall offer acceptability determination, however, and these individual factual determinations are eligible for arbitration.
05. The Appeals Area Director must approve the acceptance of all cases for mediation or arbitration.

## SECTION 4. SCOPE OF MEDIATION AND ARBITRATION FOR OIC CASES

01. In addition to the exclusions contained in Revenue Procedure 2009-44 and Revenue Procedure 2006-44, the following limitations on OIC cases apply:

(1) Neither mediation nor arbitration is available for:

- i. Cases in which the taxpayer has the ability to pay in full based on the unadjusted financial information submitted by the taxpayer, except when economic hardship exists;
- ii. Cases in which the taxpayer declines to amend or increase the offer without stating any specific disagreement with the valuations, figures, or methodology used by Appeals in determining reasonable collection potential;
- iii. Cases in which the disputed issue is explicitly addressed in established guidance (for example, the issues addressed in the instructions for Form 656, "Offer in Compromise," such as unsecured debt, college expenses, and non-qualifying charitable contributions);
- iv. Cases in which an OIC is submitted as an alternative to collection in a Collection Due Process or equivalent hearing case;
- v. Cases in which the issue of liability was previously determined by Appeals; or
- vi. Cases in which Delegation Order 5-1 requires a level of approval higher than that of the Appeals Team Manager, such as Effective Tax Administration offers or those in which a determination is made by

Appeals that acceptance is not in the best interest of the government  
(see Policy Statement P-5-100 and IRM 5.8.7.6(6)).

(2) Mediation is not available for:

- i. Cases in which the taxpayer has already attempted to resolve the matter through Fast Track Mediation.

(3) Arbitration is not available for:

- i. Corporate OIC cases in which the issue to be arbitrated is whether an individual is responsible for a Trust Fund Recovery Penalty or Personal Liability for Excise Tax assessment; or
- ii. Doubt as to liability cases.

02. Provided all facts are known by both parties, appropriate issues for mediation or arbitration in OIC cases generally include:

- (1) The value of assets, including those held by a third party;
- (2) The value of dissipated assets and what amount should be included in the overall determination of reasonable collection potential;
- (3) A taxpayer's proportionate interest in jointly held assets;
- (4) Projections of future income based on calculations other than current income;
- (5) The calculation of a taxpayer's future ability to pay when living expenses are shared with a non-liable person; and
- (6) Other factual determinations, such as whether a taxpayer's contributions into a retirement savings account are discretionary or mandatory as a condition of employment.

03. Additionally, provided all facts are known by both parties, appropriate issues for mediation in OIC cases generally include whether the taxpayer meets the criteria for deviating from national and/or local expense standards.
04. For cases with liabilities of \$50,000 or more, any settlement or agreement reached through mediation or arbitration must be reviewed by the Office of Chief Counsel pursuant to section 7122(b) before being finalized. When review is required, Appeals will forward the case to Area Counsel for an opinion concerning whether the case is subject to compromise. See IRM sections 5.8.8.5 and 8.23.4.2.2.

#### SECTION 5. SCOPE OF MEDIATION AND ARBITRATION FOR TFRP CASES

01. Appropriate issues for mediation in TFRP cases generally include:
  - (1) Whether a person was required to collect, truthfully account for, and pay over income, employment, or excise taxes;
  - (2) Whether a responsible person willfully failed to collect or truthfully account for and pay over such tax, or willfully attempted in any manner to evade or defeat the payment of such tax;
  - (3) Whether a taxpayer sufficiently designated a payment to the trust fund portion of the unpaid tax; and
  - (4) Whether the taxpayer provided sufficient corporate payroll records to establish that a corporate tax deposit was in the amount required by Treas. Reg. § 31.6302-1(c) and therefore was considered a designated payment to be applied to both the trust fund and non-trust fund portions of the employment taxes associated with that specific payroll. See the Note to IRM 5.7.4.3(7).

02. Appropriate issues for arbitration in TFRP cases generally include:

(1) Specific factual determinations concerning whether a person was required to collect, account for, and pay over income, employment, or excise taxes.

Common factors include whether the taxpayer:

- a. was an officer, director, or shareholder of the corporation;
- b. had the authority to sign checks;
- c. exercised significant control over the corporation's financial affairs;
- d. had the authority to determine which creditors would be paid;
- e. was involved in payroll disbursements;
- f. had control over the voting stock of the corporation;
- g. was involved in making federal tax deposits; and
- h. had the ability to hire and fire employees.

(2) Specific factual determinations concerning whether a responsible person willfully failed to collect or truthfully account for and pay over such tax, or willfully attempted in any manner to evade or defeat the payment of such tax. Common factors to be determined include:

- a. when the taxpayer became aware of the failure to pay over the withheld tax;
- b. whether the taxpayer had knowledge of payments to other creditors, including employees, after becoming aware of the failure to pay over the withheld tax;
- c. whether there were unencumbered funds available to satisfy pre-existing employment tax liabilities; and

- d. whether the taxpayer failed to use unencumbered funds to satisfy pre-existing tax liabilities after becoming aware of such liabilities.
- (3) A factual determination of the amount designated by the taxpayer as a payment to the trust fund portion of the unpaid tax; and
- (4) A factual determination whether the taxpayer provided sufficient corporate payroll records to establish that a corporate tax deposit was in the amount required by Treas.Reg. § 31.6302-1(c) and therefore was considered a designated payment to be applied to both the trust fund and non-trust fund portions of the employment taxes associated with that specific payroll. See Note to IRM 5.7.4.3(7).

## SECTION 6. APPLICATION PROCESS

01. Either the taxpayer or Appeals may submit a request to mediate or arbitrate after consulting with and obtaining the concurrence of the other party.
02. A taxpayer may submit a request to mediate or arbitrate by sending a written request to the appropriate Appeals Team Manager and a copy to:
- Chief of Appeals  
Attn: Tax Policy & Procedure – Collection & Processing  
1099 14<sup>th</sup> St. NW, Suite 4200 East  
Washington, DC 20005
03. For an OIC case, the written request to mediate or arbitrate should include:
- a. The taxpayer's name, address, and taxpayer identification number, and the name, title, address, and telephone number of the person to contact;
  - b. The name of the Appeals Team Manager, Appeals Officer, or Settlement Officer;
  - c. The taxable periods involved;

- d. A detailed description of the issue(s) for which the taxpayer is requesting mediation or arbitration, including both the specific dollar amount and the basis by which that amount was determined; and
  - e. A representation that the disputed issue is not an excluded issue listed in section 4.01 above or in Revenue Procedure 2009-44 or Revenue Procedure 2006-44.
04. For a TFRP case, the written request to mediate or arbitrate should contain items a through e in section 6.03 above and a detailed explanation of the taxpayer's position, including explanations of the following (where applicable):
- a. Why the taxpayer was not required to collect, truthfully account for, and pay over the income, employment or excise taxes;
  - b. Why the taxpayer did not willfully fail to collect or truthfully account for and pay over such tax, or willfully attempt in any manner to evade or defeat the payment of such tax; and
  - c. Why the computation of the Trust Fund Recovery Penalty should reflect payment(s) designated specifically to the trust fund portion of the unpaid tax.
05. If the taxpayer wants to use a non-IRS co-mediator (at the taxpayer's expense) or a non-IRS arbitrator (expense shared equally by the taxpayer and Appeals), the application should state this preference.

#### SECTION 7. EFFECT ON OTHER DOCUMENTS

Revenue Procedure 2009-44, Announcement 2008-111, and Revenue Procedure 2006-44 are modified.

#### SECTION 8. EFFECTIVE DATE

The procedures in this announcement are effective December 1, 2010.

## SECTION 9. CONTACT INFORMATION

The principal author of this announcement is Grace Kim, Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this announcement, contact Dale Veer, Appeals, Tax Policy & Procedure (Alternative Dispute Resolution – Collection) at (651) 726-7430 (not a toll-free number) or by e-mail at [Dale.R.Veer@irs.gov](mailto:Dale.R.Veer@irs.gov).