



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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JUN 29 1999

CC:DOM:FS:PROC
PKReilly:SPRO-110479-99

MEMORANDUM FOR NATIONAL DIRECTOR OF APPEALS
ATTN: THOMAS LOUTHAN C:AB:AR&CS

FROM: Deborah A. Butler *Deborah A. Butler*
Assistant Chief Counsel CC:DOM:FS

SUBJECT: Appeals Arbitration Procedure

By e-mail dated June 10, 1999, you requested advice with respect to two concerns raised by section 1001 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98). First, you ask whether the ex parte rule in section 1001 applies to Appeals personnel who are parties to a mediation or arbitration proceeding. Second, you ask whether Appeals should include an ex parte waiver clause in the agreements to mediate and arbitrate signed by the taxpayer and Appeals.

Section 1001(a)(4) of RRA 98 provides that the plan to reorganize the Internal Revenue Service (Service) shall ensure an independent appeals function and the plan will include a prohibition on ex parte communications between appeals officers and other Service employees to the extent that such ex parte communications appear to compromise the independence of the appeals officers. Section 1001(b)(1) preserves specific tax rights and remedies and provides that nothing in the plan "shall be considered to impair any right or remedy . . . to recover any internal revenue tax . . ." RRA 98 section 3465 codified existing Alternative Dispute Resolution (ADR) procedures and added a pilot program for binding arbitration. The legislative history acknowledges Congressional awareness of the extent to which Appeals participates in ADR proceedings and the intent to codify that process. H.R. Conf. Rep. No. 105-599, at 290-291 (1998).

We believe that the prohibitions of section 1001(a)(4) contemplates appeals officers acting in their settlement role capacity rather than acting as an arbitrator or mediator in an ADR proceeding. As such, we do not believe RRA 98 section 1001(a)(4) is implicated when an appeals officer is acting in a non-appeals role, i.e., a third-party neutral in an ADR proceeding. As enacted, section 7123(b)(2), codifies existing ADR procedures for disputes of all sizes, which includes appeals officers acting as arbitrators in an ADR proceeding.

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Even if we assumed that the legislative history was not clear, courts would have to construe RRA 98 as a whole and seek to harmonize its provisions so that none of them are denied. Ransomes America Corp. v. Spartan Distributors, 914 F. Supp. 183, 186 (W.D. Mich. 1996). Logic would dictate that harmony between the sections requires the recognition of the distinction between appeals officers acting in their settlement role capacity versus acting as a third-party neutral in an ADR proceeding. Even if section 1001(a)(4) applied, it appears it would only apply when an appeals officer was "representing" the Service in an ADR proceeding as opposed to when acting as a third-party neutral, which is the role of the appeals officer in an ADR.

Since we think that ex parte communications are not prohibited by section 1001(a)(4), a waiver is probably unnecessary. If, however, you want to include a waiver clause in the agreements to mediate, it should make the distinctions regarding the role of the appeals officer in the ADR proceedings, as described above.

Please contact Peter Reilly at (202) 622-8034 if you have any further questions or wish for us to review the matter further.