

Appeals Team Case Leader Conferencing Initiative:

Summary of Findings and Next Steps

IRS Independent Office of Appeals

September 2021

Overview

In May 2017, the IRS Independent Office of Appeals (Appeals) initiated a pilot program to test whether inviting IRS Large Business & International examination teams (“Compliance”) and their IRS Chief Counsel attorneys to engage with taxpayers (and their representatives) would improve our ability to work large, complex cases. In particular, Appeals sought to assess whether requiring Compliance and the taxpayer to participate in a joint discussion at the start of the case would help narrow the scope of the controversy and improve understanding of factual and legal differences in complex cases. Consequently, the pilot program allowed Compliance and Counsel to join the initial case discussion, but not the entire Appeals conference. As in the past, settlement negotiations for all cases were conducted between Appeals and the taxpayer without Compliance present.

Referred to as the Appeals Team Case Leader (ATCL) Conferencing Initiative, the pilot program applied only to Appeals’ largest and most complex cases—i.e., cases typically involving multi-national business entities represented by corporate officers or tax practitioners from major accounting and law firms. Such cases constitute less than 1 percent of Appeals’ total caseload but the majority of disputed tax dollars pending before Appeals. Due to their complexity, Appeals generally assigns a team of Appeals technical employees led by an Appeals Team Case Leader (ATCL) to work this type of case. ATCLs are Appeals’ most knowledgeable and experienced tax professionals who focus on the complex tax issues affecting the nation’s largest taxpayers.

Following a detailed review of stakeholder feedback about the program, Appeals concluded that inviting Compliance and Counsel to the initial discussion of complex cases can be beneficial but is not necessary in every case. As a result, Appeals will not mandate joint case discussions. Instead, we will continue to operate under longstanding Appeals’ policy that permits, but does not require, Appeals technical employees to invite Compliance to the non-settlement portion of the Appeals conference. For the reasons described below, the decision whether to invite Compliance will remain within the ATCL’s discretion.

Traditional Appeals

Appeals’ role is to independently resolve tax controversies, without litigation, in a fair and impartial manner. Through conferences, Appeals works with taxpayers to resolve cases by objectively assessing the facts, law, and litigating hazards. Appeals does not

routinely invite Compliance or Counsel to attend Appeals conferences, even though Appeals technical employees have had the discretion to do so for many years (see Internal Revenue Manual (IRM) Part 8.6.1.5.4). In most instances, Appeals technical employees review the IRS administrative file to understand Compliance's position and discuss the case only with the taxpayer. As a result, the authority to invite Compliance and Counsel has been (and continues to be) rarely exercised across Appeals.¹

Large, complex cases requiring specialized expertise have always presented unique challenges for Appeals. As a result, ATCL cases are subject to a "pre-conference" meeting where Compliance (and often their Chief Counsel attorneys) present their position, comment on the taxpayer's protest, and explain their rebuttal (see IRM Part 8.7.11.11). Pre-conference meetings have been routine for ATCL cases since at least 1998. To avoid *ex parte* communications issues, taxpayers are invited to attend and participate in all pre-conferences. However, as a practical matter, taxpayers typically choose to observe rather than participate or respond to Compliance's pre-conference presentation. At the end of the pre-conference, Compliance is excused from the process and the formal Appeals conference begins. During the Appeals conference, taxpayers present their case, often responding to points made by Compliance during the pre-conference.

ATCL Conferencing Initiative

To fulfill our mission, Appeals regularly evaluates our policies to ensure they support our core values of independence and quality decision-making. We also periodically review our procedures to identify opportunities to enhance the taxpayer experience and efficient case resolution. The ATCL Conferencing Initiative was one such effort.

In early 2017, Appeals began exploring an initiative to improve conference efficiency for large, complex cases. Consistent with Appeals' impartiality, the initiative relied on Compliance and taxpayers to participate in focused discussions with Appeals to clarify the scope of the controversy and areas of disagreement. Appeals solicited ATCLs from across the country to voluntarily participate in the pilot program. Approximately one-third of the ATCLs agreed to participate.

Under the initiative, Compliance and taxpayers were invited to attend the portion of the Appeals conference where each side discusses the facts and the law from their respective perspectives. Once the ATCL team felt the parties had addressed questions the ATCL team had about the case, Compliance and their Counsel representatives were excused from the conference. At that point, the ATCL team commenced traditional settlement negotiations with the taxpayer.

Importantly, the ATCL Conferencing Initiative did not represent a broad effort to change the nature of Appeals' administrative dispute resolution process. The pilot program

¹ The pilot program involved only the largest, most complex business cases worked in Appeals. The findings of the pilot do not affect the overwhelming majority of individual and small and mid-sized business cases worked in Appeals.

simply allowed Compliance and taxpayers to hear and respond to each other's presentations in real time to facilitate the ATCL team's understanding of the dispute and the position of each side. In effect, converting the "pre-conference" meeting into an interactive, productive session while preserving taxpayers' ability to negotiate directly with Appeals (without Compliance being present).

On May 1, 2017, Appeals officially implemented the initiative. The procedures applied to all cases assigned to the ATCLs who volunteered to participate.

In response to taxpayer and practitioner requests for more information about what to expect, Appeals posted the following documents to www.irs.gov:

- [Exhibit 1: Process and Procedures \(PDF\)](#)
- [Exhibit 2: Sample Agenda for Expectations Call \(PDF\)](#)
- [Exhibit 3: Expectations Letter to Taxpayer and/or their Representative \(PDF\)](#)

The posted materials describe procedures for conferences conducted under the initiative and outline expected communications between the ATCL and the taxpayer. The materials required ATCLs to hold an "expectations call" with Compliance, the taxpayer and/or its representatives and the Appeals team to establish ground rules and ensure everyone knew what to expect during the conference. During this call, the ATCL was also expected to explain Appeals' mission and the conference process and answer any questions from the taxpayer and its representatives.

Pilot Feedback

Over the course of the pilot program, Appeals gathered feedback and data regarding the initiative from a number of sources, including (i) internal surveys administered to Appeals and LB&I Exam personnel who participated in the pilot (ii) customer satisfaction surveys of taxpayers or representatives conducted by an independent, third-party contractor (iii) written comments from external stakeholders and (iv) informal comments and suggestions from tax practitioners provided during various outreach events. Appeals carefully considered comments and suggestions from all sources throughout the initiative and clarified or adjusted our practices in real time where appropriate.

Informal Taxpayer Comments

During the initiative, some taxpayers and practitioners asked for more clarity about how much of the Appeals conference Compliance would attend. In response, Appeals posted a list of Frequently Asked Questions to www.irs.gov and circulated additional information to participating ATCLs to reemphasize that settlement discussions should be held only between Appeals and the taxpayer, and that Compliance should not participate in settlement discussions (without taxpayer consent). Shortly thereafter, Appeals also posted the exhibits described above to improve the consistency of and provide greater transparency about initiative procedures.

In addition, a number of taxpayers and practitioners expressed concerns about ATCLs asking Compliance and taxpayers to mediate cases in the initiative, rather than Appeals independently assessing the hazards of litigation and attempting to settle the case with the taxpayer. To address this concern, Appeals leaders clarified and reemphasized to all ATCLs that, while mediation is available, taxpayers and Compliance must voluntarily choose mediation without pressure from Appeals. Appeals should not be viewed as urging the parties to mediate. We also reminded ATCLs that the initiative was never intended to change the traditional Appeals session into required mediation. Appeals also initiated regular conference calls through which ATCLs participating in the initiative discussed procedures and recent developments.

Internal Feedback

ATCLs who participated in the initiative felt that Compliance's and the taxpayer's joint participation in the initial case discussion improved their understanding of the dispute and helped them identify, narrow, and resolve factual and legal differences between the parties prior to engaging in settlement negotiations with taxpayers. For example, in cases involving expert reports or opinions it can be particularly helpful to the ATCL's grasp of the issues to have both Compliance and the taxpayer at the conference to discuss their views on each other's expert reports. According to the ATCLs, the points brought out in these discussions often give them a fuller understanding of the case than simply reading the written materials submitted by the parties.

Further, ATCLs felt that a significant advantage of the initiative over the "pre-conference" procedures was the ability to hear from both sides in real time. Specifically, under longstanding pre-conference procedures, taxpayers would often challenge statements made by Compliance only after Compliance had concluded its presentation and left the room. This routinely left ATCLs unable to hear how Compliance would respond to persuasive arguments made by the taxpayer and sometimes put ATCLs in the position of trying to articulate Compliance's position (as best they understood it). Moreover, it could undermine the ATCL's impartiality and the perception of Appeals' independence. In contrast, since the initiative allowed Compliance to attend the taxpayer's presentation, the ATCLs could maintain their impartiality and ask Compliance directly how it would respond to the taxpayer's challenge.

Public Comments

Through an announcement on www.irs.gov, Appeals solicited public input on the initiative. We received three comment letters summarized below.

One commenter indicated that, while the initiative had potential advantages for the appeals process, there were also some concerns. The commenter noted the following potential advantages:

- Lingering factual questions can be addressed as part of the Appeals conference, improving efficiency and eliminating a need to send the case back to Compliance for further factual development.

- It may be helpful for each of the parties to see presentations simultaneously, which can facilitate an active dialogue to resolve points of uncertainty between the parties.
- The initiative may encourage Compliance to take a “hard look” at its position to determine its strengths and weaknesses. Prior to the initiative, Compliance had the ability to transfer the issues to Appeals to be resolved. In the initiative, Compliance must defend and own its positions in front of Appeals in a more robust manner.

Based on their experience in the initiative, this commenter identified the following concerns and provided the following recommendations should the initiative become permanent:

- Compliance should be permitted to participate only with the taxpayer’s consent. For taxpayers who view Compliance’s participation as detrimental to the ATCL’s ability to resolve the case without litigation, Compliance should not be allowed to participate.
- It should be required that the ATCL establish ground rules before the conference with the agreement of the parties. The requirement for an expectations call must be consistently followed, and the ATCL should be required to allocate time for each side to make its opening presentation and to allow each side to respond to the other side’s presentation.
- The ATCL must exercise direction and control over the conference and enforce the previously agreed upon ground rules, and not permit interruptions or chaotic proceedings.
- Both sides should be required to identify the scope of factual and legal differences before the Appeals conference, thus allowing the parties to focus their discussion on these differences.
- Appeals must ensure the conference does not take the unintended form of mediation, and Appeals must reaffirm at the outset of any conference that the focus is for Compliance to educate Appeals as to Compliance’s position, and not to participate or assist in the negotiation of a mediated settlement between the parties.
- Appeals needs to ensure Compliance is not present for settlement negotiations once both parties have made their presentations and the ATCL’s questions have been answered. The commenter reported instances where Compliance has insisted on staying for settlement negotiations or attempted to engage with the ATCL as to what would be regarded as a “fair” settlement.
- Appeals needs to revise the initiative to require the compilation of quantitative data such as whether there was a telephone call to agree on the parties’ expectations, agreed case percentages, and cycle times.
- Appeals needs to revise the initiative to collect data on the time it takes to complete a case in the initiative and compare that to the time it took to complete a case prior to the initiative.

A second commenter acknowledged some important benefits of the initiative procedures, while identifying some drawbacks of Compliance participation and making some recommendations should the initiative procedures become permanent. Following are the benefits outlined by this commenter:

- Giving Compliance the opportunity to present their case to Appeals helps to focus the issues in dispute. It often has taken many years for Compliance to audit sometimes complex issues and amounts in dispute are significant. Compliance has shown an increased preparedness for the opening Appeals conference, which enhances the parties' ability to narrow any material factual and legal disputes.
- Compliance's participation in the Appeals process allows Appeals to question Compliance about its factual and legal positions, which helps to identify any factual disagreements between the parties and to ensure a clear joinder of issues.

Following are the drawbacks experienced by this commenter:

- Compliance's participation derailed the process when the ATCL failed to limit Compliance's participation to respectful and productive discussion of core factual disputes. The Appeals team must focus on the factual disputes that matter and narrow the real disputes that make a difference to resolution.
- Compliance's participation in the process often prolongs disputes about collateral and irrelevant issues. Compliance's participation can result in multiple conferences about immaterial factual nits.
- Compliance's participation increases the likelihood that Compliance will improperly be involved in the hazards discussion. There is no clear line between the end of the process of identifying the factual and legal issues in dispute and the beginning of the hazards discussion. This lack of clarity sometimes chills a free exchange between Appeals and the taxpayer, which in turn decreases the likelihood of a negotiated settlement.
- Compliance's participation sometimes caused the Appeals teams to abandon their role as independent and impartial evaluators of the hazards of litigation and to slip into the role of mediators. An unwanted and often unproductive quasi-mediation process undermines the utility of traditional Appeals as an independent and impartial forum in which the taxpayer can resolve its dispute.

The commenter made the following recommendations should the initiative continue:

- Clarify that Appeals should not act as a mediator (unless the parties have specifically agreed to some form of mediation).
- Clearly identify the goals of permitting Compliance to participate in the conference and develop procedures and guidelines that further those specific goals. Explain (i) how Compliance's participation in a conference will achieve the goals articulated by Appeals, and (ii) how Appeals will follow those procedures and guidelines to ensure independence and impartiality.

- Continue to solicit anonymous feedback from participants and publicly release the results of the anonymous feedback on a semi-annual basis. Appeals also should evaluate its employees based on the anonymous feedback to ensure its employees are adhering to its core values and mission.
- Clearly delineate the stages of the Appeals process in which Compliance is permitted to participate. Consider scheduling conferences specifically tailored to the stages in which Compliance will participate and the stages in which it won't. Prohibit Compliance from participating in the separate conference focused on discussing the hazards of litigation and settlement. Implement guidelines for identifying when the settlement stage begins.
- Prohibit Compliance from considering and commenting on new Appeals theories raised in Appeals' assessment of hazards. In some cases, Appeals has raised new theories that Compliance had not previously addressed or considered. Despite Compliance having no role in the development of the theory, Appeals has solicited feedback and comments from the Compliance team on the new theory. This blurs the line between the Compliance function and the Appeals function and diminishes Appeals' reputation as a separate and independent forum.

The third commenter requested that the initiative continue, noting that Compliance's participation would help ensure a balanced factual perspective for Appeals to judge the strengths and weaknesses of each side of the case. The commenter further stated that well-versed advocacy on both sides seems essential to fair understanding of the case.

Customer Satisfaction Survey

In addition to the feedback described above, Appeals contracted with an independent third-party survey provider to conduct an anonymous survey of taxpayers who participated in the initiative during fiscal years 2019 and 2020. The contractor identified 57 taxpayers in the initiative in 2019 and 2020 and attempted to contact these taxpayers following closure of their cases in Appeals. Contact was attempted first by letter and nonresponses were followed by numerous attempts to make telephone contact.

Thirteen of the 57 taxpayers contacted by the contractor responded to the survey. The survey results are as follows:

Attribute	% Satisfied (n)	% Neutral (n)	% Dissatisfied (n)
Overall appeals process	92% (n=12)	8% (n=1)	0% (n=0)
Explanation of the Independent Office of Appeal' mission	92% (n=12)	0% (n=0)	8% (n=1)
Explanation of the initiative	92% (n=12)	8% (n=1)	0% (n=0)
Expectations telephone call	90% (n=9)	10% (n=1)	0% (n=0)
The Independent Office of Appeals conference with both taxpayer and Compliance in attendance	62% (n=8)	15% (n=2)	23% (n=3)
Length of the appeals process	69% (n=9)	15% (n=2)	15% (n=2)
Outcome of the appeals process	100% (n=13)	0% (n=0)	0% (n=0)

Attribute	Yes	No	Unsure
Do you think the expectations telephone call was beneficial to the appeals process?	8	3	2
Was the attendance of the taxpayer representative and Compliance at non-settlement portion beneficial?	5	5	3
Should Compliance attend appeals conferences for large, complex cases?	8	4	1
Did it result in an earlier case outcome?	2	9	2
Do you think the initiative supported the Independent Office of Appeals' mission of independence?	7	5	1

Other Stakeholders

Appeals also considered comments about the initiative published in the *National Taxpayer Advocate's 2017 Annual Report to Congress* available at <https://www.taxpayeradvocate.irs.gov/reports/2017-annual-report-to-congress/> and the *Internal Revenue Service Advisory Council 2017 Public Report* available at <https://www.irs.gov/pub/irs-utl/2017-irsac-public-report.pdf>.

Next Steps

Our experience with the ATCL Conferencing Initiative found that the process generally is helpful in providing our ATCL Teams with a comprehensive understanding of the cases before them. Moreover, we have determined that an ATCL's discretionary use of Compliance attendance at conferences can be a valuable tool in certain instances.

In reaching this conclusion, we carefully considered the suggestion by several commenters that taxpayer consent be required for Compliance to attend the non-settlement portion of Appeals conferences. While we agree that an ATCL should always consider the taxpayer's (or their representative's) views about Compliance attending an initial case discussion, we left the decision within the ATCL's sole discretion for several reasons. First, the discretion to invite Compliance to conferences has been Appeals' policy since at least 1967.² During this time, Appeals technical employees have used this discretion sparingly and responsibly. More importantly, requiring taxpayer consent would effectively substitute the judgment of the taxpayer (or the taxpayer's representative) for the judgment of the ATCL on the question of how best the ATCL can fully understand the merits of both parties' positions and fairly assess the hazards of litigation in complex cases.

Taxpayers are entitled to negotiate settlements with Appeals without Compliance's participation but allowing taxpayers to limit Appeals' ability to understand a case would undermine fair tax administration. ATCLs are highly experienced and knowledgeable tax professionals with the ability to independently judge the facts, law and litigating hazards and propose fair and reasonable settlements. Appeals leadership trusts their judgment in

² See Treas. Reg. § 601.106(f)(4), (8) (as amended by 32 FR 15990).

determining when it would be helpful to invite Compliance to attend an initial case discussion with the taxpayer.

In exercising the discretion to invite Compliance to attend the Appeals conference, the ATCL will consider the following:

- Will the ATCL's understanding of the case be aided by a discussion between the taxpayer and Compliance regarding each side's views on the merits of the other side's position?
- Is the case factually complex, or is there a dispute between the taxpayer and Compliance about the facts or about the relevance of particular facts that would make a discussion with both parties productive?
- Does the case involve outside experts or expert opinions for which it would help the ATCL's understanding of the case to be able to hear each side's view of the other's side's report or expert?
- Does the case involve an issue of first impression or an issue where precedence is lacking or conflicting such that a discussion with the taxpayer and Compliance to narrow the scope of the legal differences between the parties would aid the ATCL's understanding?

Although the discretion to invite Exam rests solely with the ATCL, the ATCL will solicit and consider the taxpayer's view as to whether it would (or would not) help to resolve the case by inviting the Exam team to the non-settlement portion of the conference. Similarly, the ATCL will consider views expressed by Exam as to why their participation at the non-settlement portion of the conference would aid the ATCL's understanding of the dispute.

ATCLs will advise taxpayers and their representatives as to why the ATCL decided to invite Compliance. Similarly, if the ATCL decides not to invite Compliance, and Compliance personnel ask why they are not invited, the ATCL will explain why he or she concluded that Compliance participation is not necessary.

To ensure consistency and transparency of process, ATCLs will continue to follow the best practices adopted during the pilot. For example, when an ATCL decides to invite Compliance to attend the initial case discussion, the ATCL will use the guidelines from the pilot program as described above, including the requirement to hold an expectations call with the parties.

In addition, drawing on the public comments provided in response to the pilot, the independent customer satisfaction survey, and other feedback, Appeals leadership will emphasize further "best practices" to be followed by ATCLs in cases where the ATCL invites Compliance to the conference, and will assess the need for further policy guidance.

Appeals leadership and our ATCLs are keenly aware that all Appeals conference practices and procedures must enhance public confidence in the independence and impartiality of Appeals. Appeals leadership will continue to monitor feedback from taxpayers, their representatives, and ATCLs and adjust our policies as necessary to preserve this public confidence.