

## Recent Guidance: IRS updates appeals mediation procedures

On September 11, 2009 the Internal Revenue Service (IRS) issued Rev. Proc. 2009-44, which expands and clarifies the types of cases that may be mediated in Appeals. The revenue procedure also provides guidance concerning the types of cases that are ineligible for mediation. This revenue procedure supersedes earlier guidance provided in Rev. Proc. 2002-44 and is effective October 5, 2009.

### Mediation procedures overview

Generally, mediation may be requested by taxpayers who are already in the Appeals administrative process with any qualifying issues, and whose cases are not docketed in any court. Mediation is an extension of the Appeals process. It is an optional and nonbinding process that uses the services of a mediator, as a neutral third party, to help Appeals and the taxpayer reach their own negotiated settlement. The mediator acts as a facilitator, assists in defining the issues, and promotes settlement negotiations between Appeals and the taxpayer.

It is available for both factual and legal issues. However, issues designated for litigation, collection issues, issues for which mediation would not be consistent with sound tax administration, frivolous issues, whipsaw issues, and cases where the taxpayer did not act in good faith during settlement negotiations are ineligible for mediation.

### Changes from the predecessor revenue procedure

Rev. Proc. 2009-44, modifies the Appeals mediation program to expand the types of cases that are eligible for mediation while also clarifying the types of cases that are ineligible. Significant changes from Rev. Proc. 2002-44 in this Revenue Procedure include the following:

- Section 6.02 provides that Appeals has the right to communicate ex parte with the IRS Office of Chief Counsel and the originating function (e.g. Compliance) in preparation for the mediation session and to invite them to participate in the mediation proceeding to present the IRS position.
- Section 4.04(7) provides that mediation will not be available for “whipsaw” issues, such as, but not limited to, issues for which resolution with respect to one party might result in inconsistent treatment in the absence of participation of another party.
- Section 5.03 adds a provision stating that the Appeals Team Manager will confer with the Appeals Office of Tax Policy and Procedure before deciding to approve or deny a mediation request.

Additionally, the following changes from Rev. Proc. 2002-44 should be noted:

- Section 4.02 provides that mediation does not create any special settlement authority for Appeals.
- Section 4.03(7) provides that mediation may be available for certain offer in compromise and Trust Fund Recovery Penalty cases as provided for in Announcement 2008-111, 2008-48 I.R.B. 1224, or any subsequent guidance issued by the IRS.
- Section 4.04(1) provides that mediation will not be available for cases in which mediation is not appropriate under either 5 U.S.C. § 572 or 5 U.S.C. § 575, which provide the general authority and guidelines for use of alternative dispute resolution in the administrative process.
- Section 9.02 provides that, for offer in compromise cases with liabilities of \$50,000 or more, any settlement or agreement reached must be reviewed by the Office of Chief Counsel pursuant to section 7122(b).

**About Deloitte**

Deloitte refers to one or more of Deloitte Touche Tohmatsu, a Swiss Verein, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu and its member firms.

**Disclaimer**

This publication contains general information only, and none of Deloitte Touche Tohmatsu, its member firms, or its and their affiliates are, by means of this publication, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This publication is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your finances or your business. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

None of Deloitte Touche Tohmatsu, its member firms, or its and their respective affiliates shall be responsible for any loss whatsoever sustained by any person who relies on this publication.