



NATIONAL TAXPAYERS UNION FOUNDATION

122 C Street N.W., Suite 700, Washington, DC 20001

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Submitted via electronic mail at: ap.adr.programs@irs.gov.

Internal Revenue Service
Attn: CC:PA:LPD:PR
Room 5203, P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on IRS's Dispute Resolution Program, per IR-2023-136

On behalf of National Taxpayers Union Foundation ("NTUF") we write with comments on the Internal Revenue Service's ("IRS") request for public input and suggestions on ways to improve its alternative dispute resolution ("ADR") programs.

I. Introduction

NTUF has been a leader in developing responsible tax administration for nearly five decades. We strive to offer practical, actionable recommendations about how our tax system should function. Our experts and advocates engage in in-depth research projects and informative, scholarly work pertaining to our tax system.

In 2017, NTUF produced crucial research that guided policymakers as they overhauled the federal tax code for the first time in decades. Our annual Tax Complexity Report highlights the increasing time burden and out-of-pocket filing expenses imposed on taxpayers as they comply with the tax code each year. By combining policy expertise, outreach know-how, and true non-partisanship, we seek to build lasting consensus for impactful reforms.

Given this background, we write today to review the IRS's ADR programs and offer recommendations for improvements.

II. ADR is Effective for Tax Cases

The term ADR encompasses various forms of dispute resolution such as arbitration, negotiation, and mediation. In the private sector, specifically that of international commercial work, ADR methods are increasingly becoming the preferred route for resolving disputes over litigation. This is often because ADR allows the issue to be resolved more quickly than litigation, is less expensive than litigation, allows the parties more control over the dispute resolution process, and has a greater chance of preserving the parties' relationship.¹

Applied to tax disputes, ADR is valuable to reducing time spent on cases, increasing taxpayer certainty and confidence, and increasing overall trust in the tax system.² On the global scale, ADR is often utilized for tax administration systems.³ NTUF and National Taxpayers Union's President, Pete Sepp, examined the global prominence of ADR methods in the international arena:

A March 2017 report from the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD) contained the results of a Forum on Tax Administration survey of tax authorities taken in January of this year. The results are enlightening. The survey, drawn from 25 countries in the OECD, G20, and elsewhere, asked participants to rank 21 factors (on a scale of 1 to 5) that contribute "to tax uncertainty for business taxpayers in your country's tax system, regardless of whether or not the factors are within the control of the tax administration to influence." "Lengthy decision making of the courts, tribunals, or other relevant bodies" received the second-highest mean score among all 21 factors, with "Complexity in tax legislation" ranking first. Respondents were then asked to rank the importance of 25 various "tools to enhance tax uncertainty." Placing at #2 on the list (by median score) was "Effective domestic dispute resolution regimes," topped only by "Detailed guidance in tax regulations."⁴

These results clearly detail the importance of ADR in global tax disputes and frequency in which people choose to engage in such.

¹ See Sterling Miller, THE PROBLEMS AND BENEFITS OF USING ALTERNATIVE DISPUTE RESOLUTION, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/problems-and-benefits-using-alternative-dispute-resolution> (last visited Aug. 24, 2023).

² See United States Government Accountability Office, TAX ENFORCEMENT: IRS COULD BETTER MANAGE A.D.R. PROGRAMS TO MAXIMIZE BENEFITS, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON TAX, COM. ON WAYS AND MEANS, House of Rep. (2023) [hereinafter GAO Report]; ALTERNATIVE DISPUTE RESOLUTION (ADR): THE IRS IS FAILING TO EFFECTIVELY USE ADR AS A MEANS OF ACHIEVING MUTUALLY BENEFICIAL OUTCOMES FOR TAXPAYERS AND THE GOVERNMENT, TAXPAYER ADVOCATE, 2016 Annual Report to Congress, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_MSP_15_ADR.pdf, p. 214 (last visited Aug. 24, 2023).

³ See Pete Sepp, IRS REFORM: RESOLVING TAXPAYER DISPUTES, NATIONAL TAXPAYERS UNION, <https://www.ntu.org/publications/detail/irs-reform-resolving-taxpayer-disputes> (last visited Aug. 24, 2023).

⁴ Id.

Domestically, the IRS also offers its own form of ADR, namely Fast Track Settlement (“FTS”), codified in I.R.M. 8.26.1 and 8.26.2; Fast Track Mediation for Collection Cases (“FTMC”), codified at I.R.M. 8.26.3; Post Appeals Mediation Procedures for Non-Collection cases (“PAM”), codified at I.R.M. 8.26.5; and Post Appeals Mediation (“PAM”), codified at I.R.M. 8.26.11. Despite offering such programs, the IRS has only used these ADR programs in less than one half of one percent of all cases between 2013 and 2022 which were reviewed by the Independent Office of Appeals.⁵ During this period, taxpayers’ use of the IRS’s ADR programs decreased by a total of sixty-five percent. The decrease in taxpayers’ use of the IRS’s ADR programs and the disparity between the utilization of domestic versus global use of ADR programs to settle tax disputes illustrate that change is needed to encourage taxpayers’ participation in ADR.

III. Recommendations

In order to bolster taxpayers’ participation in the IRS’s ADR programs, we recommend the following alterations:

- A. Expand Individuals and Cases Eligible to Participate in ADR,
- B. Remove or Modify IRS’s Veto Power,
- C. Strengthen Neutrality of Mediators,
- D. Modify Rules to Reflect Prominent Domestic and International ADR Rules, and
- E. Develop “User-Friendly” Procedures and Notification.

A. The IRS Should Expand Individuals and Cases Eligible to Participate in ADR

Perhaps the largest challenge taxpayers face when considering the IRS’s ADR program is its limitation on who and what cases can engage in the process. Of the four prominent ADR programs, none offer individual taxpayers who wish to file a first time dispute a clear opportunity to utilize ADR. The FT program only allows large business, international, small business, and self-employed taxpayers to utilize its ADR methods.⁶ The FTMC program is limiting as to what cases can and cannot undertake this method, and any case which applies for the FTMC program must first obtain approval from the Collection Group Manager.⁷ The PAM program is also limiting as to what cases can and cannot undertake this method.⁸ Furthermore, the PAM program is not a pre-litigation method per se in the sense this avenue may only be taken “after Appeals settlement discussions are unsuccessful, and, generally, when all other issues are resolved but for the issue[s] for which mediation is being requested.”⁹ Finally, the

⁵ See GAO Report, *supra* note 2.

⁶ See I.R.M. 8(26)(1)-(2).

⁷ See I.R.M. 8.26.3.3(3), 8.26.3.4.1-.2.

⁸ See I.R.M. 8.26.5.3.3-.4.

⁹ I.R.M. 8.25.6.3(2).

RAP program is restricted to large business and international cases (absent individual compliance cases), small business cases, self-employed cases, and estate and gift cases.¹⁰

Such limitations are inherently in conflict with normal ADR protocols. Most contract cases, for example, can be settled by ADR methods absent limited exceptions.¹¹ The concept of excluding an entire class of people or cases from the ADR method confuses taxpayers. Indeed, absent having an attorney to clarify their rights, these strenuous limitations mean taxpayers may not even know if ADR is available to them. As a result, it is often the individual taxpayer or small business owner who suffers, the very individuals who likely need easy ADR methods the most.

Thus, in order to encourage taxpayers participation to use the IRS's ADR programs, the IRS should open up the ADR program to all taxpayers and all cases; or, at the very least, codify fewer limitations such that individual taxpayers have the opportunity to engage in its ADR programs. By creating the opportunity for more individuals and cases to proceed in the ADR program, the number of participants will naturally increase.

B. The IRS Should Remove or Modify Its Absolute Veto Power Over ADR Requests

Another barrier to the IRS's ADR program is that the IRS has the ability to deny any qualifying individual or case the ability to proceed into ADR. As a general rule, the IRS retains the ability to deny a taxpayer's request for ADR.¹² This frustrates the purpose of ADR. Under a typical ADR schedule, once the parties agree to engage in ADR, ADR ensues. The parties are not bound by a decision of an entity whether they have or don't have permission to avail themselves of this tool.

The RAP program takes the IRS's limiting power even further and allows the IRS to terminate the ADR program at any time if it "determine[d] that the RAP process is not facilitating the resolution of the unagreed issue[.] . . ."¹³ Such a practice is in direct opposition to allowing parties control over their dispute; or in other words, one of the main reasons parties engage in ADR. Moreover, under the RAP program, even if the parties reach a settlement, it is not final until the Office of Appeals approves such.¹⁴ In no successful private or state ADR program is a third entity required to review a settlement agreement in order to solidify it.

¹⁰ See I.R.M. 8.26.11.

¹¹ Such an exception is that the arbitration clause itself was garnered under duress, or is void as a matter of public policy.

¹² See I.R.M. 8.26.1.9.2, 8.26.2.8.3., 8.26.3.3(3), 8.26.5.4.3.

¹³ I.R.M. 8.26.11.4(7).

¹⁴ See I.R.M. 8.26.11.3(1).

The IRS's veto power over proposed cases for ADR, and settlements reached therein, are in direct contradiction to general ADR practices. Such a discrepancy creates a distrust in the program and confusion over what the IRS's ADR system entails. In order to increase taxpayers' trust in its ADR programs, it should model the successful ADR programs of global and state entities. In short, the IRS's ADR program should not allow the IRS to operate as a gatekeeper to dispute resolution, but rather allow individuals to engage freely in the process.

C. The IRS Should Strengthen the Neutrality of Mediators

An additional area in which the IRS can improve its ADR program is in its mediators' selection. Generally, mediators are required to be unbiased, third-party individuals who are present to facilitate discussion and encourage resolution of an issue.

This is not the case with the IRS's mediators. Under the IRS's ADR program, the IRS enlists Appeals Officers from the Office of Appeals to be mediators.¹⁵ These officers do not function solely as ADR officers; rather these officers' jobs are to work the general appeals process and only function as ADR officers when called upon to do so.¹⁶ In other words, these officers are not truly neutral. This is problematic as neutrality is the keystone to mediation. As the Chartered Institute of Arbitrators explained, "neutrality may be defined as the absence of any bias in relation to either disputing party, and the mediator's . . . utilization of his position to appropriately balance the distribution of power between the parties . . ." ¹⁷ The IRS's practice of allowing its appeals officers to be mediators causes there to certainly be bias on the mediator's part in favor of the IRS, and the IRS's mediator is less likely to effectively "utiliz[e] . . . his position to appropriately balance the distribution of power between the parties . . ." ¹⁸

In order to combat this bias, the IRS should undertake measures to ensure neutral mediators are installed into its ADR programs. This could be achieved by emulating other countries' practices toward selection of mediators, which tend to either allow an outside authority (such as a court or administrative law body) to name tax-case mediators, or provide a dedicated pool of mediators. Notably, research often finds that such individuals' mediation skills count as much, if not more, than their actual technical expertise in the tax field.¹⁹

The National Taxpayer Advocate also recommended a useful method for achieving such neutrality:

¹⁵ See ALTERNATIVE DISPUTE RESOLUTION, *supra* note 2, at p. 217.

¹⁶ See *id.*

¹⁷ WHAT IS MEANT BY NEUTRALITY IN MEDIATION, THE CHARTERED INSTITUTE OF ARBITRATORS <https://www.ciarb.org/news/what-is-meant-by-neutrality-in-mediation/> (last visited Aug. 25, 2023).

¹⁸ *Id.*

¹⁹ See Sepp, *supra* note 3.

[T]he IRS should establish a separate unit housing neutrals assigned solely to the IRS's ADR program. This reorganization would increase the trust of taxpayers that a neutral was indeed neutral and would further taxpayers' right to a fair and just tax system. Additionally, it would allow IRS personnel assigned to this unit to focus on refining their skills and enhancing their performance as ADR facilitators and, where applicable, decision-makers.²⁰

The Social Security Administration ("SSA") undertook such an approach with great success. SSA's ADR program is conducted by administrative law judges "who are provided [for] free to charge and who are housed in a wholly independent unit from other SSA groups."²¹ Under this model, the judges are specifically assigned to ADR cases and do not function as both mediators and judges as the IRS's mediators do. The SSA's approach is such a success that out "[o]f the approximately 700,000 ALJ decisions rendered each year, only approximately 16,000 (less than 3 percent) are appealed to federal courts."²² The SSA's characteristics of its successful ADR program can easily be implemented within the IRS through encouraging separate, independent mediators only assigned to the IRS's ADR cases.

D. The IRS Should Modify its ADR Rules to Reflect Prominent Domestic and International ADR Rules

Another key issue with the IRS's ADR practice is the rules it codified for its programs are confusing and alter the generally accepted tenets of ADR. As briefly mentioned in our introduction, ADR is one of the most prominently used methods to resolve disputes in the international community. However, the majority of these ADR proceedings follow internationally and nationally renowned ADR rules and conventions.²³ The IRS's current ADR rules are much more complicated than the standard ADR rules such that even if taxpayers are familiar with general ADR practices, they would not be able to apply these general principles to the IRS's ADR programs.

Because of this confusion, the IRS should codify clear, common-sense ADR rules to make its ADR program more accessible. Both domestic and international ADR rules provide sufficient guidance for enacting more accessible rules. By making its ADR program less complicated, taxpayers will be able to more aptly understand the program, be more comfortable with the program, and have more confidence in choosing ADR. Additionally, ensuring the IRS's

²⁰ See ALTERNATIVE DISPUTE RESOLUTION, *supra* note 2, at p. 217.

²¹ Id. at 213 (emphasis omitted) (citing *Information About SSA's Office of Disability Adjudication and Review*, https://www.ssa.gov/appeals/about_odar.html).

²² See id.

²³ For instance, the UNCITRAL Mediation Rules offer globally accepted practices and guidelines for mediation. See UNCITRAL MEDIATION RULES, UNITED NATIONS, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf (last visited Aug. 25, 2023).

ADR rules follow that of renowned ADR rules, will not only encourage taxpayer participation, but also ensure uniformity amongst ADR systems.

E. The IRS Should Develop “User-Friendly” Procedures and Notification Surrounding ADR.

How could the concepts outlined above be properly operationalized, as IR-2023-136 has called for commenters to provide? For one, the Service should consider developing an ADR initiation process that is, itself, more certain and transparent for the taxpayers and the government alike. As an example, over time the filing extension process has evolved into a nearly-automatic exercise, provided the taxpayer meets a few specified conditions and applies for the extension using Form 4868. A similar process or form could be designed for ADR, whereby a taxpayer is presumed to have their case referred for ADR if they meet a set of simple criteria. Depending upon how the ADR programs eventually grow, those criteria could involve:

- The taxpayer acknowledging that the controversy at hand is not currently in another venue such as Tax Court petition stage, or residing at appeals.
- The taxpayer asserting that the ADR application is in response to a specific notice received from the IRS, with the taxpayer providing the correspondence number on the form.
- The taxpayer certifying that they have read and understood the list of exceptions to ADR access (e.g., arguing a frivolous position as defined by law).

In effect, the taxpayer would pre-qualify for ADR using this application procedure, and other details such as selection of mediators, time and place for the mediation, etc., would automatically follow unless the Service identified an incorrect statement on the taxpayer’s part that would require follow-up. Other ideas from various types of “safe harbors” created by the Service could likewise be adapted for creating the type of certainly in applying for ADR that exist in other sectors.²⁴

Furthermore, public awareness of ADR in tax cases could be enhanced through a number of ways, starting with the foundational taxpayer protection document: Publication 1, “Your Rights as a Taxpayer.” Section 5, “The Right to Appeal an IRS Decision in an Independent Forum” easily accommodates a simple change informing taxpayers of their access and rights, under certain circumstances, to ADR. We would suggest language to the following effect, appearing as an additional sentence at the end of Section 5: “In specifically defined situations, taxpayers may also choose alternative dispute resolution procedures instead of other appeal

²⁴ See Pete Sepp, COMMENTS ON IRS NOTICE NOTICE 2023-36, “2023-2024 PRIORITY GUIDANCE PLAN,” NATIONAL TAXPAYERS UNION, <https://www.ntu.org/publications/detail/ntu-comments-on-irs-priority-guidance-plan> (last visited Aug. 25, 2023).

methods.” From this beginning, other points of the notice and interaction process between taxpayers and IRS could be strengthened to mention ADR, in accordance with the objectives expressed in the 2023 Strategic Operating Plan.

IV. Conclusion

The IRS’s ADR programs have the potential to be among the most effective programs for the resolution of taxpayer disputes filed with the IRS. A successfully implemented IRS’ ADR program will decrease litigation costs, increase taxpayer accessibility to dispute resolution, and increase taxpayer confidence. In order to best facilitate these goals, we recommend the IRS expand individuals’ and cases’ eligibilities to participate in its ADR programs, remove or modify its veto power, strengthen the neutrality of its mediators, modify its ADR’s rules to reflect prominent ADR rules, and develop more accessible procedures and notification. The implementation of such recommendations will assist the IRS in increasing the use and prominence of its ADR programs.

NTUF is grateful for your consideration. If you have any questions or concerns, please do not hesitate to contact us.