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## IRS Appeals Changes Its Policy on Raising New Issues

The IRS Appeals Division (Appeals) recently released interim guidance for all its officers with respect to the handling of issues raised in Appeals but not challenged during the IRS Examination Division's (Exam) consideration of a case.<sup>1</sup> The changes reflect the first phase of an ongoing Appeals initiative known as the Appeals Judicial Approach and Culture. Time will tell how much this initiative will impact the ability of Appeals to resolve more cases successfully, but this first step is a promising development.

Although taxpayers always have been free to raise new issues in Appeals, the government has had to meet certain long-standing materiality standards to do so. With the release of the new guidance, those standards have been strengthened considerably by increasing taxpayer protections against the government adding contested issues after a case moves into Appeals. The new policy also restricts the circumstances under which Appeals may return a case to Exam for additional factual development. The guidance is effective for all Appeals actions taken after the issuance date of July 18, 2013 and, consequently, affects not only cases protested to Appeals after that date but also all cases currently open in Appeals. As with other interim guidance, the new policy will be incorporated into the Internal Revenue Manual within 12 months.

The key changes are:

- Appeals will not raise new issues. In nondocketed (prestatutory notice of deficiency) cases, the only exceptions to the prohibition are if the taxpayer engaged in fraud, malfeasance or misrepresentation of material fact, the standard under IRC Section 7121 provided for closing agreements.
- An alternative argument is not considered a new issue. However, if Appeals asserts a new challenge under the guise of an alternative position, they may not develop information or evidence not already in the case file provided by Exam to support the alternative argument.
- If Exam forwards a case to Appeals with insufficient factual development, Appeals will not return the case. Instead, the settlement will include an assessment of the factual hazards of litigation. Depending on the nature and significance of the factual development neglected by Exam, this generally can be expected to result in more taxpayer-favorable settlements. However, if the taxpayer submits information to Appeals that was not provided to the IRS during the examination, the case will be returned to Exam for consideration of the new facts.
- Appeals also will not raise new issues in docketed cases (*i.e.*, post-statutory notice of deficiency). However, Appeals will consider new issues the government raises in its litigation pleadings and may consider new evidence developed by Exam or Counsel to support the position.

The interim guidance continues to leave taxpayers free to raise new issues in Appeals. However, Appeals can be expected to return the case to Exam where additional development of the new issue is deemed necessary.

<sup>1</sup> See <http://www.irs.gov/pub/foia/ig/spder/AP-08-0713-03.pdf>.