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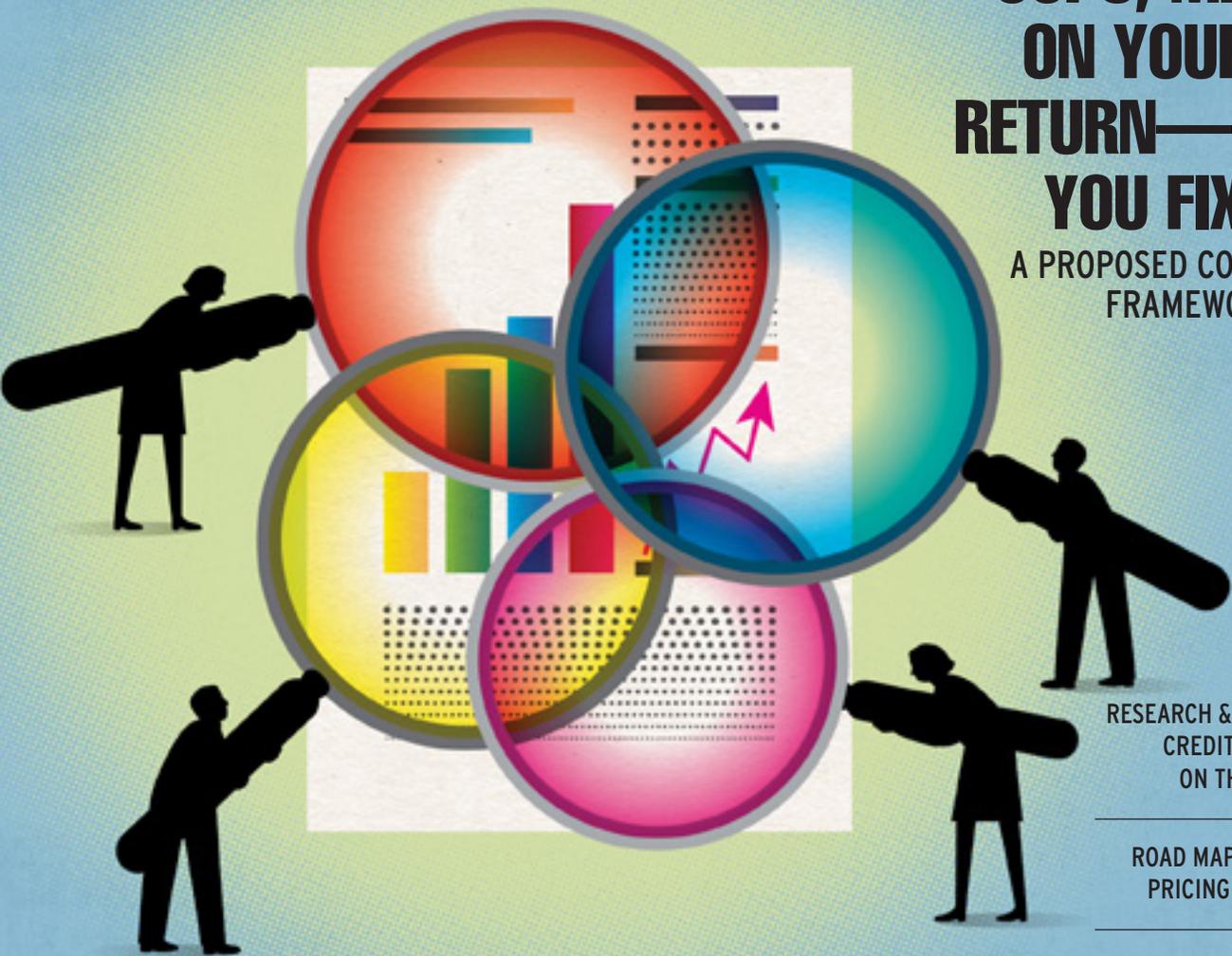
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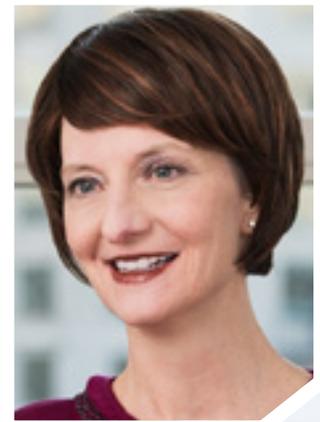




TEI Roundtable No. 29: **The Evolving Dynamic in IRS Appeals**

There's a blurring of the lines
between Exam and Appeals

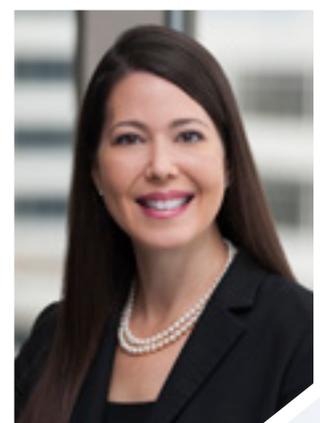
Every TEI member knows that a critical part of tax administration is the Internal Revenue Service's Appeals process. But how has it changed in the last decade? To examine this issue, we convened an outstanding panel of corporate tax practitioners in this space, including Jean Pawlow, partner in the tax controversy practice at Latham & Watkins; George Abney, partner at Alston & Bird; and Jennifer Breen, partner at Morgan Lewis. Michael Levin-Epstein, *Tax Executive's* senior editor, moderated the discussion.



Jean Pawlow



George Abney



Jennifer Breen



Michael Levin-Epstein: How has the IRS Appeals process changed over the last ten years?

Jean Pawlow: I think there has been a pretty significant shift at Appeals over the last ten years, in fact maybe even going back a little bit farther. With the introduction of the Fast Track settlement process in 2003, Appeals officers were trained in mediation techniques, and I think that the Fast Track program was really successful. Time in Appeals was shortened, the whole process was faster. You could get through things in a day or sometimes a couple of days and hash everything out. At a time when there were fewer and fewer Appeals officers, I think Appeals liked being in a situation where they had fewer resources. It was a neat tool, and I think it led directly to the Appeals Judicial Approach and Culture (AJAC) program in 2013, where Appeals said, “Look, we don’t want there to be factual disputes. We are not going to introduce new arguments. Come to us, taxpayer and Exam, each side with a fully prepared case, and then we are going to be Solomon-like and resolve that.” That then has evolved, because I think Appeals got used to having Exam as part of the process, and we ended up with “scope creep,” where now, in many Appeals conferences, the Exam team, of course, presents their side of the case, but they are invited to stay for the taxpayer’s presentation of the case as well. You’re starting to see, I think, these kinds of blurred lines between where does the Exam function stop and where does the Appeals process start.

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—Jean Pawlow

George Abney: Picking up where Jean left off, I think there has been a blurring of the lines between Exam and Appeals. While alternative dispute resolution (ADR) tools—such as Fast Track and the Rapid Appeals Process—have been overwhelmingly positive, they have chipped away

at the independence of Appeals. Because of ADR, Exam has grown accustomed to attending meetings between taxpayers and Appeals officers, so it is not surprising that Exam would seek to expand its opportunities to do so. So, in 2017, the IRS announced an initiative allowing Exam to attend Appeals conferences. In theory, this was supposed to improve efficiency by creating an opportunity for an open discussion of issues during Appeals conferences which, again in theory, would help everyone come to an agreement. But keep in mind that prior to Appeals the taxpayer and Exam likely had plenty of opportunity for open discussions and yet they still could not reach an agreement. It doesn’t seem realistic to me that after a lengthy audit, which may have been contentious, that all of [a] sudden everybody will be able to reach an agreement. As you can probably tell, I’m not a big fan of what Jean referred to as “scope creep,” but there are some indications that the pendulum may be swinging back toward an independent IRS Appeals.

Jennifer Breen: Appeals is essential to the mission of the IRS in that it is critical to have an appeals procedure that taxpayers trust to provide an independent review when they do not agree with the proposed adjustments to their tax liabilities. For Appeals to be effective, it must not only be fair, but must also *appear* to be fair and free from any conflicts of interest. This was originally achieved by separating personnel involved in the appeals process from the personnel responsible for the examination, knowing that to do anything different would make it harder for taxpayers to be assured that their case would receive impartial consideration. I think that is why some of these new approaches that Jean and George mentioned often give taxpayers and practitioners heartburn. These changes have, in some ways, gradually eroded the separation that is so important to the process.

Presentation Differences

Levin-Epstein: Could you drill a little deeper in terms of the presentations that taxpayers are making now compared to what they used to do?

Pawlow: I think that it really is forcing taxpayers to be very prepared when they go to Appeals. It used to be the case that if you got, for example, a poorly worded RAR [Revenue Agent’s Report] or you thought that the Exam team had missed an argument—you might choose to save your best arguments for Appeals. I think that that is really not the way cases in Appeals are working now. Many cases end up in Appeals because Exam is not supposed to resolve things based on the

hazards of litigation, whereas Appeals can. So, you really want to be prepared to show the Appeals officers what the hazards of litigation are. You want to tell the full story, you want to present your side of the facts—not just what the best arguments are from a legal perspective, but, for example, what you believe the witnesses would testify if the case went to trial, what your expert would say if you have already engaged an expert, and really give a full-blown picture of what your case looks like so that the Appeals officer can balance that against what the Exam team is presenting.

Abney: I agree with Jean, you really have to give the Appeals officer a “preview of coming attractions.” You have to make them see and feel the hazards of litigation. You have to tell them who your witnesses are and what they will say at trial. You have to walk them through the documents you intend to introduce at trial. And you have to explain to them why the government’s case doesn’t hold water—whether it’s based on faulty reasoning, an incorrect interpretation of the law, inadmissible evidence, or other factors. It can be difficult to convey the hazards of litigation to an Appeals officer, because trying cases is not their job. But most Appeals officers are very smart, and they are honestly seeking to make the right decision. So if you can present a coherent and compelling case to them, they are likely to start seeing the case your way.

Breen: In addition to the differences that Jean and George highlighted, I would also mention that given the impact of COVID-19, the shelter-in-place that resulted from it, and associated travel restrictions, there will be a backlog of cases waiting for a face-to-face conference. Taxpayers may decide, given a newfound familiarity with video conferencing, that while not the preferred method of holding a conference with Appeals, it would be something worth trying.

Additional Guidance Needed?

Levin-Epstein: What additional guidance might taxpayers want from IRS?

Pawlow: I think the trickiest part now is that once the Exam team is invited into the room to listen to the taxpayer’s presentation with the Appeals officers, you can devolve into what is essentially a Rapid Appeals Process (RAP), which is kind of the equivalent of Fast Track in Appeals, where the Exam team actually participates in the settlement discussions. I have done Rapid Appeals—they can be effective—but many times, the reason you are at Appeals is because you have not been able to reach

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—George Abney

a resolution with the Exam team and you want a fresh look, a fresh set of eyes, and for Appeals to exercise their hazards settlement authority. Identifying the point in time and managing the process of getting Exam out of the Appeals conference is actually probably one of the trickiest sticking points. The taxpayer needs to be cautioned to not engage in a battle with the Exam team in front of the Appeals officer. The goal should be to determine that there are hopefully no facts in dispute, give the Exam team a chance to present, give the Exam team a chance to listen to the taxpayer’s presentation and respond, but then figure out a way to get the Exam team out the door so you can actually have settlement conversations with the Appeals officers. And that line is a little bit blurry.

Abney: It’s rarely productive to engage in a back-and-forth argument with Exam. But if they are in the room for the Appeals conference, it can be difficult for clients—and their representatives—to maintain composure and keep their “eyes on the prize,” so to speak. So it’s important to counsel clients prior to the Appeals conference that the focus should be on achieving results and not arguing over facts or issues that may be of little consequence. It sounds easy, but it can be difficult when you are sitting across the table from the Exam team and listening to their presentation which you believe has little merit. In terms of additional guidance or directives, I believe it would be helpful for the IRS to give taxpayers the opportunity to invite IRS counsel to attend all or a portion of an Appeals conference. Currently, the Appeals officer or the Exam team can invite IRS counsel to participate, but taxpayers cannot. Many audits that end up at Appeals involve difficult or nuanced legal issues. If a case presents a difficult legal question, it will generally help to have IRS counsel involved to make sure that Appeals has appropriate legal guidance. Taxpayers should be given the opportunity to make sure that Appeals receives such guidance so that Appeals does not reach a decision based on an incorrect interpretation of the law.



Breen: As Jean and George highlighted, the inclusion of Examination and [IRS] counsel in the Appeals conference often changes the feel and atmosphere of the conference. Under this initiative, Examination and counsel are invited to stay until “settlement discussions” begin. According to Appeals, settlement discussions begin after both sides have presented their understanding of the facts and the law and have responded to any questions. However, it’s often hard to know when the discussion of facts and law end and the discussion of settlement begins. Some taxpayers are of the view that their settlement discussions begin the minute they begin their presentation.

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—Jennifer Breen

Levin-Epstein: Following up on your last point about trying to get the Exam team out of a meeting so that you can reach a settlement, do you have any specific tips for taxpayers to follow to make that happen?

Pawlow: I try to tell taxpayers to pick and choose their battles. Sometimes, by the time we get to Appeals, taxpayers are frustrated. The sheer size and scope of the problem that the Exam teams are addressing, many of these issues are very complex. In many cases it has taken years for the Exam team to get this far. Often the dollar amounts are very large, and there may even be penalties. The Exam teams for years had this impression that Appeals was giving away the store, so they worked harder and harder on bigger and bigger issues with higher dollar amounts. For taxpayers, I say, “Look, even if you think that the Exam team has gotten eighty percent of the things wrong, or fifty percent of the things wrong, focus on and identify the ten percent of the thing that really makes a difference to your case.” Try to identify and narrow down where the real disputes are that will make a difference to the Appeals officer. Many times you can say, for example, “Well, we don’t agree with what the Exam team is saying, but you don’t need to resolve that dispute in order to resolve this issue. These are the three

most important things,” or “This is the path that you need to follow to get to a settlement.” So, telling the taxpayer how to pick and choose their battles—if they don’t fight every battle, then the battle with the Exam team will be over faster.

Abney: Echoing Jean’s comments, I typically tell clients they need to be patient with the Appeals process. It is often hard for them to be patient, because they may have endured a lengthy audit during which they felt they had no recourse, and then all of [a] sudden they are expecting recourse from the independent Appeals office. But clients can’t expect to walk into an Appeals conference and walk out thirty minutes later with a complete concession by the IRS. It takes time for the Appeals officer to understand the case and to review the voluminous documents that are typically involved. And most Appeals officers will request additional information or a follow-up briefing on certain issues. So it’s usually not a quick process. But if you are patient, and the Appeals officer sees you as cooperative and willing to answer all of his or her questions, then typically you can achieve the desired result.

Breen: Jean and George make some excellent recommendations. I would also give thought to how you decide to present your case and how to structure the discussions you have with Examination and counsel present and then after they leave. For example, you may decide to create two presentations, one that covers the facts and law and another that is used to facilitate settlement discussions with Appeals and provided after Examination and counsel have left the conference. Also, I would recommend being flexible, to know your case, its strengths and weaknesses, and be willing to jump around a bit in an effort to move things forward in the end. ♦