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INSIGHT: 10 Actions for Managing IRS Audits, Appeals, and Litigation Under Covid-19



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For tax professionals managing tax controversies, working under a Covid-19 lockdown presents unique challenges. In addition to personal concerns and business disruptions, tax enforcement is still proceeding, albeit under a strained environment for all parties. The tax controversy group at Mayer Brown has pooled our recent experiences and best practices based on what we have learned to date, resulting in 10 action items for the tax professional.

1. Prepare for an Active Exam

Under the Internal Revenue Service's new "People First Initiative," the agency announced it will generally not open new examinations until after July 15, provided the statute of limitations will not expire in 2020. For taxpayers merely notified of a new examination, you likely won't hear from the IRS until after that date. For taxpayers already provided with a date for an opening meeting, be prepared for the meeting to happen, and be ready for the challenges of proceeding remotely.

For taxpayers already under active examination, audit activity is surprisingly still robust, subject to practical limitations of taxpayer and the examination (Exam) teams working remotely. Active audits are still the norm for the Large Business and International Division (LB&I) taxpayers, because LB&I agents were already well equipped for working remotely at taxpayer sites. Exam teams are still expecting regular meetings with taxpayers, albeit by phone instead of in person. Exam teams are still issuing information document requests (IDRs) and proposing adjustments.

2. Adjust How You Communicate With the IRS

In-person meetings with the IRS have been suspended, and paper correspondence is extremely limited. Agents have been instructed to accommodate changes in taxpayer availability due to the crisis. Many IRS offices have closed or been reduced to mission-critical teams. Agents are working remotely, however, and requesting teleconferences with taxpayers to work their cases.

We are finding that what once could be accomplished in *one* in-person meeting now is best accomplished with *two* teleconferences spaced closely together. Participants tend to be reserved during the first teleconference. The purpose of a second, follow-up teleconference is to allow teams to debrief internally and come back with questions after the first teleconference, to confirm each party's understandings, and to coordinate on next steps.

The limitations of teleconferences could be addressed with videoconferences, but LB&I historically has been reluctant to use that technology. We understand LB&I is exploring a wider use of videoconferences, following generally the videoconference model embraced by the IRS Appeals Office (Appeals) in recent years.

Fortunately, the IRS has acted quickly to change its policies (temporarily) regarding email and original signatures. Effective March 27, 2020, the IRS is allowing its employees to receive documents by email and to transmit documents to taxpayers using SecureZip (or other IRS-approved secured messaging systems). The IRS is also accepting, in lieu of original signatures, digi-

tal signatures and images of signatures (scanned or photographed). This liberalization applies to documents traditionally requiring original signatures, including statute extensions, closing agreements, etc. If a signature requires notarization, build in additional time for notarization to occur pursuant to the quickly-evolving remote notarization procedures becoming available in many states.

When all else fails, faxes must be accepted by the IRS. Most fax machines have been replaced by computer software programs that send and receive faxes. This is a good time to familiarize yourself with your company's fax software.

3. Ask for Changes to the IDR Process

Exam still expects taxpayers to respond timely to IDRs. One approach is to ask Exam to extend the review period for *draft* IDRs to give the taxpayer more time to assess whether the scope of the request is practical in light of the company's limited working conditions. In our experience, Exam has been generally sympathetic to these new concerns, particularly for industries that are announcing large furloughs of headquarter employees. Further, IDR enforcement procedures have been suspended through July 15, so a cooperative dialogue is best for both parties.

Despite these changes, taxpayers should continue to strive toward responding in timely manner and maintaining frequent communication with Exam to avoid creating a backlog of work. Taxpayers and Exam will need to be creative to avoid the pitfalls of poor written communication, which can readily occur when email becomes the primary means for communication. Regularly scheduled conference calls (*i.e.*, touch points) will allow the parties to discuss information requests to effectively limit the scope of information being sought and to manage expectations regarding the time it will take for the taxpayer to respond.

4. Pause Witness Interviews

Site visits have stopped for everyone's safety, but some Exam teams are still pursuing witness interviews, both informal and formal (typically under oath and with a written and/or video transcription). Exam has proposed videoconferencing for this purpose, but the logistics are unclear and need to be considered carefully by the parties.

Prior to Covid-19, interviews were typically conducted in-person, with the witness and IRS and taxpayer teams and their respective attorneys in the same room and jurisdiction. In contrast, interviewing a witness remotely presents practical and legal challenges. Practically, it is challenging to represent the company effectively by video. Legally, some states have laws against administering oaths if the witness is not sworn in and questioned in person. Courts also have rules regulating when testimony is and is not admissible.

If the witness is located outside the U.S., then you have a duty to comply with foreign laws governing interviews of locals. You should remind Exam that the IRS must coordinate with the foreign government through the State Department, because the U.S. government is effectively reaching into the foreign jurisdiction to conduct an investigation.

The above issues can be addressed if interviews are truly necessary, but in this time of strained resources and capacities, we recommend exploring alternatives with Exam.

5. Consider a Taxpayer Presentation

Prior to Covid-19, to accommodate Exam's fact-finding mission in an efficient way for all parties, some taxpayers routinely offer to give presentations to Exam to explain facts, issues, and positions. The advantage to both parties is efficiency, with the taxpayer providing the narrative and the IRS having an opportunity to ask questions in real time from a knowledgeable presenter. Presentations can be particularly useful for complex factual issues such as transfer pricing, the R&D credit, the tax code [Section 965](#) transition tax, etc., but there's no reason a presentation can't be used for other issues as well, particularly under the Covid-19 lockdown.

Under the Covid-19 lockdown, the presentation approach may be a useful tool by both parties as a replacement for site tours, witness interviews, discussing proposed adjustments and positions, etc. If the parties host a presentation by videoconference that includes collaboration tools, then slides and visuals can be shared with greater effectiveness.

6. Keep Pursuing Your Admission to CAP

If you are under consideration for the Compliance Assurance Process (CAP), please note that the IRS has not suspended the evaluation process and is moving ahead with taxpayers. With the Covid-19 lockdown, CAP continues to be desirable for taxpayers that have already determined CAP is right for them.

7. Adjust Your Plans for Fast Track Mediation

Fast Track mediation is a useful tool for both taxpayers and Exam teams to settle tax disputes more quickly than a traditional IRS Appeals. To the extent a taxpayer and Exam are currently considering or have already submitted applications for Fast Track mediation, taxpayers should reach out to Exam to discuss the status of the process. The IRS's goal is to complete mediation within 120 days of the date the Fast Track application is accepted, which may no longer be attainable. Remote mediation may not be effective because mediation works best when the parties are in one location under pressure to reach a resolution. It may be best to postpone the mediation date until the mediation can be conducted in person. A postponement will reduce the speediness of the process, rendering traditional IRS Appeals a better path for some taxpayers.

8. Adjust Your Plans for IRS Appeals

If you need an extension to file your protest, you should request one. Taxpayers and the IRS are both facing challenges due to the Covid-19 lockdown, resulting in heightened cooperation. As the IRS commissioner stated: "During this difficult time, we want people

working together, focused on their well-being, helping each other and others less fortunate.”

For cases transferred to IRS Appeals, including those awaiting assignment of an Appeals Officer, it should be noted that IRS Appeals Officers continue to work their caseloads remotely. At this time it does not appear as though cases transferred to Appeals will be placed on an indefinite moratorium as Appeals Officers traditionally communicate by teleconference prior to the pre-opening conference.

If, however, your Appeals Conference is scheduled for a date during the Covid-19 lockdown, Appeals will ask you to participate remotely, either by teleconference or videoconference. Remote participation will require you to rethink how to best present the taxpayer’s position to the IRS Appeals team. While remote participation is not ideal, establishing simple ground rules can reduce the challenges faced by everyone involved. These ground rules can include:

(1) Setting a date and time for the parties to exchange any pre-conference and opening conference presentation materials;

(2) Deciding whether questions should be held until after a party presents its position;

(3) Requesting the Appeals Officer to provide questions in advance;

(4) If Exam is invited to attend the taxpayer’s opening conference, deciding which party will present first and what opportunities the parties will have to provide rebuttal arguments;

(5) Setting an agenda and schedule for the meeting (that is, calendar times for recesses, so you can be prepared to work with your colleagues remotely during those times if needed); and

(6) Testing technology in advance of the meeting (that is, avoiding derailment by a necessary conference attendee missing part of the conference due to technological issues).

While these tips and tools can reduce some of the challenges raised by remote meetings, if the issue or dynamic particularly lends itself to an in-person meeting, then requesting an in-person meeting at a future date may be the better approach for the parties.

9. Adjust Your Plans for Litigation

Exam has authority to extend the date for filing a protest for going to IRS Appeals, but will not extend the time for filing a petition with the U.S. Tax Court. Accordingly, if you have received a Notice of Deficiency (90-Day Letter), you must file your petition prior to the due date on the notice.

In our experience with other filing deadlines arising after a case has been docketed, IRS counsel has been flexible and accommodating with taxpayer requests for changes driven by Covid-19. IRS counsel is not conduct-

ing face-to-face meetings or taking depositions, but is still available to discuss cases by phone.

The U.S. Tax Court has canceled all trial sessions through June 2020 and has closed the Tax Court building in Washington, D.C. All Tax Court mail will be held for delivery until the Tax Court building reopens, but eAccess and eFiling will remain operational.

Federal District Courts and Courts of Appeals are coordinating with state and local health officials. Practitioners can find links to individual court’s websites and orders relating to coronavirus at <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>. Department of Justice (DOJ) employees were told to inform District Chief Judges that DOJ employees were still able to travel if necessary.

10. Protect Privilege and Your Peace of Mind

Working remotely raises concerns about preserving the tax practitioner privilege under [Section 7525](#) and the attorney-client privilege. One might expect leniency under this extraordinary situation, but tax practitioners are well advised to take reasonable precautions to protect the taxpayer.

Reasonable precautions include using only company-approved computers, closing doors for calls, turning off any voice-assistant devices like Alexa and Google Home, and taking time to confirm that telephone and videoconference attendees include only those within the privileged relationship.

The situation is evolving quickly. The IRS and Treasury have both created coronavirus information pages. These pages collect all department announcements and changes relating to the coronavirus. Tax practitioners should make sure to monitor these sites for further details about the People First Initiative and other coronavirus changes. <https://www.irs.gov/coronavirus> <https://home.treasury.gov/coronavirus>

Finally, it’s just as important to take care of your own peace of mind and recognize that both taxpayers and the IRS are dedicated workers who need compassion and a mutual accommodation of work and personal challenges during this challenging time.

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