


Updates to Fast-Track Settlement Program Draw Concerns

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Some of the new updates to the small business/self-employed fast-track settlement (FTS) program, which provides an expedited method of resolving disputes with SB/SE taxpayers, are raising concerns among practitioners.


Sheldon M. Kay of Crowe Horwath LLP told Tax Analysts that one controversial aspect of the new revenue procedure (Rev. Proc. 2017-25, 2017-14 IRB 1 ) is a section that provides "SB/SE FTS is not available for issues for which SB/SE FTS would not be in the interest of sound tax administration."

"The problem is that there's no real clear definition of what is or is not 'in the interest of sound tax administration,'" Kay said. Furthermore, if a taxpayer can't use the FTS program because it wouldn't be in the interest of sound tax administration, then the appeals procedure becomes less clear, he said. He added that under normal circumstances, if a taxpayer can't reach a settlement via the FTS program, he or she can file a protest and proceed to the Office of Appeals.

"If you can't use a fast-track because a case is not in the interest of sound tax administration, what happens in regular appeals? What's going to be the procedure? If you can't handle this there, do you have to go right to tax court?" Kay said. He said those uncertainties create a quandary for taxpayers.

Kay said the language echoes Rev. Proc. 2016-22, 2016-15 IRB 577 , which deals with settlement jurisdiction between the Office of Chief Counsel and the Office of Appeals in cases docketed in the Tax Court. That revenue procedure states that "in limited circumstances, a docketed case or issue that has not been designated for litigation will not be referred to Appeals if Division Counsel or a higher level Counsel official determines that referral is not in the interest of sound tax administration." Kay said that under Rev. Proc. 2016-22, if you go to the Tax Court, you can't go back to Appeals.

"This may be effectively taking the appeals consideration away entirely," Kay said. He said it's hard to tell because the provision is ambiguous, but it is troubling.

Susan E. Seabrook of Buchanan Ingersoll & Rooney PC said the inclusion of the "in the interest of sound tax administration" language isn't a surprise given the IRS's use of that phrase in other guidance. For example, since 2014 the IRS's yearly revenue procedure on procedures for issuing letter rulings (Rev. Proc. 2017-1, 2017-1 IRB 1 ) has included language that the IRS "may decline to issue a letter ruling or a determination letter when appropriate in the interest of

sound tax administration, including due to resource constraints, or on other grounds whenever warranted by the facts or circumstances of a particular case."

Seabrook said her understanding is that the catchall language is intentionally vague and that it makes sense that the government would want to include the provision to protect itself. However, she said it's unfortunate that taxpayers could be left without recourse if denied access to the FTS program under that provision.


Odd Statement on Settlement Authority

Seabrook also highlighted a "very odd" statement in Rev. Proc. 2017-25 that reads, "At any time, SB/SE and the taxpayer may agree to resolve the issues independent of SB/SE FTS and close the case on those terms."

She said, "No delegation order is referenced providing SB/SE the authority to independently settle cases, perhaps because there isn't one. Compliance does not have the authority to directly compromise tax liability based on hazards of litigation." She said that although Delegation Order 8-9 extends some flexibility for the SB/SE commissioner to delegate authority to administer alternative dispute resolution procedures, "interpreting that authority as so broad as to displace the specific authority delegated by DO 8-9 concerning FTS would be nonsensical."

"This is new to me, the idea that taxpayers can go directly to exam and somehow negotiate and reach an agreement to resolve the issues outside of Appeals entirely," Seabrook said, adding that it blurs the line as to who has the authority to compromise a proposed tax adjustment. She said the whole point of the FTS program is to use an Appeals employee trained in mediation to assist the parties in reaching settlement, and the statement in the revenue procedure suggests taxpayers can simply ignore that process and negotiate an agreement directly with SB/SE.

Other Changes

Rev. Proc. 2017-25 also establishes that taxpayers aren't eligible for FTS unless their issues remain unresolved after the involvement of the group manager, but Kay said that in reality, group managers were already getting involved in almost all cases. He said, however, that to the extent that group managers weren't involved before, it's good that it's now mandated. Kay said there is now a good-faith requirement, which he said is also a positive addition, although it may not have a major impact. He also noted that the revenue procedure clarifies that taxpayers using the SB/SE FTS program are ineligible to use post-appeals mediation for any issue that was considered during the SB/SE FTS process if that issue wasn't resolved, as consistent with Rev. Proc. 2014-63, 2014-53 IRB 1014 .

The revenue procedure also clarifies several changes that have been made to the program in recent years, including that the program is now available to taxpayers nationwide and that the program is no longer available for cases under the jurisdiction of the Tax-Exempt and Government Entities Division as a result of the establishment of a permanent, separate fast-track settlement program for TE/GE taxpayers.