

When Does a Settlement Become Binding on a Party in the Tax Court

*By T. Keith Fogg**

Keith Fogg examines the circumstances that can bind a party in Tax Court to an agreement as well as the circumstances that do not.

Case Settlement

The low-income taxpayer clinic I directed at Villanova Law School had a case last year pending in the Tax Court and referred after answer to Appeals because the notice of deficiency in the case did not issue from Appeals. The client, a surviving spouse who had relied on her husband to primarily handle the financial matters of the couple, brought to the clinic an issue it had not previously handled concerning the ability to roll over individual retirement account (IRA) funds after the statutory 60-day period. The Internal Revenue Code (“the Code”) gives the IRS the authority to waive the statutory time frame administratively where it finds the failure to roll over the funds meets certain criteria. The affirmative authority granted to the IRS under Code Sec. 408(d)(3)(i) represents a rare instance of the legislative branch specifically ceding authority to the executive branch to override the time frame established by statute.¹

As the students began the representation, one of the first issues they faced concerned the ability of Appeals, or Chief Counsel or the Tax Court, to grant the relief the taxpayer sought. The statute provides a method for obtaining a waiver administratively but does not mention relief through judicial action. We had some concern whether the Appeals Officer had authority to settle this case by granting full or partial relief for the client to roll over the IRA well past the 60-day deadline. Their research provided no clear answer. The students did not want to assume that negotiation with the Appeals Officer could result in relief.

They began by providing him with factual and legal information in support of granting relief and asked for confirmation that this matter could be resolved in a Tax Court proceeding. After hearing their preliminary presentation of the issue and facts, the Appeals Officer indicated that he thought the case was susceptible to settlement in the Tax Court proceeding and that he should be able to come up

T. KEITH FOGG is a Professor of Law and the Director of Federal Tax Clinic at the Villanova Law School, Pennsylvania.

with a settlement that the client would like. The discussion went on for a few months, at which point it appeared that settlement was reached allowing the client to roll over a certain percentage of the funds and causing her to take into income the balance. The client agreed with the proposed settlement but wanted to know the financial impact. The Appeals Officer made no mention of needing to get approval from his manager, and the students did not ask about this. The Appeals Officer provided a computation, and when the student attorneys pointed out a mistake in the computation, he said he would make sure the mistake got fixed in the final computation. The students notified the Appeals Officer that the client accepted the offer and

We did not necessarily want the lesson that we learned because it felt as though the rug was pulled out from underneath us after a fair negotiation, but we did not have a binding settlement with Appeals.

stood ready to sign the decision document. The students asked the Appeals Officer to write a letter to the client's bank stating that it could transfer the funds to the retirement account in accordance with the settlement. They were calling the Appeals Officer every two weeks trying to get an answer on that question, and the Appeals Officer was deferring until he could obtain an answer from the Chief Counsel attorney about that. At no point did he say that the entire settlement was off or that the settlement turned on getting an answer to this question.

Finally, over two months after the apparent agreement, the Appeals Officer wrote to say that his manager did not agree with the settlement and asked that the client agree to a full concession of her case and that his only concession would be waiving the penalty for substantial understatement. Throughout the negotiations, the Appeals Officer never mentioned that he had not obtained the authority of his supervisor to make the offer that he made to settle the case. Everything he did suggested that he had authority to reach the proposed settlement. The sudden and unexpected rejection after the conclusion of the semester left us in a quandary and put the clinic in a tight spot for the early fall trial calendar date because the students who had spent all semester working on this case had finished the class and new students had to start. As we looked into what we might do, we examined the Tax

Court precedent concerning settlements to determine if the Appeals Officer's actions here might result in a binding settlement.

The lines of authority for Appeals Officers and Chief Counsel docket attorneys clearly require managerial approval for settlement. I knew this but failed to explicitly mention it to the students working with the Appeals Officer because I thought the Appeals Officer would make clear his authority during the settlement process. This experience may change my practice in preparing students for this process. My own practice as a docket attorney and my experience dealing with Appeals Officers and Chief Counsel docket attorneys on many cases is that this approval process was constantly mentioned so that the other side knows a settlement needs further approval. In circumstances in which the approval exists for the line employee in Appeals or in Counsel to make a settlement offer, my experience is that this is also communicated so that the taxpayer or their counsel knows that the offer already has approval. As a government employee operating with lines of authority, making clear those lines and the stage of approval of a proposal seems like a best practice and one most employees in those offices follow.

I incorrectly assumed that my students were dealing with someone who would make that clear. The case served as a good learning tool for me and for the students working on it. We did not necessarily want the lesson that we learned because it felt as though the rug was pulled out from underneath us after a fair negotiation, but we did not have a binding settlement with Appeals. We learned this as we researched the authority for binding settlements. While I think an Appeals Officer or a docket attorney has a responsibility to make the lines of authority clear when making a proposal, that responsibility does not come from a requirement placed upon the individual in the Internal Revenue Manual or the Code.² As discussed below, taxpayers in other cases have also mistakenly thought they had an agreement only to find they did not. Appeals could instruct its employees to make it clear when a proposed settlement needs further approval. Such a practice would enhance customer service.³

Although some strong case law exists on the binding nature of certain actions prior to trial, as discussed below, those cases primarily turn on action by the taxpayer and not by the government. The precedent binding the government to an agreed settlement provides little relief to taxpayers in most instances. This article will examine the circumstances that can bind a party in Tax Court to an agreement as well as the circumstances that do not. Unfortunately, the circumstances in our case fell into the nonbinding category; however, the Chief Counsel attorney ultimately offered

the same settlement that Appeals unexpectedly withdrew leaving our client happy at the end of the day. The Chief Counsel attorney made it clear that she made the same offer because she thought it was a good offer and not because she thought a binding agreement existed. The discussion here applies only to cases in Tax Court and not to nondocketed discussions with Appeals. The case law concerns settlement discussions between petitioners and the government. Those discussions could occur with either Appeals or Chief Counsel. The same general principles should apply no matter whether Appeals or Counsel engaged in the negotiations although interaction with the court frequently plays a role in the outcome and that implicates Chief Counsel attorneys more than Appeals Officers.

During a negotiation with the IRS about a case pending in Tax Court, when does the discussion cross the line from tentative agreement to binding agreement? This article seeks to find that line, but a big takeaway from this article should be that it is very rare that the government will be bound by something other than a statement to the court. As with most instances of line drawing, describing the things that clearly fall on either side of the line comes much easier than finding the actual crossing point. This article does not seek to discuss the settlement process in federal tax cases generally. For an excellent and in depth article on that process from a broader perspective, see *Settling with the IRS: The Importance of Procedure*.⁴

Clearly Binding Agreements

The poster child for cases clearly creating a binding agreement is the case of *Dorchester Industries, Inc.*⁵ The *Dorchester* case should have notoriety because it served as the springboard for the IRS offshore effort, which has so successfully identified offshore accounts.⁶ Instead, the case is best known for the antics of the owner of the business after apparently reaching an agreement and the Tax Court's response to those antics. The taxpayer engaged in complicated offshore transactions. The examination went on for about eight years. The parties obtained a special trial session from the Tax Court because they anticipated a several week trial. On the eve of trial, the parties reached an agreement to resolve the case. The agreement principally involved a concession by the taxpayer. The parties went before the court and told the court they had reached a basis for settlement. The court accepted their representation and gladly canceled the special trial session. The court ordered the parties to file a decision document with 30 days. The government computed the correct tax based on the agreement of the parties and sent the decision document to petitioner. Petitioner's owner refused to sign the decision

document or allow its counsel to do so, and the case went back before the court. The IRS moved to enforce the agreement by entry of a decision, and the court granted the motion. In doing so, Judge Halpern used strong language about the binding nature of a settlement agreement and that the settlement agreement served as a contract between the parties, which the court could enforce.

The opinion sets out the facts leading up to the agreement reported to the court in great detail. It does not simply enter the decision without comment but sets the scene by providing the actions of the parties prior to the moment of reporting the settlement to the court. The factual background in *Dorchester* and any case seeking to enforce a settlement has significance on the decision of the court to enforce a broken agreement between the parties. The court held an evidentiary hearing on the issues leading up to the report of settlement. The opinion recounts in great detail all of the discussions leading up to, and including, the report to the court that the parties had reached a basis for settlement and no longer needed the scheduled special trial session. The court then examined the actions of the parties in deciding whether these actions added up to an enforceable contract. It found:

A settlement is a contract and, consequently, general principles of contract law determine whether a settlement has been reached. A prerequisite to the formation of a contract is an objective manifestation of mutual assent to its essential terms. Mutual assent generally requires an offer and an acceptance. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." 1 Restatement, Contracts 2d, sec. 24 (1981).

In a tax case, it "is not necessary that the parties execute a closing agreement under section 7121 in order to settle a case pending before this Court, but, rather, a settlement agreement may be reached through offer and acceptance made by letter, or even in the absence of a writing." Settlement offers made and accepted by letters are enforced as binding agreements.⁷

The Tax Court went on to say that "A valid settlement, once reached, cannot be repudiated by either party; and after parties have entered into a binding settlement agreement, the actual merits of the settled controversy are without consequence."⁸

If you attend a Tax Court calendar call, you will almost always see several cases in which the government offers to

the court a signed stipulation of settled issues or a signed decision document with only faxed signatures. Occasionally, you will see the parties stand in front of the judge and orally explain the basis for settlement issue by issue. If signed documents get submitted to the court by the Chief Counsel attorney, it is common that the taxpayers or their representative do not even appear. The court accepts these documents or the oral statements of agreed issues and orders the parties to submit a signed decision document within 30 or 60 days. The court also removes that case from the trial calendar by doing this and relieves

If the IRS employee does not affirmatively state to you that a proposed settlement has the approval of the appropriate manager, assume that it does not.

the parties of the necessity of trial even though they have not perfectly completed the case at that point. This normal action at a trial calendar sets up almost precisely the circumstances that existed in *Dorchester*. If either party later tries to back out of the settlement after making that representation to the court and after the postponement of the trial as a result of the representation, the court will, in almost all cases, enforce the settlement reflected in the document lodged with the court at calendar call or in the statements made by the parties. Exceptions to the enforcement of the settlement will generally only occur if a party can show a misunderstanding of the agreement or some false statement in the formation of the agreement. Several cases address these situations.

Other Eve-of-Trial Cases Where the Court Enforces Settlement

*D.C. Clark*⁹

Judge Haines faced a case similar to *Dorchester* with petitioners who sought to avoid having an oral statement of settlement as well as a written stipulation of settled issues become binding. Because the parties anticipated a lengthy trial, they requested and received a special trial session in San Francisco as had the petitioners in *Dorchester*. Before the scheduled trial date, taxpayers and counsel agreed to settlement. The parties informed the court of the settlement in a conference call causing the court to cancel a

scheduled trial session. The parties then filed a stipulation of settled issues with the court. The attorney for the Office of Chief Counsel sent decision documents to petitioners' counsel. Petitioners said they disagreed with the computations but never explained why. Petitioners found some additional evidence that would have allowed them to obtain a better settlement had they found it before the filing of the stipulation of settled issues. The court found they were bound, stating that, "This Court has declined to set aside a settlement duly executed by the parties and filed with the Court in the absence of fraud, mutual mistake, or other similar ground."¹⁰ Here, the petitioners found at least two issues they wanted to contest after they agreed to the settlement. First, they found an application for extension of time to file. During the settlement negotiations, the IRS had stated it would concede a penalty if petitioners produced this document. Second, they noticed a duplication of rental income in the notice of deficiency. Based on these items found after they stated the basis for settlement, petitioners sought to unwind the settlement. At least they offered a concrete basis for their request, but the court rejected their request stating, "If petitioners made a mistake in agreeing to the settlement, respondent contends, and the Court agrees, it was not mutual but unilateral. This Court has previously held that a party may be bound by its agreement although it has made a unilateral mistake in the calculation of a deficiency. Petitioners have not shown that respondent committed fraud or otherwise improperly induced petitioners to agree to the offer."¹¹

*Stamm Intl. Corp.*¹²

The parties requested a special trial calendar because of the anticipated length of the trial. Before the special trial calendar, the parties contacted the court to state that a basis of settlement was reached, and this caused the cancellation of the special trial calendar. Shortly thereafter, the parties filed a memorandum of settled issues. After filing the memorandum, respondent began to see the downside of its agreement:

During a meeting on February 12, 1987, among respondent's counsel, a revenue agent, and petitioner's accountant, the applicability of section 959 to the calculation of the correct amount of the deficiencies was raised. Prior to this meeting, respondent's counsel had not taken account of section 959, which, for reasons discussed below, would reduce the total amount to be paid by petitioner to approximately \$1.1 or \$1.25 million. Petitioner's attorneys had discussed among themselves the effect of section 959 on the

computation prior to execution of the settlement agreement, and they had been aware that respondent's counsel was not giving effect to that section. They had not, however, discussed section 959 with respondent's counsel or otherwise called attention to his apparent error.

As a result of realizing the failure to take into account the impact of Code Sec. 959, which reduced the anticipated liability by 70 percent, the IRS sought to reopen the settlement discussions. Petitioner refused and asked that the court enforce the settlement. Because petitioner knew of the impact of Code Sec. 959 on the settlement, the court found that this impact was a unilateral mistake. It refused to negate the settlement based on the failure of one party to understand the computational consequences of the deal. The parties described the settlement with great specificity in their memorandum of settlement to the court. The court found that the settlement was not ambiguous.

At the hearing on whether to enforce the settlement, the IRS argued that the agreement should be set aside 1) based on the unilateral mistake of his counsel which was known by petitioner's counsel and 2) because the agreement did not mention the application of Code Sec. 959. The IRS did not argue that the agreement was not authorized or binding, but rather that as a matter of contract law, he should be relieved of the agreement. The IRS cited no authority that the court should relieve him of the settlement based on the mistake of fact. There was misleading silence by petitioner's counsel but no overt misrepresentation.

The court notes that it has undone settlements where "excusable damaging silence" upon a false or true representation of the other party, even one innocently made, is recognized as a ground for relief from a settlement stip.¹³ Here, the silence was not equivalent of a misrepresentation because petitioner's counsel had no duty to explain the Code to respondent. The IRS cited *Adams* for the position that the "primary consideration in determining whether a settlement stipulation should be set aside is whether such action is necessary to prevent manifest injustice The determination, however, takes into account the injury to the opposing party and the inconvenience to the Court, as well as possible injustice to the moving party."¹⁴ The court points out that if a computational surprise in the amount of the deficiency by itself were a basis for overturning an agreement, petitioners [or respondent] would make this motion all the time once they received the computations and could see the tax consequences of the issue settlement. The court also felt that a party had a very high burden to undo a settlement in the posture of this case unlike the

Adams case, which involved a pre-trial motion. The case points to the need for a party, if money is the driving force—which will almost always be the case for petitioners-- to calculate the dollar impact of a settlement before agreeing to the issues in a settlement stipulation filed with the court.

The court then looked at what the agreement meant and how to interpret it in the context of the Code Sec. 959 argument. If the agreement was unclear, a trial of the matter might be inevitable even where the agreement might have otherwise been binding. The court found that the agreement was ambiguous and indefinite; however, looking at the Code as a whole in this section, the court concluded that the most logical reading of the agreement is to view it as allowing the application of Code Sec. 959 in the absence of a clear statement to the contrary. It appreciated that the Code was complex and understood the failure of respondent's counsel to appreciate how it would work but, nonetheless, felt that the agreement included related adjustments such as the one in Code Sec. 959. So, the court enforced the settlement agreement allowing petitioner to reduce the tax owed by including the Code Sec. 959 adjustments in the computation. Because the document providing the court with the settlement agreement would have been reviewed by the party within the IRS authorized to settle the case, the argument of lack of approval at the appropriate level was unavailable to the IRS and was never made.

The *Stamm* case demonstrates that if either party pulls out of an eve-of-trial settlement, the court will enforce the settlement. In submitting the settlement document to the court, the IRS will necessarily have obtained the necessary approval level for settlement. So, that argument will never really provide an effective basis for pulling out of a settlement communicated to the Tax Court.

Cases Where Court Declines to Enforce the Settlement

*D. Halder Est.*¹⁵

Petitioner sought to hold an agreement binding regarding the value of the estate's interest in a partnership on the date of death. The Appeals Officer spoke with a representative of the estate and stated that he had calculated a value of \$1.2 million. The Appeals Officer offered to fax the basis for the calculation and did so. The fax mistakenly left off the final page of six which caused the impression that the Appeals Officer determined that the value was \$1 million and not \$1.2 million. Petitioner's representatives noticed

the discrepancy but did not bring it to the AO's attention. The representatives then faxed an agreement to the \$1 million settlement proposal. The parties never executed any agreement nor did they report to the court a basis had been reached. Petitioner then filed a motion to enforce the settlement based on the lower amount.

The court noted that settlement agreements could be reached through correspondence in the absence of a formal agreement citing *B.F. Manko*.¹⁶ "A prerequisite to the formation of an agreement is an objective manifestation of mutual assent to its essential terms,"¹⁷ *i.e.*, a meeting of the minds. The court stated that if it enforced a settlement on these facts, it would "allow the estate to take an unfair advantage of a simple, honest error that was immediately corrected."¹⁸ Citing to *Adams*, the court quoted "The party seeking modification, however, must show that the failure to allow the modification might prejudice him Discretion should be exercised to allow modification where no substantial injury will be occasioned to the opposing party; refusal to allow modification might result in injustice to the moving party and the inconvenience to the Court is slight."¹⁹

Ask whether such authority exists before taking an offer to your client and suggesting to your client that the IRS has agreed to a particular settlement.

The court pointed out that in eve-of-trial settings, the rules were much more stringent. Eve-of-trial cases, such as *Dorchester* and *Stamm*, also involved the filing of stipulation of settled issues. Allowing the enforcement of the terms of the mistaken fax would provide an inappropriate advantage to the estate and an injustice would occur. The court summed up its view by stating that:

We find those cases [*Dorchester* and *Stamm*] distinguishable from the instant case because: (1) The parties did not reach a meeting of minds, execute any settlement agreement, notify the Court that a settlement had been reached, or file a stipulation of settled issues with the Court; (2) the Court did not cancel or delay the trial date because of any settlement between the parties (*i.e.*, the Court granted a continuance in this case because the estate's expert was ill); and (3) Mr. Lindenbaum contacted Mr. Sherland with regard to the error *the next day*.²⁰

In a footnote, the court added, "Even if we held there was a meeting of minds, we would deny the estate's motion because the 'settlement' was never signed or approved by, or even submitted to, any Service official authorized to approve it."²¹ The *Manko* case gives hope to petitioners seeking to hold the IRS to a settlement not communicated to the court through the formality of a pre-trial settlement; however, any tentative agreement must have the approval of the appropriate level of authority, or it will fail as a basis for binding the IRS to the settlement.²²

S.J. David²³

The Appeals Officer sent to the taxpayer's representative an audit statement and a Form 870-AD together with a transmittal letter that stated the taxpayers would be notified "when the proposed settlement is approved." The Appeals Officer did not receive back an executed Form 870-AD and later informed the representative that the settlement was no longer available. The taxpayer sought to enforce the settlement in Tax Court. The court found there was no binding settlement because there was no indication that the appropriate person at the IRS had approved the settlement, and, in fact, the letter to the taxpayer indicated that the approval had not yet occurred.

The opinion offers nothing of great interest except it shows the futility of the attempts by the taxpayer's representative to turn the offer of settlement into a binding settlement on the basis of the delegation orders in the face of clear language in the transmittal letter that the Appeals Officer still need authorization on his end.

J. Mathia²⁴

The parties in this collection due process case submitted the case fully stipulated under Rule 122. Although the issue of when a settlement occurred arose in the context of a collection due process case challenging the timeliness of respondent's assessment, the real issue focused on the TEFRA partnership proceeding that gave rise to the assessment. Applying the same general rules of contract that control in other circumstances, the Tax Court determined that no binding settlement existed in the TEFRA case at the early date sought by petitioner and held that the statute of limitations on assessment remained open at the time the IRS assessed the liability at issue in the collection due process case.

"A settlement agreement can be reached through offer and acceptance made by letter, or even in the absence of a writing Settlement of an issue before the Court does not require the execution of a closing agreement under section 7121, or any other particular method or form

Settlement agreements are effective and binding once there has been an offer and an acceptance, filing the agreement with the Court as a stipulation is not required for the agreement to be effective and binding.²⁵ This description certainly fits the circumstances of the settlement my clinic thought it had with the appeals officer. There was an offer and acceptance of the offer and even the preparation of computations before the appeals officer suddenly, at a much later point, brought up for the first time the failure of the manager to assent to the agreement.

The court in *Mathia* carefully examined the correspondence between the partnership and the IRS attorney to determine if it had a binding settlement. It found that the correspondence confirms

that Greenwich and respondent reached an agreement in 1991 to enter into a settlement of the partnership-level proceeding, we remain unconvinced that the agreement was sufficiently fleshed out in 1991 to constitute a binding settlement agreement at that time. The agreement in principle that was reached in 1991 set forth the parameters of a settlement, but the correspondence described above reflects that negotiations continued between respondent and the attorney representing the Swanton TEFRA partnerships to at least September 3, 1993. Moreover, the correspondence indicates that the execution of a decision document resolving the partnership litigation depended upon the fulfillment of certain conditions such as the TMP's ability to represent that all partners consented to the settlement. Implementing and finalizing the proposed settlement required the collection and analysis of detailed information, the preparation of calculations and agreements, and in some cases, the execution of closing agreement by individual partners.²⁶

The court further found that even if it determined that the parties had entered into a binding settlement agreement, it would not qualify as an agreement between a partner and the IRS within the meaning of Code Sec. 6231(b)(1)(C). This section requires an agreement between the IRS and a partner, not the IRS and the partnership. The case then goes into an analysis of the partnership provisions not relevant to the overall analysis of when an agreement becomes binding because the analysis here is peculiar to the partnership provisions.

Hunt Est.²⁷

The taxpayer and the IRS entered into a settlement which the parties knew would generate a refund through the

operation of the carryback of a loss. In the settlement discussions, both parties anticipated that the taxpayer would receive interest on the refund payment. When the IRS paid the refund, it paid no interest because the refund occurred within 45 days of the request. The taxpayer brought suit in federal district court seeking interest, arguing the IRS was equitably estopped from arguing he should not receive interest and the district court agreed. The Fourth Circuit reversed, finding that employees of the IRS could not create a right to interest through their misunderstanding of the application of the refund provisions that was not granted by the statute. The case shows another limitation on settlement with the government. Parties cannot rely on every statement that the IRS employee makes and use that statement as a basis for relief not otherwise available.

Lessons on Settlement Agreements and Their Binding Effect

If you tell the Tax Court orally or in writing that a basis for settlement exists, you should expect the settlement to bind the parties in the absence of a mutual mistake or fraud. The difficulty will compound if the court cancels a scheduled trial time because of representation of settlement; however, do not expect to get out of a settlement reported to the court just because the reporting of the settlement does not cause postponement of a trial. You cannot use as an excuse for undoing a settlement that the computations did not turn out the way you expected. Do the math before telling the court you have a settlement unless you do not care what the math will bring.

You cannot expect the court to bind the IRS in the same way it might bind the petitioner. If you expect to bind the IRS, you must show that the properly authorized person gave assent to the settlement.²⁸ You cannot trick a party into settlement by seeking to use a mistake as the basis for binding a party. If you know the other side has made a mistake in something you receive, it is better to clear the air before you try to argue for a binding settlement than to look slick in trying to enforce an agreement you know did not exist in the mind of the other party. The court will also not enforce provisions not contained in a settlement document contrary to the statute.

If the IRS employee does not affirmatively state to you that a proposed settlement has the approval of the appropriate manager, assume that it does not. Ask whether such authority exists before taking an offer to your client and suggesting to your client that the IRS has agreed to a particular settlement. The court precedent suggests little reluctance in enforcing terms

recited to the court and very little appetite for enforcing settlements not yet brought to the court. If you want to bind the IRS, get it in writing, signed by the

authorized official or get a statement made by a Chief Counsel attorney to the court. Anything else will create problems in trying to enforce it.²⁹

ENDNOTES

* Keith Fogg is a Professor at Villanova Law School and the Director of the Federal Tax Clinic. He is currently visiting at Harvard Law School to establish a tax clinic there. He is the co-founder of the tax procedure blog *procedurallytaxing.com*. He gratefully acknowledges the assistance of his research assistant Caroline Goldstein who was also one of two student attorneys on the case that gave rise to this article.

¹ In most cases when a taxpayer misses a statutory time frame, the IRS, and the courts, take the position that the taxpayer simply loses whatever rights existed had they timely requested relief. One prime example of the inability to hold open a statute in the face of circumstances supporting a tolling of the statute occurred with the time period for filing a refund claim where Congress also created a potential statutory fix. T. Keith Fogg & Rachel Zuraw, *Financial Disability for All*, 62.4 CATHOLIC UNIVERSITY LAW REVIEW 965 (2013). Perhaps the recent Ninth Circuit decision in *L. Volpicelli*, CA-9, 2015-1 USTC ¶150,175, 777 F3d 1042 will make equitable tolling a common basis for extending timeframes rather than an uncommon one. For a general discussion of equitable tolling, see *Carlton M. Smith, Matuszak v Commissioner, A Tax Court Innocent Spouse Equitable Tolling Case*, Jan. 28, 2016, available online at www.procedurallytaxing.com/?s=equitable+tolling and the links contained within that article.

² The IRM does make some mention of the duty of an Appeals Officer to advise the taxpayer of the scope of their authority, but not on this point. IRM §8.6.4.1.6.7 provides that the Appeals Officer should "advise taxpayers that tentative agreements not finalized using Form 870-AD or Form 906 are subject to renegotiation in the circumstances described above." Form 870-AD is the consent-to-assess form used by Appeals that seeks to bind the parties, in a nondocketed phase of the case, to the terms of the agreement so that the taxpayer cannot later bring a refund suit to recover the taxes. Form 906 is a closing agreement form binding the parties to the agreement pursuant to Code Sec. 7121. The language of the IRM referring to circumstances described above refers to "Exercise care in a case where a tentative agreement was reached with the taxpayer and a change in the position of an applicable authority occurs which affects the agreement in a substantive and material manner. If a tentative agreement was not finally reflected on Form 870-AD or Form 906

and signed by a Service official authorized by the Commissioner to approve negotiated settlements, the tentative agreement is subject to modification if the law or legal precedent relied upon to formulate the tentative agreement changes. If the change is substantive and material, the agreement is renegotiated. For purposes of this section, the word 'substantive' means the change in law or legal precedent results in a meaningful change to Appeals' assessment of the hazards of litigation."

³ We found other IRM provisions addressing settlement and finality but nothing expressly addressing the discussion an Appeals employee might have during settlement negotiation concerning the managerial approval process. See IRM §8.6.4.3.3 discussing how to achieve greater finality in nondocketed cases through the use of Form 870-AD or Form 906 and IRM §8.4.1.17.2 requiring the manager to review the stipulated decision in a complex Tax Court case. This provision suggests by negative implication that the manager need not review the decision document prepared and sent out by the Appeals Officer in routine cases. It does not address the issue of whether the manager must approve the settlement before the Appeals Officer sends out the decision document in a routine case. Creating clear directives on this point in the manual provisions would give needed guidance to Appeals employees about their duties in settlement negotiations. In docket Tax Court cases, Appeals Officers deal primarily with *pro se* taxpayers who will never have dealt with Appeals before and will have every reason to believe that the person with whom they are negotiating has the authority to bind the IRS. Creating clarity about when a proposal is, or is not, subject to further approval does not detract from the settlement discussions and avoids situations that can create hard feelings toward the Appeals employee and the government process.

⁴ Ronal Stein, *Settling with the IRS: The Importance of Procedure*, 2005 TAX NOTES TODAY 123-33 (June 28, 2005).

⁵ *Dorchester Industries, Inc.*, 108 TC 320, Dec. 52,011 (1997), *aff'd without published opinion*, CA-3, 2000-1 USTC ¶150,265, 208 F3d 205.

⁶ T. Keith Fogg, *Go West: How the IRS Should Foster Innovation in Its Agents*, 57.3 VILL. L. REV. 441 (2012).

⁷ *Dorchester Industries, Inc.*, 108 TC, at 330 (most citations within quote omitted).

⁸ *Id.*

⁹ *D.C. Clark*, 96TCM 448, Dec. 57,612(M), TC Memo. 2008-279.

¹⁰ *Id.*, at 2.

¹¹ *Id.*, at 3.

¹² *Stamm Intl. Corp.*, 90 TC 315, Dec. 44,584 (1988).

¹³ *Fred M. Saigh, Jr.*, 26 TC 171, 180, Dec. 21,694 (1956).

¹⁴ *Stamm*, at 90 TC, at 320.

¹⁵ *D. Halder Est.*, 86 TCM 427, Dec. 55,314(M), TC Memo. 2003-84.

¹⁶ *B.F. Manko*, 69 TCM 1636, Dec. 50,412(M), TC Memo. 1995-10.

¹⁷ *Halder Est.*, at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*, at 4.

²¹ *Id.*, citing to *M.J. Gardner*, 75 TC 475, 479, Dec. 37,507 (1980).

²² See *Henry* (Civil Action No. 02-0968) (E.D. Louisiana 2004). (Taxpayer sought to bind the IRS to an agreement alleged entered into with a Revenue Agent, and the District Court refused to acknowledge any settlement not signed by the appropriate Department of Justice official.)

²³ *S.J. David*, 66 TCM 1774, Dec. 49,501(M), TC Memo. 1993-621.

²⁴ *J. Mathia*, 97 TCM 1611, Dec. 57,836(M), TC Memo. 2009-120.

²⁵ *Id.*, at 8.

²⁶ *Id.*, at 9.

²⁷ *Hunt Est.*, CA-4, 103 FedAppx 475 (2004) (unpublished opinion).

²⁸ *R.A. Burton*, 97 TCM 1309, Dec. 57,764(M), TC Memo. 2009-60. (The Tax Court refused to bind IRS to settlement where the appropriate official had not signed the closing agreement. The court was also concerned that there had not been a meeting of the minds.)

²⁹ See 93 TNT 221-59 ATTORNEYS OBJECT TO PROPOSED AMENDMENT OF PROCEDURAL RULES. (Miscellaneous) (Release Date: Oct. 14, 1993) (Doc 93-10899). A letter to the IRS from Practitioners in 1993 expresses concerns about an effort by the IRS to avoid being bound absent the entry of a decision document. The letter discusses the case law in existence at that time showing that a binding settlement with Appeals was possible if the person with proper authority signed for Appeals. The letter shows that the issue of nailing down a settlement has existed for some time and troubled practitioners.

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