

Mediation in the Tax Court

Tax Court Rule 124(b)

Panelists

- Robert H. Aland, Adjunct Professor, Northwestern University Pritzker School of Law
- Susan T. Mosley, IRS Office of Chief Counsel
- The Honorable Peter J. Panuthos, Special Trial Judge, United States Tax Court
- The Honorable Lewis R. Carluzzo, Chief Special Trial Judge, United States Tax Court

Rule 124. Voluntary Binding Arbitration

- (a) **Availability:** The parties may move that any factual issue in controversy be resolved through voluntary binding arbitration. Such a motion may be made at any time after a case is at issue and before trial. Upon the filing of such a motion, the Chief Judge will assign the case to a Judge or Special Trial Judge for disposition of the motion and supervision of any subsequent arbitration.
- (b) **Procedure:** (1) *Stipulation Required:* The parties shall attach to any motion filed under paragraph (a) a stipulation executed by each party or counsel for each party. Such stipulation shall include the matters specified in subparagraph (2).
- (2) *Content of Stipulation:* The stipulation required by subparagraph (1) shall include the following:
- (A) a statement of the issues to be resolved by the arbitrator;
 - (B) an agreement by the parties to be bound by the findings of the arbitrator in respect of the issues to be resolved;
 - (C) the identity of the arbitrator or the procedure to be used to select the arbitrator;
 - (D) the manner in which payment of the arbitrator's compensation and expenses, as well as any related fees and costs, is to be allocated among the parties;
 - (E) a prohibition against ex parte communication with the arbitrator; and
 - (F) such other matters as the parties deem to be appropriate.
- (3) *Order by the Court:* The arbitrator will be appointed by order of the Court, which order may contain such directions to the arbitrator and to the parties as the Judge or Special Trial Judge considers to be appropriate.
- (4) *Report by the Parties:* The parties shall promptly report to the Court the findings made by the arbitrator and shall attach to their report any written report of summary that the arbitrator may have prepared.

(Effective July 1, 1990)

Rule 124. Voluntary Binding Arbitration

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- (3) *Order by the Court:* The arbitrator will be appointed by order of the Court, which order may contain such directions to the arbitrator and to the parties as the Judge or Special Trial Judge considers to be appropriate.
- (4) *Report by the Parties:* The parties shall promptly report to the Court the findings made by the arbitrator and shall attach to their report any written report of summary that the arbitrator may have prepared.
- ** (5) *Other Methods of Resolution:* Nothing contained in this Rule shall be construed to exclude use by the parties of other forms of voluntary disposition of cases, including mediation.

(Effective July 1, 1990)

T.C. RULE 124

ALTERNATIVE DISPUTE RESOLUTION

(a) Voluntary Binding Arbitration: The parties may move that any factual issue in controversy be resolved through voluntary binding arbitration. Such a motion may be made at any time after a case is at issue and before trial. Upon the filing of such a motion, the Chief Judge will assign the case to a Judge or Special Trial Judge for disposition of the motion and supervision of any subsequent arbitration.

(1) *Stipulation Required:* The parties shall attach to any motion filed under paragraph (a) a stipulation executed by each party or counsel for each party. Such stipulation shall include the matters specified in subparagraph (2).

(2) *Content of Stipulation:* The stipulation required by subparagraph (1) shall include the following:

- (A) A statement of the issues to be resolved by the arbitrator;
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- (E) a prohibition against ex parte communication with the arbitrator; and
- (F) such other matters as the parties deem to be appropriate.

(3) *Order by Court:* The arbitrator will be appointed by order of the Court, which order may contain such directions to the arbitrator and to the parties as the Judge or Special Trial Judge considers to be appropriate.

(4) *Report by Parties:* The parties shall promptly report to the Court the findings made by the arbitrator and shall attach to their report any written report or summary that the arbitrator may have prepared.

(b) Voluntary Nonbinding Mediation: The parties may move by joint or unopposed motion that any issue in controversy be resolved through voluntary nonbinding mediation. Such a motion may be made at any time after a case is at issue and before the decision in the case is final.

(1) *Order by Court:* The mediation shall proceed in accordance with an order of the Court setting forth such directions to the parties as the Court considers to be appropriate.

(2) *Tax Court Judge or Special Trial Judge as Mediator:* A Judge or Special Trial Judge of the Court may act as mediator in any case pending before the Court if:

- (A) the motion makes a specific request that a Judge or Special Trial Judge be designated as such, and
- (B) a Judge or Special Trial Judge is so designated by order of the Chief Judge.

(c) Other Methods of Dispute Resolution: Nothing contained in this Rule shall be construed to exclude use by the parties of other forms of voluntary disposition of cases.

T.C. Rule 124(b)

(b) Voluntary Nonbinding Mediation: The parties may move by joint or unopposed motion that any issue in controversy be resolved through voluntary nonbinding mediation. Such a motion may be made at any time after a case is at issue and before the decision in the case is final.

(1) *Order by Court:* The mediation shall proceed in accordance with an order of the Court setting forth such directions to the parties as the Court considers to be appropriate.

(2) *Tax Court Judge or Special Trial Judge as Mediator:* A Judge or Special Trial Judge of the Court may act as mediator in any case pending before the Court if:

(A) the motion makes a specific request that a Judge or Special Trial Judge be designated as such, and

(B) a Judge or Special Trial Judge is so designated by order of the Chief Judge.

(Effective May 1, 2011)

Note to Rule 124

Currently, Rule 124 is titled “Voluntary Binding Arbitration”, and mediation is referenced as an optional form of dispute resolution in paragraph (b)(5). In the Court’s experience, only a few arbitrations were conducted during the past 20 years, as opposed to a more substantial number of mediations. Accordingly, Rule 124 is amended to remove arbitration as the focus of the Rule. The amendments to Rule 124 change the title to “Alternative Dispute Resolution” and more clearly state that the Rule is applicable to both arbitration and mediation by, inter alia, inserting new paragraph (b) providing for the filing of a motion to proceed with mediation. Because a motion for mediation may be an agreed motion or simply unopposed, a joint motion is not required by the amendments. As contrasted with voluntary binding arbitration under what is now Rule 124(a), the issues susceptible of resolution through mediation are not limited to factual ones, and the mediation is nonbinding. Consequently, the amendments require no stipulation by the parties. The amendments to Rule 124 are not intended to prevent the parties from engaging in informal mediation or other forms of dispute resolution, with or without involvement by the Court. The amendments are effective as of May 5, 2011.

Agreement to Mediate

1. The Mediation Process. This mediation is intended to help *(petitioner)* and the Internal Revenue Service Office of Chief Counsel (the "Parties") reach their own negotiated settlement of the issues to be mediated in the Tax Court case *(petitioner)* v. Commissioner, *(insert Docket No.)* ("docketed case"). See paragraph 2 below for the participants in the mediation process. To accomplish this goal, the Mediator will act as a facilitator, assist in defining the issues and promote settlement negotiations between the Parties. The Mediator will inform and discuss with the Parties the rules and procedures pertaining to the mediation process. The Mediator will not have settlement authority and will not render a decision regarding any issue in dispute. The Parties WILL CONTINUE TO HAVE SETTLEMENT AUTHORITY FOR ALL ISSUES CONSIDERED UNDER THE MEDIATION PROCESS.

2. Nature of Process, Withdrawal. The mediation process is optional. The participants in the mediation session from *(petitioner)* will be *(name of petitioner, petitioner's counsel, any witness, and/or any expert witness for petitioner)*; and from the Internal Revenue Service Office of Chief Counsel, will be *(name of any counsel by respondent, any witness, and/or any expert witness for respondent)*. *(Petitioner)* must have participants attending the mediation session, in person or by telephone, with authority to recommend acceptance of any settlement proposal to persons in *(petitioner)* with decision-making authority regarding settlement. The Internal Revenue Service Office of Chief Counsel must have participants attending the mediation session with authority to recommend acceptance of any settlement proposal to persons in the Internal Revenue Service Office of Chief Counsel with decision-making authority regarding settlement. Either Party may withdraw from the mediation process at any time prior to reaching a settlement of the issues to be mediated by notifying the other Party and the Mediator in writing.

Each Party:

- a) may involve other appropriate persons in the mediation; and
- b) must notify the Mediator and the other Party 14 days before the mediation session regarding participants on their mediation team.

Agreement to Mediate

3. Selection of Mediator, Costs. The Parties agree to file a joint motion with the Tax Court seeking a Judge or Special Trial Judge of the Tax Court to be designated to act as Mediator pursuant to Tax Court Rule 124(b)(2). The Mediator shall have no official, financial, or personal conflict of interest with respect to the Parties, unless such interest is fully disclosed in writing to the Parties, and they agree that the Mediator may serve. The costs of the Mediator will be shared equally by the Parties, subject to applicable rules and regulations for Government procurement. In any event, neither Party shall be responsible for more than &-1 of the costs of mediation.

4. Issues to be Mediated. The mediation session will encompass the following items at issue in the Tax Court petition filed in the docketed case:

(List the issues to be mediated here).

5. Submission of Materials. Each Party will present to the Mediator a separate written summation not to exceed 20 pages (exclusive of exhibits consisting of pre-existing documents and expert reports) regarding the items in issue in the docketed case. At the mediation session, each party shall make its expert witness(es) available to the Mediator for questioning outside the presence of counsel for the Parties. The Mediator may question the Parties' expert witness(es) separately and/or together, but no counsel for either Party shall be present for such questioning. The Mediator will have the right to ask either Party for additional information before the mediation session if deemed necessary for a full understanding of the issues to be mediated. A copy of all information a Party gives to the Mediator will be provided simultaneously to the other party.

6. Proposed Schedule. Below is a schedule which will be followed by the Parties in preparation for the mediation process:

- a) Date for selection of Mediator: On or before 14 days after the signing of this Agreement, but by no later than **(date)**, the Parties shall file a joint motion with the Tax Court pursuant to Tax Court Rule 124(b) requesting the appointment of a Mediator.
- b) Date for submission of materials to Mediator and other Party: On or before 14 days prior to the date of the mediation session.
- c) Date for submission of participant's list to Mediator and other Party: On or before 14 days prior to the date of the mediation session.
- d) Mediation session: On or before **(date)**.

Agreement to Mediate

7. Place of Mediation. The Parties prefer to mediate in *(city, state)*. The Parties will select a mutually agreed upon site.

8. Confidentiality. The mediation process will be confidential. No Mediation Party shall in any arbitration, judicial, or other proceeding introduce as evidence or otherwise disclose:

(a) Views expressed or suggestions made by another Mediation Party or its or his attorneys or witnesses with respect to a possible settlement of this dispute;

(b) Admissions made by another Mediation Party or its or his attorneys in the course of the mediation proceedings;

(c) Proposals made or views expressed by any Mediation Party or the Mediator; or

(d) The fact that another Mediation Party had or had not indicated willingness to accept a proposal for settlement made by the Mediator. All statements by the Mediation Parties, attorneys, witnesses, and expert witnesses relating to the mediation process, and any documents created for or during the mediation process, including the mediation summations referenced in paragraph 5, are inadmissible and not discoverable for any purpose, including impeachment, in any pending or subsequent legal, administrative, or other proceedings.

9. Protection of Tax Return Information. (Petitioner) acknowledges that the Mediator and the other persons invited by the Parties to participate in the mediation will have access to all of *(petitioner)* tax return or return information pertaining to the issues being mediated pursuant to I.R.C. §§6103(b), 6103(c) and 6103(n) and the regulations thereunder. Internal Revenue Service employees involved in any way in the mediation process, and any person under contract to the Internal Revenue Service that the Internal Revenue Service invites to participate, will be subject to the confidentiality and disclosure provisions of the Internal Revenue Code, including I.R.C. §§ 6103, 7213 and 7431. Internal Revenue Service employees, LRA BriarRose, the Mediator, and persons invited to participate by the Parties in the mediation shall not voluntarily, or through discovery or compulsory process, disclose any information regarding the mediation process or any communication made during the mediation process, including the settlement terms.

10. I.R.C. § 7214(a)(8) Disclosure. The Parties to this agreement acknowledge that Internal Revenue Service employees involved in this mediation are, bound by the I.R.C. § 7214(a)(8) disclosure requirements concerning violations of any revenue law.

11. No Record. There will be no stenographic record or tape recording of the mediation process.

12. Ex-Parte Contacts Prohibited. There will be no ex-parte contacts with the Mediator outside the mediation session.

Agreement to Mediate

13. Stipulation of Settled Issues or Decision Document. If the mediation process enables the Parties to reach an agreement on the issues, Counsel for respondent will draft a Stipulation of Settled Issues or a Decision Document for the Parties' signature and submission to the Tax Court. If the Parties cannot reach agreement on the issues being mediated, the Parties will prepare for trial to commence on *(date of trial session)*, as Ordered by the Tax Court.

14. Precedential Use. A settlement reached by the Parties through mediation shall not serve as an estoppel in any other proceeding. Such settlement may not be considered in any factually unrelated proceeding and may not be used as precedent.

Order Appointing Mediator

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UNITED STATES TAX COURT
WASHINGTON, DC 20217

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Petitioner,)
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v.) Docket No. ██████████
)
COMMISSIONER OF INTERNAL REVENUE.)
)
Respondent)

ORDER

At the suggestion of the Court and by agreement of the parties in their joint Status Report filed May 5, 2016, it is

ORDERED that Special Trial Judge Lewis R. Carluzzo will act as a mediator to facilitate the parties' attempt to resolve this case through nonbinding mediation. See Rule 124(c), Tax Ct. Rules of Prac. & Proc. It is further

ORDERED that all information and documents furnished to Special Trial Judge Carluzzo for mediation purposes shall be kept confidential, shall not be included in the Court's official file in this case, and shall not be disclosed to any person who is not participating in the mediation process unless a Judge of this Court determines that disclosure of such information and documents is necessary:

- a. To prevent a manifest injustice;
- b. To help establish a violation of law; or
- c. To prevent harm to the public health or safety, and is of sufficient magnitude to outweigh the integrity of the mediation proceedings.

After taking into account the preferences of the parties, mediation shall take place in the manner, and on a date or dates, specified by Special Trial Judge Carluzzo.

Chief Judge

Dated: Washington, D.C.
(Date)

Order Appointing Mediator

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UNITED STATES TAX COURT
WASHINGTON, DC 20217

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████████████████████)
Petitioner,)
v.) Docket No. ██████████
COMMISSIONER OF INTERNAL REVENUE,)
Respondent)

and is of sufficient magnitude to outweigh the integrity of the mediation proceedings.

3. After taking into account the preferences of the parties, the mediation conference(s) shall take place in the manner, and on a date or dates, specified by Special Trial Judge Carluzzo.

Chief Judge

ORDER

Upon due consideration of the parties' Motion for Appointment of Mediator, filed July 24, 2015, it is

ORDERED that the parties' Motion for Appointment of Mediator is granted, and the mediation shall proceed in accordance with this Order. It is further

ORDERED that:

1. Special Trial Judge Lewis R. Carluzzo will act as the mediator in order to facilitate the parties' attempt to resolve the remaining issue in this case.

2. All documents to be furnished to Special Trial Judge Carluzzo shall be sent by the parties in a double-sealed wrapper, marked "Special Trial Judge Lewis R. Carluzzo, PERSONAL AND CONFIDENTIAL". All information and documents shall be kept confidential, shall not be disclosed to any person who is not participating in the mediation process unless a Judge of this Court determines that disclosure of such information and documents is necessary to -

- A. prevent a manifest injustice;
- B. help establish a violation of law; or
- C. prevent harm to the public health or safety,

Dated: Washington, D.C.
(Date)

Reserved: Traditional Steps.

Reserved: Confidentiality.