

Is Compelled Mediation a Viable Option for the Tax Court?

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In this article, Hoard and Nelson argue that an equitable and effective way to reduce the Tax Court's backlog is for the court to compel good-faith mediation, pointing to conservation easement disputes as a perfect example of the need for this resolution.

The Tax Court's backlog is no secret.¹ Reducing that backlog should be a priority not only for the court but also for its litigants. At the current rate, a taxpayer in a complicated case cannot expect a decision to be rendered until more than a decade after the transaction at issue.

One way to reduce the backlog is to compel good-faith mediation, which benefits taxpayers by simultaneously providing them with a voice and the means to resolve disputes equitably.

Easements: An Example of the Need for Resolution

Syndicated conservation easements are part of the IRS's "Dirty Dozen" campaign.² In December 2016 the IRS issued Notice 2017-10, 2017-4 IRB 544, which purported to identify certain easements as listed transactions.

Before issuing the notice, the IRS engaged in good-faith negotiations over the value of easements placed on individual parcels of real estate. In one coastal property case, the government settled for approximately \$62,000 an acre. In another, it settled for an amount comparable to the \$20 million deduction claimed on the return.

But since the issuance of Notice 2017-10, the IRS has taken the position that no donated real estate has any real value. Instead, the government has pursued a publicity campaign touting the evils of conservation easements³ and has insisted on the consistent treatment of all easements as worthless — no matter the value of the underlying real estate involved.

As of late, the only alternative to prolonged litigation has been to accept a new settlement initiative. Rather than publicize the initiative, the IRS has quietly offered the settlement to select partnerships on a basis that has not been widely disclosed. Under this initiative, a partnership must concede that the value of the conservation easement is zero. In exchange, taxpayers are offered a deduction for something the government calls an "other deduction" in an

¹ See, e.g., Bernie Becker, "A Little Tax Court Momentum," *Politico*, June 3, 2024; Chris Cioffi, "Tax Court Cases Stall as IRS Enforcement Grows, Vacancies Linger," *Bloomberg Tax*, Jan. 30, 2024.

² IRS, "Dirty Dozen: Beware of Abusive Tax Avoidance Schemes" (updated Mar. 4, 2024).

³ See, e.g., IR-2022-214.

amount approximating the investment in the transaction.⁴

But what about valid easement donations? What happens to transactions involving the donation of valuable real estate? Many individuals have put valuable developable properties into conservation, forever giving up the opportunity to monetize those properties. Under the current initiative, they get no deduction for the lost development potential — and must still pay a penalty. No wonder many citizens are angry and refuse to accept the IRS's offer.

Today, there is no meaningful way to discuss alternatives. Even after the passage of the Taxpayer First Act, it appears that the IRS Independent Office of Appeals continues to lack meaningful settlement authority. One Appeals officer even said that his hands were tied. As a result, conservation easement cases are a significant part of the Tax Court's backlog and are all headed to trial. At least, that appears to be the IRS's plan.⁵ In essence, the IRS is single-handedly controlling the Tax Court's docket and foreclosing a just, speedy, and inexpensive determination in the only prepayment forum available to taxpayers.

This approach not only wastes taxpayer money in general and the individual resources of each taxpayer, but it also creates additional work for the federal judiciary. For example, the Eleventh Circuit recently affirmed a district court's decision to set aside Notice 2017-10 because it was procedurally invalid under the Administrative Procedure Act.⁶ That case involved transactions from several years for which the plaintiff served as a material adviser. The plaintiff filed suit in 2021 and later moved for summary judgment, which the district court granted, and the appellate court affirmed.

A few years ago in *Hewitt*, the Eleventh Circuit held that the so-called proceeds regulation “violated the APA's procedural requirements.”⁷ Based on its review of the agency record and its own interpretation of the APA, the Eleventh Circuit concluded that the proceeds regulation “as read by the Commissioner to prohibit subtracting the value of post-donation improvements to the easement property from the proceeds allocated to the donor and donee in the event of judicial extinguishment — is arbitrary and capricious under the APA for failing to comply with the APA's procedural requirements and is thus invalid.”⁸

Another case, *Champions Retreat Golf Founders*, involved the 2010 donation of an easement on property along the Savannah River.⁹ The IRS challenged the conservation purposes of a relatively natural habitat and open space. The Eleventh Circuit disagreed and described the IRS's positions with terms like “nonstarter” and “makeweight.”¹⁰

In *Pine Mountain Preserve*, the appellate court summarily dismissed the IRS's position by relying on established state property law regarding land ownership and easements.¹¹

There is at least a possibility that these cases might have been resolved earlier if there had been meaningful settlement discussions. The Tax Court should feel empowered to enforce its own Rule 1(d), which envisions a quick and equitable resolution to proceedings. Compelled mediation is one underused tool that could be very helpful. An impartial mediator could help a taxpayer understand the perils of litigation and help the IRS evaluate real estate valuation in different markets across the country that the IRS's attorneys (and their managers) lack the experience and expertise to understand.

⁴The press has recently reported on this new settlement initiative. Erin McManus, “Conservation Easement Settlement Suggests Emerging Formula,” *Tax Notes Federal*, May 6, 2024, p. 1116.

⁵See IR-2022-17 (announcing the IRS's intention to hire an additional 200 attorneys to litigate, among other things, conservation easement cases).

⁶*Green Rock LLC v. IRS*, No. 23-11041 (11th Cir. 2024).

⁷*Hewitt v. Commissioner*, 21 F.4th 1336, 1353 (11th Cir. 2021).

⁸*Id.* at 1350.

⁹*Champions Retreat Golf Founders LLC v. Commissioner*, 959 F.3d 1033 (11th Cir. 2020).

¹⁰*Id.* at 1039, 1041.

¹¹*Pine Mountain Preserve LLLP v. Commissioner*, 978 F.3d 1200 (11th Cir. 2020).

The Tax Court's Authority to Compel Mediation

Tax Court Rule 124(b) provides for mediation with the parties' consent but does not foreclose court-ordered mediation. To the contrary, subsection (c) of that rule explicitly states that the listed alternatives for dispute resolution do not limit other forms of disposition. Mediation is a type of "voluntary disposition" implicitly contemplated by the rules.¹²

Further, the Tax Court has explained that "courts have the inherent authority to issue such orders as they deem necessary and prudent to achieve the orderly and expeditious disposition of cases in their jurisdiction."¹³ That inherent authority includes the court's power "to protect its own process from abuse, oppression and injustice and to enforce and vindicate its lawful process."¹⁴

The Supreme Court has likewise confirmed that all courts have the inherent authority to manage the process of litigation before them.¹⁵ As courts have recognized, this authority "forms the basis for continued development of procedural techniques designed to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts' dockets."¹⁶

One procedural technique the Tax Court has inherent power to compel is mediation. The authority to order parties to participate in alternative dispute resolution "would seem to be beyond question."¹⁷ In *Atlantic Pipe Corp.*, the seminal case addressing this topic, the First Circuit explored the issue in detail and held that a court "may order mandatory mediation through

the use of its inherent powers as long as the case is an appropriate one and the order contains adequate safeguards."¹⁸ Of course, the authority to order mediation can also stem from statutes and court rules.¹⁹ However, "even the adoption of a federal procedural rule does not implicitly abrogate a district court's inherent power to act merely because the rule touches upon the same subject matter."²⁰ That is because courts always have "substantial inherent power to manage and control their calendars."²¹ Although compelled mediation may not be appropriate for every situation, there are "specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objectors' rights to a full, fair, and speedy trial."²² The First Circuit explained:

In some cases, a court may be warranted in believing that compulsory mediation could yield significant benefits even if one or more parties object. After all, a party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position. In such an instance, the party's initial reservations are likely to evaporate as the mediation progresses, and negotiations could well produce a beneficial outcome, at reduced cost and greater speed, than would a trial. While the possibility that parties will fail to reach agreement remains ever present, the boon of settlement can be worth the risk.

This is particularly true in complex cases involving multiple claims and parties. The fair and expeditious resolution of such cases often is helped along by creative solutions — solutions that simply are not available in the binary framework of traditional adversarial litigation. Mediation with the assistance of a skilled

¹² See *Habitat Green Investments LLC v. Commissioner*, No. 14433-17 (T.C. 2022) (explaining that involuntary mediation is not explicitly authorized in Rule 124(b) but is not foreclosed and potentially falls within Rule 124(c)).

¹³ *Williams v. Commissioner*, 92 T.C. 920, 932 (1989) (internal quotation omitted).

¹⁴ *Id.* at 933.

¹⁵ See *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-631 (1962) (analyzing the inherent power "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

¹⁶ *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1989).

¹⁷ *Nick v. Morgan's Foods Inc.*, 99 F. Supp. 2d 1056, 1059 (E.D. Mo. 2000); see also *Sigma Marble & Granite-Houston Inc. v. Amerisure Mutual Insurance Co.*, No. H-09-3942, at *13 (S.D. Tex. Dec. 28, 2010) (ordering mediation in accordance with "the court's inherent power to manage its own affairs to achieve the orderly and expeditious disposition of cases").

¹⁸ *In re Atlantic Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002).

¹⁹ *Id.* at 140.

²⁰ *Id.* at 142.

²¹ *Id.* at 143.

²² *Id.* at 144.

facilitator gives parties an opportunity to explore a much wider range of options, including those that go beyond conventional zero-sum resolutions. Mindful of these potential advantages, we hold that it is within a district court's inherent power to order non-consensual mediation in those cases in which that step seems reasonably likely to serve the interests of justice.²³

The concept of a court requiring parties to seek a resolution out of court is not new.²⁴ Even Congress has recognized the value of alternative dispute resolution, including mediation.²⁵ Proceedings in the Tax Court should be no different. Nothing in the Tax Court rules precludes compelled mediation. To the contrary, the court "is informed by experience as to what is best to promote efficiency in disposing of the volume and variety of its work."²⁶ Mediation is one way to promote efficiency and can be compelled under the court's inherent authority.

Mediation Benefits Litigants and Judges Alike

Alternative dispute resolution options are valuable tools that can be used "to promote the speedy, just, and economical resolution of civil disputes."²⁷ Among these tools is mediation, the value of which "has been widely recognized."²⁸ In fact, mediation is one of the "numerous and varied types of pretrial settlement techniques" federal courts have used for many years.²⁹ Its increased use is not surprising because of its many benefits. For example, when a case is complex and judicial resolution would be both costly and time-consuming, "mediation holds out the dual prospect of advantaging the litigants and

conserving scarce judicial resources."³⁰ Mediation leads to "reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs."³¹

"The mediator improves communication, helps parties clarify their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal position, helps identify key legal and factual issues, identifies common interests and areas of agreement and helps generate options for a mutually agreeable resolution of the dispute."³² Because of the unique role of the mediator, mediation can "expand traditional settlement discussion, and broaden resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy."³³

Further, mediation does not prejudice either party; it is a nonbinding form of dispute resolution.³⁴ As the Eleventh Circuit explained, "mediation does not resolve a dispute, it merely helps the parties do so."³⁵ Although a judge cannot coerce parties to settle their disputes, the law favors and encourages the voluntary settlement of civil suits.³⁶ Mediation assists with that goal. Indeed, regardless of whether a particular case settles, participants are generally satisfied with the outcome of the mediation process.³⁷

The IRS has recognized that "the use of mediation, in appropriate cases, can result in a more efficient use of judicial and Service resources and assist in reducing the Tax Court's

³⁰ *Atlantic Pipe Corp.*, 304 F.3d at 145.

³¹ Adam Noakes, "Mandatory Early Mediation: A Vision for Civil Lawsuits Worldwide," 36 *Ohio St. J. on Disp. Resol.* 409, 413 (2020); see also D.D.C. LCvR 84(a) (explaining that mediation can "lead to resolutions more quickly, with less expense and with results that are more satisfying to the litigants than those that result from judicial disposition of a claim").

³² D.D.C. LCvR 84.2(a).

³³ *Id.*

³⁴ *Masso-Torrellas v. Toa Alta*, 845 F.3d 461, 465 (1st Cir. 2017).

³⁵ *Advanced Bodycare Solutions LLC v. Thione International Inc.*, 524 F.3d 1235, 1240 (11th Cir. 2008).

³⁶ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1072 (11th Cir. 2005); *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *Metropolitan Housing Development Corp. v. Arlington Heights*, 616 F.2d 1006, 1013 (7th Cir. 1980).

³⁷ See, e.g., U.S. District Court, Central District of California, 2017 *ADR Program Report* at 2.

²³ *Id.* at 144-145 (internal citation omitted).

²⁴ Cf. Fed. R. Civ. P. 16(c)(2) (allowing district courts to "consider and take appropriate action" by "using special procedures to assist in resolving the dispute"); *HSBC Bank USA NA v. Lombardo*, No. 2:19-cv-00291-NT, at *7 (D. Me. 2020) ("District courts around the country mandate various ADR [alternative dispute resolution] procedures.").

²⁵ 28 U.S.C. section 651.

²⁶ *Commissioner v. Erie Forge Co.*, 167 F.2d 71, 78 (3d Cir. 1948).

²⁷ *Pucci v. 19th District Court*, No. 07-10631, at *4 (E.D. Mich. 2009) (citing the Alternative Dispute Resolution Act of 1998).

²⁸ *DeepGulf Inc. v. Moszkowski*, 330 F.R.D. 600, 612 (N.D. Fla. 2019).

²⁹ *Id.*

inventory.”³⁸ Even if there is a chance mediation will not be successful, the court should be “mindful that the results of mandatory mediation resemble those achieved in voluntary mediation in terms of settlement rates and party satisfaction.”³⁹

Mediation has the potential to speed up what could otherwise be a very lengthy process and help clear cases from the Tax Court’s docket.⁴⁰ There is a need for legitimate options beyond Appeals. If there is any chance to bring the cases in the existing backlog to a quicker resolution, that tool should be employed.

The Tax Court Can Direct Mediation Procedures

The inherent authority to order mediation also includes the power to specify the procedures used and the way the mediation is to be conducted.⁴¹ In other words, the Tax Court can put in place “ground rules intended to maximize the efficaciousness of the process and increase the likelihood of settlements.”⁴²

Those rules could include dictating how the parties go about selecting a mediator, the time limits in which the mediation should be conducted, and the expectation that qualified independent appraisers be involved in a mediation involving valuation issues. If the parties are unable to agree on a mediator, the court could appoint a retired judge. The mediator could also engage the services of a neutral qualified appraiser to serve as an appointed expert witness.⁴³ We suggest the Tax Court follow procedures adopted by the U.S. District Court for the District of Columbia in its mediation program,

including the submission of confidential mediation statements⁴⁴ and a requirement for those with settlement authority to attend.⁴⁵

In certain circumstances, it may also be appropriate to stay a case so that mediation can occur.⁴⁶ A temporary stay could give the parties time to mediate without expending more resources.

Whatever procedures are employed, any court-ordered mediation should include an obligation for the parties to participate in good faith, with many jurisdictions already imposing and enforcing such an obligation.⁴⁷ But as one judge lamented, “We can lead a party to water but we cannot make him drink.”⁴⁸ The Tax Court has previously recognized a similar sentiment:

The parties are encouraged to try to settle the case before either side incurs further costs of expert witness fees on the valuation issue. . . . Each party would be justified in settling the case on the grounds that they face the risk of an unfavorable outcome because of the uncertainties of continued litigation.⁴⁹

A court-ordered obligation to mediate in good faith will not solve every problem, but it will at least help.

Conclusion

Unless the Tax Court intends to try every case before it, it should investigate options for alternative dispute resolution. Compelled mediation is one such option. We hope that those with the authority to do so will investigate and pursue this option. ■

³⁸ Internal Revenue Manual 35.5.5.4(3).

³⁹ *United States v. Tenacious Holdings Inc.*, 6 F. Supp. 3d 1374, 1378 (Ct. Int’l Trade 2014) (internal quotation omitted); see also Noakes, *supra* note 31, at 413 (“The numbers show that whether purely voluntary or part of a mandatory regime, mediation is wildly successful.”).

⁴⁰ *Pine Mountain*, decided by the appellate court in 2020, involved contributions from 2005, 2006, and 2007. *Champions Retreat*, decided by the appellate court in 2020, involved a 2010 contribution. *Hewitt*, decided by the appellate court in 2021, involved contributions from 2012, 2013, and 2014.

⁴¹ *Pinero v. Corp. Courts at Miami Lakes Inc.*, 389 F. App’x 886, 888-889 (11th Cir. 2010) (per curiam); *Belanger v. Powell*, No. 3:10-cv-1405, at *2 (M.D. Pa. 2017); *AquaShield Inc. v. Sonitec Vortisand Inc.*, No. 1:13-cv-119-SKL, at *2 (E.D. Tenn. 2014); *Cunningham Charter Corp. v. Learjet Inc.*, No. 07-233-DRH, at *2 (S.D. Ill. 2012).

⁴² *Pucci*, No. 07-10631 at *5.

⁴³ See Fed. R. Evid. 706.

⁴⁴ D.D.C. LCvR 84.6.

⁴⁵ D.D.C. LCvR 84.8.

⁴⁶ *Aerofund Financial Inc. v. Office Depot Inc.*, No. 14-80420-CIV, at *1 (S.D. Fla. 2014); *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1117 (E.D. Wash. 2012); see also *Advanced Bodycare Solutions*, 524 F.3d at 1241 (noting that “granting a stay to permit mediation (or to require it) will often be appropriate”).

⁴⁷ Sarah R. Cole et al., *Mediation: Law, Policy and Practice* section 9:6 (2024) (citing examples).

⁴⁸ *Habitat Green Investments*, No. 14433-17.

⁴⁹ *Pine Mountain Preserve LLLP v. Commissioner*, No. 8956-13 (T.C. May 2, 2023).