

ALTERNATIVE DISPUTE RESOLUTION AND
JUDICIAL REVIEW

8TH INTERNATIONAL CONFERENCE ON TAXPAYER
RIGHTS

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KEEP IN MIND.....

All ADR techniques in the Tax Court are voluntary.

ADR procedure should be less burdensome and less expensive than proceeding to trial.

EXECUTIVE ORDER 12988

February 5, 1996, President William Clinton

In February 1996, President Clinton issued Executive Order 12988 requiring that all government litigation counsel make reasonable attempts to resolve a dispute before proceeding to trial. Relevant portions of the Executive Order are reproduced below.

Civil Justice Reform, 61 Fed. Reg. 4729

Section 1 . . .

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal ADR methods, litigation counsel should be trained in ADR techniques.

U.S. TAX COURT RULES

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; (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 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.

CHALLENGE TO ARBITRATION RESULTS

Duncan v. Commissioner, 121 T.C. 293 (2003).

- Taxpayers petitioned for redetermination of deficiencies arising from disallowed charitable contribution deductions of interest in natural gas wells. The taxpayers agreed to binding arbitration under T.C. Rule 124 on the fair market value of such interests. The taxpayers, dissatisfied with the arbitration, moved to delay entry of arbitrator's findings, but the Tax Court (Thornton, J.) held that the terms of arbitration agreement precluded the taxpayers from offering additional information.

IS NONBINDING REALLY NONBINDING?

Dorchester Indus. Inc. v. Commissioner, 108 T.C. 320 (1997), *aff'd. without published opinion* 208 F.3d 205 (3d Cir. 2000).

CONFIDENTIALITY

5 U.S.C. 574(a)

Provides in general that “a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral.”

28 U.S.C. 652(d)

Requires that each U.S. District Court by local rule “provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.”