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## Ninth Circuit Rules That DOJ Tax Division Head Does Not Have to Attend Routine Settlement Conference

The Ninth Circuit in *U.S. v. U.S. District Court for the Northern Mariana Islands* (“*Northern Mariana Islands*”), No. 11-72940, 2012 WL 3984406, recently granted relief to the government and directed a district court to vacate orders that directed the government to send a representative with full authority to settle a civil tax refund lawsuit to an initial settlement conference. Although the appellate court held that the district court has the authority to order parties, including the federal government, to participate in mandatory settlement conferences, the Ninth Circuit found that the district court abused its discretion in ordering attendance by a representative with full settlement authority under the circumstances of the case. The Ninth Circuit cited two factors important to its determination: (1) the lowest-ranking official with settlement authority over the case was the Assistant Attorney General of the Tax Division (“Assistant Attorney General”) and it would be impractical to require the Assistant Attorney General to appear at all settlement conferences in all cases involving amounts within his or her settlement authority; and (2) the initial settlement conference was a matter of routine practice under the district court’s local rules, and the personal participation of the person able to make a final decision was not vital. While the practice of not sending a representative with ultimate settlement authority is fairly standard for the Department of Justice, the Ninth Circuit’s decision adds guidance with respect to an important issue for taxpayers, as settling a case can be more difficult when not dealing directly with the ultimate decision-maker.

The Department of Justice has promulgated specific regulations that identify the persons with authority to settle claims made against the United States. In the case of tax refund claims, authority to settle claims in excess of \$2 million resides with the Assistant Attorney General of the Tax Division. 28 C.F.R. § 0.160. See also 26 U.S.C. § 6405 (also requiring review by the Joint Committee on Taxation where a refund amount exceeds \$2 million). Settlements of less than \$2 million may be accepted by other representatives of the Tax Division, pursuant to specific delegation procedures issued by the Assistant Attorney General. 76 Fed. Reg. 15212.

In *Northern Mariana Islands*, the underlying case was a tax refund case in which the taxpayer sought to recover more than \$5 million in taxes, penalties and interest. Pursuant to a local rule that provided that the court may mandate attendance at a scheduled settlement conference by each party through a representative with full authority to settle the litigation, the district court issued an order scheduling a settlement conference before a settlement judge. The government moved for relief on three separate occasions arguing that because of the size of the claim, the lowest-ranking official authorized to settle the case was the Assistant Attorney General. The government proposed a compromise to send the trial attorneys responsible for the case, with the Section Chief of the Tax Division’s Office of Review<sup>1</sup> available by telephone, rather than to send the Assistant Attorney General. The district court denied the government’s request and proposed compromise on each occasion. Finally, the government filed an emergency petition for a writ of mandamus to the Ninth Circuit and an emergency motion to stay the settlement conference.

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<sup>1</sup> The Office of Review is a section within the Tax Division. It has authority to settle cases in which the Government’s concession is \$1.5 million or less. See 76 Fed. Reg. 15212. The Office of Review also typically advises the Assistant Attorney General on settlements where the settlement amount is in excess of the \$1.5 million threshold.

On review, the Ninth Circuit clarified that the district court has broad authority to compel participation of a party with settlement authority in a mandatory settlement conference, citing three sources: (1) Federal Rule of Civil Procedure 16(c)(1); (2) the Civil Justice Reform Act of 1990; and (3) the district court's inherent power to control the disposition of its docket. The court further confirmed that that authority extended to cases involving the federal government, noting that "[t]he Attorney General is not independent of the court's authority, including its authority over a settlement conference." However, the court held that the district court's broad power to compel participation in a mandatory settlement conference is subject to review for abuse of discretion, and the court concluded that such an abuse had occurred under the facts of the case. In reaching its conclusion that the district court abused its discretion, the Ninth Circuit cited two factors. First, it stated that the most important reason is that the federal government is unlike any other litigant. In particular, the court acknowledged that the Department of Justice and the Tax Division are responsible for a very large number of cases—approximately 549 civil cases involving an amount in controversy exceeding \$2 million. The court noted that requiring the Assistant Attorney General "to prepare for and appear at all settlement conferences for all of those cases would be highly impractical, if not physically impossible." Second, the court noted that the settlement conference in question was the first scheduled in the case, that the conference was a matter of routine practice under the local rules, and that discussions had not yet reached the point where the personal participation of the person able to make a final decision was vital.

The Ninth Circuit's decision is generally consistent with the Fifth Circuit's decision in *In re Stone*, 986 F.2d 898 (5<sup>th</sup> Cir. 1993), which similarly held that a district court abused its discretion in routinely requiring a representative of the government with ultimate settlement authority to be present at all settlement conferences. Like the Fifth Circuit, however, the Ninth Circuit noted that an order requiring attendance by a representative with full settlement authority would be appropriate in certain circumstances; for example, when the district court's reasonable efforts to conduct settlement efforts were "thwarted because the government official with settlement authority will not communicate with the government counsel or the court in a timely manner." In addition, in a later case, *In re United States of America*, 149 F.3d 332 (1998), the Fifth Circuit denied the government's writ of mandamus and held that the district court did not abuse its discretion where it ordered that the government be represented by someone with full settlement authority at an ordered mediation. In that case, the Fifth Circuit distinguished *In re Stone* on the basis that the mediation was not of a routine nature. Similarly, two recent non-tax United States district court cases have denied the government's request for relief. In each, the court determined that alternative efforts had already been made to reach settlement, such as a prior settlement conference and resolving substantive pretrial motions before a mandatory settlement conference. See *Dietzmann v. U.S.*, 2010 WL 5067901 (D.Alaska); and *Scott v. U.S.*, 552 F.Supp.2d 917 (D.Minn. 2008).

Together with opinions from the Fifth Circuit and other federal courts, taxpayers should read *Northern Mariana Islands* as adding important guidance with respect to settlement discussions with the government in tax litigation cases. While the government is given particular attention considering its unique position as a litigant, in certain circumstances—such as non-routine settlement conferences—it may be appropriate for a district court to require the government to send a representative with full settlement authority to be present at a settlement conference.



*If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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