

## Tax Court Mediation : Reshaping the Current Practice in Thailand

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The expansion of court mediation around the globe is the best evidence of the effectiveness of mediation as a form of alternative dispute resolution. Mediation is widely applied not only because it can reduce the backlog of cases before the court, but also because it can better lead to amicable resolutions of disputes. The parties play an important role in finding ways to settle their disputes. The hostility between parties is mitigated by the self-determination of outcomes. With the growing number of tax disputes today, taxpayer dissatisfaction with tax collectors is on the increase. Taxpayers consistently complain about harsh approaches of tax collection under government agency schemes and cry out for more taxpayer-oriented dispute resolution. This paper aims to discuss mediation as an instrument of tax dispute resolution and the possibility of its development in the Central Tax Court of Thailand. The first part of this paper begins with an overview of mediation and its advantages at the individual and systematic level. The second part explores the role of mediation in tax disputes by focusing on US experiences. Part three discusses the current practice of tax mediation in the Central Tax Court of Thailand, and the final part identifies problems and recommends some procedural amendments for the future development of the mediation in the Central Tax Court of Thailand.

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## 1. Mediation and Its Advantages

Although the definition of mediation varies and is subject to wide discussion, in principal, it entrenches an informal, consensual process in which a neutral third party, without power to impose a settlement, assists disputing parties in reaching a mutually satisfactory solution. The term "mediation" stems from the Latin "mediate", meaning "to be in the middle".<sup>1</sup> Accordingly, the primary role of the mediator is to reorient the parties toward each other by helping them to share perception of their relationship. This role will redirect the parties' respective attitudes toward one another.<sup>2</sup> One of the most attractive values of mediation is the self-determination; parties in dispute identify the issues, develop options for settlement and decide freely without pressure from outside.<sup>3</sup> From all perspectives, the advantages of mediation can be viewed in two levels: the individual level and the systematic level.<sup>4</sup>

For individual advantages, parties derive three outstanding benefits from mediation as an alternative to adjudication. The first is the preservation of a relationship between the parties. While the traditional approach of adjudication may leave dispute parties in a state of deep conflict due to the confrontational nature of adversarial procedures, mediation amicably resolves disputes by the consensual resolution of parties. After resolution, the continuation of a relationship between those involved in conflict is perceivable. The second, in contrast with judicial procedure, mediation paves the way for both parties to engage in bargaining. After bargaining and reaching a settlement, both

1. Kimberlee K Kovach, *Mediation Principal and Practice* 16 (1994).

2. Jacqueline M, Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47, 50 (1996).

3. Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 Pepp. Disp. Resol.L.J.111, 113 (2002).

4. Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Process*, 103 Harv.L.Rev.1086, 1089 (1990).

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parties are regarded as a winner. Lastly, the self-determined features of mediation create opportunities for the parties to have more input in the process and fashion their own remedies.<sup>5</sup>

Apart from individual values, mediation also contains a benefit at the systematic level. Where adjudication is not the only means to resolve conflict, mediation plays a significant role in reducing court congestion. Mediation methods will be utilized as a means of resolving conflicts which are not necessarily well-suited for adjudication. It opens the door for other cases requiring judgments to be adjudicated and accelerates their disposition.<sup>6</sup>

### 2. Mediation in Tax Disputes: US Experiences

Although mediation is an effective mechanism of dispute settlement both individual and systematic benefits for the legal system, the effectiveness of mediation is unclear in the context of tax cases. Disputes regarding tax matters create distinctive issues apart from those in other commercial disputes. A tax agency has as its primary interests the collection of revenue and providing public examples of tax misbehavior, whereas the taxpayer's primary interest is in paying less tax. Hence, we would expect the respective positions of the disputing parties to create impasses during the course of mediation.

Despite these theoretical impasses, the application of tax mediation has proven to be successful in the US not only in tax administration but also in Tax Court. American tax agencies believe that mediation is a promising way to pursue the interests of tax collection agencies while maintaining fairness and a positive relationship with taxpayers.<sup>7</sup>

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5. Id.

6. Id.

7. Tonya M. Scherer, *Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens Its Doors to Mediation*, J. Disp. Resol. 215, 225 (1997).

## 2.1 The IRS and Mediation

In order to improve the relationship between the Inland Revenue Service (IRS) and taxpayers, in 1995, the IRS launched a one-year pilot project applying mediation in the tax appeal process. At the start of this project, the IRS restricted the instances in which mediation would be made available. Under Announcement 95-86, the taxpayer or Office of Appeals can request mediation only after negotiations in the appeals process fail. Moreover, the cases in which mediation is considered appropriate are limited to factual issues such as valuation, reasonable compensation and transfer pricing issues. In addition, requests for mediation must be approved prior to its implementation in any given case.

With the success of pilot project, Congress expanded the mediation program three years later. In 2002, the IRS instituted mediation as a permanent part of the appeal process and made it available for both factual and legal issues.<sup>8</sup>

## 2.2 Tax Court and Mediation

Societal changes have triggered dramatic changes not only in the private sector but also in the public sector, such as the judicial system. The traditional ways in which courts conduct hearings, examine evidence and deliver judgments are insufficient to handle growing court dockets. In response to those changes, Alternative Dispute Resolution (ADR), especially mediation, has been applied as an instrument of case management. Courts around the world have increased interest in mediation's potential as an official settlement process.<sup>9</sup>

Mediation in various areas such as personal injury, commercial disputes, divorce and family mediation begin in most cases with a referral from a court or other authoritative

8. Gregory P. Mathews, *Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes*, 19 Ohio St. J. on Disp. Resol. 709, 720 (2004).

9. Jacqueline M, *supra* note 2 at 2.

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public agency.<sup>10</sup> With the successful outcome of the IRS's mediation program, the Tax Court has consistently encouraged parties to settle valuation disputes outside of litigation and publicly urged the use of mediation to resolve factual issues. The Tax Court applies general judicial authority governed by Rule 1, or the broad language of Rule 124 in support of the application of mediation in docketed cases. Nevertheless, mediation is not available in docketed cases if it proved unsuccessful before as a non-docketed case.

The parties to the mediation process are the taxpayer and district counsel. After the parties jointly select a mediator according to the Ann. 95-86 guidelines, the mediator will act as a facilitator for the parties and assist parties in defining the issues and promoting settlement and bargaining between the parties. If the parties reach an agreement on the course of mediation, district counsel will draft a stipulation of settled issues and submit it to the Tax Court. If the parties are unable to reach an agreement, the case will go to trial.<sup>11</sup>

### 3. Tax Court Mediation in Thailand

The Civil Procedure Code of Thailand B.E. 2477 sections 19, 20 and 20 bis empower the Court to order mediation either at his own discretion or at the request of a party. Moreover, to facilitate the entire mediation process, the Code stipulates that court may conduct mediation in private and, when deemed appropriate, the mediation may be made without the presence of the other party.

Triggered by the large number of financial disputes, the Court of Justice established the Mediation Center in the Dispute Resolution Office to settle cases amicably without going to trial. In 1996, the President of the Supreme Court issued the Practice Guidance on Court-Annexed Mediation and Arbitration. This guidance

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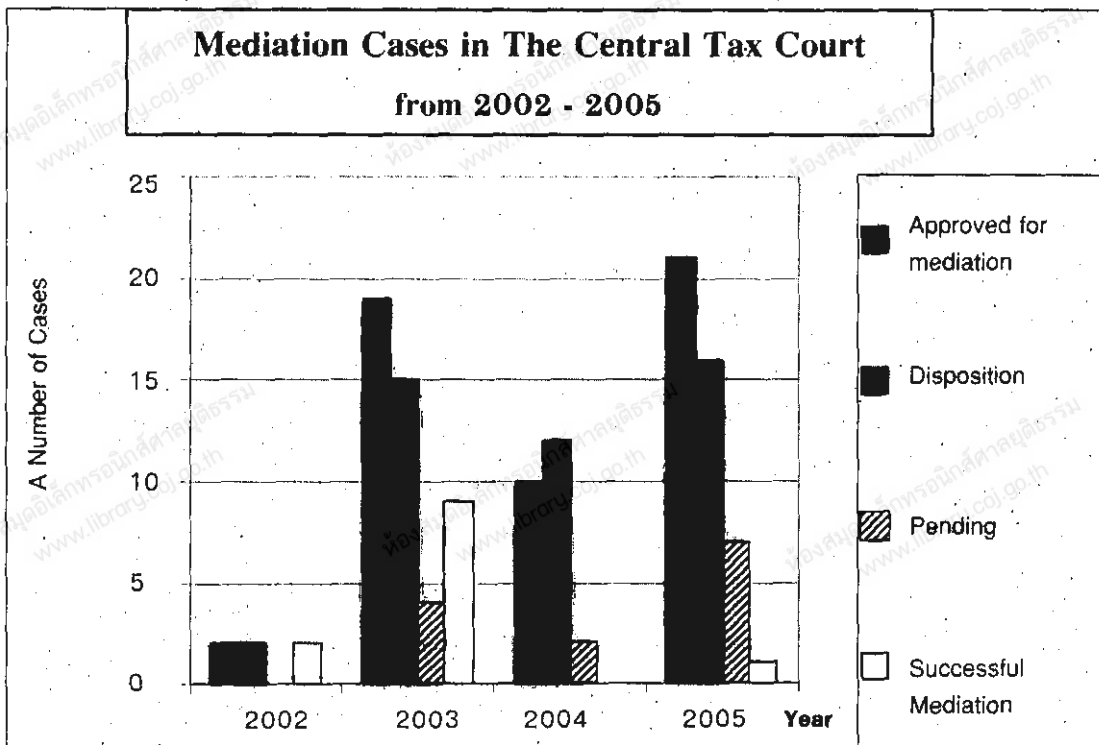
10. Bush, *supra* note 3, at 114.

11. Louthan, Thomas Carter, Wrapps, Steven C., *Building A Better Resolution: Adapting IRS Procedures to Fit the Dispute*, 13 Tax Notes Int'l 1473, 1484-1485 (1996).

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contributes to the progressive increase in the popularity of the mediation. At present mediation is widely practice by courts of justice throughout the country including the Central Tax Court (the "Court").<sup>12</sup>

By issuing the Central Tax Court Rules regarding Mediation for the Dispute Settlement in 2002, the Court began its experiment in officially and systematically placing mediation as a dispute settlement mechanism for case management in the Court. Since then, a number of cases filing a request for mediation have steadily increased along with the growing numbers of successful mediations. The following chart illustrates the trend of mediation cases in the Central Tax Court from 2002 to 2005.



12. Vichai Ariyanontaka, *Court-Annexed ADR in Thailand: A New Challenge*, LEADR's 7th International Alternative Dispute Resolution Conference, 27th - 29th July 2000, available at <http://member.tripod.com/asiaweb/articles/adr.htm> (last visited July 18, 2006).

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## 4. Reshaping Current Practice

Although the practice of the mediation in the Court is promising, it still contains room for improvement, especially with respect to the mediator. The governing rule, the Central Tax Court Rules regarding Mediation for the Dispute Settlement, 2002, defines "mediator" as a judge working in the Court and appointed by the Chief Judge as a mediator. In response to the Rule and in an effort to improve the efficiency of mediation, the Court issued Order No. 5/2548 (2005) listing the names of mediators. All of them are present judges in the Central Tax Court. Moreover, those rules contain no provision entitling the parties to select the mediator on their own. The parties are bound to be mediate only through a court-provided mediator.

### a. A Critique of Judicial Mediators

Because mediation is a process in which a neutral third party assists the dispute parties to find way of resolving problems, the mediator plays a leading role in mediation success. Although some studies suggest that judge-run mediation saves the parties and the courts both time and money, the central criticism of judicial mediation is that judge-run mediation may conflict with the perception of judicial impartiality and thereby may not lead to effective outcomes when compared with non-judge mediators.

There are apparent advantages to having tax court judges as mediators. Firstly, tax court judges possess expertise regarding tax issues. Their training allows them to easily understand taxpayer claims. Secondly, tax court judges may be able to offer more practical experience in tax dispute settlements than most private mediators. Finally, a judge's social status may contribute to the speed in which the parties settle disputes. However, these advantages do not outweigh the inherent weaknesses of judge-run mediation.

Judges and mediators play a different role in settling disputes. As an adjudicator, a judge is accustomed to keeping both physical and psychological distance from the parties. The purpose of this objective detachment is to reassure the parties of both

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the actual impartiality and the appearance of impartiality of the ultimate decision-maker.<sup>13</sup> In a court room, judges sit apart from the parties, usually in an elevated physical position. The communication between judges and parties has to be done in a formal manner according to procedural rules. The judge delivers an opinion based on evidence, not emotion. In contrast, the role of mediator is to understand and help the parties. The distance between the mediator and the parties is naturally minimized. The mediator sits close to the parties and speaks directly to them, sometimes without the presence of lawyers.

The contradiction between the judge's role and mediator's role is even clearer when discussing the mediation technique called "caucus conference". Generally, a judge does not meet separately with one side to reassure that party of judicial impartiality. In mediation, speaking separately with each party through the caucus method creates the opportunity for the mediator to receive information that the parties would otherwise hold private.<sup>14</sup>

To resolve controversial issues and enhance the effectiveness of the mediation program, appointing non-judge tax mediators who possess tax expertise should be the next step in the development of the Court's mediation program. The qualifications Central Tax Court Mediators may include mediation training, previous mediation experience and substantive knowledge of tax law or commercial and financial practices.

### **b. Open Door for Mediator Selection**

As above mentioned, the Central Tax Court Rules regarding Mediation for the Dispute Settlement, 2002 contains no provision regarding the selection of mediators. The parties are bound to have their disputes mediated only by court-provided mediators.

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13. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, in *Alternative Dispute Resolution* 347 (Michael Freeman ed., 1995).

14. Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 *Ariz. L. Rev.* 559 (2001).



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The mediator not only needs to facilitate the building trust between the parties but must generate trust on the mediator himself.<sup>15</sup> The building of trust may easily be achieved from the beginning of the mediation process if both parties are allowed to mutually select the mediator. A court-provided mediator should be in place only after the selection process fails.

### Conclusion

The traditional way of solving disputes amicably through mediation could prove to be an effective means of dispute mechanism in present world. Courts around the world recognize the advantage of mediation for a cheap, simple and self-determined resolution of disputes. Courts tend to use mediation as a significant instrument of ADR and case management. Nevertheless, the potential effectiveness of mediation has been questioned when being applied in tax cases. Much of this doubt has evaporated after seeing the successful outcome of pilot projects in tax mediation in the U.S. On the other hand, in Thailand, apart from applying articles 19 and 20 of the Civil and Procedure Code, the Central Tax Court now officially fosters mediation as a key dispute settlement mechanism by issuing the Central Tax Court Rules regarding Mediation for the Dispute Settlement, 2002. Although the use of mediation in the Court has achieved some promising results to date, it requires further improvement, especially regarding mediator, to achieve full effectiveness. Non-judge mediators are an essential element of achieving the most effective outcome and fully gaining the benefits of mediation. Moreover, the Courts should consider the amendment of governing rule to open opportunity for parties in jointly selecting their mediator.



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15. John W. (Sam) Keltner, *Mediation toward a Civilized System of Dispute Resolution* 11 (1990).