



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, D.C. 20224

SMALL BUSINESS / SELF-EMPLOYED DIVISION

April 2, 2008

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MEMORANDUM FOR EXAMINATION EXECUTIVES

FROM: Valerie K. Liu /s/Valerie K. Liu
Director, Technical Services

SUBJECT: Interim Guidance on Counsel Review Criteria for Statutory
Notices of Deficiency

The purpose of this memo is to issue interim guidance to inform you of changes to the criteria for the type of cases that require mandatory Area Counsel review of statutory notices of deficiency prior to issuance contained in IRM 4.8.9.7.1. This interim guidance memorandum transmits the modifications to these criteria until incorporated into the IRM. Attached is a draft of the revised IRM. Please ensure that the information contained in this memo is distributed to all affected employees within your organization.

The permanent changes to the criteria in IRM 4.8.9.7.1 requiring mandatory Area Counsel Review involve the following:

- The threshold amount of the deficiency plus penalties per tax period has been increased *from* deficiencies plus penalties exceeding \$250,000 per tax period without considering offsets *to* \$1,000,000 in the aggregate, excluding interest and without considering offsets. Cases falling below this threshold *must* be reviewed if other mandatory review criteria apply.
- The amount of substantial deficiencies involving indirect methods of determining unreported income, use of Bureau of Labor statistics (BLS), or information returns (IRP) in which the burden of proof is on the Commissioner, remains at \$100,000, but has been clarified: the \$100,000 threshold amount is per tax period and excludes penalties and interest.

Three new permanent criteria have been added:

1. Cases where no fraud penalty is asserted against the taxpayer, but the statute of limitations is open because the case involves a fraudulent return prepared by a return preparer. See Allen v. Commissioner, 128 T.C. 37 (2007)
2. Cases involving listed transactions, transactions of interest, or other reportable transactions unless excepted from mandatory review by all IMT Counsel of the IMT in consultation with the IMT.
3. Cases in which a Final Partnership Administrative Adjustment (FPAA) letter must be issued

Any questions or concerns should first be routed through your local management chain for resolution. For any unresolved issues, contact Chief, Technical Services Operations Paul Marmolejo or Technical Services Analyst, Carol Walters.

Effect on Other Documents: This Interim Guidance Memorandum will be incorporated into IRM 4.8.9 by April 1, 2009.

Attachment

cc: Division Counsel, SB/SE, LMSB, TEGE
Director, Technical Services, Appeals
www.irs.gov

4.8.9.7.1 Mandatory Area Counsel Review Criteria

(1) The Field Director and Area Counsel may decide that Area Counsel will not review any of the notices of deficiency before issuance. Otherwise, as outlined in the following paragraphs (2 through 20 immediately below), certain notices of deficiency must be reviewed prior to issuance. The authority to issue a notice of deficiency rests with those Service officials delegated the authority by Service-wide Delegation Order 4-8 (formerly Delegation Order 77). The role of Area Counsel in this procedure is to provide advice on whether a notice of deficiency should be issued, and if so, to make recommendations concerning the issues to be asserted and the wording of the determination.

(2) Fraud penalty, including notices where no fraud penalty is asserted against the taxpayer, but the statute of limitations is open because the case involves a fraudulent return prepared by a return preparer. See Allen v. Commissioner, 128 T.C. 37 (2007)

(3) Transferee liability

(4) Burden of Proof cases: e.g., exceptions to the statute of limitations due to mitigation, substantial omission of income, accumulated earnings tax, illegal bribes or kickbacks, etc.

(5) Substantial deficiencies (in excess of \$ 100,000 per tax period, excluding penalties and interest) involving indirect methods of determining unreported income, use of Bureau of Labor statistics, or information returns where the burden of proof will be on the Commissioner.

(6) Notices where the deficiency plus penalty exceeds \$ 1,000,000 in the aggregate (excluding interest and without considering offsets). Notices falling below this dollar threshold must be reviewed by Counsel if other mandatory review criteria apply.

(7) Jeopardy and termination assessments

(8) Doubt as to proper party to which the notice should be sent

(9) Alternative positions

(10) Issues affecting related parties: parent and subsidiary corporations, corporate distributions, corporate reorganizations and similar issues or facts.

(11) High profile media attention cases where the appropriateness of conducting the examination may be questioned. Examples include cases where the taxpayer is famous or notorious, had a prior criminal case which was the subject of media attention, or any case involving politicians, congressional hearing witnesses, or allegations that the Service had examined the taxpayer for impermissible reasons.

(12) Difficult legal issues

(13) Department of Justice, Chief Counsel or Area Counsel recommendation to issue notice

(14) Complex international issues

(15) Unique, recurring or complex issues

(16) Coordinated issues

(17) Notices involving *Munro* calculations or notices involving oversheltered returns. See IRM 4.8.9.14.5

(18) Notices involving listed transactions, transactions of interest, or other reportable transactions unless excepted from mandatory review by all IMT Counsel of the IMT in consultation with the IMT.

(19) All Final Partnership Administrative Adjustment (FPAAs) letters

(20) Any notice, regardless of amount, that the Area Director (or designee) believes warrants Area Counsel review.