

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2009-002

October 10, 2008

Subject: Generic Legal Advice

Upon incorporation
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Purpose

This notice sets forth revisions to the legal advice procedures implementing the recommendations in Notice CC-2006-013 (May 5, 2006) and Notice CC-2007-003 (January 17, 2007).

Background

A primary function of the Office of Chief Counsel is to serve as the legal advisor to the Commissioner of Internal Revenue on all matters pertaining to the interpretation, administration, and enforcement of the internal revenue laws. In August 2005, the Chief Counsel and the Deputy Chief Counsel (Operations) assembled a task force to consider whether field counsel and national office counsel were working effectively together to provide timely and accurate legal advice to the Internal Revenue Service. On May 5, 2006, the task force reported its observations and recommendations to the Chief Counsel, who directed the adoption of the recommendations, which was done through Notice CC-2006-013 (May 5, 2006), Notice CC-2007-003 (January 17, 2007), and Rev. Proc. 2007-2, 2007-1 I.R.B. 88. Thereafter, in December 2007, the Chief Counsel asked for a review of the effectiveness of the previous recommendations.

The cross-functional team asked to conduct the review decided that the most effective means to determine whether the prior recommendations had been effectively implemented would be to interview a cross-section of managers involved in the process of providing legal advice to the Internal Revenue Service. Those interviews focused on several topics, including (1) generic legal advice memoranda (GLAs), (2) technical advice memoranda (TAMs), and (3) other legal advice issued by the National Office.

In the original task force report, several principal problems were noted. First, the original task force found that revenue agents were using TAMs as generic guidance, rather than as case specific advice, even though TAMs were not supposed to be used in that way. Second, there was an acknowledgement of the need for faster responses by Counsel because the IRS operating divisions were making efforts to complete cases in a more timely fashion.

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The original task force concluded that no single change would resolve these problems. Instead, it recommended an approach that was designed to relieve the pressure on TAMs to resolve generic problems, to provide an alternative vehicle for obtaining timely advice, and to streamline the TAM process. This was to be accomplished by creating a standard format for generic legal advice, by creating a standard format for case-specific legal advice, and by streamlining and simplifying the revenue procedure for TAMs.

Generic Legal Advice Issued by Executives in the National Office (Executive GLAs)

The interviewees were overwhelmingly enthusiastic in their approval of the revamped process. The Counsel Field executives found it to be a useful product that was quickly delivered. They also mentioned that IRS executives found GLAs attractive. Support for the GLA process was particularly strong among the various Associate Chief Counsel offices. Counsel executives have observed an increased need for rapid, widely applicable, written advice. The ability to issue advice that is generic in nature helps Counsel meet this need. Counsel can be particularly helpful to the IRS by providing generic advice that helps the IRS develop its cases in a more focused and deliberate way.

Although the interviewees favored the Executive GLA, there were some questions about the process. One question is whether an Associate Chief Counsel may initiate the GLA process. One purpose of this notice is to emphasize to all employees that a Counsel executive in the National Office may initiate the process for issuing an Executive GLA. It is not necessary to ask a Counsel Field executive to formally request a GLA, and it is not necessary for anyone to prepare a formal, written request for a GLA. The only requirement is that a Counsel National Office executive and a Counsel Field executive both agree to develop a GLA after discussing the need for guidance, the scope of the GLA, and the timeframe for issuing the GLA.

A second question is whether a GLA on a particular issue is appropriate if no specific taxpayers are yet under examination for that issue. The purpose of the GLA is to provide timely assistance to the IRS. It should rarely be needed on an issue that is not yet under examination by the Service. In addition, extreme care should be taken to ensure that the GLA process is not used as a substitute for published guidance. When a particular interpretation of the tax laws will affect a large number of taxpayers, formal publication is the preferred method for providing guidance to the IRS. Moreover, it is never appropriate to use the GLA process solely as a method of providing guidance to the public. The GLA should only be used to provide guidance to the IRS.

Similarly, a GLA is not a substitute for a TAM. The TAM is a legal determination on a specific set of facts for a particular taxpayer. In contrast, the GLA is a tool that the National Office should use to assist the IRS in the development of cases. Not only may it be used to provide a legal analysis for a generic set of facts, but it may also be used to suggest alternate legal theories and to suggest appropriate ways of developing the facts necessary for applying these theories.

A third question is whether a GLA should be cleared through the Office of Tax Policy (OTP) or other offices within the Department of the Treasury before it is issued. Although there may be some rare instances when it is desirable to do so, there is no need to inform OTP or other offices about the issuance of a GLA. It is generally inappropriate to discuss these matters during their development with personnel outside of the Office of Chief Counsel or the IRS. Because GLAs are based on specific matters of taxpayers under examination, only those employees within the Office of Chief Counsel and the IRS, who need to know about those

matters to perform their work, should be informed of them. To ensure that information about GLAs under consideration is shared only in appropriate circumstances, and that the laws on privacy are strictly enforced, approval must be obtained from the Chief Counsel or a Deputy Chief Counsel before any matter that is the subject of a GLA may be discussed with anyone outside of the Office of Chief Counsel or the IRS.

Generic Legal Advice Issued by Non-Executives in the National Office (Non-Executive GLAs)

The final question is whether any advice that is generic in nature could be signed and issued by someone other than a Counsel executive in the National Office. The original task force had recommended that generic advice must be signed by a Counsel executive in the National Office, except for certain generic advice that had traditionally and routinely been issued to Service Centers. Interviewees noted, however, that since the recommendations of the original task force had been implemented, a significant amount of generic advice had been issued without executive signatures. These Non-Executive GLAs address simple legal issues that are not controversial or complex. Instead, they address simple questions that, if left unaddressed, would delay the processing of routine cases or create unnecessary administrative costs and inefficiencies for the IRS and taxpayers.

After considering the nature of these Non-Executive GLAs and the substantial benefit they provide to administration, it was recommended that the practice of issuing these memoranda continue. As noted above, however, extreme care should be taken to ensure that these Non-Executive GLAs not be used as a substitute for published guidance or for Executive GLAs. Vigilance and sound judgment are required to ensure that the use of Non-Executive GLAs is appropriately limited.

Technical Advice Memoranda (TAMs)

The interviewees universally stated that TAMs should remain available and the current version of the TAM procedure should remain in force. Although they expected TAMs would not be used very often, the interviewees thought that under the right circumstances, the TAM is a useful tool. More importantly, they were enthusiastic about the portion of the TAM procedure that sets forth the process for holding pre-submission conferences. The interviewees thought that both the IRS and the public found this process a useful way to bring issues to the National Office for discussion, refinement, and occasionally resolution, even if technical advice is never formally requested, and that, in some cases, effective pre-submission conferences could not only refine issues, but also eliminate the submission of unnecessary requests for technical advice.

Changes to the Chief Counsel Directives Manual

Based on the conclusions of the reviewing committee, the following modifications are made to Exhibit 33.1.2-1 (08-11-2004) of the Chief Counsel Directives Manual by adding the following questions and answers:

Q29. What is Executive Generic Legal Advice?

A29. Executive Generic Legal Advice is legal advice initiated by an executive within the Office of Chief Counsel and signed by an executive within the Office of Chief Counsel.

Q30. May an Associate Chief Counsel or other executive within the Office of Chief Counsel initiate a project that is expected to result in the issuance of Executive Generic Legal Advice?

Q30. Yes. The Associate Chief Counsel or other executive in the National Office should first contact an executive in the field to discuss the need for Executive Generic Legal Advice and establish a deadline for issuing a memorandum.

Q31. Is it appropriate to issue Executive Generic Legal Advice on a particular issue if no taxpayers are under examination on that issue?

A31. No. The purpose of the Generic Legal Advice memorandum is to provide timely assistance to the Internal Revenue Service. It should rarely be needed on an issue that is not yet under examination by the Service. In addition, extreme care should be taken to ensure that the Generic Legal Advice process is not used as a substitute for published guidance. When a particular interpretation of the tax laws will affect a large number of taxpayers, formal publication is always the preferred method for providing guidance to the Internal Revenue Service. Moreover, it is never appropriate to use the Generic Legal Advice process solely as a method of providing guidance to the public. The Generic Legal Advice memorandum should only be used to provide guidance to the Internal Revenue Service.

Q32. Should an Executive Generic Legal Advice memorandum be cleared with offices outside of the Office of Chief Counsel?

A32. No. Although there may be some instances when it is desirable to do so, there is no need to inform OTP or other offices about the issuance of a Generic Legal Advice memorandum. It is generally inappropriate to discuss these matters during their development with personnel outside of the Office of Chief Counsel or the Internal Revenue Service. Because Generic Legal Advice memoranda are based on specific matters of taxpayers under examination, only those employees within the Office of Chief Counsel and the Internal Revenue Service, who need to know about those matters to perform their work, should be informed of them. To ensure that information about Generic Legal Advice under consideration is shared only in appropriate circumstances, approval must be obtained from the Chief Counsel or a Deputy Chief Counsel before any matter that is the subject of a Generic Legal Advice memorandum may be discussed with anyone outside of the Office of Chief Counsel or the Internal Revenue Service.

Q33. May Non-Executive Generic Legal Advice memoranda be issued by the National Office?

Q33. Yes. Extreme care should be taken, however, to ensure that Non-Executive Generic Legal Advice memoranda are not used as a substitute for published guidance or for Executive Generic Legal Advice memoranda. The constant use of vigilance and sound judgment are required to ensure that the use of Non-Executive Generic Legal Advice memoranda is strictly limited.

Q34. Are Executive Generic Legal Advice memoranda and Non-Executive Generic Legal Advice memoranda subject to disclosure under § 6110 of the Internal Revenue Code?

