

Disclosure Litigation BULLETIN

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Bulletin No. 98-4

September 1998

CHIEF COUNSEL ADVICE MEMORANDA

The IRS Restructuring and Reform Act of 1998 (P.L.105-206) ("RRA") was signed into law on July 22, 1998. Section 3509 of the Act provides for the public release of Chief Counsel Advice memoranda (CCAs), a new "umbrella" term which encompasses Field Service Advice memoranda (FSAs), technical assistance rendered to the field, Litigation Guideline Memoranda (LGMs), Service Center Advice (SCAs), and any other written advice prepared by any National Office component of the Office of Chief Counsel and issued to Counsel or IRS field office employees that conveys a legal interpretation or Counsel position or policy with respect to a revenue provision.

The RRA includes CCAs within the procedures of section 6110 of the Internal Revenue Code, under which Private Letter Rulings (PLRs) and Technical Advice Memoranda (TAMs) are currently released to the public with taxpayer identifiers and certain other privileged information redacted. Under these procedures, as with PLRs and TAMs, the taxpayer will be given a copy of the CCA and will be asked to concur with the proposed taxpayer identifier redactions before public release. Unlike PLRs and TAMs, however, CCAs may include litigation advice and assessment of evidence, strategies, etc. that are subject to privileges recognized under Freedom of Information Act (FOIA) exemptions. For this reason, CCAs will be structured in a format designed to segregate such privileged material which will be redacted along with taxpayer identifiers before being given to the taxpayer and public release.

The procedures of section 6110 will apply to any CCA issued after October 20, 1998. Section 3509(d)(2) of the RRA also provides that certain existing CCAs are also subject to release under section 6110 on a staggered schedule over a six-year period. The transition rule primarily affects FSAs and technical assistance issued to the field by the offices of Associate Chief Counsel for Domestic, Employee Benefits and Exempt Organizations, and International. Those CCAs that were issued after January 1, 1986, are covered by the legislation. All LGMs, as well as the Criminal Tax, General Litigation and Tax Litigation Bulletins, issued on or after January 1, 1986, will also be made available for public inspection no later than July 22, 1999.

Because section 6110 is now the exclusive means by which these CCAs are available to the public superceding the FOIA, FOIA requests by members of the public for these documents, unless the requests were received before enactment of the RRA, cannot be honored. Requesters should be referred to section 3509 of the RRA and informed that such documents will be released according to the schedule set forth in the RRA.

OTHER RRA DISCLOSURE PROVISIONS

•RRA § 3702 amended I.R.C. §6103(1) by adding a new paragraph (17) authorizing the IRS to disclose confidential tax records to officers and employees of the National Archives and Records Administration (NARA), upon written request of the Archivist of the United States, for purposes of the appraisal of such records for destruction or retention. However, NARA may not make any tax records available to the public.

•RRA § 3708 amended I.R.C. § 6103(f) by adding a new paragraph designated as section 6103(f)(5) which allows any person (i.e., a whistle blower) who has or had access to confidential tax information to disclose such information directly to the Senate Committee on Finance, the House Committee on Ways and Means, or the Joint Committee on Taxation, or to any individual authorized by one of those committees to receive confidential tax information, if the whistle blower believes such confidential tax information may relate to evidence of possible misconduct, maladministration, or taxpayer abuse. The legislative history of this provision indicates that disclosure to one of these committees could be made either to the Chairman or to the full committee sitting in closed executive session, but may not be made to an individual member of Congress unless that member is explicitly authorized as an agent of any of these committees.

•RRA § 3711 amended I.R.C. § 6402 to permit states to participate in the IRS refund offset program to collect past due legally enforceable state income tax obligations. The RRA also amends I.R.C. § 6103 (1)(10) to authorize disclosures necessary to carry out this program.

•RRA § 3802 requires that the Joint Committee on Taxation and the Secretary of the Treasury each conduct a study of the scope and use of provisions "regarding taxpayer confidentiality" and to report their findings and recommendations to the Congress within 18 months of enactment. Specifically, these studies are to examine:

- the present protections for taxpayer privacy,
- any need for third parties to use return information,
- whether voluntary compliance would be promoted by allowing the public to know who is legally required to file tax returns but does not file tax returns,
- the interrelationship between "I.R.C. §6103 and 552a (commonly FOIA)"-- (please note that 5 U.S.C 552a is the Privacy Act not the Freedom of Information Act).
- the impact on taxpayer privacy of sharing tax information for purposes of enforcement of State and local tax laws other than income tax laws, and,

- whether the public interest would be served by greater disclosure of information regarding section 501 tax exempt organizations.

- RRA § 6019(c) amended I.R.C. § 6103(e)(6) to authorize disclosure to attorneys in fact of persons to whom disclosure is required under subsections 6103(e)(8) (disclosure of collection activity with respect to a joint return to persons who are no longer married or living together), and 6103(e)(9) (disclosure of certain information where more than one responsible person is subject to the penalty under section 6672).

- Miscellaneous provisions of RRA have disclosure implications, e.g., disclosure of tax information to the Treasury Inspector General for Tax Administration established under RRA § 1103. The new Treasury IG for Tax Administration that will be created on January 19,1999, will have full access to tax information in the performance of the official duties of that office, similar to the access previously available to the IRS Inspection Service. In contrast, the IRS Oversight Board established under RRA § 1101 will only have limited access to tax information, i.e., only from the Treasury IG for Tax Administration or from the Commissioner in connection with reports to the Board, and then only with taxpayer identifiers removed.

CASE DEVELOPMENTS

Bayview Farms et al., v. IRS et al., CA 94-2135 DKC (4th Cir. July 24,1998)

In this case a service center photocopy unit processed a number of Forms 4506 (Request for Copy of Tax Form) with subpoenas attached, and provided the returns and return information of plaintiffs to an attorney who had provided no evidence of material interest under I.R.C. § 6103(e) entitling him to the information. Plaintiffs brought a suit for damages under I.R.C. § 7431 for unauthorized disclosures of tax information. The Government conceded that the disclosures were not authorized by I.R.C. § 6103. The district court limited recovery to statutory damages and denied plaintiffs motion for an award of attorneys' fees under I.R.C. § 7430.

The Fourth Circuit addressed plaintiffs claim for punitive damages and determined that I.R.C. § 7431 (c)(1)(B)(ii) allows for recovery of such damages in wrongful disclosure cases only when the disclosure was willful or grossly negligent. Citing to Barrett v. U.S., 100 F.3d 35,40 (5th Cir.1996), the circuit court stated that in order for conduct to rise to the level of being grossly negligent, it must be "marked by wanton or reckless disregard of the rights of another." Op. at 10. The court reasoned that the service center unit's conduct in this case resulted from a lack of due care or simple negligence from oversight or carelessness, not from gross negligence or willfulness. It concluded that there was nothing in the record to indicate that the conduct of service center personnel reflected a higher level of culpability than mere negligence. As a result, the court upheld the denial of punitive damages.

Regarding the issue of attorneys' fees, the circuit court stated that I.R.C. § 7431 lawsuits do not automatically fall within the requirements of I.R.C. § 7430(a) which allows for attorneys' fees. The court concluded that the disclosure of the plaintiffs' stored tax returns occurred in a nontax related forum, and therefore, did not occur "in connection with the determination, collection, or refund of any tax." Op. at 19. Accordingly, the plaintiffs did not qualify for an award of attorneys' fees pursuant to I.R.C. § 7430.

It should be noted that, as a result of a split in the circuits on the attorneys' fees issue, Congress amended I.R.C. § 7431 as part of the Restructuring and Reform Act of 1998 to make clear that attorneys' fees may be awarded in any unauthorized disclosure case where, as in Bayview Farms, a plaintiff has substantially prevailed.

Hobbs v. United States. Civil Action No. H-96-4260 (S.D. Tex. 1998).

The district court held that I.R.C. § 6103(h)(4)(A) authorized the disclosure of return information in a Merit Systems Protection Board (MSPB) proceeding and a Title VII lawsuit. Plaintiff, a former employee, filed an I.R.C. § 7431 suit claiming damages from the United States for the unauthorized disclosure of return information in an MSPB proceeding, wherein he challenged his dismissal from employment for failure to comply with the tax laws, and in a federal court wherein the plaintiff had brought a suit under Title VII claiming unlawful discharge based on discrimination.

I.R.C. § 6103(h)(4)(A) provides that a taxpayer's returns and return information "may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration ... if the taxpayer is ... a party to the proceeding" The court said that the MSPB proceeding qualified as a federal administrative proceeding pertaining to tax administration and the Title VII lawsuit was a federal judicial proceeding pertaining to tax administration within the meaning of I.R.C. § 6103(h)(4). With regard to the MSPB action the district court concluded that the employee's dismissal for failure to comply with the tax laws pertained to "tax administration" as defined in I.R.C. § 6104(b)(4) because it related "to the management, conduct, and supervision of the tax laws." Slip op. at 13. Similarly, the court held that the Title VII litigation pertained to tax administration because the plaintiff challenged his dismissal in that proceeding.

DISCLOSURE LITIGATION SCHOOL

Disclosure Litigation sponsored its sixth Disclosure Training for Field Attorneys program in June. Twenty-eight attorneys, representing all four regions, attended the 3-day program, which considered foundational concepts for the Internal Revenue Code's confidentiality and disclosure provisions, the parameters for disclosures for tax administration purposes, in nontax criminal matters, and for tax administration investigative purposes. Other areas covered included disclosures in the bankruptcy context, civil and criminal penalties for unauthorized inspection (UNAX) and disclosure, the interplay of privileges and I.R.C. § 6103, the Freedom of Information and Privacy Acts, and disclosure issues in testimony authorizations.

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Your suggestions for inclusion of topics in future Bulletins are invited.