Department of the Treasury **Internal Revenue Service** **Office of Chief Counsel**

Notice

CC-2003-014

May 8, 2003

Subject: Following Published Guidance in Advice and Litigation **Cancellation Date:** Upon Incorporation Into the CCDM

Purpose

This notice clarifies and supersedes the Chief Counsel Notice (CC-2002-043) dated October 17, 2002, regarding the requirement that Chief Counsel attorneys follow legal positions established by published guidance in papers filed in the Tax Court or in defense or suit letters sent to the Department of Justice. This notice also continues the requirement established in the previous notice that all briefs, trial memoranda and motions to be filed in the Tax Court or letters to the Department of Justice that seek to distinguish a position set forth in published guidance shall be subject to national office review prior to filing in the Tax Court or transmission to the Department of Justice.

Discussion

Overview

This topic was recently discussed as part of the mandatory Ethics IVT broadcast nationwide on May 5, 2003. In that IVT, we went over what should now be familiar principles that were derived from the Chief Counsel's Roles memo issued on August 26, 2002. In short, those principles are as follows. Published guidance comes within the province of the Associate Chief Counsel offices. In contrast, litigation primarily falls under the jurisdiction of the Division Counsel. Tax policy should not be made through litigation. Therefore, our litigating positions should be derived from, and consistent with, the Internal Revenue Code and our published guidance. Any disagreement between a Division Counsel office and an Associate Chief Counsel office concerning the legal positions to be pursued in litigation or other resolution of a case, and whether a position proposed to be taken in a particular case conflicts with published guidance, should be resolved through the existing reconciliation procedures.

Specific rules

The specific rules regarding the requirement to follow published guidance are as follows:

(1) Chief Counsel attorneys may not argue contrary to final guidance

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Final guidance consists of final regulations, temporary regulations, revenue rulings, revenue procedures, IRB notices, and announcements. PLRs, TAMs or CCA do not constitute final guidance. Those documents are case specific and are not prepared with the intention of having other taxpayers rely upon them. They are, however, guidance with respect to the taxpayer whose transaction or case was the subject of the ruling or advice. Good judgment dictates, however, that Chief Counsel attorneys should coordinate with the Associate Chief Counsel office with subject matter jurisdiction over the issue if a Chief Counsel attorney proposes to take a position that conflicts with any PLR, TAM or CCA addressing the issue. This potential conflict may suggest an internal disagreement between the Associate Chief Counsel office and Division Counsel office, or between two Associate Chief Counsel offices, that requires reconciliation.

(a) Final or temporary regulations in force

If there are final or temporary regulations in force regarding an issue, Chief Counsel attorneys generally should follow the final or temporary regulations, even if the Service has subsequently issued proposed regulations addressing the issue, which might yield a different result if the proposed regulations were actually adopted and in effect. For example, if the application of the proposed regulations would have an adverse effect on the taxpayer by reaching a result that is not achievable under the final or temporary regulations, then the proposed regulations should not be applied in that situation. Proposed regulations do not operate to alter temporary or final regulations until they are finalized and adopted. Hence, where there are final or temporary regulations on an issue, as well as proposed regulations, Chief Counsel attorneys should follow the final or temporary regulations, not the proposed regulations.

(2) Effect of proposed regulations

Proposed regulations have no legal effect unless and until they are adopted. This is so, even if there are no final or temporary regulations currently in force pertaining to the matter in question. Prior to adoption, proposed regulations can be withdrawn or modified at any time. Taxpayers generally should not rely on proposed regulations for planning purposes, except where there are no applicable final or temporary regulations in force and there is an express statement in the proposed regulations that taxpayers may rely on them currently. If there are applicable final or temporary regulations in force, taxpayers may only rely on proposed regulations for planning purposes in the limited circumstance where the proposed regulations contain an express statement permitting taxpayers to rely on them currently, notwithstanding the existence of the final or temporary regulations. In contrast, as set forth in rule (3), Chief Counsel attorneys should look to the proposed regulations to determine the office's position on the issue.

(a) Proposed regulations should not be the subject of PLRs or TAMs

In light of the fact that proposed regulations have no legal effect, Chief Counsel attorneys should not issue PLRs or TAMs interpreting proposed regulations. Instead, PLRs or TAMs should interpret the statute, taking into account relevant case law and final guidance. Of course, that interpretation should be consistent with, and guided by, the proposed regulations, unless there are final or temporary regulations in force pertaining to the matter, in which case, the final or temporary regulations should be followed as stated in rule (1)(a). Moreover, proposed regulations should not be cited as authority for the positions taken in PLRs or TAMs. Rather, PLRs or TAMs should set forth the reasoning supporting the positions in the proposed

regulations. It is permissible, however, to refer to the proposed regulations for illustrative purposes to show that the office is being consistent in its interpretation of the statute.[1]

(3) If there are no final or temporary regulations currently in force addressing a particular matter, Chief Counsel attorneys may not take a position that is inconsistent with proposed regulations [2]

If there are no final or temporary regulations currently in force addressing a particular matter, but there are proposed regulations on point, consistent with the principles set forth in rules (2) and (2)(a), Chief Counsel attorneys should look to the proposed regulations to determine the office's position on the issue. Thus, Chief Counsel attorneys ordinarily should not take any position in litigation or advice that would yield a result that would be harsher to the taxpayer than what the taxpayer would be allowed under the proposed regulations. In this regard, if a taxpayer has not followed the proposed regulations, but takes a position that is nonetheless a reasonable interpretation of the statute, coordination with the Associate Chief Counsel office having subject matter jurisdiction over the issue would be appropriate to determine the best course of action.

(4) Perceived conflicts between proposed regulations and final guidance or between two or more pieces of nonregulatory final guidance should be coordinated

If a Chief Counsel attorney believes that a proposed regulation conflicts with a revenue ruling, notice, announcement or other final guidance, the matter should be brought to the attention of the Associate Chief Counsel office with subject matter jurisdiction over the issue. Similarly, notification and reconciliation is appropriate if the perceived conflict is between two or more revenue rulings, notices, announcements or other nonregulatory final guidance. This may occur, for example, where a proposed regulation has been outstanding for a long time but due to more recent events, the office issues a notice stating that a position set forth in the proposed regulation is being reconsidered.

(5) Case law invalidating or disagreeing with the Service's published guidance does not alter rule 1 or 3

Chief Counsel attorneys may <u>not</u> rely on case law to take a position that is less favorable to the taxpayer in a particular case than the position set forth in published guidance. This means that in circumstances where Chief Counsel attorneys must follow published guidance under the rules set forth above, it is irrelevant that the result under the case law would be more advantageous to the Service than under the Service's published guidance. Under those circumstances, Chief Counsel attorneys must follow the position in the published guidance and give the taxpayer the more beneficial treatment, notwithstanding that the treatment is inconsistent with the case law. For example, if a revenue ruling provides that a particular expense may be currently deducted, Chief Counsel attorneys should not challenge the deduction even though under the applicable case law, the expense might be capitalized.

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[1] The principles stated herein are also applicable to briefs, other court filings, and letters to the Department of Justice.

[2] But see rule (4) regarding circumstances where subsequently issued published guidance calls into question the continuing vitality of the proposed regulations.

(6) The government's authority to resolve cases through settlement or other dispute resolution mechanisms remains unchanged, so long as the rules set forth above are not violated

The requirement to follow published guidance means that Chief Counsel attorneys are prohibited from taking positions in litigation or advice that is inconsistent with published guidance. That does not mean, however, that every case presenting an issue that is the subject of published guidance must be litigated if the taxpayer does not concede the issue in full. In other words, this requirement is not intended to foreclose the possibility of recommending settlement or concession of an issue in a particular case based on litigating hazards. For example, if there is an adverse circuit court opinion on an issue governed by published guidance, it may be appropriate in a TAM, CCA or other legal advice to recommend settlement or concession of the issue in light of Golsen v. Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971), since the Tax Court ordinarily would follow the adverse circuit court precedent. The exception would be if the Service is seeking a vehicle to request the circuit court to reconsider the issue or the Service is continuing to litigate the issue in other circuits in an effort to create a conflict among the circuits for the purpose of seeking Supreme Court review of the issue. A relevant consideration in giving advice in this situation is whether the Service issued an AOD stating what action should be taken in cases appealable to the adverse circuit. Since this is likely to be a fluid situation, the matter should be coordinated with the Associate Chief Counsel office with subject matter jurisdiction over the issue.

Distinguishing published guidance

Reasonable minds can sometimes differ over whether a proposed position in a current case can be effectively distinguished from an existing published position. Likewise, Chief Counsel attorneys may encounter rulings that appear outdated or inconsistent with well-established case law. In those situations, Chief Counsel attorneys should bring the ruling or other published guidance to the attention of the Associate Chief Counsel office with subject matter jurisdiction over the issue so that the Associate Chief Counsel office can consider whether to revoke or modify the published guidance or determine whether the published guidance can be distinguished in a particular case. Accordingly, all briefs, motions, trial memoranda and letters that seek to distinguish a litigation position from a published guidance position must be reviewed by the national office prior to filing with the Tax Court or transmission to the Department of Justice, regardless of the issue or amount involved.

Conclusion

Our litigating positions should be derived from, and consistent with, the Internal Revenue Code and our published guidance. A reading of the Roles Memo and the Tax Court opinions where the court has found that respondent argued contrary to published guidance should make us sensitive to that principle. See Rauenhorst v. Commissioner, 119 T.C. 157 (2002); Walker v. Commissioner, 101 T.C. 537 (1993); Phillips v. Commissioner, 88 T.C. 529 (1987). See also Byrne v. Commissioner, T.C. Memo. 2002-319.

Effect on other documents

Chief Counsel Notice CC-2002-043 is clarified, modified and superseded.

Any questions regarding the matters contained herein should be directed to George Bowden or Henry Schneiderman of the Office of the Associate Chief Counsel (Procedure and Administration) at (202) 622-3400.

/s/
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Associate Chief Counsel
(Procedure and Administration)