Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: 200623061

Release Date: 6/9/2006
CC:TEGE:EOEG:E01:
PUBWE-113519-06
UILC: 7611.00-00

date: May 09, 2006

to: Deputy Area Counsel (Tax Exempt and Government Entities) CC:TEGE:GLGC:DAL

from: Senior Technician Reviewer (Exempt Organizations Branch 1)
CC:TEGE:EOEG:EO1

subject: Procedural Matters Related to IRC Section 7611 Follow-Up Examinations and Delegation of Authority

Issue (1): If the IRS concludes at the end of an examination under section 7611 of the Internal Revenue Code that a church has intervened in a political campaign, but the IRS is not revoking the church's tax exempt status, can the examination function refer the church to the Review of Operations Unit for follow-up in the coming election cycle?

Overview and Section 7611(a) Reasonable Belief Rule

Congress added section 7611 to the Internal Revenue Code by the Tax Reform Act of 1984. By enacting section 7611, Congress intended to protect churches from undue interference from the IRS and to minimize IRS contacts with churches to only those necessary to insure compliance with the tax laws. Section 7611 limits the time and types of contacts the IRS may utilize to determine compliance. Section 7611(a)(1) provides that the IRS may begin a church tax inquiry if "an appropriate high–level Treasury official reasonably believes" that the church may not qualify for tax exemption. Section 7611(f) generally provides that a church inquiry or examination on the same or similar issues within 5 years of the earlier inquiry or examination needs to receive higher level approval before a subsequent inquiry can begin.[1]

[1] In addition to the requirement of an appropriate high-level Treasury official's 'reasonable belief,' sections 7611(b)(1)(A) and (B) provide that during the course of an examination (or if expanding the scope of an examination pursuant to section 7611(b)(4)) the IRS may only examine records or activities "to the extent

In our view, under section 7611, once an inquiry or examination involving a church is closed, the IRS action with respect to the organization on the same issue is final and any action with respect to any subsequent allegations must comply with the procedures of section 7611. This includes the basic requirement under section 7611(a) that IRS needs a reasonable belief before it can begin a later examination of the church. It is our view that the statute does not intend to permit use of the prior inquiry or examination and its outcome by itself in determining whether a reasonable belief exists regarding a subsequent allegation. The fact that a church was revoked for an earlier year, given a strong advisory, or assessed an excise tax does not allow us to start an inquiry several years later unless we have a reasonable belief under section 7611(a)(2) based on a subsequent allegation and information received in connection with it from a referral or from public sources. If the prior allegation or the outcome of the prior examination were sufficient to establish a new reasonable belief, then a single credible allegation could give the IRS perpetual authority to examine a church. Although there is no suggestion that anyone intends to use the old allegation or examination outcome, by itself, to create a basis for reasonable belief, the use of that information to any degree in forming a reasonable belief could be controversial given the policy underlying the statute. Looking to a new allegation for purposes of forming a reasonable belief for a subsequent inquiry will avoid raising questions about the legality of the inquiry under section 7611(a)(2).

This approach does not mean that the official responsible for determining reasonable belief is precluded from having access to administrative files or other information about the prior audit history of the church. This information is relevant in determining whether the proposed subsequent examination is on the same or a different issue than the previous examination. (As discussed below, if it is on the same or a similar issue a higher level of review is generally required before commencing the subsequent inquiry or examination.) This information regarding the previous allegation and examination also assists in providing institutional consistency and may also be considered in setting priorities for the use of resources if examination resources preclude inquiries in all church cases where there is a reasonable belief under section 7611(a). Certainly there is a risk that a church could challenge the access or use of prior audit information by the official responsible for determining reasonable belief, but that is in effect questioning whether the official's determination of reasonable belief was otherwise based upon adequate or reliable information related to the new allegation. In all cases where we are considering a follow-up church tax inquiry, we believe we will satisfy the requirements of section 7611 for opening a church tax inquiry if the information related to the new allegation is sufficient to support reasonable belief that an examination is warranted regardless of the church's prior audit history.

---

necessary" (the standard set in sections 7611(b)(1)(A) and (B)) to determine liability or church status. This requirement arguably sets a higher standard for enforcing a summons in a church case than in other summons enforcement proceedings because the IRS must show that the information is 'necessary' to demonstrate a failure of compliance.

Section 7611(f) Five Year Rule

Any action involving a subsequent church inquiry needs to comply with the limitations on additional inquiries and examinations under section 7611(f). Section 7611(f) generally provides that a church inquiry or examination on the same or similar issues within 5 years of the earlier inquiry or examination needs to receive higher level approval before a subsequent inquiry can begin. Treas. Reg. § 301-7611 Q&A 16 provides that the higher signature level authority is the Assistant Commissioner (Employee Plans and Exempt Organization). Pursuant to Delegation Order 193 (Rev. 6) (11/08/2000), that authority is now delegated to the Division Commissioner (Tax Exempt and Government Entities).[2] Section 7611(f)(1)(A) provides an exception to this higher level signature requirement where the earlier inquiry or examination resulted in an adverse action (including revocation or notice of deficiency). However, it is important to note that section 7611(f)(1)(A) does not remove the need for a reasonable belief under section 7611(a)(2) to start the subsequent inquiry.

In determining whether a subsequent inquiry during the 5 year period discussed above involves the same or similar issues, Q&A 16 provides that "substantive factual issues involved in the two examinations, rather than legal classifications" govern whether a subsequent inquiry involves the "same or similar" issues. It follows from Q&A 16 that if the subsequent inquiry is on political campaign intervention, it is not a similar issue to the earlier political campaign intervention examination unless it is factually similar to the issue in the prior examination. It is our view that a subsequent inquiry is similar to the prior examination if they both involve a specific type of political campaign intervention, such as voter guides, a sermon, or a campaign contribution. It is not clear what other kinds of factual similarities would trigger the requirement for higher level approval. For example, if a church had been examined for implied advocacy for a candidate in a church publication, and a subsequent allegation was made in a different year that the church was engaging in implied advocacy for a different candidate during a sermon, a taxpayer might argue that there were similar issues even though the concrete activities are different. If EO Examinations has any doubt as to whether a subsequent church tax inquiry requires higher level approval where both the first and the second inquiries involve alleged political campaign intervention, and if the volume of such cases remains very low, it can elevate such a case involving subsequent inquiries during the five-year period to a higher level. Alternatively, Counsel is available to provide its opinion as to whether the issues are the same or different in specific cases.

Section 7611(f)(1)(B) also provides an exception from the higher level signature requirement for a subsequent inquiry where the earlier inquiry or examination resulted in

[2] After the Restructuring and Reform Act of 1998, Delegation Order 193 (Rev. 6) (11/08/2000) provides that actions previously delegated to Assistant Commissioners et al. by Treasury Regulations (par. 7) are now delegated to Division Commissioner et al. (par. 8).

"a request by the Secretary for any significant change in the operational practices of the church." The statute is silent as to whether the organization must have adopted the requested changes. However, it was likely assumed that if the church did not reassure the IRS on future compliance, the church's exemption would have been revoked. It seems unlikely the authors of the statute would have anticipated closing an unagreed case with a written advisory. Therefore, we believe that the exception in section 7611(f)(1)(B) is best read as applying where IRS requested changes and the organization committed to make changes to its policies regarding political campaign intervention as part of the earlier inquiry or examination.

Where in the prior examination IRS concluded political campaign intervention occurred and requested changes, but the church disputed the IRS conclusion, and IRS closed the inquiry or examination with an advisory, it is our view that section 7611(f)(1)(B) does not apply. Although the language of the statute speaks only to the request for changes and is silent on the organization's response, we believe the organization's acquiescence is assumed. Therefore, we believe a higher level of review would be required if a subsequent inquiry were proposed under circumstances where the church disputed that it had violated the law in the period covered by the first exam. There may also be uncertainty as to whether the exception in section 7611(f)(1)(B) applies where the church already had language in their policies and procedures forbidding political campaign intervention and the IRS "requested" a clarification of the interpretation of political campaign intervention as applied to the specific incident or incidents that served as the cause for the inquiry or examination. It is not clear whether a request for a clarification is a request for a change. Again, if EO Examinations wants certainty in these cases, it will obtain the higher level approval for the subsequent examination.

In sum, the potential need for higher level approval arises whenever the following circumstances are present:

- both the initial and the subsequent allegations involve potential political campaign Intervention;
- the subsequent inquiry would fall within the five-year period; and
- the prior examination did not result in revocation or assessment of tax.

Elevating the approval to the Division Commissioner will avoid the risk that a subsequent inquiry or examination will be challenged by the church as violating section 7611(f)(1). However, that level of approval is not required if the facts in the cases are not the same or similar.

<u>Data Collection for a Possible Subsequent Inquiry</u>

Before a subsequent inquiry can begin IRS needs a reasonable belief under section 7611(a) that the church is not exempt from tax or may be otherwise engaged in

activities subject to tax. It is important to consider the scope of IRS' ability to collect any data beyond acting as a passive recipient of allegations sent to IRS by third parties. Treas. Reg. § 301-7611 Q&A 1 states that "[i]nformation received by the Internal Revenue Service at its request may not be used to form the basis of a reasonable belief to begin a church tax inquiry...." It is our view that this reference applies to active requests by IRS to a church or an individual connected to a church for documents or information that is otherwise not generally available to the public, but does not apply to the perusal of documents available to the public by IRS without request to the church or individuals connected with the church. We recognize that churches may argue that by taking affirmative steps to look for violations regarding whether a church is engaged in activities subject to tax the IRS is violating the underlying intent of section 7611. We find this argument unpersuasive. If the IRS is not able to consider the same information and material that is available to the general public, it would be limited to remaining passive and considering only that information that is referred to it by third parties, who may not necessarily be the most impartial or reliable sources. The IRS could not respond to information or allegations published or broadcast widely to hundreds of thousands of people in newspapers, on television or on radio. We view the policy of section 7611 as prohibiting random audits and audits based on speculation or the identity of an organization without any further information presenting a credible allegation of noncompliance with the requirements for tax exemption. We do not believe section 7611 is intended to force the IRS to be utterly passive in the face of information in the public domain.

We believe that review of publicly available documents including, but not limited to, newspapers, public data on campaign contributions, court documents, and web sites on the internet, does not violate section 7611 and can be used to develop a 'reasonable belief' under section 7611(a)(2). In our view, perusal of these types of sources to search for any mention of churches, or a specific church does not constitute a church tax inquiry, let alone a church tax examination. Therefore, we do not believe that review of publicly available material at our own initiative or as a measure taken in response to the result of a prior examination violates any provision of section 7611. We believe this is the case even though section 7611 was enacted prior to widespread use of the internet.

The internet has become one of the most utilized methods of making information available to the general public. As a practical matter, websites on the internet, including a church's website, are all publicly available information. Moreover, any organization, including any church that operates a website, has the ability to divide the website into sections with different types of access. For example, the church may have a part of the site that allows unrestricted access for the public and another part of the site that is restricted with secured access for members or employees. In our view, for purposes of section 7611, IRS viewing of the publicly available sections of any website would be no different than its perusal of any other publicly available document. Furthermore, we believe that viewing a church's website is entirely distinguishable from contacting the church for information. By creating the website the church has made the information on

the website freely and publicly available to all just as if it had published a newspaper advertisement or church personnel had granted an interview to a newspaper. If however, the IRS contacts the church with questions or requests for documents or information, or the IRS contacts other persons with questions or requests for documents or information that are not publicly available, those contacts raise section 7611 issues. Similarly, viewing sections of a church's website that are not intended to be publicly available, for example, sections with restricted or secured access for members or employees, would also raise section 7611 issues.

For these reasons, we do not see any legal issues arising from having the examination function refer a church that was the subject of a prior examination to the Review of Operations Unit for follow-up in the coming election cycle as long as the follow-up is limited to reviewing publicly available material. In all cases, before commencing an inquiry, the IRS must comply with applicable section 7611 procedures, including the reasonable belief requirements of section 7611(a), and the requirements of section 7611(f) for higher level approval in certain cases, before beginning a subsequent inquiry.

Issue (2): Is the Director, Exempt Organizations Examinations "an appropriate high-level Treasury official" described in section 7611(a)(2)? Should we anticipate difficulties in sustaining this position if we do not revise our regulation which cites the abolished position of 'Regional Commissioner' as the appropriate official?

Section 7611(a)(2) requires that "an appropriate high-level Treasury official" have a reasonable belief that a church may not be exempt from federal income tax before the IRS may start a church tax inquiry. A church tax examination is legally valid under section 7611(b)(1) if and only if the church tax inquiry was legally valid. Thus, in order to establish that a church tax examination is legally valid, the IRS must be able to document that an appropriate high-level Treasury official had the necessary reasonable belief prior to the opening of the church tax inquiry on the church in question.

Section 7611(h)(7) provides that the term "appropriate high level Treasury official" means any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region. The designation of the Regional Commissioner (or higher treasury official) as the appropriate higher-level Treasury official for purposes of section 7611(a) is provided in the legislative history to section 7611. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1101 (1984). That designation was captured in regulations that are effective for all tax inquiries and examinations beginning after December 31, 1984. Treas. Reg. § 301.7611 Q&A 18.

Section 1001 of The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, (RRA 1998), provides that the Commissioner of Internal Revenue shall develop and implement a plan to reorganize the IRS. The plan shall "eliminate or substantially modify the existing organization of the Internal Revenue Service which is based on a national, regional, and district structure; [and] establish organizational units

serving particular groups of taxpayers with similar needs...." Under the reorganized structure, tax exempt and government entities are recognized as a particular group of taxpayers with similar needs.

Congress was aware that positions within the IRS would be eliminated by the reorganization it was directing the Commissioner to implement and accordingly, section 1001(b) of RRA1998 provides a savings provision. Section 1001(b) provides that "All orders, determinations, rules, regulations. . . and other administrative actions . . . which are in effect at the time this section takes effect . . . shall continue in effect according to their terms until modified, terminated, superseded, set aside or revoked in accordance with law . . ." This savings provision applies to keep in effect regulations that make reference to officers whose positions no longer exist. The legislative history of RRA 1998 at H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 195 (1998) explains that "[t]he legality of IRS actions will not be affected pending further appropriate statutory changes relating to such a reorganization (e.g., eliminating statutory references to obsolete positions)." Although the legislative history to the savings provision only refers to statutory changes, the provision refers to orders, determinations, rules, regulations and other administrative. The Service, therefore, interprets the savings provision liberally, applying it to regulations and other published rules.

After RRA 1998, the IRS issued Delegation Order 193 (Rev. 6) (11/08/2000) to specify who would take the place of various officials in performing delegated functions. Delegation Order 193 provides in part that actions previously delegated to Regional Commissioners et al. by Treasury Regulations (par. 7) are now delegated to Directors, Compliance Services Field et al. Although there is no further delegation order specifically addressing functions under section 7611,[3] the IRM has been amended to designate the Director, Exempt Organizations Examinations (hereinafter, "Director"), as having final authority in all cases to determine whether to conduct a church tax inquiry and requiring the Director to sign the notice of examination. This position is recorded in IRM 4.76.7. Based on our understanding of the duties of the Director, the Service's decision to designate the Director to replace the Regional Commissioner as the IRS official responsible for determining whether to conduct a church inquiry is consistent with the policies underlying section 7611 and the accompanying regulations in effect in 1998.

Challenges to the Director's designation as "an appropriate high-level Treasury official" are likely to try to distinguish the Director from the Regional Commissioner based on the former Regional Commissioner's complete authority within a region and the Regional Commissioner's proximity to the Commissioner in the chain of authority. As cited in the RRA 1998 legislative history above, the restructuring of IRS was intended to change

[3] The only delegation order specific to Church Tax Inquiries and Examinations is Delegation Order 137 (Rev. 3) (12/31/1996). Delegation Order 137 concerns the authority of certain officials to hold conferences described in IRC § 7611(b)(3)(A)(iii) and to execute agreements under IRC § 7611(c)(2)(C) to suspend the periods for completing church tax inquiries or examinations. Delegation Order 137 does not address who may authorize a church tax inquiry.

focus from geographic location and concentrate on particular taxpayer groups. These objectives are achieved by assigning the duty of determining reasonable belief to an official who has national responsibility for tax exempt organizations, including churches, and oversees the examination function in which the need to determine reasonable belief arises. This designation of the Director enables the IRS to have nationwide consistency in the administration of section 7611 and is consistent with the statutory directives on the goals of the reorganization.

As a direct report, the Regional Commissioner had closer management proximity to the Commissioner, but the more appropriate criteria for identifying a comparable official is the official's scope of authority. Before amendment by RRA 1998, the Employee Retirement Income Security Act, Pub. L 93-406, section 1051(a) enacted section 7802(b) which created the position of Assistant Commissioner (Employee Plans and Exempt Organizations). At the same time that the legislative history of section 7611 indicated that Regional Commissioners should sign the section 7611(a) reasonable belief letter to begin a church tax inquiry, the suggestion was made that the Assistant Commissioner (Employee Plans and Exempt Organizations) approve any subsequent examination under the five year rule of section 7611(f). H.R. Conf. Rep. No. 861, 98th Cong., 2nd Sess. 1110 (1984). As the Assistant Commissioner's approval was required for opening new examinations within 5 years of a previous examination, Congress believed the national perspective of the Assistant Commissioner carried more weight than the geographic perspective of the Regional Commissioner when it came to the administration of section 7611 cases. Thus, for purposes of section 7611, the Regional Commissioner was not considered a higher official than the Assistant Commissioner, notwithstanding his position in the management chain as a direct report to the Commissioner.

The Director is at least an equivalent position to the Regional Commissioner for the purpose of approving a church inquiry or examination under IRC section 7611, The Regional Commissioner only had regional jurisdiction and in 1998, when the position was abolished, it was necessary to assign the responsibility for approving church tax inquiries to someone with comparable authority. The Commissioner could have assigned this responsibility to area managers because they have complete management authority within a geographic span comparable to the old Regional Commissioners. However, by designating the Director, who has national jurisdiction, as "an appropriate high-level Treasury official," the Service was, in fact, being more conservative than necessary. As noted above, the intent of the reorganization was to move IRS away from geographic divisions and focus upon particular groups of taxpayers with similar needs. The position of the Director is well suited for this purpose, having national jurisdiction over all the organizations covered by section 7611 and able to provide consistent application to the reasonable belief standard.

Currently, there is no significant litigation risk with respect to the delegation to Director. The arguments laid out above for considering the Director to be at an equal or higher level than the Regional Commissioner following the reorganization are sound.

Nevertheless, whenever the section 7611 regulations are updated next, we recommend the regulations be updated to reflect this change. This is a ministerial change for clarity that would not make the current delegation to the Director vulnerable.

While the litigating risk may increase without an update to the regulations at some future date because courts may give less weight to the savings provision in section 1001(b) of RRA98 over time due to its temporal attributes, the regulations under section 7611 are no more vulnerable to this possibility than other regulatory provisions that refer to positions that have been eliminated.[4] The Service has updated several orders, determinations, rules and regulations to reflect position changes resulting from the reorganization, but many significant orders, determinations, rules, regulations, and other administrative actions have not been modified following the reorganization and continue to reference positions eliminated as a result of the reorganization. The plan generally is to update the positions in these orders, rules, and regulations whenever the orders, rules, or regulations are next revised. Therefore, although an update is recommended, there is no urgency requiring the Service to consider a regulation project before other modifications to the regulations are needed.

[4] The regulations include several references to district directors and other officials whose positions no longer exist. Treasury Regulation § 301.6212-1(a) authorizes a district director or director of a service center (or regional director of appeals) to send a notice of deficiency to a taxpayer if the official determines that there is a deficiency in respect of income, estate or gift tax imposed by subtitle A or B or an excise tax imposed by chapter 41, 42, 43, or 44. Similarly, Treasury Regulation § 301.6201 1(a) authorizes and requires the district director to make all inquiries necessary to the determination and assessment of all taxes, and Treasury Regulation § 301.6404-1(a) authorizes the district director or the director of the regional service center to abate any assessment, or any unpaid portion thereof, if the assessment is in excess of the correct tax liability. Although the position of district director was eliminated with the reorganization, successor positions, i.e., area directors and territory managers, continue to take actions pursuant to these regulations. We acknowledge that the area director and territory managers positions have similar management and tax administration authorities as those previously held by the district director, and, therefore, the “redelegation” of these duties is not completely analogous to the “redelegation” of the section 7611 authority, but, as with the church tax inquiry, these critical functions continue to be performed and are unaffected by the elimination of the position referenced in the regulation.