Office of Chief Counsel • Internal Revenue Service • Assistant Chief Counsel (Disclosure Litigation)

Disclosure Litigation BULLETIN

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NEW LEGISLATION ENACTED MAKING ADVANCE PRICING AGREEMENTS (APAs) CONFIDENTIAL

In response to a FOIA/I.R.C. § 6110 lawsuit filed by the Bureau of National Affairs seeking access to APAs, and the Service's concession during the course of the litigation that APAs are written determinations under I.R.C. § 6110, and therefore subject to public inspection, legislation was enacted explicitly including APAs in the definition of return information under I.R.C. § 6103. This new legislation, § 521 of Title V of the "Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860, (effective date December 17, 1999), thus excludes APAs from disclosure under I.R.C. § 6110, and thereby ensures that APAs will remain confidential.

The new statute amended I.R.C. § 6103(b)(2) by adding a new subparagraph (C), which provides that the definition of return information includes "any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or application for an advance pricing agreement." Similarly, I.R.C. § 6110(b)(1) was amended to provide that the term written determination, for purposes of ascertaining which IRS documents must be made open to public inspection in accordance with the provisions set forth in I.R.C. § 6110(a), does not include "any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement." Thus, the new statute explicitly confers confidential return information status under I.R.C. § 6103 to APAs and related background information. Furthermore, the relevant legislative history clarifies that the legislation is meant to cover all APAs and related background file documents, regardless of whether executed before or after enactment of the new legislation.

In order to address the concerns of those practitioners and members of the public interested in the APA process who expressed the view that the provisions of APAs should be made available to the public, the newly enacted legislation also requires that the Treasury Department prepare and publish an annual report disclosing aggregated information on completed APAs.

DISCLOSURE OF CHIEF COUNSEL ADVICE WITHIN CHIEF COUNSEL AND IRS

May unredacted Chief Counsel Advice (CCA) be shared within Chief Counsel and with IRS employees?

> Only the publicly available, redacted, CCA may be shared. Any dissemination of the original, unredacted, version beyond those who have direct authority over and involvement in the taxpayer specific case or nontaxpayer specific matter for which the advice was issued, might be viewed by a court as a legal waiver of privileges as to the redacted material in the publicly available CCA.

Accordingly, an employee should not disclose an unredacted CCA except to those in the employee's chain of command who work or review work on the matter, to those with whom the matter is coordinated, or to those employees to whom the matter is later assigned. This guidance has been posted on the Chief Counsel Intranet (IRS Chief Counsel Advice (CCA) Questions and Answers; Q&A #12).

May a redacted CCA be shared within Chief Counsel and the IRS before it is published?

> Sharing a redacted CCA prior to publication would not violate the spirit of the above dissemination guidance; practically speaking, however, it seems unwise because of possible differences that may exist between the redacted CCA shared prior to publication and any last-minute changes that may have been made to the publicly released and redacted CCA.

DISCLOSURE TO EMPLOYEES OF TAXPAYER CORPORATIONS

During examinations of corporations, a company official may indicate to a revenue agent that the agent should be dealing with the corporate bookkeeper or accountant. Under I.R.C. § 6103(e), with regard to taxpayers who are entities, such as corporations and municipal bond issuers, the IRS can disclose tax information to persons with authority under state law to bind the entity. Generally, this is the CEO or other high level official. Corporate bookkeepers or accountants are generally not persons with authority to bind the corporation and cannot, therefore, receive returns or return information under I.R.C. § 6103(e).

In order for the revenue agent to be able to disclose returns and return information of the entity to the bookkeeper or accountant during the examination, someone authorized by state law to bind the corporation, such as the CEO, must execute an I.R.C. § 6103(c) consent authorizing disclosure of the returns and return information to the intended designee. The I.R.C. § 6103(c) consent must comply with all statutory and regulatory requirements in order for disclosure of returns and return information to occur. A properly executed Form 8821, Tax Information Authorization would suffice. Reliance on the authority for investigative disclosures set forth in I.R.C. § 6103(k)(6) would not normally be appropriate for the type of ongoing dialogue with a bookkeeper

or accountant that is usually necessary in an examination context.

If the designated bookkeeper or accountant is doing more than just providing and receiving taxpayer information and is actually representing the taxpayer before the IRS, a power of attorney (POA) would be necessary. 31 C.F.R. 10.7(c)(1)(iv). A Form 2848, Power of Attorney and Declaration of Representative should be executed which would satisfy both the representation and disclosure requirements. As indicated on the Form 2848, officers and full time employees of the taxpayer are two of the categories of individuals that are permitted to represent taxpayers before the IRS. The Director of Practice should be consulted regarding which cases constitute representation before the IRS such that a POA is required.

DISCLOSURES TO OFFICE OF SPECIAL COUNSEL

The Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, such as reprisal for whistleblowing. Occasionally in the context of an OSC investigation, the issue arises as to whether tax information may be accessed by OSC. An example of how this issue may arise is as follows. An IRS employee alleges that his manager retaliated against him for making a complaint that the audit selection process in a particular location was racially discriminatory, and OSC opens an investigation. During the investigation OSC determines that it needs tax information from files on which the employee worked to complete the investigation.

The OSC investigation is a "proceeding affecting the personnel rights" of the employee. As such, tax information may be disclosed to the OSC investigator under I.R.C. § 6103(l)(4)(B) if the IRS determines that the disclosure is necessary to advance or protect the interests of the United States. Generally, OSC should be asked to make a written request explaining the reasons why any tax information is needed. Also, data should be stripped of identifiers unless inclusion of identifying information is necessary to advance or protect the interests of the United States. If the investigation's focus turns to the actions of a specific manager, then the OSC investigation is also a "proceeding affecting the personnel rights" of the manager. At that point, the manager (or his private attorney) may make an I.R.C. § 6103(l)(4)(A) request for relevant and material tax information.

The Privacy Act may be implicated if OSC requests nontax information, such as personnel records, from the IRS. Personnel records may be turned over to OSC pursuant to the "routine use" authority under Treasury/IRS System of Records 36.003, General Personnel and Payroll Records.

CASE DEVELOPMENTS

TERRY JOHNSTON V. INTERNAL REVENUE SERVICE, 1999 U.S. Dist. LEXIS 6012 (M.D. Fla. March 15, 1999)

Plaintiff, an employee of the Service, filed an Equal Employment Opportunity complaint against his former supervisor. The attorney representing the Service in the proceeding sent a witness list and a request for information and documents via facsimile transmission to plaintiff's office fax machine. The documents, which contained private information about the plaintiff, were seen by co-workers in the office. As a result, plaintiff argued that he suffered "extreme emotional distress" and that his reputation was "unnecessarily damaged." He filed suit alleging that the disclosure by the Service attorney violated the Privacy Act.

To establish a prima facie case under the Privacy Act the plaintiff must show (1) a violation of the Act; (2) an adverse effect resulting therefrom; and (3) that the violation was willful or intentional.

The District Court for the Middle District of Florida held that, assuming the first two elements of a prima facie case were met, any disclosures made by the Service were not intentional or willful. The court considered the fact that the day before the first fax was sent to plaintiff, plaintiff faxed the Service attorney his own witness list and had handwritten his office fax number on the cover page. The Service attorney also filed a declaration with the court stating that he had not intended for others to see the information in the faxes, that he did not know the configuration of the plaintiff's office and that he had obtained the fax number directly from the plaintiff. Further, the plaintiff had placed no restrictions on the use of his fax number. The court granted the Service's motion for summary judgment and the plaintiff appealed.

On January 18, 2000, in an unpublished opinion, the Eleventh Circuit held that plaintiff had not provided any evidence that the Service acted willfully or intentionally, thus failing to create an issue of material fact for the court to rule upon. Accordingly, the court affirmed the district court's grant of summary judgment in favor of the Government.

ANDERSON v. UNITED STATES DEP'T OF TREASURY, IRS, No. 98-1112, 1999 U.S. Dist. LEXIS 20877 (W.D. Tenn. Mar. 24, 1999)

During the course of a criminal investigation of the plaintiff and her husband, the special agent assigned to the investigation interviewed plaintiff and two family members. Prior to the interview of plaintiff, the special agent assembled a spreadsheet of checks written by the plaintiff and her husband during the period of 1992 to 1994. When interviewing the plaintiff, the special agent presented the plaintiff with the check spreadsheet, requesting plaintiff review and initial it; plaintiff asserted her Fifth Amendment and spousal privileges. There was a factual dispute between the parties concerning whether, during the interviews, the special agent had agreed to furnish plaintiff's counsel with a copy of the check spreadsheet. After plaintiff's FOIA request for the check spreadsheet was denied and the denial upheld on administrative appeal, plaintiff filed suit.

Granting summary judgment, the court agreed with the Government's assertion that the check spreadsheet was exempt from disclosure pursuant to FOIA exemptions (b)(3), in conjunction with I.R.C. § 6103(e)(7), and (b)(7)(A). FOIA exemption (b)(3) provides for the withholding of information specifically exempted from disclosure by statute. I.R.C. § 6103(e)(7), which provides that a taxpayer's return information is available to the taxpayer unless disclosure would "seriously impair Federal tax administration," is a statute within the coverage of FOIA exemption (b)(3). FOIA exemption (b)(7)(A) provides that records or information compiled for purposes of law enforcement may be withheld if release "could . . . interfere with enforcement proceedings."

The court agreed with the Service that release of the check spreadsheet could jeopardize the ongoing criminal proceedings by more fully revealing the scope and nature of the government's case. The court also rejected the plaintiff's argument that the IRS waived the exemptions by showing the plaintiff and her attorney the check spreadsheet during the interview, holding that a limited, discretionary disclosure does not amount to waiver. Finally, the court held that regardless of whether the special agent had committed to provide a copy of the check spreadsheet, such a statement, even if made, is not binding and may be revoked.

ROEBUCK V. UNITED STATES, No. 99-2097 (4th Cir. Nov. 23, 1999)

The United States Court of Appeals for the Fourth Circuit in a short, unpublished opinion, affirmed the decision of the United States District Court for the Eastern District of North Carolina that the Service did not make unlawful disclosures of the fact of criminal investigation. This lawsuit, filed pursuant to I.R.C. § 7431, involved the display of Criminal Investigation credentials by a special agent during third party interviews and the inclusion of the special agent's business card, which identified her as a special agent in the Criminal Investigation Division, with summonses. The disclosures of the nature of the investigation during these third party contacts were upheld as permissible investigative disclosures under 26 C.F.R. § 301.6103(k)(6)-1(a). See Disclosure Litigation Bulletin 99-3 (June 1999).

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