DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

July 2, 2001

Number: **200131029**
Release Date: 8/3/2001

CC:PA:CBS:Br2FWSchindler
GL-103449-00
UILC: 17.24.01-00
9999.98-00

MEMORANDUM FOR ALL AREA COUNSEL (SB/SE)

FROM: Deborah A. Butler
Associate Chief Counsel
(Procedure and Administration)

SUBJECT: Chief Counsel Notice CC-2001-036, Counsel Opinion in Offer in Compromise Cases

Internal Revenue Code section 7122(a) grants the Secretary the authority to compromise civil or criminal liabilities arising under the internal revenue laws. Ever since that authority was granted, the Code has required that an opinion of Counsel be placed on file in certain cases. See I.R.C. § 7122(b). Chief Counsel Notice CC-2001-036, issued June 29, 2001, sets forth procedures to be followed by Associate Chief Counsel (SB/SE) offices when issuing the statutorily required opinion. This memorandum provides background information that was considered in drafting the Notice. We encourage you to share this information with local offices where review of offers in compromise is performed.

INTRODUCTION

On July 19, 1999, temporary regulations were issued which expanded the Secretary's authority to compromise tax liabilities under section 7122. See T.D. 8829, Compromises, 64 Fed. Reg. 39020 (July 21, 1999). In addition to the traditional compromise grounds of doubt as to liability and doubt as to collectibility, the temporary regulations authorize the Secretary to compromise when compromise will promote effective tax administration. Specifically, where there is no doubt as to either liability or collectibility, the Service may now compromise on the basis that: 1) collection of the full tax liability would create economic hardship, or 2) regardless of the taxpayer's financial condition, exceptional circumstances exist such that collection of the full liability would be detrimental to voluntary compliance by taxpayers. See Temp. Treas. Reg. § 301.7122-1T(b)(4).

Since publication of those regulations, questions have arisen regarding the opinion of Counsel when the Service proposes acceptance grounded on the promotion of effective tax administration. At the same time, the Service's increased reliance on compromise as the preferred method of resolving cases has given rise to a number of questions about the role of the Office of Chief Counsel in the offer in compromise program as a

general matter. Issues that have arisen include: 1) what form the required opinion of Counsel is to take when asked to review offers in compromise based on the promotion of effective tax administration; 2) whether a negative opinion of Counsel in such cases would preclude acceptance of the offer by the Service; 3) whether Counsel must issue a negative opinion in collectibility cases if the Service proposes acceptance of less than what could otherwise be collected; and 4) whether and to what degree Counsel offices should question offer groups' deviation from Internal Revenue Manual methods or from Service policies in general.

The Chief Counsel Notice is intended to provide clarity on these issues. Although an opinion of Counsel is statutorily required in certain cases, the form and content of that opinion, as well as the force and effect it should be given, are matters which are within the discretion of the Secretary and the Commissioner. The Notice defines Counsel's role in the offer in compromise program with the goals of supporting the Commissioner's compromise policy, improving the quality of the program as a whole, and assisting our client by providing the legal support needed to resolve cases in an efficient and timely manner.

SECTION 7122(b) AND ITS LEGISLATIVE HISTORY

The Internal Revenue Code requires an opinion of Counsel when certain compromises are made, and establishes the minimum requirements as to what that opinion should contain. The Code provides:

> Record.–Whenever a compromise is made by the Secretary in any case, there shall be placed on file in the office of the Secretary the opinion of the General Counsel for the Department of the Treasury or his delegate,[1] with his reasons therefor, with a statement of—
>
> (1) The amount of tax assessed,
>
> (2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and
>
> (3) The amount actually paid in accordance with the terms of the compromise.
>
> Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $50,000. However, such compromise shall be subject to continuing quality review by the Secretary.

---

[1] The General Counsel for the Treasury has delegated the functions relative to the review of offers in compromise to the Chief Counsel of the Internal Revenue Service. See General Counsel Order No. 4. (Rev. January 19, 2001).

I.R.C. § 7122(b).

The procedure for obtaining review of offers recommended for acceptance is contained in the Service's IRM Handbook 5.8, Offers in Compromise, Chapter 8, and in the Chief Counsel Directives Manual, Part 34, Chapter 5 (CCDM 34.5). The opinion of Counsel is sought after a recommendation of acceptance has been made but prior to formal acceptance of the offer by the official with delegated authority to accept. IRM 5.8.8.4.3. The Service expects that Counsel's opinion will assess both whether the legal requirements for compromise are met and whether the offer conforms to the Service's policies and procedures. IRM 5.8.8.2(2).

The language of section 7122(b) requires that certain information about the case be included with Counsel's opinion, but it does not give any precise instruction as to what else the opinion should address. The legislative history of the section is even less clear, but does support the notion that Counsel's review will include both legal and policy elements. The idea that the Counsel opinion need not favor compromise is clearly supported by this history, even though the phrase, "with his reasons therefor," implies that the General Counsel will give reasons supporting the decision to compromise. During consideration of the predecessor section to 7122(b), Congress removed language which would have made the concurrence of Counsel a prerequisite to compromise. Section 102 of the Act of July 20, 1868, initially required "the advice and consent of the Solicitor of Internal Revenue" prior to compromise by the Commissioner. See J.S. Seidman, Seidman's History of the Federal Income Tax Laws 1938-1861 1055-56 (1938). The phrase "with his reasons therefor" initially modified "advice and consent," indicating that the solicitor was to give reasons supporting his consent to the compromise. In subsequent debate it was acknowledged that removing the requirement of consent by the solicitor while continuing to require that an opinion be placed on file after the compromise was made resulted in an "awkward" construction, but no change was made prior to enactment. See Comments of Senator Morton, Cong. Globe, 40th Cong., 2d Sess. 3774 (July 7, 1868).[2]

[2] In further support of the idea that a favorable opinion by Counsel is not a prerequisite to compromise, at least one court has concluded that the lack of a Counsel opinion does not render the compromise invalid. See Backus v. United States, 59 F.2d 242, 256 (Ct. Cl. 1932). The court found that, since the provision requires an opinion of Counsel after the compromise has been made, "[i]t is addressed to the officer and is directory, and a failure to comply therewith would not affect the compromise itself or its validity." Id. See also Hamilton v. United States, 324 F.2d 960, 965 (Ct. Cl. 1963) (concurring opinion). If a legally binding compromise can be executed without the need of a Counsel opinion, notwithstanding the requirement in the statute, it is difficult to conclude that a negative opinion by Counsel would prevent compromise, unless the opinion stated that the case could not be compromised at all under the existing statute and regulations.

Other parts of the legislative history suggest that the dual legal and policy role of Counsel is consistent with the intent of the statute. Although it would be reasonable to assume that an opinion by the General Counsel would be legal in nature, Congressional debate suggests that the original purpose of requiring the written opinion of the solicitor was to prevent compromise based on insufficient information. The Senate debate showed concern over both abuse and fraud by taxpayers against the government and abuse and fraud against taxpayers by government officials. One of the stated purposes of requiring that the opinion of the solicitor be placed on file was to ensure that the Commissioner had all of the facts before him. The Commissioner of Internal Revenue was not to make a compromise until after a full and fair investigation. Congress apparently believed it would be good for the compromise process to have a "check" from a source not connected with the assessors and collectors of Internal Revenue. Not that the solicitor was deemed less subject to corruption than the collector and assessor of internal revenue, but it was felt that it would be more difficult to corrupt all three. See Comments of Senator Turnbull, Cong. Globe, 40th Cong., 2d Sess. 3773 (July 7, 1868).

Excerpts from the discussion on this section suggest that Congress was aware that the modified version of the proposed statute made the opinion of the solicitor gratuitous. The Commissioner was required to obtain the assent of the Secretary of the Treasury prior to compromise, but the opinion of the solicitor need only be placed on file after a compromise was made. Thus, the opinion of Counsel would have no effect on the decision to accept or reject an offer to compromise, and could only act as a "check" on the compromise power to the extent the Commissioner was concerned about what the opinion later placed in the record might say. Although there was discussion in the Senate to the effect that it would be more sensible to require that the opinion be rendered before a compromise is accepted, the language was not changed prior to enactment and subsequent revisions of the section have not specified that Counsel's opinion be placed on file prior to acceptance of the compromise. See Seidman, supra.

The change made in section 7122(b) in 1996, as part of the Taxpayer Bill of Rights 2 (TBOR2), is the most recent hint as to the role Congress intends Counsel to play in the compromise process. The amount of assessed tax below which an opinion of Counsel is not required was raised from $500 to $50,000 and the final sentence, reading "However, such compromise shall be subject to continuing quality review by the Secretary," was added. The conference report gave no indication as to why the change was made, but the insertion of the final sentence makes it reasonable to assume that Congress believed Counsel review in some way contributed to the overall quality of the compromise program. However, no indication was given as to how or in what way Congress intended Counsel to contribute to the compromise process.

These few indications of the Congressional intent behind section 7122(b) do not provide any particular clarity as to the meaning of the section. The review criteria in the CCDM are, however, consistent with the concerns expressed by Congress in its debate of the original measure, and with the sentence added in 1996. Counsel review that is focused on both the authority to compromise and a full development of the facts is in

keeping with Congress's apparent belief that a "check" on the system would guard against corruption, insure that the accepting official is fully informed, and contribute to the overall quality of case resolutions.

TRADITIONAL ROLE OF COUNSEL IN OFFERS IN COMPROMISE

The scope of the section 7122(b) opinion has traditionally tracked the Service's understanding of the legal bounds of the compromise authority. Arguably, Counsel's review has failed to adjust as our understanding of the legal requirements for compromise has evolved. Based principally on various opinions of the Attorney General, the Service had long taken the position that compromise is authorized only when it is established that there is doubt regarding the amount or existence of the liability or there is uncertainty that the liability could be collected. See generally T.D. 8829, Compromises, 64 Fed. Reg. 39020, 39021-22 (July 21, 1999) (discussing evolution of offer in compromise authority and policy from 1930's to 1990's). In response to a request from Acting Secretary of the Treasury Acheson, Attorney General Cummings considered the scope of the Secretary's authority to compromise, concluding that "where liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the government to collect, there is no room for 'mutual concessions' and therefore no basis for 'compromise.'" Op. Atty. Gen. 6, XIII-47-7138 (October 24, 1933).

Relying upon this opinion and others which had reached similar conclusions,[3] the Commissioner adopted a policy of compromising only on the bases of doubt as to liability or collectibility. See Commissioner's Statement of Policy with Respect to the Compromise of Taxes, Interest, and Penalties, July 2, 1934. See also Treas. Reg. § 301.7122-1(a) (1960). The Commissioner's statement of policy also provided that the acceptability of an offer to compromise should be determined with regard to the "degree" of doubt present in a particular case. This policy was implemented within the Service by adopting a practice of accepting offers based on doubt as to collectibility only when the amount offered reflected the taxpayer's "maximum capacity to pay."

Pursuant to this 1934 statement of policy, Counsel generally reviewed proposed agreements to verify that the amount offered reflected the maximum capacity to pay. Offers were not regarded as "legally sufficient" unless the maximum capacity to pay standard was met. The Form 7249, Offer Acceptance Report, was revised in 1993 to include a statement that could be checked to indicate that the offer was legally sufficient, thus eliminating the need to place a separate narrative opinion on file. The text of that statement illustrates that doubt as to collectibility and legal sufficiency were defined in near identical terms at that time:

---

[3] See, e.g., Op. Atty. Gen. 7, XIII-47-7140 (October 2, 1934); 16 Op. Atty. Gen. 617 (1879); 12 Op. Atty. Gen. 543 (1868).

> Doubt as to collectibility. This offer is consistent with the taxpayer's ability to pay, since the offer amount is greater than the value of the taxpayer's current collectable assets. Based upon the taxpayer's projected future income, the Service believes collection of the remaining liability is in doubt.

Form 7249, Offer Acceptance Report (Rev. 6-93) (emphasis added). If the basis for compromise was doubt that any greater amount could be collected, then any offer for less would not only fall short of the standard for acceptance, but would also appear to be ineligible for compromise based on collectibility as a legal matter.

In the early 1990's, the Service began an effort to expand the use of offers in compromise. This led to the adoption of a new compromise policy in 1992. While continuing to base the compromise of cases on a finding of doubt as to liability, doubt as to collectibility, or both, the policy removed references to the "maximum capacity to pay" standard in favor of language stating that a compromise may be accepted if it "reasonably reflects collection potential." Policy Statement P-5-100. This change in terminology was intended to recognize that the collection potential of a case could not always be determined with precision, and to signal a willingness to be flexible in resolving cases. The general rule with regard to acceptances remained unchanged, however, and taxpayers were still expected to make offers consistent with their ability to pay.

At about the same time, the Office of Chief Counsel made clear its position that collectibility, or lack thereof, is defined by examining the taxpayer's case as a whole. Once it is determined that the taxpayer's assets and future income are insufficient for the government to collect the tax liability in full, the amount accepted to settle the controversy is a matter within the Service's discretion.[4] The Commissioner's delegation of authority was eventually revised to permit certain officials to accept offers from taxpayers notwithstanding the fact that the offer may not reflect the amount that could be collected by other means. This authority, however, was expressed by reference to whether Counsel had issued a negative opinion regarding the legal sufficiency of the proposed acceptance:

---

[4] We do not believe that this conclusion was intended to imply that the Service is authorized to resolve all cases that could not be collected in full for merely nominal sums or that the compromise statute authorized the creation of an ad hoc amnesty program. Rather, it is an unspoken assumption that compromise authority will only be exercised in a manner consistent with the Service's other obligations under the Code and in furtherance of its overall mission. See, e.g., I.R.C. § 6301 ("The Secretary shall collect the taxes imposed by the internal revenue laws."); Policy Statement P-5-2, Collecting Principles ("The public trust requires us to ensure that all taxpayers promptly file their returns and pay the proper amount of tax, regardless of the amount owed.").

> District directors; service center directors; Director, Austin Compliance Center; and Regional Directors of Appeals are delegated the authority to accept offers in compromise in the event Counsel renders a negative legal opinion, regardless of the amount of the liability sought to be compromised. This applies only to offers in compromise - Doubt as to Collectibility. This authority may not be redelegated.

See Delegation Order No. 11 (Rev. 24) (June 21, 1994). Acceptances of an offer for less than full collection potential came to be known as “Delegation Order 11" acceptances. Although the text of the delegation implies that Service officials could accept offers regardless of any negative opinion by Counsel, internal guidance encouraging the use of this authority made clear that this authority could only be used when a basis for compromise had been established.

Current Service procedures authorize acceptance of less than reasonable collection potential to resolve a case when it is necessary to avoid economic hardship. Such cases are now called “special circumstances” cases. The delegation order was revised in 1999 to add a delegation of authority to accept offers based on the promotion of effective tax administration. At that time, a decision was made to specifically delegate the authority to accept offers based on special circumstances criteria, rather than to define the authority by reference to the negative opinion of Counsel. See Delegation Order No. 11 (Rev. 27) (November 1, 1999) (delegating authority to accept offers based on special circumstance criteria to District Directors, Deputy Assistant Commissioner (International), and Chiefs of Appeals); IRM 5.8.8.3 (explaining special circumstances criteria and acceptance authority).

The Commissioner’s expanded delegation of authority had not previously been met with a corresponding change in the procedures for Counsel review. Although the CCDM recognized that an affirmative opinion by Counsel is not a prerequisite to compromise, the procedures continued to imply that Counsel must issue a negative opinion whenever the Service intended to accept less than reasonable collection potential, even where the area director identified special circumstances which warranted the acceptance of some lesser amount. Thus, some Counsel offices continued to issue opinions to the effect that offers were “legally insufficient,” even though all of the legal requirements for compromise had been met and any disagreements were grounded in policy concerns.

CHIEF COUNSEL NOTICE CC-2001-036

The Chief Counsel Notice makes clear that Counsel’s review consists of both legal and policy elements. The legal standard for establishment of each basis for compromise, as defined by the regulation, is briefly stated. The revised procedure calls for Counsel to sign the Form 7249, Offer Acceptance Report, in all cases, provided the proposed action is within the Service’s authority and complies with the requirements of the law. The Notice also briefly outlines the Service’s acceptance policy with regard to each

basis for compromise. If Counsel is of the opinion that the proposed acceptance is inconsistent with the Service's policies, it should advise the offer group of its concerns by separate memorandum. Conversely, if Counsel recognizes and supports the decision to deviate from normal acceptance standards, the procedures will no longer imply that a negative opinion must be issued.

The revised procedure will allow Counsel to more clearly communicate the nature of any concerns to the area director and staff. Counsel signature on the acceptance report will indicate to the area director that the proposed acceptance is legally permissible under the Code and regulations, notwithstanding any disagreements over policy concerns. The lack of a signature will no longer merely signal that approval of a higher authority is needed, but will indicate more serious problems that call into question the legality of the proposed compromise. Expressly authorizing Counsel to support deviations from normal policy in appropriate cases by issuing a separate memorandum will serve to foster an environment of cooperation and send a message to offer groups that both they and Counsel are working toward the same goals.

The Notice makes a conscious effort to eliminate the "legal sufficiency" terminology from the IRS lexicon. The term legally sufficient appears only in the Internal Revenue Manual and Chief Counsel Directives Manual. The lack of a consistent definition of the term in the CCDM and elsewhere has invited individuals to attach their own meaning. Use of the term has also perpetuated the misconception that the Service's usual standard for the acceptance of offers is in some way legally mandated, and that a Counsel opinion to the effect that an offer reflects less than could be collected by other means is necessarily a legal determination. Of greater concern, however, is the implication that <u>any</u> negative recommendation of Counsel, even one which concludes that the case could not be compromised at all under the statute, can be disregarded if the proper official signs the letter accepting the offer. Because the legal sufficiency determination in the CCDM contained elements that the Notice divides into separate and distinct inquiries, continued use of the term could potentially cause continued confusion.

We hope that this memorandum will provide useful background for your offices as they implement the revised procedures for Counsel review of offers in compromise. Questions about this memorandum or the Chief Counsel Notice should be directed to Frederick W. Schindler, Attorney, Branch 2 (Collection, Bankruptcy, & Summonses) who can be reached at (202) 622-3620.

cc: Division Counsel (SB/SE)
Division Counsel (W&I)
Division Counsel (LMSB)
Division Counsel/Associate Chief Counsel (TEGE)