Office of Chief Counsel
Internal Revenue Service
Memorandum

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subject: Section 303(a)(2)(B)(iii) of GOZA and section 6404(g) of the Code

This Chief Counsel Advice responds to your e-mail dated January 11, 2006, with respect to section 303(a)(1) of the Gulf Opportunity Zone Act of 2006, Pub. L. 109-135, which modifies paragraph 2 of section 903(d) of the American Jobs Creation Act of 2004. This advice may not be used or cited as precedent.

ISSUES

1. Whether the reference to the Secretary of the Treasury in this provision means that the Secretary must personally exercise the authority described in the statute.

2. What is the scope of interest relief for listed and certain reportable transactions under the amendments in section 303(a)(1) of GOZA?

CONCLUSIONS

1. Given the plain language of the amendment to the off-Code provision, the Secretary of the Treasury must personally exercise the authority described.

2. To qualify for relief under the amendment to 903(d)(2)(B)(ii)(II), taxpayers must have legally binding settlement agreements by January 23, 2006.

LAW AND ANALYSIS

Section 303(a) amends section 903(d)(2)(B)(iii) to read: "TAXPAYERS ACTING IN GOOD FAITH.--The Secretary of the Treasury may except from the application of clause (i) any transaction in which the taxpayer has acted reasonably and in good faith." You have asked for our opinion whether the reference to the Secretary of the Treasury in this provision means that the Secretary must personally exercise the authority described in the statute. As you know, section 7701(a)(11)(A) provides that "the term 'Secretary of the Treasury' means the Secretary of the Treasury, personally, and shall not include any delegate of his." Section 7701(a) applies only to Title 26, however. Because section 903(d) is an off-Code provision, section 7701(a) does not apply. We must, therefore, look instead to the language of the provision and apply the normal rules of statutory construction. We note that section 903(d)(2)(B)(iii) reads "[t]he Secretary of the Treasury may…" and the neighboring section 903(d)(2)(B)(ii) uses the term "[t]he Secretary of the Treasury or the Secretary's delegate…" (Emphasis added). The fact that Congress expressly provided for delegation by the Secretary of the Treasury in section 903(d)(2)(B)(ii) and did not do so in section 903(d)(2)(B(iii), is an indication that Congress consciously chose not to allow delegation in latter provision. Applying the rules of statutory construction, we conclude that the better interpretation of the term "Secretary of the Treasury" excludes a delegate. We have found no other statutory or case law that would allow the Secretary to delegate his authority to sign the waivers under section 903(d)(2)(B)(iii).

The Joint Committee's discussion of the provision does not indicate one way or the other whether Congress intended for the Secretary of Treasury to personally make these good faith determinations. (See Technical Explanation of the Revenue Provisions of H.R. 4440, The "Gulf Zone Opportunity Zone Act of 2005", p.67) We note that the Joint Committee's discussion of the provision does refer to the "Secretary" not the "Secretary of the Treasury." If used in a Title 26 provision subject to section 7701(a), the use of the term Secretary in the legislative history might suggest an alternative

reading if the statutory language were ambiguous. This is not a Title 26 provision, however, and the plain language of the statute does not appear ambiguous. It is our opinion based on that language that the Secretary of the Treasury must personally exercise this authority.

We can suggest that the Treasury Department seek a technical correction of this provision on the grounds that, despite the plain language, we believe that Congress may not have intended to prevent delegation of the authority. There is no assurance, however, that such a technical correction will occur or, if it does, that it will occur in time to resolve the immediate problems the Service faces in dealing with the many outstanding cases where settlements are pending.

You have also asked for our opinion regarding the scope of interest relief. We initially read section 903(d)(2)(B)(ii) of the AJCA as limited to those participating in the settlement initiative described in Announcement 2005-80. After further review of the legislation as it developed, however, we now conclude that a broader group of initiatives qualify, both those offered through published guidance and those select initiatives that were undertaken by directly contacting targeted groups of all known taxpayers who participated in a tax shelter promotion, but where the initiative was not formally published. In order to qualify under section 903(d)(2)(B)(ii)(II), "the taxpayer [must have] entered into a settlement agreement…as of January 23, 2006." To have entered into a settlement agreement, both parties must have reached a meeting of the minds. The Service's practice is to make settlement agreements, usually on Form 906, effective only when the taxpayer has first signed and the Service has countersigned the document. In addition, initiatives sometimes specifically require signed closing agreements to effectuate the settlement. Prior to that point, the agreements typically are not binding on the parties and either party can withdraw. Consequently, we believe that to qualify under this provision, taxpayers must have legally binding settlement agreements by January 23, 2006.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-7950 if you have any further questions.