Department of the Treasury

Internal Revenue Service Office of Chief Counsel



CC-2002-043

October 17, 2002

Following Published Guidance Subject: Positions in Litigation

Upon Incorporation Cancellation Date: into the CCDM

<u>Purpose</u>

The purpose of this notice is to remind Chief Counsel attorneys of the requirement to 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 establishes a requirement 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

It has been a longstanding policy of the Office of Chief Counsel that we are bound by our published positions, whether in regulations, revenue rulings, or revenue procedures, and that we will not argue to the contrary. Accordingly, we do NOT take positions in litigation, TAMs, PLRs, CCAs, advisory opinions, etc., inconsistent with a position that the Service has taken in published guidance or in proposed regulations. This policy applies even when attorneys disagree with the published guidance or even if there are plans to revoke, change or clarify the position taken in the published guidance. The policy applies regardless of the age of the guidance and regardless of whether courts have chosen to follow the published position. So long as the published guidance remains on the books, the Office of Chief Counsel will follow it. Counsel can, however, take positions inconsistent with prior informal advice, such as TAMs, CCAs, etc., but should never take a position inconsistent with published guidance or proposed regulations. Our adherence to the Internal Revenue Code and our published guidance in articulating our litigating position was recently reiterated by the Chief Counsel in the Roles Memo issued on August 26, 2002.

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Sometimes reasonable minds can differ over whether we can effectively distinguish the position we want to take in our current case from an existing published position. Also, attorneys will encounter rulings that appear outdated or inconsistent with well established case law. In those situations, attorneys should bring the ruling or other published guidance to the attention of the Associate office with subject matter jurisdiction so that the Associate can consider whether to revoke or modify the published guidance or whether the published guidance can be distinguished in a particular case. Accordingly, as stated above, effective immediately, 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 sending to the Department of Justice, regardless of the issue or amount involved.

Again, 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 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. No. 9 (Oct. 7, 2002); Walker v. Commissioner, 101 T.C. 537 (1993); Phillips v. Commissioner, 88 T.C. 529 (1987).

Any questions regarding the matters contained herein should be directed to George Bowden of Procedure and Administration at (202) 622-3400.

_____/s/ DEBORAH A. BUTLER Associate Chief Counsel (Procedure and Administration)