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

OFFICE OF
CHIEF COUNSEL

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January 30, 2001

MEMORANDUM FOR SBSE ASSOCIATE AREA COUNSEL (BROOKLYN)

FROM: Peter J. Devlin
Deputy Assistant Chief Counsel (Collection, Bankruptcy & Summonses)

SUBJECT: Letter 1058 or LT11 to Power of Attorney
Request for Significant Service Center Advice

This memorandum responds to your request for Significant Service Center Advice dated June 2, 2000. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

ISSUES:

1. Whether the failure to send the taxpayer's authorized representative a copy of a notice entitling the taxpayer to a Collection Due Process (CDP) hearing, or a Collection Appeals Program (CAP) hearing notice would justify reversal or prohibition of a collection action?

2. Whether any corrective action should be taken if the authorized representative is not sent a copy of a notice entitling the taxpayer to a CDP or CAP hearing, and the procedural failure is not discovered by the Internal Revenue Service (IRS) until the hearing or the date the hearing is requested?

CONCLUSION:

1. While the failure to send a copy of a CDP notice, or a notice entitling the taxpayer to a CAP hearing, to an authorized representative may constitute a violation of an administrative procedure, such failure alone would not justify the reversal or prohibition of a collection action.

2. The Service Center is not legally required to take any corrective action when the failure to send a copy of the notice to the authorized representative is discovered at the time of the hearing or the date the hearing is requested.

FACTS:

This request for Significant Service Center Advice was prompted by a request from a settlement officer with the IRS Office of Appeals (Appeals) for an amplification of a Routine Service Center Advice previously issued by your office. According to the settlement officer, taxpayers have challenged the failure of the IRS to send a copy of a Letter LT11, Final Notice - Notice of Intent to Levy and Your Notice of a Right to a Hearing, to the representative as an inappropriate collection action because the IRS has failed to satisfy an administrative procedural requirement. The Letter LT11 is a computer-generated letter giving notice to the taxpayer of the IRS's intent to levy and the taxpayer's right to a CDP hearing under I.R.C. § 6330 with Appeals. The administrative procedure the taxpayers are referring to is 26 C.F.R. § 601.506(a), which requires IRS employees to send to an authorized representative a copy of all notices and other written communications sent to the taxpayer. Pursuant to this procedural rule, the Internal Revenue Manual (Manual) applicable to Service Center collection employees requires that a copy of any Automated Collection System (ACS) letter to the taxpayer be sent to the authorized representative. IRM 21.9.6.4.41.1. Letter LT12, which is identical to Letter LT11, is the copy sent to the taxpayer's authorized representative.

The settlement officer has concluded that a violation of administrative procedure occurs if a copy of a CDP notice, or a notice entitling the taxpayer to a CAP hearing, as applicable, is not sent to the authorized representative. Because the settlement officer is required to verify that the requirements of all applicable law and administrative procedures have been met, he would be required to reveal this violation of administrative procedure. He is concerned that if he sustains the collection action, regardless of whether he is involved in a CDP, CAP or equivalent hearing, the Service Center employee who committed the violation could become subject to termination under section 1203 of IRS Restructuring and Reform Act of 1998 (RRA 98).

Accordingly, the settlement officer believes that based on I.R.C. § 6330(c)(1), the regulations thereunder, and the IRM provisions for CDP hearings, he may be required to prohibit a proposed levy, if a copy of Letter LT11 (or in limited circumstances, a virtually identical Letter 1058C) was not sent by the Service Center to the taxpayer's authorized representative. The settlement officer believes that based on Manual provisions for CAP hearings, he may be required to reverse or prohibit the collection action, if copies of other notices relating to collection were not sent by the Service Center to the taxpayer's authorized representative.

To avoid this required reversal or prohibition, the settlement officer has suggested that the Service Center take corrective action. Because the Service Center does not keep any copies of notices (electronic or paper) sent to taxpayers, sending a belated copy of the notice to the authorized representative would not be possible. In addition, an exact copy of the notice is difficult to recreate because the exact balance due calculated by the computer on the date the letter is generated is not readily available. Understanding this, the settlement officer has suggested that a letter be sent to the representative explaining that a notice of intent to levy and right to CDP hearing was sent to the taxpayer on a specified date, and that although a copy of the notice is not retained, a copy of the form letter sent to the taxpayer is enclosed. The settlement officer also recommends that if the omission is discovered after the 30-day period for filing a request for a CDP hearing, the letter could give the representative 10 days from the date of the letter to inform his client of the availability of a hearing equivalent to a CDP hearing, but with no right to judicial review. See Temp. Treas. Reg. § 301.6330-1T(i).

This Service Center Advice assumes that the CDP notice, or notice entitling the taxpayer to a CAP hearing, has been properly and timely sent to the taxpayer. The sole procedural irregularity is that the IRS did not forward a copy of the notice to the authorized representative as required by section 601.506(a).

BACKGROUND:

Two types of Appeals proceedings involving taxpayers and their authorized representatives are relevant to this analysis. The first type of proceeding is the CDP hearing, the right to which was added by RRA 98. At such hearing, an impartial officer with the Office of Appeals, whether a settlement officer or Appeals officer (hereinafter, both will be referred to as an "Appeals officer") is to determine "whether any proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." I.R.C. § 6330(c)(3)(C). Taxpayers wishing to challenge the first filing of a notice of federal tax lien with respect to a particular tax and period, or the first levy proposed for the collection of a particular tax and period, will be given the opportunity to have a CDP hearing. The Service Center, specifically ACS, is responsible for sending out Letter LT11 (or Letter 1058C), informing the taxpayer of his or her right to a CDP hearing under I.R.C. § 6330 prior to levy.1/ If the taxpayer fails to timely request a CDP hearing on either a lien filing or proposed levy, he or she will be given an equivalent hearing. Other than judicial

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1/ The Service Centers are not responsible for sending out Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under IRC 6320, which entitles the taxpayer to a CDP hearing in which to challenge the filing of the notice of federal tax lien.

review, the provisions of section 6320 or 6330 are fully applicable to an equivalent hearing.

I.R.C. § 6330(c)(1) requires the Appeals officer to "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." This provision and the regulations make clear that it is not the Appeals officer but the IRS office or officer pursuing collection that is required to provide the verification. See Temp. Treas. Reg. §§ 301.6320-1T(e)(1) and 301.6330-1T(e)(1). The legislative history reinforces this interpretation: "During the hearing, the IRS is required to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met." H. Rep. 105-599, 105th Cong., 2d Sess., p. 264. I.R.C. § 6330(c)(3)(A) requires the Appeals officer in making his or her determination as to the appropriateness of the collection action to "take into consideration" this verification. Temp. Treas. Reg. §§ 301.6320-1T(e)(3), Q&AE1 and 301.6330-1T(e)(3), Q&A-E1 reinforce the statutory language by stating that "Appeals will consider the following matters in making its determination: (i) Whether the IRS met the requirements of any applicable law or administrative procedure." The Manual, consistent with the statute and temporary regulation, requires that the Appeals officer document, in a case memorandum and in the attachment to the Notice of Determination, that he or she obtained "verification from the Service that the requirements of any applicable law or administrative procedures have been met." IRM 8.7.1.1.9.11(8).

The second type of proceeding discussed in this memorandum, CAP, was initiated in 1996 to permit taxpayers to appeal a prior or proposed lien, levy or seizure action to the IRS Office of Appeals. A taxpayer may obtain a CAP proceeding to challenge subsequently proposed or completed lien filings or levies involving the same tax and period for which a CDP hearing was offered. Before a lien notice is filed, and therefore before a CDP hearing is offered, the taxpayer can obtain a CAP proceeding to contest the threatened filing. The taxpayer can also challenge the denial or termination of an installment agreement in a CAP proceeding. There are a number of ways a CAP hearing can result from written notices issued by the Service Center. When the Service Center sends out a Letter CP 503 (stating that a Notice of Federal Tax Lien may be filed unless the IRS receives payment within 30 days) or a Letter CP 504 (SITLP notice), the taxpayer is entitled to a CAP hearing.2/ When a Letter CP 523 is sent by the Service Center proposing the

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2/ A CAP proceeding would be available to a taxpayer based on the additional lien filing, after the taxpayer receives notice via Letter 3171, Notice of Additional Federal Tax Lien Filing. This letter is sent to the taxpayer after a lien is filed in a different jurisdiction at a later date for a tax period for which a CDP notice has already been issued. Letter 3171 is not issued by the Service Centers.

termination of an installment agreement, the taxpayer may obtain a CAP hearing.3/ When a Service Center employee informs the taxpayer by letter, if the taxpayer is unavailable by telephone, that a proposed installment agreement is rejected, the taxpayer may initiate a CAP proceeding.4/ Publication 1660, entitled "Collection Appeal Rights," informs the taxpayer about his right to a CAP hearing, and is enclosed along with the above-described letters.5/

The CAP procedures in the Manual provide that "Appeals should review the case for appropriateness based on law, regulations, policy and procedures (National, Regional and Local), considering all the facts and circumstances." IRM 8.7.1.1.9.8(6). "Judgment is likely to be an issue in these types of cases, although they can also involve legal or procedural issues. Appeals may reverse Collection's action if evaluation of the taxpayer's history and current facts and circumstances reveal a more appropriate solution." IRM 8.7.1.1.9.8(8). The CAP training manual states on page 1-10: "On the other hand, you may make a determination reversing Collection because the Collection employee did not follow the law or manual."

DISCUSSION:

1. Failure to send a copy of the CDP or CAP notice to an authorized representative is an administrative procedure violation to be considered under CDP or CAP, but does not alone justify reversal or prohibition of collection action

26 C.F.R. § 601.506(a) states: "Any notice or written communication (or a copy thereof) required or permitted to be given to a taxpayer in any matter before the Internal Revenue Service must be given to the taxpayer and, unless restricted by

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3/ The right of a taxpayer to appeal the proposed termination of an installment agreement was added by the Taxpayer Bill of Rights II, enacted July 30, 1996, and is codified at I.R.C. § 6159(d).

4/ The right to appeal the rejection of a proposed installment agreement was added by RRA 98, and is codified at I.R.C. § 7122(d).

5/ Once a taxpayer has had a CDP hearing on a proposed levy for a particular tax and period, or an opportunity for one, he or she may obtain a CAP proceeding for subsequent levies to collect the same tax and period, either before or after the levy. Because no written notice is issued with respect to the subsequent levies by the Service Centers (or by field compliance), there would not be an occasion to send a copy to the authorized representative.

the taxpayer, to the representative...."6/ Section 601.501(a) states that "[t]hese rules [as to the authorized representative] apply to all offices of the Internal Revenue Service in all matters...." Therefore, the procedural rules relating to authorized representatives apply to CDP notices, or notices or written communications that would entitle a taxpayer to a CAP hearing.7/

Consequently, we believe that failure to send the authorized representative a copy of such notice would be a failure to meet the requirements of an administrative procedure, subject to verification under section 6330(c)(1) or under CAP procedures. Section 6330(c)(1) requires the Appeals officer to obtain from the IRS verification that "the requirements of any applicable law or administrative procedure have been met." Moreover, the legislative history of section 6330(c) demonstrates that verification applies not only to statutory and regulatory requirements but to internal administrative requirements as well: "During the hearing, the IRS is required to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met." H. Report 105-599, 105th Cong., 2d Sess., p. 264. Whether the failure to send a copy of the notice is deemed a violation of section 601.506(a) or a provision of the Manual, the Appeals officer would be required to consider the violation by section 6330(c)(3)(A) or under applicable CAP procedures.

Although failure to send an authorized representative a copy of the notice sent to the taxpayer, as required by section 601.506, is a failure to follow a required administrative procedure, we do not believe that the failure alone to comply with this section and corresponding Manual provisions would justify the reversal or

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6/ A person holding a power of attorney for a taxpayer must be a recognized representative of the taxpayer in accordance with 26 C.F.R. § 601.502 et seq.

7/ I.R.C. § 6304, relating to communications with taxpayers and their representatives, does not apply when a CDP notice under either I.RC. §§ 6320 or 6330 is sent to the taxpayer, because these notices are statutorily required to be sent to the taxpayer. Moreover, where a taxpayer and his or her representative have executed a Power of Attorney form, Form 2848, sending to the taxpayer other collection notices or communications entitling him or her to a CAP hearing does not violate section 6304(a)(2). Section 6304(a) provides in relevant part that "without prior consent of the taxpayer ... the Secretary may not communicate with the taxpayer in connection with the collection of any unpaid tax ... (2) if the Secretary knows such person is represented by any person authorized to practice before the [IRS] ... unless such person consents to direct communication with the taxpayer." (Emphasis added). The execution of Form 2848, constitutes "prior consent of the taxpayer" to direct receipt of either the original or a copy of all written communications, including written communications in connection with the collection of an unpaid tax. By executing such form, the taxpayer's representative is also consenting to such direct contact.

prohibition of any collection action. Section 601.506(a)(3) states that "failure to give notice or other written communication to the recognized representative of a taxpayer will not affect the validity of any notice ...." Based on this language, courts have interpreted section 601.506(a) as "directory," not mandatory. Smith v. United States, 478 F.2d 398, 400 (5th Cir. 1973); Swann v. Alameda County Retirement Assoc., 97-2 U.S.T.C. ¶ 50,676; 80 A.F.T.R.2d 6532 (9th Cir. 1997); Nuehoff v. Commissioner, 75 T.C. 36, 41-42 (1980).8/ Thus, the limiting language of section 601.506(a)(3) makes clear that the validity of a CDP notice, or a notice or written communication that would entitle a taxpayer to a CAP hearing, is not affected by the failure to send the authorized representative a copy. In other words, even though the IRS failed to send a copy of the requisite notice to the authorized representative, the notice is valid, and, in the case of an untimely request for a CDP hearing, the only relief the Appeals officer can provide is to conduct an equivalent hearing.

For this reason, an Appeals officer would not be justified in withdrawing a lien filing or prohibiting a levy if the only reason was that the procedural failure prevented the taxpayer from receiving a CDP hearing, instead of an equivalent hearing. Likewise, an Appeals officer may not reverse or prohibit a lien filing or levy in a CAP proceeding solely because the IRS failed to send a copy to the authorized representative. A reversal or prohibition of a collection action under CDP or CAP based on this procedural violation alone would be an implicit determination that the notice was invalid, a result prohibited by section 601.506(a)(3).9/

On the other hand, this procedural violation in combination with the proposal of a viable collection alternative may justify the determination in a CDP hearing under section 6320 or 6330, or equivalent hearing, that the notice of federal tax lien should be withdrawn or the proposed levy prohibited.10/ Similarly, in a pre-lien

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8/ In addition, the Statement of Procedural Rules, including section 601.506, has not been signed by the Secretary of the Treasury and is not given the force of law by the courts. Smith, 478 F.2d at 400; Swann, 97-2 U.S.T.C. ¶ 50,676. See also Boulez v. Commissioner, 810 F.2d 209, 214-215 (D.C. Cir. 1987); Luhring v. Glotzbach, 304 F.2d 560 (4th Cir. 1962). As such, these rules do not confer any rights on the taxpayer. Smith, 478 F.2d at 400; Boulez, 810 F.2d at 215; Luhring, 304 F.2d at 565.

9/ This is true whether the requirement to send a copy to the authorized representative is found in section 601.506 or in the Manual.

10/ The Service Centers are not responsible for sending out Letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing under IRC 6320, which entitles the taxpayer to a CDP hearing in which to challenge the filing of the notice of federal tax lien. Although Letter 3172 is not issued by the Service Centers, a CDP or equivalent hearing requested in response to this letter is included in this analysis.

filing or post-lien filing CAP proceeding11/, or a pre-levy CAP proceeding12/, the reversal or prohibition of a lien filing or levy may be justified by the proposal of a viable collection alternative in addition to the failure to send the authorized representative a copy of a notice. If the taxpayer is requesting a return of levied property in a post-levy equivalent hearing, or a post-levy CAP proceeding elected in lieu of the equivalent hearing, then the return of property is governed by I.R.C. § 6343(d) (proposed regulations promulgated thereunder should be issued shortly for public comment).

The settlement officer whose questions prompted the request for advice was also concerned that he might have to reverse or prohibit any collection action where a copy is not sent to the authorized representative in order to avoid a possible section 1203 termination of the Service Center employee who failed to send the copy to the taxpayer's representative.13/ We believe that in addition to being a failure to follow section 601.506(a)(3), reversing or prohibiting a collection action would be an inappropriate exercise of discretion if such determination is solely because an Appeals officer fears approval of the collection action will expose an IRS employee to possible termination under section 1203. The Office of Appeals is an independent body and its officers are charged with rendering impartial decisions. See I.R.C. §§ 6320(b)(3) and 6330(b)(3); 26 C.F.R. § 601.106(f)(2). For an

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11/ A CAP proceeding would be available to a taxpayer based on the additional lien filing, after the taxpayer receives notice via Letter 3171, Notice of Additional Federal Tax Lien Filing. This letter is sent to the taxpayer after a lien is filed in a different jurisdiction at a later date for a tax period for which a CDP notice has already been issued. Although Letter 3171 is not issued by the Service Centers, the CAP proceeding requested in response to this letter is included in this analysis.

12/ After the CDP notice under section 6330 is sent for a particular tax and period, no written notices are sent to the taxpayer prior to or after subsequent levies to collect the same tax and period. As a result, there is nothing to send the authorized representative with respect to subsequent levies. Accordingly, while the taxpayer can obtain CAP hearings to challenge these levies, he or she could not complain about the failure to send the authorized representative a copy.

13/ Section 1203(b)(6) is broadly written to include as grounds for termination violations of "Internal Revenue Code of 1986, Department of Treasury regulations, policies of the Internal Revenue Service (including the Internal Revenue Manual)." Thus, section 601.506 and corresponding Manual provisions are subject to section 1203(b)(6) of RRA 98. We observe, however, that such violations must be committed "for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service" before the offending employee can be terminated. As a result, a Service Center employee who fails to send a copy of a notice or written communication that would entitle a taxpayer to a CAP hearing, or a CDP notice, may not be terminated under section 1203 unless it is shown that he or she intended to retaliate against or harass the taxpayer or representative.

Appeals officer to permit his or her decisionmaking to be influenced by the desire to protect a Service Center employee from possible termination under section 1203 would be a breach of his or her duty to render an impartial determination.

2. No action needed by Service Center to correct the failure to send a copy to the authorized representative

Based on the limiting language of section 601.506(a)(3), it is our opinion that the IRS is not legally required to furnish a duplicate notice, or an explanatory letter with a copy of the applicable form letter (LT11, 1058C, CP503, CP 504, CP 523, letter rejecting installment agreement, etc.) to the authorized representative when the omission is discovered at the time of the hearing or the date the hearing is requested. Providing the representative a copy at that point would be meaningless. However, where the Service Center can reproduce an accurate duplicate of the notice sent to the taxpayer and there is still sufficient time for the taxpayer to file a timely request for a CDP hearing or for the taxpayer to obtain meaningful review in a CAP proceeding, a late copy to the representative in this scenario is better than no copy and would be in keeping with section 601.506(a).

If you have any further questions, please call 202-622-3610.

cc: CC:PA:TSS; Attn: Barbara A. Johnson, TSS Supervisor
Office of National Chief of Appeals