

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

N(35)5(21)0-1

September 30, 1998

Revision of Review
Procedures for Certain Motions

Subject: To Compel Discovery

Cancellation Date: March 29, 1999

Review responsibility for all motions to compel discovery is currently vested with the Procedural Branch of the Field Service Division. The purpose of this Notice is to apprise all District and Regional Counsel attorneys and managers of revised procedures for the review of motions to compel discovery. Under the revised procedures, District and Regional managers will assume responsibility for review and clearance of motions to compel discovery that arise as a result of a petitioner's complete failure to respond to informal and formal discovery. The revised procedures are effective October 1, 1998.

Situations where a petitioner is considered to have provided no response to discovery include not only situations where the taxpayer fails to respond to informal or formal discovery, but also situations where the responses question the constitutionality or overall validity of the Internal Revenue Code, the authority of the Service to enforce the Code or collect information, or make similar arguments that have been repeatedly reviewed and rejected by the courts. Accordingly, in those situations, motions to compel may be filed after review by a District or Regional Counsel manager, without national office review. All other motions to compel discovery will continue to require review and clearance by the national office before filing.

As you are aware, the Tax Court, in the past, has expressed concern that the Service may be using discovery and discovery sanctions in an improper or overly aggressive manner, particularly against pro se taxpayers. Aggressive discovery was also a concern of Executive Order 12988 on Civil Justice Reform, which requires review of discovery, including motions to compel, by a Grade 15 or higher. Mandatory national office review of motions to compel discovery was instituted to ensure compliance with the Executive Order and to assure the Tax Court that motions to compel discovery were filed by Counsel only in appropriate circumstances and that the motions were in compliance with the Tax Court's Rules and decided case law.

Motions to compel should be filed judiciously and only when the respondent can demonstrate that the information requested is needed for the government's case or to rebut the petitioner's case. Further, motions to compel should only be filed where the underlying discovery request satisfies the court-imposed obligation to consult and

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communicate. Common deficiencies noted in proposed motions to compel in the past have included, among others, the failure to demonstrate that sufficient time was provided to respond to Branerton requests and the failure to demonstrate a last chance contact.

Each step in the discovery process requires adherence to both the letter and the spirit of the Tax Court's Rules, Executive Order 12988, and Chief Counsel policy on discovery. Managers are expected to take an active role in the discovery process. This means not only considering whether a motion to compel can be filed, but also considering whether a motion should be filed. Counsel's commitment to the Tax Court's Rules and the Executive Order can only be fulfilled if attorneys and managers responsibly apply the discovery rules.

A discovery checklist has been developed to assist attorneys and managers in ensuring that all discovery rules and procedures have been followed before a motion to compel is filed. The checklist is set forth at CCDM Exhibit (35)500-21. A CD-ROM providing information on the appropriate use of motions to compel discovery, practical tips for preparing and filing motions to compel, and sample letters and motions has been developed and will be available in each District Counsel office. Pending revision of the online version of the CCDM, downloading the sample motions and checklist from the CD-ROM, or consulting an up-to-date paper copy of the CCDM, is strongly recommended to ensure that motions comply with the Tax Court's Rules and Office policy.

Where the necessity for national office review of a motion to compel discovery is in question, contact the Procedural Branch of the Field Service Division for assistance at (202) 622-7950. The Procedural Branch will continue to provide assistance on an informal and formal basis as required for those motions to compel which will now be reviewed by managers in the District or Regional Counsel offices.

Motions to compel discovery reviewed by the national office will be studied over a six month period beginning October 1, 1998. The purpose of the study is to determine whether additional categories of motions to compel may be appropriate for review and clearance by District and Regional Counsel offices.

Should you have any questions regarding this Notice, please contact the Procedural Branch of the Field Service Division at (202) 622-7950.

/s/
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