

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

**N o t i c e**

N(35)(11)79-2

July 7, 2000

REVISED NATIONAL OFFICE  
**Subject:** BRIEF REVIEW LIST

Upon Incorporation  
**Cancellation Date:** Into the CCDM

The following is a complete rewrite of CCDM (35)(11)79 regarding the review of briefs in the national office. This version of CCDM (35)(11)79 should be used in lieu of the version of the section that is set forth on CCDM (35) at 497-490. This version of CCDM (35)(11)79 will be incorporated into the CCDM when next revised.

**(35)(11)79**

(1) It is imperative that all briefs filed with the Tax Court assert positions consistent with Service legal positions and policies and uphold the office's reputation for the highest quality of written product. In order to ensure these attributes, a number of briefs, prepared by the field offices, are reviewed in the National Office before filing. A brief must be reviewed in the National Office if one of the following exist or have occurred:

- (a) the case involves the validity of a regulation, temporary regulation, revenue ruling or revenue procedure;
- (b) the case relates to a proposed Treasury regulation;
- (c) the case involves a Coordinated Examination Program (CEP) or Industry Specialization Program (ISP) issue; or the case involves an international issue or a tax treaty issue;
- (d) the National Office has determined a litigating position on the issue for the guidance of local counsel or the case has been designated as a notice case;
- (e) the Danielson rule [Commissioner v. Danielson, 378 F.2d 771 (3d Cir. 1967)], the parol evidence rule, the strong proof rule, estoppel, duty of consistency or other similar rule is implicated;
- (f) the National Office issued Chief Counsel Advice in the case;

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(g) an issue exists whether evidence to be presented by respondent must be suppressed because of the method in which it was obtained;

(h) the case contains TEFRA partnership/S corporation procedural issues;

(i) responses or briefs filed in opposition to taxpayers' motions for litigation or administrative costs, § 7430. See (35)4(16)(12);

(j) petitioner alleges misconduct on the part of Service employees or local counsel;

(k) cases raising the taxpayer's eligibility to elect to allocate under § 6015(c) or raising challenges to the standard allocation rules of § 6015(d). Also, cases raising jurisdictional issues under § 6015(e) or (f) regarding the Service's administrative denial, in whole or part, for relief under § 6015(b) or (c);

(l) cases in which the taxpayer raises the issue of income that was not reported as taxable because of an exclusion under §§104-106 (i.e., income was received under workman's compensation or from an accident plan or health plan);

(m) cases involving § 7436 which gives the Tax Court jurisdiction over worker classification and whether the relief provided under § 530 of the Revenue Act of 1978 should apply to employers, and cases involving § 530 of the Revenue Act of 1978; and

(n) the issues in the brief are not listed on the direct file list in (35)5(11)79.

(2) Even though a case involves only an issue or issues described in (35)(11)79:(3), novel, unusual or unique questions may be presented. It is the responsibility of the docket attorney and the reviewer in the Field to identify those cases involving issues presenting such questions as to warrant review in the National Office, and to forward the brief for such review according to present procedures.

(3) As noted above, a number of briefs must be reviewed in the National Office prior to filing. Many briefs filed with the court, however, involve issues which are purely factual in nature, or issues as to which Service position and policies are clearly established. Briefs in these latter cases ordinarily should not require review by the National Office. Therefore, except in the situations noted in subparagraphs (1) through (2) above, as a general rule, briefs may be filed directly by local counsel with the Tax Court in the following cases:

(a) "S" cases, except cases involving employee benefit issues in which the Service's motion to remove S status has been denied or the case involves an issue on the significant issue list;

(b) cases where the petitioner is only raising frivolous or groundless arguments, and the burden of proof has not been raised as an argument by the petitioner;

(c) where question of deductibility depends solely on substantiation;

(d) reconstruction of income, except cases involving the reconstruction of an item of income solely through the use of statistical information from unrelated taxpayers (I.R.C. § 7491(b) or cases involving a reasonable dispute with respect to an item of income reported on an information return filed with the Service (I.R.C. § 6201(d));

(e) understated income, except issues raised with respect to the burden of proof, the presumption of correctness, or I.R.C. § 7522;

(f) allowance of deductions that are purely the computational result of a change in adjusted gross income;

(g) deductibility of payment of a shareholder's expenses and corresponding dividend, except in the context of corporate reorganizations or buy-outs; and

(h) valuation of land and personal property, except valuation of corporate stock with restrictive sales agreements, valuation issues involving minority interest discounts, or post-death events, or valuation issues involving family limited partnerships.

In addition, briefs involving those issues enumerated below may also be filed directly. Briefs involving any issue not specified in this section must be reviewed by the National Office prior to filing.

§ 2--Head of household.

§ 2--Surviving spouse.

§ 21--Child care credits.

§ 31--Withholding of income tax on wages.

§ 61--Family trusts (limited to only the income or not issue).

§ 61--Illegal gains (income or not), except issues raised with respect to the burden of proof or presumption of correctness.

§ 61--Reimbursement of moving expenses (income or not).

§ 61--Taxes paid by another.

§ 71--Alimony.

§ 73--Services of child (income or not).

§ 74--Prizes and awards (income or not), except certain employee achievement awards under § 74(c).

§ 117--Scholarships or fellowships (inclusion or exclusion).

§ 119--Meals and lodging furnished for the convenience of the employer (excluded or not from income).

§ 151--Personal exemption.

§ 162--Educational expenses.

§ 162(a)--Unreasonable compensation, except for cases involving merger, takeovers, or "golden parachute" payments.

§ 162(a)--Rents and royalties, except Oil and Gas cases.

§ 165--Wagering losses (deductible or not), except where the definition of "wagering transaction" is in dispute.

§ 166--Bad debts; Worthlessness; business or nonbusiness; bona fide indebtedness.

§ 167--Depreciation; Reasonable allowance; methods; useful life and salvage, except cases involving amortization of intangibles.

§ 170--Valuation of charitable contribution, except for quid pro quo issues in gifts to churches or religious organizations.

§ 170--In the context of ULC or other similar mail order ministries.

§ 183--Hobby v. Business.

§ 213--Medical, hospital and dental expenses.

§ 215--Alimony.

§ 217--Moving expenses (deductible or not).

§ 262--Commuting expenses, except for cases involving Rev. Rul. 190, 1953-2 C.B. 303, Rev. Rul. 90-23, 1990-1 C.B. 28, and Rev. Rul. 94-47, 1994-29 I.R.B. 6, modified and superseded by, Rev. Rul. 99-7, 1999-5 I.R.B. 4 or a principal place of business issue.

§ 274--Briefs involving purely factual issues of substantiation under section 274 may be direct filed; briefs involving all other issues, substantive and otherwise, must be reviewed in the National Office.

§§ 531-537--Accumulated Earnings Tax.

§ 1034--Nonrecognition of gain from the sale of a principal residence except for cases involving the sale of a jointly owned residence by divorced taxpayers.

§ 1221--Property held primarily for sale to customers in ordinary course of trade or business (capital asset v. not a capital asset), except cases affected by Arkansas Best Corp. v. Commissioner, 485 U.S. 212 (1988).

§§ 1301-1305 [repealed]--Income averaging rules.

§ 1362--Whether shareholders properly filed a subchapter S election.

§ 1401-1402--Self-employment tax, except where employee v. independent contractor issues are present implicating Section 530, Revenue Act of 1978.

§ 6013--Whether a spouse signed or otherwise intended to sign a joint return.

§ 6013(e)--Innocent spouse issues, except those in which the "reason to know" standard is challenged as in Price v. Commissioner, 887 F.2d 959 (9th Cir. 1989), and Bokum v. Commissioner, 94 T.C. 126 (1990), aff'd, 992 F.2d 1132 (11<sup>th</sup> Cir. 1993), and except those cases raising apportionment under § 6015(b)(2).

§ 6015(b)--Innocent spouse claims under § 6015(b) raised in the context of a proceeding brought under § 6213, except those in which the "reason to know" standard is challenged as in Price v. Commissioner, 887 F.2d 959 (9<sup>th</sup> Cir. 1989) and Bokum v. Commissioner, 94 T.C. 126 (1990), aff'd, 992 F.2d 1132 (11<sup>th</sup> Cir. 1993).

§ 6401--Overpayments of tax.

§§ 6651--6663 additions to tax (except for cases involving controversial or novel legal or evidentiary questions, the meaning of "attributable to," constitutional challenges (such as double jeopardy) to the imposition of a civil addition to tax), or the fraud delinquency penalty under § 6651(f).

§ 6673--Penalties assessed before the Tax Court, except issues of failure to pursue available administrative remedies or where the penalty is sought to be applied against an individual other than the taxpayer.

§ 7502--Timely mailing treated as timely filing and timely paying, except cases involving testimony only as to mailing where the Service had not received the mailing.

(4) For those briefs which are directly filed by the Field Office, it is the responsibility of the Field Reviewer to ensure that they are correct factually and legally and of the highest quality.

(5) The Field Office must forward an opening brief (including an initial seriatim brief) to the National Office for review prior to filing so that it is received at least 10 calendar days prior to the due date. Moreover, the Field Office must send any reply brief (including supplemental briefs) so that it is received by the National Office for review at least 7 calendar days prior to the filing date set by the court. In the alternative, Tax Court Briefs may be transmitted to the National Office by email to "TSS4510." A brief will be considered received as of the date the brief is "received" in the TSS4510" mailbox if it is received by 3:00 p.m. Eastern time on the day that the United States Postal Service delivers regular mail to the National Office. Transmittals received in the TSS4510 mailbox after 3:00 p.m. on a business day, or any weekend day or holiday, will be logged in as received on the next business day. Briefs submitted by email must be sent using "normal sensitivity" and must not be marked "private."

(6) To facilitate necessary changes, all briefs must be accompanied by a computer disk containing the brief in WordPerfect 8.0 format, utilizing the features for automatically generating the "Table of Authorities," "Table of Contents," and "Automatic Paragraph Numbering." The trial attorney should request sufficient briefing time at the conclusion of the trial to ensure that these time requirements are met.

(7) The timely filing of briefs with the court is critical. While the "timely mailing as timely filing" provisions of section 7502 apply to the filing of Tax Court briefs, Field Offices ideally should mail all briefs in sufficient time so that they will be received by the court on or before the due date. See Tax Court Rule 22. Each brief should be mailed separately by certified mail or via a designated private delivery service qualified under section 7502(f). The brief should not be mailed in the same envelope with any other documents being directly filed with the court. If possible, the person posting the brief by certified mail should attempt to have the United States Postal Service postmark the envelope containing the brief. In addition, a postmarked sender's receipt for certified mail, or receipt provided by a designated private delivery service under section 7502(f), should be retained in the event it is necessary to prove timely mailing of the brief to the court.

(8) The Field Office must forward two copies of every directly filed brief to the National Office at the same time the original is mailed to the court. The transmittal to the Technical Services Section should identify the issues and the exception of section (35)(11)79(3) which permits the direct filing without National Office review. One copy of the brief will be forward by the Technical Services Section to the appropriate Division for determination if formal post review of the brief is required. Within 5 days of the receipt of the brief, the Division will make the determination if formal post review of the brief is required. This determination will be recorded on the Post Review of Direct Filed Briefs form and returned to the Technical Services Section. One copy of the direct filed brief will be forwarded to the Digest room where they are indexed and stored for future use.

(9) As a general rule, if there is any doubt or hesitation as to whether the brief is one of the types that should be reviewed by the National Office, it would be preferable to send it to the National Office for review prior to filing.

Any questions concerning this Notice should be directed to the Procedural Branch at (202) 622-7940.

          /s/ Daniel J. Wiles for            
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(Domestic)