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# Notice

CC-2001-036

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June 29, 2001

**Subject:** Opinion of Counsel in Offer in Compromise Cases **Cancel Date:** Upon Incorporation into the CCDM

## PURPOSE

This Notice sets forth procedures to be followed by Associate Area Counsel (SB/SE) offices<sup>1</sup> when reviewing proposed acceptances of taxpayer offers in compromise. Review by Counsel is performed pursuant to I.R.C. § 7122(b) and the Service's policies and procedures. No opinion of Counsel is required in cases where the total liability is less than \$50,000. This Notice clarifies the role of Counsel in reviewing offers based on doubt as to collectibility and doubt as to liability. It also adds procedures and standards for the review of offers based on the promotion of effective tax administration. This Notice supercedes any previous communications on this subject and will be incorporated into the Chief Counsel Directives Manual.

## OFFERS IN COMPROMISE AND THE ROLE OF COUNSEL

As reflected in Policy Statement P-5-100, compromise is a viable collection alternative. It is the Service's policy to encourage the use of this tool where appropriate. Correspondingly, Counsel will support the Commissioner's offer in compromise policy and will assist the Service by providing the legal opinion required by section 7122(b) and by rendering assistance with legal and policy issues that the Service may encounter in the processing and evaluation of offers.

## REVIEW OF PROPOSED ACCEPTANCES OF OFFERS IN COMPROMISE

**A. Overview** - Counsel's review of proposed acceptances has two separate and distinct components: 1) certification that all of the legal requirements for compromise have been met, and 2) review of the proposed compromise for consistent application of the Service's acceptance policies.

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<sup>1</sup> Associate Area Counsel (SB/SE) offices should consult with Counsel from other divisions when appropriate, such as where an LMSB or TEGE taxpayer raises doubt as to liability issues.

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Certifying that the legal requirements for compromise have been met is the primary purpose of Counsel review. These requirements have been met if: 1) a basis for compromise under the Treasury regulations—as described in parts B, C, and D, below—has been established, and 2) the documentation requirements of section 7122(b) have been satisfied. Once it has been determined that all of the legal requirements for compromise have been met, Counsel will sign the Form 7249, Offer Acceptance Report. The signed Form 7249 constitutes the opinion of Counsel required by section 7122(b), and will be placed on file for public inspection.

If the legal requirements for compromise have been met, Counsel then reviews the proposed acceptance for consistent application of the Service's policies regarding whether the proposed compromise amount is acceptable. These acceptance policies are explained in more detail below. A finding by Counsel that a proposed acceptance is not in keeping with Service policy is not a justification for withholding an opinion if all of the legal requirements for compromise have been met. Rather, Counsel should advise the Service of its concerns by separate memorandum. If Counsel recognizes that a proposed acceptance deviates from the policy, but concurs in the Service's determination that such deviation is warranted under the facts of the case, those views should also be conveyed to the Service by separate memorandum. In either event, the views of Counsel, as set forth in the separate memoranda will be reviewed by the official with authority to compromise prior to making the acceptance final. If Counsel is contemplating issuing an opinion that an offer should not be accepted, the offer group should be contacted on an informal basis to explore the possibility of reaching a consensus on the issues causing Counsel to question the propriety of accepting the offer.

In making each of the foregoing determinations, Counsel must rely upon factual determinations made by the Service. These determinations should ordinarily not be reexamined by Counsel unless patently erroneous. Asset valuations and necessary expense determinations are largely matters of administrative discretion and judgment and should not be questioned by Counsel.

## **B. Review of Doubt as to Liability Offers**

**Legal basis for compromise:** Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. Doubt as to liability does not exist where the liability has been established by a final court decision concerning the existence or amount of the liability.

**Policy regarding acceptance of amount offered:** The determination of the amount accepted to resolve a doubt as to liability case should be made by reference to the expected hazards in litigating the case. The evaluation of litigating hazards is, of course, not an exact science. Ordinarily, an amount should be considered acceptable under the Service's policies if it is within a reasonable range of the predicted result in litigation.

### **C. Review of Doubt as to Collectibility Offers**

**Legal basis for compromise:** Doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the assessed liability.

**Policy regarding acceptance of amount offered:** Where doubt as to collectibility has been established, an offer is generally considered acceptable if it closely approximates the amount that could reasonably be collected by other means, including the Service's administrative and judicial collection powers. See Policy Statement P-5-100. No asset should be eliminated from consideration or valued at zero simply because the Service would be unlikely to seize the asset. See IRM 5.8.4.1(4); IRM 5.8.5.3(2). In evaluating a proposed acceptance, Counsel's review should include a determination of:

- 1) whether the four components of collectibility (net equity in assets, present and future income, amounts collectible from third parties, and amounts available to the taxpayer but beyond the reach of the Service) have been considered;
- 2) whether issues with regard to lien priority have been properly determined; and
- 3) whether fraudulent conveyances and/or transferee liability issues have been properly resolved.

The Service's policies and procedures establish accepted methods for valuing assets, as well as rules regarding the portion of assets to be included in reasonable collection potential. Counsel should not question asset valuations and future income calculations that fall within the parameters established in these policies and procedures.

The Service's policies and procedures recognize that it may be appropriate in some cases for the Service to accept an offer of less than the total reasonable collection potential of a case. These are known as "special circumstances" cases. The Service anticipates acceptance of less than reasonable collection potential in cases where, despite the proper application of the Service's allowable expense standards and asset valuation rules, the taxpayer could not pay the full reasonable collection potential without suffering economic hardship. See IRM 5.8.4.2(4). Economic hardship is defined as the inability to meet reasonable basic living expenses. See Treas. Reg. § 301.6343-1(b)(4). Economic hardship does not include mere inconvenience or the inability to maintain a luxurious or affluent standard of living. Under the Service's procedures, the amount accepted should reflect what could reasonably be collected less the amount a taxpayer must retain to avoid the economic hardship. See IRM 5.8.11.2.1(5).

### **D. Review of Offers Based on Promotion of Effective Tax Administration**

On July 19, 1999, temporary Treasury regulations were issued that expanded the Service's authority to compromise beyond the traditional bases of doubt as to liability and doubt as to collectibility. Where there are no grounds for compromise on collectibility or liability grounds, a compromise may be entered into to promote effective tax administration, where: (1) collection of

the full liability would create economic hardship within the meaning of section 301.6343-1 of the Treasury regulations; or (2) exceptional circumstances exist such that collection of the full liability would be detrimental to voluntary compliance by taxpayers. Temp. Treas. Reg. § 301.7122-1T(b)(4). No such compromise may be entered into, however, where it would undermine compliance with the tax laws. Id.

## **1. Collection of the tax liability in full would create economic hardship**

**Legal basis for compromise:** The Service is now authorized to compromise when it determines that a liability could be collected in full, but to do so would cause economic hardship. Economic hardship is defined as the inability to meet reasonable basic living expenses. See Treas. Reg. § 301.6343-1(b)(4). Economic hardship does not include mere inconvenience or the inability to maintain a luxurious or affluent standard of living. If, even after deferring to the Service's valuation and expense determinations, Counsel concludes that the liability could be collected in full without causing economic hardship, as defined under the regulations, this basis for compromise is not established. In establishing this basis for compromise, the possible effect of compromise on future compliance with the tax laws must be considered.

**Policy regarding acceptance of amount offered:** Under the Service's procedures, the amount accepted should reflect what could reasonably be collected less the amount a taxpayer must retain to avoid the economic hardship. See IRM 5.8.11.2.1(5). The determination to accept a particular amount must be based on the taxpayer's particular facts and circumstances, and must be explained and documented clearly. See IRM 5.8.11.9(1). The decision to accept a particular amount will necessarily involve judgment on the part of the offer specialist and the official delegated the authority to make the final acceptance decision.

## **2. Collection of the tax liability in full would be detrimental to voluntary compliance**

**Legal basis for compromise:** The Service may compromise a case when it is determined that, although there is no doubt as to collectibility or liability, exceptional circumstances exist such that collection of the full liability would be detrimental to voluntary compliance. This basis is established when collection in full would work such an inequity or unfairness that compliance by other taxpayers would be adversely affected. This basis is not established if the offer file contains only vague assertions that the imposition of a tax liability, or of interest and penalties, is unfair. This authority to compromise should not be used as a method to disregard or circumvent established limits to relief granted elsewhere in the Code, such as interest abatement. See IRM 4.3.21.3.4(3). In establishing this basis for compromise, the possible effect of compromise on future compliance with the tax laws must be considered.

**Policy regarding adequate amount:** An adequate compromise amount will be determined based on what is considered fair and equitable under the particular facts and circumstances. The offer acceptance recommendation should contain a detailed explanation as to how the Service determined that the amount offered was adequate and is a fair and equitable resolution of the case. See IRM 5.8.11.2.2(3).

### **E. Issues not Related to Basis for Compromise or Acceptance Standards**

Occasionally, although a basis for compromise may be established and a proposed acceptance may be in keeping with the Service's acceptance standards, Counsel may have reservations about whether the offer should be accepted, based on policy or other non-legal concerns. As with all advice rendered by Counsel, it is proper to raise these concerns with the appropriate Service official, whether informally or by memorandum. Such concerns, however, are not grounds for withholding an opinion that the legal requirements for compromise have been established.

### **F. Documentation Requirements - I.R.C. § 7122(b)**

Section 7122(b) requires that the opinion of Counsel contain the reasons for compromise as well as a statement of the tax, penalties, and interest assessed and the amount paid in accordance with the terms of the compromise. Counsel should review the Form 7249 to see that this information has been included.

Questions regarding this notice may be directed to Frederick W. Schindler of the Office of the Assistant Chief Counsel, Collection, Bankruptcy & Summonses, at (202) 622-3620.

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Associate Chief Counsel  
(Procedure and Administration)