

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel **N o t i c e**
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CC-2003-022

July 1, 2003

Procedures for Processing Taxpayer Specific
Chief Counsel Advice that will be Upon Incorporation
Subject: Withheld in Full from Public Disclosure Cancel Date: into CCDM

Purpose

The purpose of this Notice is to apprise all Chief Counsel employees of the procedures for processing taxpayer specific Chief Counsel Advice (CCA) when it is determined that no portion of a particular CCA need be disclosed to the public under the provisions of I.R.C. § 6110. This Chief Counsel Notice supplements and modifies Chief Counsel Notice 2002-026, issued on May 16, 2002, which outlined the procedures for obtaining and processing CCA.

Discussion

Section 6110 provides that certain written determinations, or portions thereof, are to be made available for public inspection and copying. Special rules apply to making deletions from each CCA and notifying taxpayers who are the subjects of taxpayer specific CCA. Section 6110(i)(3) and (4). While certain information is required to be deleted from taxpayer specific CCA, other information may be deleted and withheld from the public if it falls within the statutory exemptions of, or exclusions from, the Freedom of Information Act, 5 U.S.C. § 552(b) and (c). In some instances, these deletions may result in no information being made available for public inspection or copying.

In accordance with section 6110(i)(4), in cases of taxpayer specific CCA, certain procedures are to be followed to notify the subject taxpayers of proposed deletions of identifying details contained in the taxpayer specific CCA. In cases where it is determined that a taxpayer specific CCA consists in its entirety of taxpayer-identifying information and

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information otherwise exempt from public disclosure, there is no intent to disclose any information and, therefore, there would be no need to issue the notice to the taxpayer described in section 6110(i)(4). For example, if the non-identifying portions of a taxpayer specific CCA consist entirely of attorney work product, it is exempt from disclosure in its entirety pursuant to exemption 5 of the FOIA and, therefore, no portion is required to be made available to the public. Other FOIA exemptions, in conjunction with the requirement to delete taxpayer identifying information, may also render a taxpayer specific CCA nondisclosable in its entirety.

Even though a taxpayer specific CCA may be withheld from public disclosure in its entirety, the issuing office continues to be responsible for timely sending a completed check sheet and the CCA to the Disclosure Unit of the Office of the Associate Chief Counsel (Procedure & Administration) for appropriate processing. No notice of intention to disclose will be sent to the taxpayer, but the Disclosure Unit will maintain a record of the CCA and its disposition.

Chief Counsel Notice 2002-026 sets forth, in the form of questions and answers, certain procedures for obtaining and processing 6110 documents. Based on the foregoing, the questions and answers 37, 49 and 50, appearing in that Notice, are updated as follows:

Q. 37. What is the scope of the attorney work product doctrine as it pertains to CCA?

A. 37. Claiming attorney work product requires a litigation predicate, either docketed in court, or, based on the totality of the facts, there is a reasonable anticipation of litigation (e.g., designated case, prior cycles with the taxpayer on these issues were litigated; taxpayer representative advises of intention to litigate, etc.). The attorney work product doctrine may include general discussions of the law, including the application of those legal principles to the particular facts of the case that is the subject of the CCA. See *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002) (IRS need not segregate and release agency working law from documents withheld in their entireties pursuant to the attorney work product privilege).

Q. 49. When do we give the taxpayer to whom a taxpayer specific CCA pertains notice of intention to disclose?

A. 49. The taxpayer must be provided with the notice of intention to disclose within 60 days after the document is issued, unless the Office of Chief Counsel determines that no portion of the CCA is to be made available to the public, in which case no notice of intention to disclose is sent to the taxpayer. CCA are issued when they are dated and signed by the Counsel employee authorized to sign the CCA.

Q. 50. Who is responsible for providing the taxpayer with the notice of intention to disclose?

A. 50. The Disclosure Unit is responsible for providing the taxpayer with the notice of intention to disclose. The issuing office is responsible for timely sending the completed appropriate check sheet and 6110 document, including taxpayer specific CCA which have been determined to be exempt from public disclosure in their entirety, for appropriate processing.

Questions concerning the scope of permissible redactions and dissemination should be addressed to A.M. Gulas of the Associate Chief Counsel, Procedure and Administration (Disclosure & Privacy Law Division), at 202-622-4560.

_____/s/_____
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

Attachment: Checksheet for Processing CCA

**Checksheet for Processing CCA
That is to be Withheld in its Entirety**

Case Control Name: _____

Case Control Number: _____ WLI # _____

N.O. Issuing Branch: _____ Date of issuance (signed): _____

Mailing address for CC:PA:T:CRU--Taxpayer's (**not Taxpayer's representative**) address:

_____ 1. Does the CCA reflect the uniform issue list number(s)?

_____ 2. Does the CCA contain only privileged matter (see reverse side)?

_____ If yes, Was the CCA and the CCA transmittal cover sheet faxed (**not e-mailed**) to the Field for comment on the proposed withholding **on the date that the advice was issued (signed)**?

_____ Did the Field attorney or his or her manager telephone or e-mail the National Office attorney verifying receipt of the fax as required by the CCA transmittal cover sheet?

_____ If the Field attorney or his or her manager did not contact the National Office attorney to confirm receipt of the fax within 1 business day after it was sent, did the National Office attorney telephone or e-mail the Field attorney (or his or her manager) to confirm that the fax was received and that the **Field attorney (or his or her manager) knew that their comments on the proposed withholding were needed no later than 3 business days after the fax was sent and that the National Office would assume that they had no comments if a response was not received within that time?**

_____ 3. Did the Field provide any comments on the proposed withholding? The results of any discussions with the Field on the proposed withholding should be noted on the case history sheet.

_____ If the Field disagreed with the proposed withholding of the CCA in its entirety, has the disagreement been reconciled in accordance with applicable Chief Counsel procedures? If it is determined that the CCA is to be made available for public inspection, with only some redactions, please use one of the other CCA check sheets and follow its instructions. If it is determined that the CCA contains only privileged matter and therefore is to be withheld in its entirety, then forward one copy to CC:PA:T:CRU (see #6 below) and one copy with the applicable authority for the withholding noted to be retained in the official case file.

_____ If the Field did **not** provide any comments on the proposed withholding, has one copy been forwarded to CC:PA:T:CRU (see #6 below) and one copy with the applicable authority for the withholding noted to be retained in the official case file)?

_____ 4. Has a memo to the file been prepared and placed in the official case file identifying the specific privileges being claimed, if any, and describing the harm which would result from disclosure of the privileged matter?

_____ 5. Has an electronic version of the CCA been named (or renamed) with its TECHMIS (or case control) number, WLI, and ".WPD" suffix, and e-mailed to CC:PA:T:CRU's mailbox - "6110 Disclosure"? For example, the CCA may be named/renamed "TL-N-12345-98WLI2.wpd". The e-mail must be sent using "Normal" sensitivity. **A copy of the e-mail transmitting the electronic version to the "6110 Disclosure" mailbox must be placed in the office's official case file.**

_____ 6. Forward 1 paper copy of the CCA and a paper copy of the completed checksheet to CC:PA:T:CRU (Rm. 6561) **no later than 5 business days after the Field provided (or was deemed to have provided) their comments** on the withholding to the National Office. Place a copy of this check sheet in the office's official case file.

Initiator: _____ Date: _____

Reviewer: _____ Date: _____

Note: Initiators and Reviewers are responsible for ensuring that CCA procedures have been followed and that the documents have been sent to CC:PA:T:CRU.

Attorney Work Product Privilege

A Chief Counsel advice that is subject to FOIA exemption 5 and the attorney work product privilege may be withheld in its entirety. In *Tax Analysts v. IRS*, 294 F.3rd 71, 76 (D.C. Cir. 2002), the appellate court adopted the district court's holding that "IRS need not segregate and release agency working law [from documents] in their entirety pursuant to the attorney work product privilege." The attorney work product privilege permits the deletion of any material prepared in anticipation of litigation or for trial by or for a party or by or for that party's representative, including the party's attorney, consultant, or agent. Documents prepared in the ordinary course of business, in which legal advice or assistance is rendered (e.g., routine review of statutory notices of deficiency, summonses, IDRs, etc.), are not subject to the attorney work product privilege *per se*, unless it can be established that the documents were prepared primarily because of a reasonably anticipated prospect of litigation. In order for the attorney work product privilege to apply, the document must have a "litigation predicate."

A litigation predicate will be established if one or more of the following statements is true.

- ___ 1. The case is already docketed in court, including bankruptcy court, when the CCA is issued.
- ___ 2. The large case taxpayer has litigated the issues addressed in the CCA during the past 3 cycles.
- ___ 3. The taxpayer or taxpayer's representative has affirmatively represented that they will litigate the issue(s) addressed in the CCA.
- ___ 4. The case has been designated for litigation.
- ___ 5. The taxpayer's representative has litigated the same issue which is addressed in the CCA for three or more clients.
- ___ 6. The taxpayer is reputed for its litigious nature.

___ If you did not check any of the above statements, but believe a litigation predicate exists, please articulate the basis upon which you believe the attorney work product privilege applies.

Attorney-Client Privilege

A Chief Counsel advice that is subject to FOIA exemption 5 and the attorney-client privilege may be withheld in its entirety. For purposes of Chief Counsel advice, the attorney-client privilege does not protect the legal conclusions that are based upon information obtained from taxpayers. In *Tax Analysts v. IRS*, 117 F.3rd 617, 619 (D.C. Cir. 1997), the court upheld the assertion of the attorney-client privilege for confidential information regarding the scope, direction, or emphasis of audit activity. Thus, if the Chief Counsel advice's response is limited to strategic advice; that is, a discussion of nonroutine factual development, an evaluation of the strengths and weaknesses of the case, or an analysis of the hazards regarding the Service's technical position, it may be withheld in its entirety. The Chief Counsel advice should not contain a lengthy dissertation on the law or an extensive recitation of the facts. Only the most pertinent facts and legal principles as are necessary to understand the advice being given should be included.

___ This Chief Counsel advice consists entirely of strategic advice, as described in Chief Counsel Notice CC-2003-002 and the Chief Counsel's August 26, 2002 "Roles" memorandum.

Other Exemptions
(Provide exemption)
