



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

OFFICE OF  
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE), AREA 1  
LONG ISLAND

FROM: Joseph W. Clark  
Senior Technician Reviewer, Branch 2  
(Collection, Bankruptcy & Summonses)

SUBJECT: Delegation Order No. 11

This Chief Counsel Advice responds to your request dated March 1, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES:

1. Can the Compliance Area Director accept an offer in compromise notwithstanding an opinion by the Associate Area Counsel (SB/SE) opposing acceptance of the offer?
2. Can the Compliance Area Director accept an offer in compromise if no grounds for compromise under section 301.7122-1T of the Treasury Regulations have been established?

CONCLUSIONS:

1. Yes. Although section 7122(b) of the Internal Revenue Code requires that an opinion of Counsel be placed on file whenever a compromise is made, Counsel's opinion need not favor compromise in order for the Service to accept an offer.
2. No. Although section 7122(a) grants the Secretary broad authority to compromise, Treasury Regulations issued pursuant to that section establish that compromise can only be made on specific grounds. No compromise may be made unless one of the bases for compromise recognized by the regulations has been established.

BACKGROUND:

On July 19, 1999, temporary regulations were issued which expanded the Secretary's authority to compromise tax liabilities under section 7122 of the Code. See T.D. 8829, Compromises, 64 Fed. Reg. 39020 (July 21, 1999). In addition to the traditional compromise grounds of doubt as to liability and doubt as to collectibility, the temporary regulations authorize the Secretary to compromise when compromise will promote effective tax administration. Specifically, where there is no doubt as to either liability or collectibility, the Service may now compromise on the basis that: 1) collection of the full tax liability would create economic hardship, or 2) regardless of the taxpayer's financial condition, exceptional circumstances exist such that collection of the full liability would be detrimental to voluntary compliance by taxpayers. See Treas. Reg. § 301.7122-1T(b)(4).

You have asked our advice regarding several issues revolving around this expanded compromise authority. Specifically, you have asked whether and under what circumstances the Area Director can compromise a case notwithstanding an opinion by Counsel which opposes acceptance of a taxpayer's offer when the offer is based on a purported finding that collection in full would cause the taxpayer economic hardship. First, you have asked that we address a situation in which the offer group has established that collection in full would result in economic hardship, but Counsel issues an opinion stating that the amount proposed for acceptance is nevertheless too low under the circumstances of the case. Second, you have asked our opinion of a case in which it has not been established that collection in full would result in economic hardship.

DISCUSSION:

Section 7122(a) of the Internal Revenue Code grants the Secretary the authority to compromise civil or criminal liabilities arising under the internal revenue laws. Ever since that authority was granted in 1868, the Code has also required that an opinion of Counsel be placed on file in certain cases. The current statement of this requirement provides:

Record.—Whenever a compromise is made by the Secretary in any case, there shall be placed on file in the office of the Secretary the opinion of the General Counsel for the Department of the Treasury or his delegate,<sup>1</sup> with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

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<sup>1</sup> The General Counsel for the Treasury has delegated the functions relative to the review of offers in compromise to the Chief Counsel of the Internal Revenue Service. See General Counsel Order No. 4. (Rev. January 19, 2001).

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than \$50,000. However, such compromise shall be subject to continuing quality review by the Secretary.

#### I.R.C. § 7122(b).

The system for obtaining review of offers recommended for acceptance is contained in the Service's IRM Handbook 5.8, Offers in Compromise, Chapter 8, and in the Chief Counsel Directives Manual, Part 34, Chapter 5 (CCDM 34.5). The opinion of Counsel is sought after a recommendation of acceptance has been made but prior to formal acceptance of the offer by the official with delegated authority to accept. IRM 5.8.8.4.3. The offer itself (Form 656), along with the Form 7249, Offer Acceptance Report, and supporting documentation, are sent to the appropriate Associate Area Counsel (SB/SE) office for review. The Service expects that Counsel's opinion will assess both whether the legal requirements for compromise are met and whether the offer conforms to the Service's policies and procedures. IRM 5.8.8.2(2).

The CCDM states that the "primary role" of Counsel "is to determine whether there is a bonafide doubt as to liability or doubt as to collectibility." CCDM 34.5.2.1(3)a. At the time this manual section was promulgated, doubt as to collectibility and doubt as to liability were the only authorized bases for compromise under then governing Treasury regulations. See Treas. Reg. § 301.7122-1(a) (1960). Although the permissible bases for compromise have since been expanded in the regulations to include the promotion of effective tax administration, Counsel's role has not changed, and verifying that a basis for compromise is present continues to be the most important part of Counsel's role in reviewing proposed acceptances.

Although verifying that there is a legal basis for compromise is the principal role of Counsel, most of the manual is dedicated to Counsel's examination of the "adequacy" of the amount proposed for acceptance, a matter which is undoubtedly a question of policy. See T.D. 8829, 64 Fed. Reg. at 39023 ("[T]he amount to be paid, future compliance or other conditions precedent to satisfaction of a liability for less than the full amount due are matters left to the discretion of the Secretary."). Thus, both the offer in compromise handbook and the CCDM recognize that the role of Counsel is to review both legal and policy issues.

Asking that Counsel review policy matters does not grant a veto power or establish that Counsel has final say over whether an offer will be accepted. The procedures explicitly recognize that Counsel's concurrence in the decision to compromise is not required. See IRM 5.8.8.2(2); CCDM 34.5.2.1(3)a.5. Thus, if Counsel issues an opinion that the compromise of the case is not in keeping with the Service's acceptance policy, either because the amount offered is too low or for any other reason, the Service may nevertheless compromise the case. Because the Counsel opinion is sought prior to the issuance of an acceptance letter, the official with final authority to accept will have an opportunity to consider Counsel's concerns before the decision to accept is made final.

Your question assumes that the basis for compromise is the promotion of effective tax administration, specifically economic hardship. The Internal Revenue Manual gives the following guidance with respect to determining an acceptable offer based on considerations of economic hardship:

In offers based on economic hardship, an acceptable offer amount should be determined based on the facts and circumstances of the taxpayer's situation and the financial information analysis. For example, the taxpayer has \$100,000 liability and assets and income of \$125,000. To avoid economic hardship, it is determined that the taxpayer will need \$75,000. The remaining \$50,000 should be considered in determining an acceptable offer amount.

IRM 5.8.11.2.1(4). The standard articulated in this manual provision appears very similar to the "reasonable collection potential" standard used for doubt as to collectibility offers, see Policy Statement P-5-100, in that the Service expects a taxpayer to offer an amount equal to that which could be collected after the economic hardship has been accounted for. Counsel's disagreement with the amount determined to be acceptable pursuant to the foregoing guidance will not barr compromise of the case. As with all advice issued by Counsel, it is appropriate and proper for you to render your opinion as to whether a proposed action is in keeping with the Service's stated policies. The ultimate decision, however, remains with the Area Director or other delegated official.

A more serious issue is presented if Counsel concludes that no basis for compromise is present. Treasury regulations enacted by the Secretary in accordance with required procedures have the force and effect of law. They are mandatory, not directory, and must be followed. See Boulez v. Commissioner, 810 F.2d 209, 215 (D.C. Cir. 1987) (specifically discussing compromise regulations under section 7122).<sup>2</sup> In fact, the

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<sup>2</sup> In Boulez, the court was considering the requirement, contained in the regulations but not in the statute, that all compromises be in writing. We find the court's analysis even more persuasive when the issue is one of substantive authority as opposed to mere procedural safeguards. In the words of the court: "Indeed, when a compromise of tax liability is at issue, the need for rigorous compliance with pertinent

Supreme Court has recognized that it “must defer to Treasury Regulations that implement the congressional mandate in some reasonable manner.” Commissioner v. Portland Cement Co., 450 U.S. 156, 169 (1981) (citations and internal quotation marks omitted). The Commissioner’s delegation of authority to compromise necessarily carries with it the implicit assumption that it will be exercised in accordance with applicable law and regulations. See Boulez, 810 F.2d at 215 (stating that it “defies common sense” to infer that Secretary’s delegates may waive requirements stated in regulations). Thus, no Service official may compromise a case unless it has been established that a basis for compromise, as established by Temp. Treas. Reg. § 301.7122-1T, is present in the case.<sup>3</sup>

Confusion on this point may in part stem from language in prior versions of Delegation Order No. 11, which grants certain officials the authority to compromise. Prior to revision in November 1999, the delegation of authority vested in certain officials the authority to compromise “in the event Counsel renders a negative legal opinion.” Delegation Order No. 11 (Rev. 25) (September 29, 1997). In spite of internal guidance to the contrary, many within the Service mistakenly believed that this language authorized compromise even where there was no doubt as to either liability or collectibility. In reality, this delegation was intended to authorize certain officials to accept less than reasonable collection potential once doubt as to collectibility had been established. See Delegation Order No. 11 (Rev. 24) (June 21, 1994) (stating that authority to accept notwithstanding negative Counsel opinion “applies only to offers in compromise - Doubt as to Collectibility”).

The more recent delegation of compromise authority, partially in an effort to alleviate any confusion, has removed language making reference to the opinion of Counsel in favor of positive grants of authority to certain officials. The authority to accept less than could otherwise be collected in a doubt as to collectibility case, now referred to as compromise based on “special circumstances,” is specifically delegated to certain officials. See Delegation Order No. 11 (Rev. 27) (November 1, 1999) (delegating authority to accept offers based on special circumstance criteria as well as authority to accept offers based on the promotion of effective tax administration); IRM 5.8.8.3 (explaining special circumstances criteria and acceptance authority).

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regulations may be at its greatest, for not only the integrity of the public fisc but also public faith in the equitable enforcement of the tax laws hangs in the balance.” 810 F.2d at 218.

<sup>3</sup> See also Rev. Proc. 80-6, 1980-1 C.B. 586. In explaining the various delegations of compromise authority, the revenue procedure stated: “The above delegations are ‘limited’ to the extent that the delegated authority must be exercised in accordance with the limitations prescribed by section 301.7122-1 of the Regulations on Procedure and Administration and with procedures established by the National Office.”

In reviewing proposed acceptances, Counsel should defer to the offer group on factual determinations such as valuation of assets, allowable expenses, and the existence of circumstances which warrant acceptance of less than could otherwise be collected.<sup>4</sup> If, having done so, Counsel is unable to verify that a basis for compromise as authorized under the regulations is present, that determination is more than a policy disagreement. Under such circumstances, the seriousness of the decision to compromise warrants opening up a dialogue with the Area Director to attempt to reach consensus. If no consensus can be reached, it is appropriate to elevate the question to higher levels of management just as would be done in any other type of case. Nevertheless, because both Compliance and Counsel are working toward the same goals, disputes of this nature should be rare.

If you have any questions, please contact the attorney assigned to this matter at 202-622-3620.

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<sup>4</sup> At the outset, the CCDM states clearly that the factual determinations of the Service are not to be reexamined unless “patently erroneous” and that asset valuations in particular are “largely matters of administrative discretion and judgment and should rarely be questioned by Counsel.” CCDM 34.5.2.1(3)a.1.