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January 21, 1999

Subject: CHANGE IN LITIGATING POSITION **Cancellation Date:** January 21, 2000

The purpose of this Notice is to announce a change in the Service's litigating position with respect to the assessment of I.R.C. § 72(t) tax on early distributions from qualified plans made to satisfy levies under section 6331.

Section 72(t) provides that a 10 percent additional tax should be applied to early distributions from qualified retirement plans. In Larotonda v. Commissioner, 89 T.C. No. 25 (1987) the Tax Court held that petitioner was not liable for the 10 percent early distribution tax under section 72(m)(5), the predecessor to section 72(t), if the distribution was the result of a government levy, notwithstanding the fact that no statutory exception for distributions made on account of government levy existed at the time.

On April 11, 1988, the Service issued Larotonda v. Commissioner, AOD CC-1988-010, an action on decision stating that the Service would not acquiesce in Larotonda, but rather, would follow the reasoning of In re Kochell, 804 F.2d 84 (7th Cir. 1986). Recent legislation warrants withdrawal of the AOD. Section 72(t) was modified by the Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998), enacted on July 22, 1998. Section 3436 of the Act amends section 72(t) to provide that the early distribution tax does not apply to a distribution made on account of a levy under section 6331 on a qualified retirement plan. In response to this legislation, the Service published an AOD reconsidering and withdrawing its AOD in Larotonda.

Immediately before Congress enacted this legislation, the Tax Court ruled in Murillo v. Commissioner, T.C. Memo. 1998-13, that section 72(t) did not apply to an individual retirement account that was forfeited to the government pursuant to a plea agreement in a civil proceeding. The Service issued an AOD in response to that decision. The AOD states that due to the Restructuring and Reform Act of 1998, the Service will not assess section 72(t) tax on distributions from qualified retirement plans made on account of levy, and in addition, will not assess section 72(t) tax under the narrow circumstances of Murillo. However, in all other cases involving early distributions, the Service will continue to assess section 72(t) tax unless a statutory exception applies. See, e.g. In re Kochell, 804 F.2d 84 (7th Cir. 1986) (10 percent early distribution tax applied to a withdrawal made by bankruptcy trustee from an IRA under I.R.C. § 408(f)(1)).

If you have questions concerning the application of the rules, please contact Christine Keller at (202)622-6090.

/s/

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