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INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR DIRECTOR, OPERATIONS POLICY AND SUPPORT

Edward F. Cronin
FROM: Edward F. Cronin
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SUBJECT: Illegal "tax protester" designation

This memorandum was prepared in response to your inquiry concerning the potential liability of an IRS employee who refers to or otherwise designates an individual taxpayer as a "tax protester."

QUESTION PRESENTED

Can IRS personnel lawfully refer to or designate an individual taxpayer as an illegal "tax protester?"

DISCUSSION

In 1998, Congress passed the IRS Restructuring and Reform Act of 1998¹ which provides the following prohibition as to the use of the "tax protester" designation:

SEC. 3707. ILLEGAL TAX PROTESTER DESIGNATION.

- (a) Prohibition. – The officers and employees of the Internal Revenue Service –
- (1) shall not designate taxpayers as illegal tax protesters (or any similar designation), and
 - (2) in the case of any such designation made on or before the date of the enactment of this Act –
 - (A) shall remove such designation from the individual master file, and
 - (B) shall disregard any such designation not located in the master file.

¹ Pub.L. 105-206, 112 Stat. 778 (July 22, 1998).

It is quite clear that Service personnel may no longer "designate" an individual taxpayer as a "tax protester," or use any similar designation, under the above stated provision. While we note it is not entirely clear what specific conduct constitutes "designating" an individual taxpayer as a "tax protester." and recognize that existing

Further, from a practical standpoint, what value is actually derived from calling an IRS employee to label an individual taxpayer a "tax protester" at trial? It would appear that such trial strategy might unnecessarily complicate the trial process. At the same time, given the prohibition set forth in § 3707, calling an IRS employee to testify in such a manner could provide defense counsel with grounds for a potential appeal or possibly subject the employee to disciplinary action.

I have also spoken with Tony Abernathy (PA:APJP) who indicates he is unaware of any Procedure and Administration position paper on this topic; he did advise, however, that the "tax protester" designation is not used by IRS attorneys in Tax Court. He suggests that an AUSA and/or IRS employee avoid the designation by simply referring to the taxpayer's anti-tax arguments as frivolous or by quoting case law which refers to such argument(s) as "tax protester argument[s] or rhetoric."

CONCLUSION

Regardless of how the circuits have treated the government's use of the "tax protester" designation in the past, it would appear that Service employee's are now prohibited from labeling an individual taxpayer as such under § 3707 of the IRS Restructuring and Reform Act of 1998.

Should further assistance be required, please feel free to contact me directly at (202) 622-4460 or Mike Sargent of my staff at (202) 622-4470.

² See *United States v. Bergman*, 813 F.2d 1027 (9th Cir. 1987) (Government's references to taxpayer as "tax protester," which accurately characterized failure to file tax returns, did not prejudice taxpayer); *United States v. Turano*, 802 F.2d 10 (1st Cir. 1986) (Court's use of term "tax protester" in instructions to jury in prosecution for failure to file income tax returns was not vague, especially since specific acts and statements were put in evidence at trial, and term could be used to refer to such activities and highlight their relevance); and *United States v. Reed*, 670 F.2d 622 (5th Cir. 1982) (Evidence of a person's philosophy, motivation and activities as a tax protestor is relevant and material to the issue of intent).