

Office of Chief Counsel
Internal Revenue Service
memorandum

date: August 19, 2009

to: Manager, EO Technical Guidance and Quality Assurance SE:T:EO:RA:G

from: Chief, Exempt Organizations Branch 1, CC:TEGE:EOEG:EO1

subject: Interpretation of "Publication" under IRC §§ 6033(j) and 7428(c)

This is in response to the first issue posed in your memorandum dated January 6, 2009. You requested our view on whether the IRS may publish notices of revocation of tax-exempt status on irs.gov, rather than the historically used method of publishing in the Internal Revenue Bulletin ("IRB"), and whether that meets the standard of "publish" for IRC § 6033(j)(1) and "published" in IRC § 7428(c). We understand the crux of the issue to be whether electronic publication satisfies the statutory requirements. We concur that the publication on irs.gov meets the standard of "publish" for IRC § 6033(j)(1) and "published" in IRC § 7428(c).

Background

Section 6033(j)(i)

All tax exempt organizations, other than those specifically excepted, such as churches, are required either to file an annual information return under IRC § 6033(a)(1) or to submit an annual electronic notification under § 6033(i). IRC §6033(j)(1) revokes, by operation of law, the tax exemption of an organization that fails to file an annual information return under section 6033(a) or fails to submit an electronic notice under section 6033(i)(1) for 3 consecutive years. Section 6033(j)(1) states that "[t]he Secretary shall publish and maintain a list of any organization the status of which is so revoked."

IRC § 6033(j) was added to the Code as part of the Pension Protection Act of 2006, P.L. 109-280 (August 17, 2006), and is effective with respect to returns and notifications for annual periods beginning in 2007. As noted in your memorandum, in establishing the electronic notice requirement, Congress provided that the IRS was to notify organizations of the effect of the requirements and the penalty for failure to comply. Notice was permitted to be provided to organizations unknown to the IRS (unknown by either name or address), "by Internet or other means of outreach." See P.L. 109-280 at Sec 1223(e).

PMTA 2009-155

The first revocations of tax exemptions under IRC § 6033(j)(1) are expected to occur in 2010. You state in your memorandum that you expect that the volume of revocations under section 6033(j)(1) to be substantial, at least in 2010 when the law first becomes applicable. You believe that many organizations that were required to submit electronic notifications for the 2007 annual period have yet to do so (based on the discrepancy between the number of organizations notified of their obligation and the number of submitters).

Section 7428(c)

In the case of a section 501(c)(3) organization filing a declaratory judgment action under section 7428 regarding the determination of its exempt status, section 7428(c) generally provides that contributions to such an organization remain tax deductible during the period “beginning on the date on which the notice of the revocation was published” and ending on the date a court makes a determination that the organization’s tax exempt status was properly revoked.

The legislative history to IRC § 7428 explains that:

[Section 7428(c)] is to apply only where ... the Service has published a notice of the revocation of its advance assurance of deductibility of contributions.... The "publication" requirement is satisfied if the Internal Revenue Service has made a public announcement, such as by issuing a press release or by printing a notice in the Internal Revenue Bulletin.

Changes in tax-exempt status resulting from revocation by operation of law under IRC § 6033(j)(1), however, do not give rise to a declaratory judgment right under IRC § 7428. See IRC § 7428(b)(4).

Publication 78 contains a list of organizations to which contributions are deductible. Rev. Proc. 82-39, 1982-2 CB 759, provides that contributions to organizations listed in or covered by Publication 78 generally remain deductible by persons unaware of a change in the organization’s tax exempt status, if made before the date of an appropriate public announcement, such as publication in the IRB, indicating that contributions are no longer deductible.

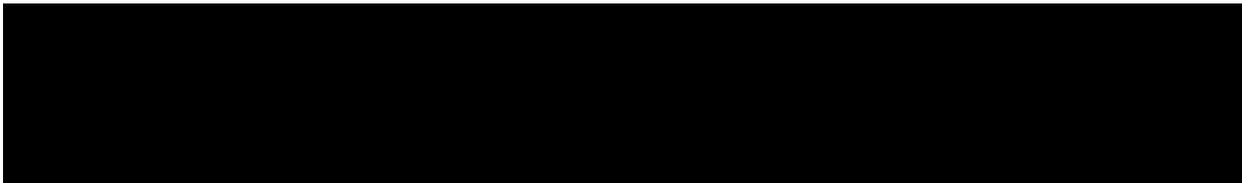
Statement of Procedural Rules (“SPR”) section 601.201(n)(3)(iii)(a) provides that when an organization that has been listed in Publication 78 as an organization to which tax deductible contributions under section 170 may be made ceases to qualify as such, and the organization’s determination letter or ruling is revoked, contributions made to the organization by persons unaware of the change in exempt status generally will be considered allowable until (1) the date of publication of an announcement in the IRB that contributions are no longer deductible, or (2) a date specified in such an announcement where deductibility is terminated as of a different date.

Consistent with Rev. Proc. 82-39, administrative practice has been to publish revocations in the IRB, in those cases where the organization has a declaratory judgment right under IRC § 7428.

Discussion

We agree that publication on irs.gov meets the standard of “publish” for IRC § 6033(j)(1) and “published” in IRC § 7428(c). As discussed in your memorandum, neither section 6033(j)(1) nor section 7428(c) nor their attendant legislative histories require that publication be made in the IRB. At most, the IRB is cited as an acceptable means through which the required publication is satisfied. We agree that no legal authority specifies the method of publication, i.e. in the IRB. We also agree with your observation that the public should be put on notice of any changeover in the method of publication.

As your memorandum stated, the policy related to requiring publication of any revocation of tax exempt status, at least with respect to those organizations to which deductible contributions may be made, is to “provide sufficient notice to contributors so that they will know that contributions to a particular organization will no longer be tax-deductible.” You have also stated you are aware that the public would have to be put on notice of any changeover in the method of publication. You would indicate that the effective date of non-deductibility would be the date of appearance on irs.gov. We concur. We also suggest, given the IRS’s long standing practice of publishing matters related to change of tax exempt status, including revocation, in the IRB, that the public would expect to continue to find the list of revoked organizations in the IRB. Therefore, in addition to any initial notices to the public of the planned changeover, you should also consider printing an advisory cross-reference in the IRB to alert taxpayers when the electronic list of revoked organizations at irs.gov is updated. We note that, in the discussion of ‘publication’ for purposes of section 7428(c), the legislative history provides that the publication requirement is satisfied if the IRS makes a public announcement, *such as* by issuing a press release or printing a notice in the IRB. Rev. Proc. 82-39 contains similar ‘*such as*’ language regarding the effect of revocations on listings in Publication 78. While the SPR does not contemplate publication of revocations of exempt status in a format other than that of the IRB, the SPR is not binding upon the Service. The rules “serve merely as guidelines for conducting the internal affairs of the agency.” Boulez v. Commissioner, 810 F.2d 209, at 215 (D.C. Cir. 1987). Nonetheless, as discussed above, we recommend the publication of advisory cross-reference in the IRB with a cite to the website.





In addition, we would note that, by statute, the federal government is authorized and encouraged to make information available in electronic form. The Government Paperwork Elimination Act (GPEA), Public Law 105-277, Title XVII requires federal agencies to allow individuals and entities, when practicable, the option of submitting information to or transacting business with the agency by electronic means. Although the Treasury Department and the IRS are specifically exempt from this Act, allowing information to flow electronically between agency and citizen is still a priority throughout the entire Federal government.

Additionally, agencies have already had authority and have been mandated to make documents available electronically where the agency used to provide the documents in the agency's public reading room. In 1996, Congress passed the Electronic Freedom of Information Act amendments (EFOIA), P.L. 104-231, 110 Stat. 3048 to address electronic records issues. The EFOIA directed that federal agencies make reading room material, such as records in which the public would have interest, available electronically via the Internet. The EFOIA embodies a strong statutory preference for records to be provided electronically by agencies in the form of online, Internet access, which is most efficient for both agencies and the public alike.

Please call me if you have any additional questions regarding this matter.