

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

[CC-2008-002]

[December 07, 2007]

Subject: Legal Advice Provided by Email

Cancel Date: Upon incorporation
into CCDM

Purpose

This notice is interim guidance addressing the effect of *Tax Analysts v. Internal Revenue Service*, 495 F.3d 676 (D. C. Cir. 2007), on the questions and answers concerning emailed legal advice in CCDM Exhibit 33.1.2-1. CCDM 33.1.2.1 sets out the procedures for providing informal legal advice, including informal legal advice provided by email. The Court of Appeals in the most recent *Tax Analysts* case held that email messages to IRS and Counsel field personnel from attorneys in the Chief Counsel's National Office which contain written interpretations of a revenue provision fall under the definition of Chief Counsel advice (CCA) in I.R.C. § 6110(i). Accordingly, Q&As 12, 13, 16, 18, and 19 are no longer effective to the extent they are inconsistent with this notice.

Discussion

Prior to the decision in *Tax Analysts*, the Office of Chief Counsel took the position that legal advice conveyed by email that was prepared in under two hours did not constitute CCA, and thus was not subject to processing for public inspection under the procedures set out in CCDM 33.1.3.1.1. The Court of Appeals held that interpretation to be inconsistent with the plain language of the statute, and its decision is now final. Accordingly, emailed legal advice provided to an IRS or Counsel field office by attorneys in any Associate or Division Counsel Headquarters Office is CCA, regardless of the time spent providing it, if the advice conveys (1) an interpretation of a revenue provision, (2) an IRS or Counsel position or policy concerning a revenue provision, or (3) a legal interpretation of any law relating to the assessment or collection of a liability under a revenue provision.

The Office of Chief Counsel is considering the procedures it will put in place to comply with the court's decision, both with regard to the emailed legal advice that was

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previously given and the emailed legal advice that is prepared in the future. Until those procedures are finalized, all emailed legal advice provided after the date of this notice that is CCA, as described in the preceding paragraph, must be sent to the "Informal Advice" email inbox. This emailed legal advice will then be processed for release consistent with the exemptions permitted by section 6110(i). To email this advice to the "Informal Advice" email box simply include "Informal Advice" on the to or cc lines of the email message sent to the requester, so that the emailed legal advice will arrive in the email inbox at the same time the recipient of the advice receives it. If there is any question about whether an email message is CCA, err on the side of sending it to the email inbox. For example, Associate office attorneys should send all messages transmitting reviewed briefs to the email inbox. Most of these email messages will not be CCA, but this will allow the Office to process, subject to the exemptions in section 6110(i), those emails that contain discussions of language changes that would constitute CCA.

While redactions of taxpayer identifying details or privileged matter need not be made before sending your emailed legal advice to the email inbox, please ensure that the emailed legal advice reflects whether the advice was provided in anticipation of litigation. A CCA providing legal advice in anticipation of litigation is forwarded for processing, even though it will not be made available for public inspection. Processing these messages can be expedited if attorneys would place the following text at the beginning of email messages providing legal advice in anticipation of litigation: "This advice is being provided in anticipation of litigation." The check sheet for processing taxpayer-specific CCA withheld in its entirety, or the CCA Training Materials (April 2006) on page 11, at http://www.irs.gov/pub/irs-utl/cca_training.pdf, set out the criteria to be considered in determining whether litigation is anticipated.

If the advice is based on a request made by an IRS or field counsel's email that has attachments, any email response should be forwarded (rather than sent as a reply) to the requester so that the attachments contained in the email are able to be retrieved when sent to the email inbox. Since the email copied to this inbox will be centrally gathered for eventual processing under section 6110, it will no longer be necessary to forward **these email messages**, in paper form, to the Technical Services Support Branch. See CCDM 33.1.2.1.

At this time, we are not asking that a search be undertaken for any emailed legal advice sent to the field prior to the date of this notice. We are exploring various methods to retrieve this advice, but in the interim all Associate or Division Counsel Headquarters Office attorneys must take steps to preserve, in its current format, any emailed legal advice previously provided to an IRS or Counsel field office until further instructions are given. This includes emailed legal advice maintained in an electronic form (whether stored on servers, on individual computers, on disks, or in some other form of electronic storage) or maintained in paper form. This includes emailed legal advice maintained by individual attorneys, as well as that maintained by the office in centralized files.

