

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:06:GHKim
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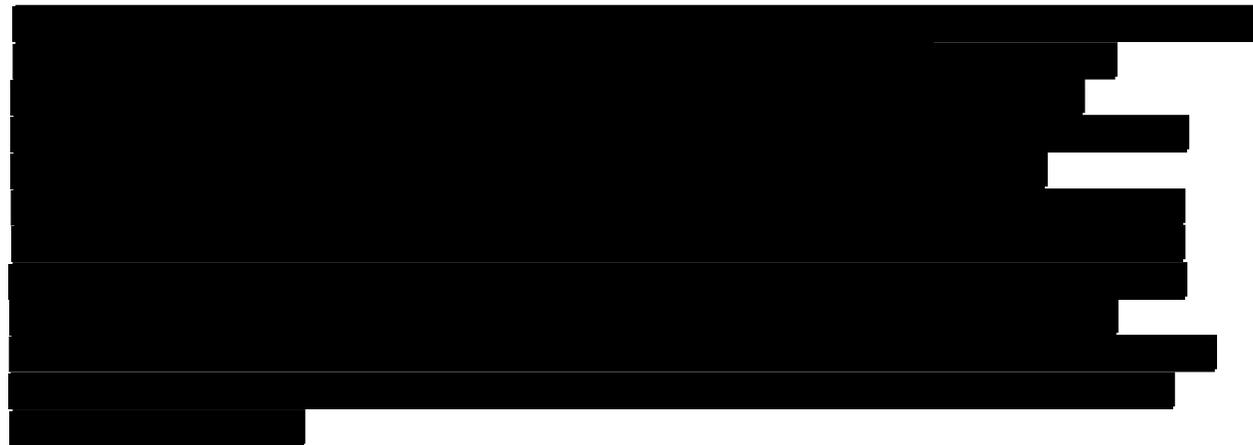
to: Diane Ryan
Chief, Appeals

from: Deborah A. Butler 
Associate Chief Counsel (Procedure & Administration)

subject: Appeals Jurisdiction over Exempt Organization Determinations

This memorandum responds to your request for advice regarding the current restriction on Appeals settlement authority over tax exempt status issues when a technical advice memorandum has been issued adverse to the taxpayer. Specifically, you asked whether section 1001(a)(4) of the Internal Revenue Service Restructuring and Reform Act of 1998, which requires an independent Appeals function, mandates the elimination of this restriction.

It is our conclusion that the current restriction on Appeals settlement authority when TE/GE has issued an adverse technical advice concerning an organization's exempt status to the taxpayer is not inconsistent with section 1001(a)(4) of RRA 98.



Section 1001(a)(4) of RRA 98 requires that the Service "ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the

independence of the appeals officers.” This requirement reaffirms the Service’s longstanding policy to support an independent dispute resolution forum to promote settlements of tax controversies. For example, the Statement of Procedural Rules states: “It shall be [the Appeals Officer’s] duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.” 26 C.F.R. § 601.106(f)(1) (Rule I).

RRA 98 made no fundamental changes with respect to Appeals authority, or how Appeals functions, although it did result in more formal rules for communicating with Appeals once an issue or case is under consideration. The statute clearly mandated provisions to protect Appeals from unwarranted influence that would compromise its independence. Ensuring that Appeals remains independent, however, does not mean that Appeals must have unlimited authority to consider all tax issues. The requirement to ensure an independent Appeals function means that the Service must make sure that Service employees do not interfere with or attempt to influence Appeals after the case has been transferred to Appeals for consideration. The requirement in RRA 98 does not limit the Commissioner’s authority to restrict the subject matter that Appeals is permitted to consider.

The Commissioner has chosen to restrict Appeals’ authority to determine exempt status when a technical advice has been issued. Four separate authorities confirm this restriction.

Delegation Order 66, updated on October 2, 2000, delegates authority to Appeals to make determinations regarding exempt status in non-docketed cases. IRM 1.2.47.5(3). The delegation order specifically excepts those cases in which the National Office has issued a ruling or technical advice on the case with respect to exempt status. If Appeals proposes to dispose of a case contrary to the technical advice, it may refer its proposed disposition to the National Office function that issued the technical advice. That office makes the final decision regarding the disposition of the issue.¹

The revenue procedure governing technical advice issued with regard to exempt status provides that the Appeals Area Director must follow the conclusions in a technical advice on issues of an organization’s exempt status. The revenue procedure also provides that Appeals may request reconsideration of the conclusions in the technical advice. Rev. Proc. 2010-5, Section 17.01(2), 2010-1 C.B. 165.

Similarly, the Statement of Procedural Rules, 26 C.F.R. § 601.106(a)(1)(v), provides that Appeals shall consider cases involving the initial or continuing recognition of tax exemption and foundation classification, or employee plan qualification, except when

¹ This is not the only limitation on Appeals settlement authority. Delegation Order 66 also limits Appeals authority to eliminate the fraud penalty for a year in which a recommendation of criminal prosecution for tax evasion or failure to file a return was made without the recommendation or concurrence of district counsel and to act in any case in which a recommendation for criminal prosecution is pending without the agreement of district counsel.

the determination concerning exemption or qualification is made by a National Office ruling or technical advice. In a case that is already before Appeals, any proposed disposition contrary to the ruling or technical advice will be forwarded to the national office for consideration. Appeals is then required to follow the national office's decision.

Consistent with these rules, IRM 8.7.8.5.5(7) states that "conclusions expressed in a technical advice memorandum concerning an organization's exemption and foundation status are final and will be followed by an Appeals office. On other issues, the Appeals office will follow the conclusion of the technical advice memorandum where it is favorable to the taxpayer; if the technical advice is unfavorable to the taxpayer, Appeals settles the issues using existing authority." The IRM goes on to provide that, if the technical advice or ruling was issued before the case reached Appeals, and Appeals proposes to resolve it contrary to the technical advice or ruling, Appeals may submit a technical advice request for reconsideration.

In summary, all of the existing authorities are consistent in providing that Appeals is bound to follow a technical advice or ruling regarding exempt status. They also consistently provide Appeals the opportunity to request reconsideration of the position via technical advice. If the new technical advice remains adverse to the taxpayer regarding exempt status, Appeals is required to follow it.

The limitation on Appeals' authority is a valid exercise of the Commissioner's authority to direct and manage the employees of the Internal Revenue Service and administer the execution and application of internal revenue laws. See I.R.C. §§ 7803 and 7804. Section 1001(a)(4) does not provide that Appeals must be allowed to consider every determination made by the Service. Section 1001(a)(4) does require the Commissioner to ensure that Appeals operates independently on those matters that it does consider. The restriction on Appeals' consideration of exempt status rulings and technical advice does not impair Appeals' independence on those matters that the Commissioner has determined that Appeals may consider.

The Commissioner has the discretion to reconsider the scope of Appeals' jurisdiction in this area and revise the existing authorities to permit Appeals to determine exempt status, but until he exercises that discretion, Appeals may not.

If you have any further questions concerning this issue, please contact George Bowden or me at 202-622-3400.