



DEPUTY COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

October 14, 2011

MEMORANDUM FOR NINA E. OLSON, NATIONAL TAXPAYER ADVOCATE

FROM:  Steven T. Miller
Deputy Commissioner for Services and Enforcement

SUBJECT: Taxpayer Advocate Directive 2011-1

Pursuant to Delegation Order No. 13-3, which grants the Deputy Commissioner the authority to modify or rescind any form of Taxpayer Advocate Directive, this memorandum sets forth the agreements to and rescissions of Taxpayer Advocate Directive (TAD) 2011-1.¹

Background

On August 16, 2011, the National Taxpayer Advocate issued TAD 2011-1 to the Commissioner, Large Business & International Division, and the Commissioner, Small Business/Self-Employed Division to:

1. Disclose the March 1, 2011, memo for Offshore Voluntary Disclosure Initiative (OVDI) Examiners that addresses the use of discretion in 2009 Offshore Voluntary Disclosure Program (OVDP) cases (the "March 1 memo") on IRS.gov, as required by the Freedom of Information Act (FOIA) (whether or not it is revoked).
2. Revoke the March 1, 2011, memo and disclose such revocation as required by FOIA.
3. Immediately direct all examiners that when determining whether a taxpayer would be liable for less than the "offshore penalty" under "existing statutes," as required by 2009 OVDP FAQ #35 (described below), they should not assume the violation was willful unless the taxpayer proves it was not. Direct them to use standard examination procedures to determine whether a taxpayer would be liable for a lesser amount under existing statutes (e.g., because the taxpayer was eligible for (a) the reasonable cause exception, (b) a non-willful penalty because the IRS lacked evidence to establish its burden to prove willfulness, or (c) application of the mitigation guidelines set forth in the IRM) without shifting the burden of proof onto the taxpayer. Post any such guidance on IRS.gov.

¹ See Internal Revenue Manual (IRM) 1.2.50.4, Delegation Order 13-3 (formerly DO-250, Rev.1), *Authority to Issue Taxpayer Directives* (Jan. 17, 2001). See also IRM 13.2.1.6.1 *Tax Appeal Process*.

4. Commit to replace the March 1, 2011, memo and all OVD-related frequently asked questions (FAQs) on IRS.gov with guidance published in the Internal Revenue Bulletin, which describes the OVDP and OVDI. This guidance should incorporate comments from the public and internal stakeholders (including the National Taxpayer Advocate). It should reaffirm that taxpayers accepted into the 2009 OVDP will not be required to pay more than the amount for which they would otherwise be liable under existing statutes, as currently provided by 2009 OVDP FAQ #35. It should also direct OVDP examiners to use standard examination procedures to make this determination, as provided in item #3 (above); and
5. Allow taxpayers who agreed to pay more under the 2009 OVDP than the amount for which they believe they would be liable under existing statutes the option to elect to have the IRS verify this claim (using standard examination procedures, as described above), and in cases where the IRS verifies it, offer to amend the closing agreement(s) to reduce the offshore penalty.

Appeal

On August 30, 2011, TAD 2011-1 was appealed to me by to the Commissioner, Large Business & International Division, and the Commissioner, Small Business/Self-Employed Division.

Agreement to and Rescission of TAD 2011-1

I have had the opportunity to review and consider thoroughly the August 30, 2011, appeal and your rebuttal memorandum of September 22, 2011. Pursuant to Delegation Order No. 13-3, Taxpayer Advocate Directive (TAD) 2011-1 is agreed in part and rescinded in part. Action 1 of the TAD has been completed and is sustained. For the reasons stated in the August 30, 2011, appeal, actions 2-5 under the TAD are rescinded.

I believe that the relief you seek is generally provided in the existing opt out procedures. Throughout the entire program, taxpayers have had the opportunity to opt out of the settlement structure and request an examination if there is disagreement relating to the result provided for under the program. An examination is the appropriate forum for detailed facts and circumstances determinations. Moreover, the opt out procedures and additional guidance issued on June 1, 2011, clarify that, depending on the facts and circumstances, it may be preferable for a particular taxpayer to opt out of the 2009 OVDP or 2011 OVDI. The materials also provide guidance for taxpayers regarding the decision whether to opt out. Also clear in that guidance is that when appropriate, taxpayers will have the same agent for an examination following opt out.

cc: Heather C. Maloy
Faris R. Fink