



DEPUTY COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

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MEMORANDUM FOR COMMISSIONER, LARGE BUSINESS AND INTERNATIONAL
DIVISION
COMMISSIONER, SMALL BUSINESS/SELF-EMPLOYED
DIVISION
COMMISSIONER, TAX EXEMPT AND GOVERNMENT
ENTITIES DIVISION
CHIEF COUNSEL

FROM: Sunita Lough
Deputy Commissioner for Services and Enforcement

SUBJECT: Interim Guidance on Designation of Cases for Litigation

This memorandum provides interim guidance to the field on the criteria that should be applied in considering if a request for designation for litigation should be made to the Office of Chief Counsel. This memorandum also provides interim guidance on the requirements of Section 1001 of the Taxpayer First Act (TFA) with respect to the limitation on designation of cases as not eligible for referral to the IRS Independent Office of Appeals (Appeals).

Historically, cases designated for litigation have been infrequent. The IRS should continue to use designation infrequently, subject to careful consideration at all levels of the process. Chief Counsel Directives Manual 33.3.6.2.1 sets out the existing procedures for designating for litigation issues in cases under the jurisdiction of a Business Operating Division (BOD).¹ These procedures will be revised, consistent with this memorandum, and complementary procedures will be added to the Internal Revenue Manual.

Background:

The TFA added Internal Revenue Code section 7803(e)(5), which provides that if any taxpayer who has received a statutory notice of deficiency (SNOD) requests referral to Appeals and such request is denied, the Commissioner shall provide the taxpayer a

¹ The CCDM also sets out procedures for designating an issue in a case in Appeals' jurisdiction (CCDM 33.3.6.2.3) or docketed in the Tax Court (CCDM 36.3.6.2.2).

written notice with a detailed description of the facts involved, the basis for the decision to deny the request, a detailed explanation of how the basis of such decision applies to such facts, and the procedures for protesting the decision to deny the request. Under the TFA, this process does not apply when the taxpayer's request is denied because the issue involved is a frivolous position (within the meaning of section 6702(c)).

In Delegation Order 30-9 (Rev.1) (November 7, 2019), the Commissioner delegated to the Deputy Commissioner for Services and Enforcement (DCSE) the authority to deny a taxpayer's request for referral to Appeals after the issuance of a SNOD in a case designated for litigation, and to provide the taxpayer with the written notice described above. This authority may be redelegated to the Business Operating Division (BOD) Commissioners. The delegation order also delegated to the DCSE the authority to receive, review, and decide a taxpayer's protest of the decision to deny a request for referral to Appeals after the issuance of a SNOD in a case designated for litigation. This authority may not be redelegated.

Business Operating Division Request for Designation:

Limited Circumstances for Considering Designation. Certain legal issues are susceptible to recurring compliance challenges that are not effectively addressed administratively or through published guidance. In limited circumstances, examination personnel may consider requesting designation of an issue in a case where sound tax administration is best served by establishing a legal precedent on the issue. Examples illustrative of situations in which sound tax administration is best served by establishing judicial precedent are where designation would:

- stem the proliferation of abusive tax transactions or other significant non-compliance (through early issue resolution); or
- reduce future compliance and litigation costs of other taxpayers and the government (through early issue resolution, broad-based settlement initiatives, or other means); or
- resolve issues with respect to which published guidance has not resulted in compliance or where there is a wide divergence between IRS and taxpayer viewpoints on the law.

Examination personnel should request designation of an issue in a case in the limited circumstances where sound tax administration is best served by establishing a legal precedent on the issue and not merely to prevent Appeals' review.

Effect of Designating a Case for Litigation. When an issue under the jurisdiction of a BOD is designated for litigation, a partial agreement may be secured for the non-designated and agreed issues. The taxpayer will not receive a 30-day (or similar) letter with respect to the remaining unresolved issues in the case. Rather, the taxpayer will

be issued a SNOD for the unagreed issues.² In general, the designation of an issue in a case will not preclude the settlement of the remaining issues either before or after the case is docketed. Nor, in general, will designation preclude Appeals from considering and settling the same issue in other cases within its jurisdiction.

Procedures for Designating a Nondocketed Case under the Jurisdiction of a Business Operating Division. A request for designation must be raised through the BOD executive chain as set out below.

- 1) If the BOD examination personnel and the second-level manager overseeing the case, in coordination and consultation with local Counsel, determine that an issue in the case is appropriate for consideration for designation, they will consult with the Area Counsel (who will consult with the LB&I National Strategic Litigation Counsel or equivalent positions in SB/SE or TE/GE Division Counsel). The Area Counsel and examination personnel will make a reasonable effort to identify other cases presenting the proposed designated issue to allow for IRS-wide strategic coordination. If the Area Counsel concurs that it is appropriate to consider designation, then examination personnel will prepare a written memorandum that sets forth the facts of the case and the factors and justifications that support considering designation of the issue in the case for litigation. This initial request memorandum will be reviewed and approved by the Area Counsel and the first-level executive with jurisdiction over the examination, and will then be forwarded to the applicable second-level executive (Exam Director) with jurisdiction over the case and the appropriate Division Counsel.
- 2) The Exam Director and the Division Counsel will consult on the merits of designating the issue for litigation. The Division Counsel should also consult with the appropriate Associate Chief Counsel with jurisdiction over the issue.
- 3) If the Exam Director and the Division Counsel, after consultation with the Associate Chief Counsel, conclude that designation for litigation is appropriate, the Division Counsel will prepare the Designation Recommendation Memorandum (DRM) for the Exam Director's signature and concurrence. The DRM must set forth the rationale for the recommendation. After concurring in the DRM, the Exam Director must notify the taxpayer in writing of the proposed designation, the rationale for the recommendation, and that the matter will be referred to the BOD Deputy Commissioner. The Exam Director's written notice of the proposed designation will also provide the taxpayer an opportunity to submit its views on the designation recommendation in writing and/or to request a meeting with the BOD Deputy Commissioner and the Division Counsel within 60 days of being notified of the designation recommendation.
- 4) If, after reviewing the DRM and any additional information provided by the taxpayer within 60 days of being notified of the designation recommendation, the BOD Deputy Commissioner and the Division Counsel conclude that designation

² Contact Chief Counsel to discuss the appropriate procedures to follow if the issue in question is an employment tax issue.

is appropriate, they will forward the DRM and any additional information relevant to the recommendation simultaneously to the Chief Counsel and the Associate Chief Counsel with jurisdiction over the issue.

- 5) The taxpayer must be notified within 5 days of the date the recommendation is forwarded to the Chief Counsel and provided with an opportunity to share its views in writing and/or to request a meeting with the Chief Counsel within 30 days of the notification that a recommendation has been made to the Chief Counsel. The Associate Chief Counsel will provide the Chief Counsel with written comments on the recommendation within 30 days of receipt of the DRM. If the Chief Counsel does not approve the designation, the examination will continue in the normal course.
- 6) If the Chief Counsel approves the designation for litigation of the issue in the case, then examination personnel will work on issuance of the SNOD. The taxpayer will be notified within 5 days of the Chief Counsel's decision and may at such time request referral to Appeals, as described below. Alternatively, the taxpayer may wait until receipt of the SNOD to begin the process outlined below.

Taxpayer First Act Procedures in Designated Cases. As described above, the TFA prescribes new requirements that apply to any taxpayer who has received a SNOD and made a request for referral to Appeals, including a taxpayer whose case has been designated for litigation.

- 1) Upon receipt of a SNOD (or the receipt of notice of the Chief Counsel's decision, as described above), a taxpayer whose case has been designated for litigation under the foregoing procedures may request referral to Appeals. In that case, the appropriate BOD Commissioner must review and either approve or deny the request in writing within 30 days of receiving the request.
- 2) If the BOD Commissioner denies the taxpayer's request for referral to Appeals, the BOD Commissioner must provide the taxpayer a written notice with a detailed description of the facts involved, the basis for the decision to deny the request, and a detailed explanation of how the basis of such decision applies to such facts, and procedures for protesting the decision to the DCSE within 30 days of receiving the taxpayer's request.
- 3) The taxpayer may protest in writing within 30 days to the DCSE the decision to deny the request for referral to Appeals. The DCSE has 30 days to review the taxpayer's protest and communicate a written decision sustaining or reversing the decision to deny the taxpayer's protest, and the rationale for the decision.

This process furthers congressional intent by ensuring that designation of cases for litigation will remain infrequent and subject to the highest level of oversight within the IRS and the Office of Chief Counsel. This guidance is effective immediately and, as noted, will be incorporated into the appropriate IRM sections within one year from the date of this memorandum. If there are any questions concerning this guidance, please contact Mireille Khoury.

Please distribute this guidance to all affected employees within your organization.

cc: Chief, IRS Independent Office of Appeals