



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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Richard Goldman
Branch Chief, Branch 3 (Administrative Provisions and
Judicial Practice)
CC:PA:APJP:3

SUBJECT: Taxpayer's waiver of the right to receive a copy of any
original notices or other written communications that are
issued to the taxpayer's representative pursuant to the
taxpayer's power of attorney, Form 2848

This Chief Counsel Advice responds to your memorandum dated July 11, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

X =
Y =

Date 1 =
Date 2 =

Number A =

ISSUES

Whether a taxpayer may waive the right to receive a copy of any notices or other written communications when the original version of the communication has been sent to the taxpayer's power of attorney pursuant to a Form 2848, Power of Attorney and Declaration of Representation.

CONCLUSIONS

There are no statutory or regulatory provisions that would prohibit a taxpayer from waiving the right to receive a copy of an original notice or communication that was issued to the taxpayer's representative pursuant to a valid power of attorney; thus, the Service may accept and honor such a waiver.

FACTS

On Date 1, the Service issued a letter to X and Y advising them that the Service was going to examine their individual returns. The letter contained the following statement regarding X and Y's right to receive a copy of all correspondence sent to their representative:

I am required by the I.R.S. Restructuring and Reform Act of 1998 (RRA 98) to provide each of you with information concerning your rights and to send each of you a separate copy, even if you reside at the same address, of all correspondence between myself and your representative. I am required to do this even if you have a designated power-of-attorney and there are no provisions for waiving this requirement.

On Date 2, X and Y mailed a Form 2848, Power of Attorney and Declaration of Representative, to the Service. The Form 2848 was signed by both X and Y and by their designated representative. Line 7 of the Form 2848 states the following:

Notices and communications. Original notices and other written communications will be sent to you and a copy to the first representative listed on line 2 unless you check one or more of the boxes below.

- a. If you want the first representative listed on line 2 to receive the original, and yourself a copy, of such notices or communications, check this box.
- b. If you also want the second representative listed to receive a copy of such notices and communications, check this box.
- c. If you do not want any notices or communications sent to your representative(s), check this box.

X and Y did not check any of the boxes found in line 7 of the Form 2848 and instead wrote in "See attached statement." The attached statement was not separately signed by either X or Y, although the Form 2848 to which it was attached was duly executed by both X and Y. The attached statement read as follows:

A STATEMENT ATTACHED TO AND MADE A PART OF FORM 2848
POWER OF ATTORNEY AND DECLARATION OF
REPRESENTATIVE

X and Y

Number A

TAXPAYERS WAIVE THEIR RIGHTS TO RECEIVE COPIES OF
NOTICES AND OTHER WRITTEN COMMUNICATIONS. ALL
CORRESPONDENCE SHOULD BE DIRECTED TO THEIR
APPOINTED REPRESENTATIVE.

LAW AND ANALYSIS

Section 601.503 of the Service's Statement of Procedural Rules outlines the requirements of a valid power of attorney. This section states that the following information must be included in a valid power of attorney:

(a) Requirements. A power of attorney must contain the following information—

(1) Name and mailing address of the taxpayer;

(2) Identification number of the taxpayer (i.e., social security number and/or employer identification number);

(3) Employee plan number (if applicable);

(4) Name and mailing address of the recognized representative(s);

(5) Description of the matter(s) for which representation is authorized which, if applicable, must include—

(i) The type of tax involved;

(ii) The Federal tax form number;

(iii) The specific year(s)/period(s) involved; and

(iv) In estate matters, decedent's date of death; and

(6) A clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative.

26 C.F.R. § 601.503(a). Section 601.503(b) states that the proper document for a valid power of attorney is either a Form 2848 or a document that satisfies the requirements as described in section 601.503(a).

Line 7 of the Form 2848 advises the taxpayer that unless one or more of the boxes shown in Line 7 are checked, all original notices and written communications will be issued to the taxpayer and a copy will be issued to the representative. This notice and communication section of Form 2848 is not listed as one of the necessary requirements of a valid power of attorney, as described in section 601.503. Thus a taxpayer will not invalidate his or her power of attorney by either failing to fill out Line 7 of the Form 2848 or adding additional language to Line 7 of the Form 2848. See Madison Recycling Associates v. Commissioner, T.C. Memo. 1992-605.

Thus, the issue becomes whether a taxpayer can waive the right to receive a copy of all notices and written communication. There are several statutory and regulatory notice provisions that the Service is required to follow. None of these provisions, however, expressly prohibits a taxpayer from waiving the right to receive a copy of an original notice or written communication that was issued to the taxpayer's representative pursuant to a power of attorney.

Section 601.506 of the Service's Statement of Procedural Rules provides the following requirements for mailing original and copies of original notices and written communication to the taxpayer and the taxpayer's representative:

(a) General. Any notice or other written communication (or a copy thereof) required or permitted to be given to a taxpayer in any matter before the Internal Revenue Service must be given to the taxpayer and, unless restricted by the taxpayer, to the representative according to the following procedures—

(1) If the taxpayer designates more than one recognized representative to receive notices and other written communications, it will be the practice of the Internal Revenue Service to give copies of such to two (but not more than two) individuals so designated.

(2) In a case in which the taxpayer does not designate which recognized representative is to receive notices, it will be the practice of the Internal Revenue Service to give notices and other communications to the first recognized representative appointed on the power of attorney.

(3) Failure to give notice or other written communication to the recognized taxpayer will not affect the validity of any notice or other written communication delivered to a taxpayer.

Unless otherwise indicated in the document, a power of attorney other than a Form 2848 will be presumed to grant the authority to receive notices or other written communication (or a copy thereof) required or permitted to be given

to the taxpayer in any matter(s) before the Internal Revenue Service to which the power of attorney pertains.

(b) Cases where taxpayer may be contacted directly. Where a recognized representative has unreasonably delayed or hindered an examination, collection, or investigation by failing to furnish after repeated request, nonprivileged information necessary to the examination, collection, or investigation, the Internal Revenue Service employee conducting the examination, collection, or investigation may request the permission of his/her immediate supervisor to contact the taxpayer directly for such information...

The Service's Statement of Procedural Rules was not enacted by Congress and does not have the same force as legislation or regulations. Einhorn v. DeWitt, 618 F.2d 347 (5th Cir. 1980); Cataldo v. Commissioner, 60 T.C. 522 (1973). Furthermore, section 601.506(a) appears to be merely a housekeeping directive on procedures for issuing notices and communications to the taxpayer's representative and not a requirement that the taxpayer must receive a copy of all notices and written communications regardless of whether the taxpayer would rather waive the receipt of the notice. Therefore, it cannot be concluded that section 601.506 prohibits a taxpayer from waiving his right to receive a copy of all communications issued by the Service to the taxpayer's representative.

Section 3201 of the Restructuring and Reform Act of 1998 (RRA 98) requires the Service to send any notice relating to a joint return under section 6013 separately to each individual filing the joint return. Nothing in section 3201 of RRA 98 prohibits a taxpayer from waiving the right to receive a copy of the original notice or written communication that was issued at the taxpayer's express direction to the taxpayer's representative. Instead, section 3201 of RRA 98 merely requires the Service to issue a notice to both taxpayers on a joint return and prohibits the Service from issuing just one notice to both joint taxpayers. For instance, if both of the taxpayers on a joint return request in a power of attorney that all original notices be issued to the taxpayers' representative(s) and both taxpayers on a joint return waive the right to receive a copy of the notice, then the requirements of section 3201 of RRA 98 have been satisfied. If, however, only one of the joint taxpayers waives the right to receive a copy of a notice issued to the taxpayers' representative, then pursuant to section 3201 of RRA 98 the Service must still issue a copy of the notice to the nonwaiving joint taxpayer.

Section 6212(b) of the Code states that a notice of deficiency shall be sufficient if it is mailed to the taxpayer at the taxpayer's last known address. "Last known address" has been defined as the taxpayer's last permanent address or legal residence known by the Commissioner, or the last known temporary address of a definite duration to which the taxpayer has directed the Commissioner to send all

communications during such period. Weinroth v. Commissioner, 74 T.C. 430 (1980). In other words, it is the address to which, in light of all the surrounding facts and circumstances, the Commissioner reasonably believed the taxpayer wished the notice to be sent. Id. In cases where a taxpayer files a power of attorney with the Service that directs the Service to send originals of all communications to the address of the named representative, such address constitutes the taxpayer's last known address for purposes of section 6212. Honts v. Commissioner, T.C. Memo. 1995-532. Therefore, if a taxpayer has directed the Service to issue all original notices and communications to the taxpayer's representative as the taxpayer's last known address, section 6212(b) does not contain any additional requirements that a copy of the notice must still also be issued directly to the taxpayer. Indeed, the mailing of a copy of a deficiency letter other than to the taxpayer's last known address, for example, where a representative is to receive only copies of original communications sent to the taxpayer, has been held to be a mere courtesy. The Tax Court has held that if a power of attorney directs the Service to send only copies of notices and communications to the taxpayer's representative, then to send a copy to the power of attorney is a mere courtesy extended by the Commissioner. Triangle Investors LTD. Partnership v. Commissioner, 95 T.C. 610 (1990). By the same token, if the power of attorney directs the Service to send all original notices and written communications to the taxpayer's representative, then sending a copy of the notices and written communications to the taxpayer could also be considered a mere courtesy.

In addition to the lack of statutory support for prohibiting a taxpayer from waiving the taxpayer's right to receive a copy of a notice or other written communication that was issued to the taxpayer's representative pursuant to a power of attorney, there are several potential problems that would instead support the premise of allowing a taxpayer to waive the right to receive a copy of a notice if that notice was already issued to a representative. Section 6304(a) provides in relevant part that "without prior consent of the taxpayer...the Secretary may not communicate with the taxpayer in connection with the collection of any unpaid tax...(2) if the Secretary knows such person is represented by any person authorized to practice before the Internal Revenue Service...unless such person fails to respond within a reasonable period of time...or unless such person consents to direct communication with the taxpayer." It is the Service's position that generally a Form 2848 constitutes prior consent by both the taxpayer and the taxpayer's representative for the Secretary to communicate with the taxpayer even though the taxpayer is represented by counsel. Section 6304(a) evidences, however, a general intent by Congress for the Service to not communicate with a taxpayer in connection with the collection of taxes if that taxpayer is represented. Thus, section 6304(a) suggests that it is not appropriate for the Service to issue directly to the taxpayer copies of communications that were originally issued to the taxpayer's representative

pursuant to a power of attorney, where the taxpayer has specifically directed the Service not to communicate directly with him or her.

Furthermore, there are situations where communications with a taxpayer who is represented may constitute an unethical ex parte contact. Most states and Federal courts have adopted the ABA Model Rules of Conduct. Model Rule 4.2, Communication with Person Represented by Counsel, provides that “in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” Model Rule 4.2 applies to government attorneys. 28 U.S.C. § 530B; see also, CCDM Notice N(34)000-52 (April 15, 1999). Although it is the Service’s position that the taxpayer’s representative has generally consented to any communication from the Service to the taxpayer by the representative’s signature on the Form 2848, where the taxpayer has specifically directed the Service to only communicate with his or her representative, our failure to honor such a request may implicate Model Rule 4.2 if a government attorney is involved in the communication.

A taxpayer may also have valid personal reasons for not wanting to receive correspondence directly from the Internal Revenue Service. In light of section 1002 of RRA 98, which states that the Internal Revenue Service shall place a greater emphasis on serving the public and meeting taxpayer’s needs, and the absence of any legislative or regulatory authority prohibiting the taxpayer from waiving his or her right to receive a copy of all notices and written communications issued to the taxpayer’s representative, there does not appear to be any reason why the Service should not respect the wishes of the taxpayer.

In conclusion, we believe that a taxpayer can direct the Service to issue all notices and written communications to the taxpayer’s representative, and we believe that the taxpayer can also waive the right to receive copies of the notices and written communications issued to the taxpayer’s representative.

Furthermore, we conclude that inasmuch as the attachment of a waiver to the Form 2848 would not invalidate the Form 2848, the current format of the Form 2848 may still be used if the taxpayer attaches a waiver.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you have any further questions.