



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

OFFICE OF
CHIEF COUNSEL

UIL: 9999.9800

November 12, 1998

Number: **199911002**

Release Date: 3/19/1999

MEMORANDUM FOR

REGIONAL COUNSEL,

REGION

FROM:

Judith C. Dunn
Associate Chief Counsel (Domestic)

SUBJECT:

– Request for Designation

This is in response to your memorandum dated September 15, 1998 wherein you requested that we determine that the above-captioned case be designated for litigation and then seek the concurrence of the National Director of Appeals to such designation.

First, we compliment you and your staff for a well-presented written submission and oral presentation in the meeting we held November 2, 1998. I am convinced that the issue here is of substantial importance to the fair administration to the Internal Revenue laws and that the claims of the taxpayer are not consistent with the intent of Congress in enacting the excise taxes at issue here.

Secondly, we agree that the state of the law in this area is muddled and is deserving of the Office's attention to clarify or reform so that it can be correctly and efficiently applied by both taxpayers and examining agents. The interpretation of the Court of Federal Claims in J.E.C. Equipment Co. v. United States, 90-2 U.S.T.C. ¶ 70,004 (Cl. Ct. 1990) and Utilicorp United, Inc. v. United States, 90-2 ¶ 70,005 (Cl. Ct. 1990) as to the "mobile machinery exception" in Treas. Reg. § 48.4061(a)-1(d)(2)(i), while arguably fact specific and non-precedential, has spawned confusion and a fair number of undeserving claims by several industries. The problem is that the second and third regulatory tests, i.e., the "specially designed" and "substantial structural modification" tests, have been interpreted by some people as permitting readily mobile trucks to qualify for the exception so long as they carry any special equipment such as cranes, lifts or derricks. Many of these trucks use the highways daily, sustain speeds of normal traffic, and function equally to transport employees and their tools and equipment to short-term job sites. They also function to regularly deliver property to be permanently erected at the job sites. These other uses and functions, at least in the aggregate, do not seem compatible with the requirements that the chassis be "specially designed to serve only as a mobile carriage and mount" as required by Treas. Reg.

§ 48.4061(a)-1(d)(2)(i)(B). The trucks, in fact, are regularly used for other functions which seem to be specifically contemplated in the design of the truck chassis.

Nevertheless, because of policy and tactical considerations discussed below, we decline to designate this case for litigation, and refer the case back to be settled or litigated pursuant to normal administrative and judicial processes.

Policy and Tactical Considerations

1. As you know, current procedures provide that a case, under the jurisdiction of Appeals may only be designated with the concurrence of the National Director of Appeals. CCDM (35)3(14)4.2(1) provides in this regard that:

A recommendation for designation in a nondocketed case . . . should generally be made before settlement consideration commences in Appeals. This does not mean that a Litigation Vehicle is never nominated while in Appeals jurisdiction, but it does mean that such a designation should be rare and must be considered and coordinated in light of Appeals mission.

Although no discussion of this precise issue has taken place between the Appeals Office and the taxpayer here, a number of discussions as to other issues have taken place and the instant issue is ripe for Appeals consideration. Further, this issue has been considered by Appeals in earlier cycles with this taxpayer, and the issue has been settled by mutual agreement. [REDACTED]

While this office has not formally requested that the National Director of Appeals consider this case, we have a general understanding from past cases and discussions that he is reluctant to designate cases that are in Appeals' jurisdiction in light of the Appeals mission, the policy stated above, and the expectations of taxpayers that they would be permitted to amicably settle cases that have gone into Appeals. While this understanding would not prevent this office from urging designation in a compelling case, we do not believe that the facts and circumstances of this case present the rare case where that would be appropriate.

2. [REDACTED]

[REDACTED]

3.

[REDACTED]

[REDACTED]

Conclusion

We conclude that this case should not be designated for litigation and therefore it is not designated for litigation. It should be returned to the Appeals division for consideration of settlement on its merits, and failing that, litigation in the normal course and under normal procedures.

cc: Special Counsel (M&SP)
District Counsel, District
District Director, District
Regional Director of Appeals, Region
National Director of Appeals
Assistant Chief Counsel (Field Service)