



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 ASSOCIATE DISTRICT COUNSEL, PENNSYLVANIA  
DISTRICT, PITTSBURGH

Attn:

FROM: W. Edward Williams  
Senior Technical Reviewer CC:INTL:Br1

SUBJECT:

This Field Service Advice responds to your request for advice dated November 12, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

A =

Official B =

Official C =

Period X =

Period Y =

Treaty =

Country Z =

ISSUE 1:

Whether it is appropriate for the IRS examination team to request information from A to respond to a request for information made by Country Z under the exchange of information provisions of the Treaty, relating to issues not currently being examined by the IRS for Period X, and relating to taxable years of A not yet under IRS examination, Period Y? If a request is appropriate, what procedures should be followed in requesting the information from A?

ISSUE 2:

If it is appropriate for the IRS to request the information from A, whether making the request will constitute the initiation of an examination of Period Y?

CONCLUSIONS:

Issue 1:

It is appropriate for the IRS to ask A for the information needed to respond to a request for information by Country Z pursuant to the Treaty's exchange of information provisions. Further, the IRS is required to use the same procedures to obtain information for Country Z that the IRS uses to obtain information for domestic tax examinations.

Issue 2:

Requesting information from A relating to Period Y on behalf of Country Z will not constitute the initiation of an IRS examination of those years. However, even if an examination is found to have been instituted by making the request, subsequent IRS examination is not precluded.

## FACTS:

A is currently under IRS examination for Period X. Country Z has requested information relating to Period Y pursuant to the exchange of information article of the Treaty.

## LAW AND ANALYSIS

### Issue 1

The exchange of information article of the Treaty requires that the competent authorities of the United States and Country Z “shall” exchange information that is relevant for the administration of the Treaty or of the domestic taxes of the treaty partners that are covered by the Treaty. The obligation to exchange information does not require a treaty partner to take measures to obtain information that it cannot use to obtain information for its own domestic purposes. Nor is a treaty partner required to exchange information that would be against public policy.

The Treaty provides that if the information is obtainable by the IRS under U.S. law, the United States must furnish it to Country Z, with certain exceptions. In addition, the IRS must utilize whatever means are available under domestic law to secure the information, just as if the information was sought for purely domestic reasons. However, the Treaty does not obligate the United States to act contrary to domestic law in order to obtain information requested by a treaty partner.

The obligation to collect information from A under the Treaty is unrelated to whether the United States has the taxpayer under examination or needs the information for domestic tax purposes. In this regard, the Commentary to the exchange of information article in the OECD Model Tax Convention On Income And Capital (1992) includes the following:

types of administrative measures authorised for the purpose of the requested State’s tax must be utilised, even though invoked solely to provide information to the other Contracting State. [Emphasis added.]

See also United States v. Stuart, 489 U.S. 353 (1989); United States v. A.L. Burbank & Co., Ltd., 525 F.2d 9 (2d Cir. 1975), cert. denied 426 U.S. 934 (1976) (IRS summonses are properly utilized where the purpose is solely to assist a tax

investigation conducted by a treaty partner); and Barquero v. United States, 18 F.3d 1311 (5<sup>th</sup> Cir. 1994).

With respect to the methods that a State is required to employ to obtain information to respond to a treaty request, the Commentary to the OECD Model Convention includes the following:

Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examination for their own purposes. This means that the requested State has to collect the information the other State needs in the same way as if its own taxation was involved ....

Thus, it is appropriate for the IRS to comply with the request for information by Country Z pursuant to the Treaty's exchange of information provisions. Provided that the information is obtainable under U.S. law, the IRS must exercise the same means to obtain it as it would in the case of a purely domestic tax matter.

## Issue 2

The term "examination" is not defined by the Code or the Treasury Regulations. However, Code section 7602(a), titled "[e]xamination of books and witnesses," provides that for the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax...the Secretary is authorized—(1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry...." See also Treas. Reg. section 301.7602-1(a). That is, the term "examination" includes the investigation of books and records as well as a taxpayer's return for "the purpose of ... determining the liability of any person for any internal revenue tax." Under the Code, thus, an "examination" is initiated when information is inquired into for purposes of U.S. internal revenue laws. Consequently, obtaining taxpayer data for a treaty partner pursuant to a tax treaty would not constitute an examination under the Code.

Even if requesting information from A pursuant to the Treaty initiated an examination under the Code, a subsequent examination for the affected years is not precluded. Code section 7605(b). "[O]nly one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests

otherwise or unless the Secretary after investigation, notifies the taxpayer in writing that an additional inspection is necessary.” Code section 7605(b); See also Treas. Reg. section 301.7605-1(h). Cases litigated in this area have not concerned whether an examination is necessary but rather, whether written notice of a second examination had been provided. See, e.g., In re Paramount Jewelry Co., 80 F. Supp. 375 (S.D. N.Y. 1948) (the necessity of a second examination was established by affidavits of IRS agents attesting to the probability of concealment of income).

Thus, requesting information from A relating to Period Y on behalf of Country Z pursuant to the Treaty will not constitute the initiation of an IRS examination of those years. However, even if an examination was found to have been instituted by making the request, a subsequent IRS examination is not precluded.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

A may challenge Country Z’s request on the basis that the information requested constitutes protected trade secret information. In the event that A makes such an objection, we would be available to assist you in determining whether A’s assertion is correct.

If you have any further questions, please call

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