

CC:EL:D-4187-95
Br4:LPlatt

August 15, 1995

Director, Exempt Organizations Division CP:E:EO
Attn: R. Fontenrose

Chief, Branch 4, Disclosure Litigation CC:EL:D

Request for Closing Agreement from Anonymous Hospital

You have requested our opinion as to whether the Internal Revenue Service (IRS) may interact with the United States' Department of Health and Human Services' Office of Inspector General (OIG) to conduct a coordinated investigation of an anonymous hospital (Hospital) and attempt to negotiate a three-party closing agreement between IRS, OIG, and Hospital to settle all legal issues arising out of the investigation that involve Hospital and fall within IRS or OIG jurisdiction. You indicate that Hospital is prepared to authorize the IRS to disclose Hospital's tax returns and return information to the OIG for such purposes.

Analysis

Information gathered and generated by the IRS during an investigation into whether a tax-exempt hospital is organized and operated in accordance with its grant of exemption is "return information" as that term is defined in I.R.C. § 6103(b)(2) ("any other data, received by, ... furnished to, or collected by" the IRS "with respect to ... the determination of the existence or possible existence, of liability ... under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense") (Emphasis added). See e.g., Service Employees International Union v. Internal Revenue Service, 82-2 U.S. Tax Cas. (CCH) ¶9716 (D.D.C. 1982)(explanation of the interaction of I.R.C. §§ 6103 and 6104); Breuhaus v. Internal Revenue Service, 609 F.2d 80, 83 (2d Cir. 1979) (section 6103 "applies to tax exempt organizations along with all others," therefore "return information" in the form of a letter from IRS Commissioner to House Ways and Means Committee regarding a section 501(c) organization that is not public under I.R.C. § 6104, is protected to the extent provided by I.R.C. § 6103); Belisle v. Comm'r, 462 F. Supp. 460 (W.D. Okla. 1978), citing Slotnick v. Comm'r, 566 F.2d 1167 (1st Cir. 1977) (per curiam)(I.R.C. § 6104 does not make public IRS investigation files related to a section 501(c) organization).

Return information may be disclosed only as expressly authorized under section 6103 or another section of the Internal Revenue Code (Code). I.R.C. § 6103(a).

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There may be a number of bases for disclosure under facts such as those presented. For example, the Code permits the IRS to disclose returns and return information to other federal agencies for use in criminal investigations under certain circumstances and pursuant to court order as specified in I.R.C. § 6103(i). However, the most obvious route available under the facts presented is disclosure by consent of the taxpayer, Hospital.

Subsection 6103(c) of the Code permits the IRS to disclose a taxpayer's returns or return information to a person designated by the taxpayer in a written request or consent, so long as such disclosure would not seriously impair Federal tax administration. Paragraph (a) of Treas. Reg. § 301.6103(c)-1 prescribes rules governing the necessary form and content of these written requests or consents.¹

The attached draft consent complies with the requirements set forth in subsection 6103(c) and implementing regulations. Once the consent has been signed on behalf of Hospital and furnished to the IRS within 60 days of signing, the IRS will be authorized to disclose the tax returns and/or return information explicitly identified in the Hospital's consent, to OIG, the authorized recipient of such information explicitly identified by Hospital in its consent.

¹ Paragraph (b) of Treas. Reg. § 301.6103(c)-1 prescribes rules for disclosures to a person who has been requested by the taxpayer to obtain information or provide assistance concerning a contact between such taxpayer and the IRS.

IRS will not be authorized, pursuant to the consent, to disclose Hospital's tax returns or return information to anyone except OIG. Moreover, although the argument can be made that OIG is not bound by the requirements of section 6103 to maintain the confidentiality of tax information received pursuant to a taxpayer's consent, literally read, subsection 6103(a) says that OIG may not redisclose tax information received pursuant to Hospital's consent.² Accordingly, we recommend

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² In material part, subsection 6103(a) provides:

Returns and return information shall be confidential, and except as authorized by this title --

(1) no officer or employee of the United States,

...

shall disclose any return or return information obtained by him ... under the provisions of this section. (Emphasis added).

Arguably, a return or return information obtained by an officer or employee of OIG pursuant to a consent that meets the requirements of subsection 6103(c) constitutes a "return or return information obtained by him ... under the provisions of this section," i.e., under the provisions of section 6103, and accordingly, may not be disclosed by such OIG officer or employee.

³ In this regard, we bring to your attention the Fifth Circuit's opinion in Burlington Northern v. Office of Inspector General, 983 F.2d 631 (5th Cir. 1993). In Burlington Northern, the Fifth Circuit drew a distinction between authority to investigate fraud, waste, inefficiency, or abuse within a federal agency or in the agency's administration of programs for which it has statutory responsibility, as opposed to authority to undertake investigations that are designed to carry out and enforce the agency's program functions, directly. Id. at 640-643 (copy opinion attached). The Fifth Circuit concluded that as a general rule the Inspector General of an agency has authority to perform the former but not the latter types of investigations involving agency programs. Id.

From the standpoint of section 6103, the IRS may interact with OIG to conduct a coordinated investigation of Hospital and attempt to negotiate a three-party closing agreement between IRS, OIG, and Hospital without risk of violating the statutory protection afforded Hospital's tax information under section 6103 so long as in the course of any such coordinated investigation the IRS only discloses Hospital's tax information in accordance with the terms of Hospital's consent.

Finally, we emphasize that we make no representations as to the ability of OIG to participate in a coordinated investigation with another agency, nor as to the necessity or sufficiency of a consent by Hospital authorizing OIG to disclose HHS information to the IRS.

If you have any questions, please contact Lynnette Platt, the attorney assigned to this matter, at (202) 622-4570.

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JOSEPH J.

Attachments:
As stated