



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

OFFICE OF
CHIEF COUNSEL

MAY 30 2000

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BCTownsend

MEMORANDUM FOR DIRECTOR, PROGRAM AND POLICY ADMINISTRATION
Attn: David A. Drake
Peggy LeBar

FROM: Barry J. Finkelstein 
Assistant Chief Counsel (Criminal Tax)

SUBJECT: Solicitation of Returns Issue Raised by Letter 3164(C)

This responds to your request for our opinion as to whether the language used in Letter 3164(C), stating the Service has attempted to obtain unfiled returns from the recipient taxpayer, runs afoul of the policy against soliciting returns where the failure to file was wilful or involves an indication of fraud. For the reasons discussed below, we conclude the language in Letter 3164(C) technically does not solicit a return. We recognize the context and purpose of the letter may present an inherent solicitation issue which cannot be completely avoided. Solicitation issues complicate criminal prosecutions but may not be fatal to criminal referral. Resolution of the issue in any given case will revolve around the facts and circumstances presented. While we cannot rule out solicitation challenges with regard to Letter 3164(C), we believe such challenges can be resolved in the Service's favor based on a plain reading of applicable policy guidance and the letter itself.

As a final point, we suggest 

Background

Given the mandate of I.R.C. § 7602(c) that taxpayers be given reasonable, advance notice the Service may contact third parties with respect to the determination or collection of their respective tax liabilities, the Service created a generic notice for taxpayers under examination or collection process. This notice was ultimately rejected

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in favor of notices more closely tailored to the circumstances of their issuance so as to clearly inform taxpayers why the notice is being sent. Letter 3164(C) is one such notice which has been approved for use in Tax Delinquency Investigations (TDIs). The current version of Letter 3164(C) provides, in pertinent part:

We have attempted to obtain unfiled returns from you. You should already be aware of this from our previous contacts with you. Generally, our practice is to deal directly with a taxpayer or a taxpayer's duly authorized representative. However, we sometimes talk with other persons, for example when we need information that the taxpayer has been unable to provide, or to verify information we have received.

We are writing to tell you that we may contact other persons. If we do contact other persons we will generally need to tell them limited information, such as your name. The law prohibits us from disclosing any more information than is necessary to obtain or verify the information we are seeking. Our need to contact persons may continue as long as there is activity on this matter.

According to the background materials submitted with your request, IRM procedures require the issuance of this letter in failure to file cases when there is a real expectation that third party contacts will be made. It is in this context concerns have been raised that the letter constitutes a solicitation of a return within the meaning of Policy Statement P-5-133 and therefore, violates the policy's proscription against soliciting returns in potential criminal fraud cases.

Policy Statement P-5-133 (approved 11-24-1980), Delinquent returns – enforcement of filing requirements provides, in pertinent part:

Taxpayers failing to file tax returns due will be requested to prepare and file all such returns except in instances where there is an indication that the taxpayer's failure to file the required return was wilful or if there is any other indication of fraud. All delinquent returns submitted by a taxpayer, whether upon his/her own initiative or at the request of a Service representative, will be accepted. However, if indications of wilfulness or fraud exist, the special procedures for handling such returns must be followed. (Emphasis added.)

Applicable IRM provisions state that compliance employees are not to solicit returns if the possibility of fraud exists. See, IRM 104.2.7.2(3). Thus, it would appear the issuance of Letter 3164(C) in failure to file cases involving indications of wilfulness or fraud may conflict with the solicitation policy of the Service.

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Discussion

While the interpretation and application of IRS policies do not generally involve legal questions, the Service's solicitation policy is founded, in part, on a general legal concern that solicitation in some instances could jeopardize criminal prosecutions. In light of this concern, our office has issued guidance to field attorneys concerning solicitation issues affecting criminal tax cases. See, CCDM 31.3.6, Solicitation of Returns (3-21-2000).

Although Policy Statement P-5-133 does not define solicitation, the following definition is used for purposes of addressing solicitation issues affecting criminal tax cases:

Solicitation consists of an oral or written request for the filing of *specific returns* by a revenue agent/officer, or a summons for information by which a return can be prepared, if the taxpayer understands that a return could be filed in lieu of specific compliance with the summons. CCDM 31.3.6.1(1) (Emphasis added.)

We agree the language in Letter 3164(C) that "[w]e are attempting to obtain unfiled returns from you," sent to a taxpayer whose return is delinquent could be misconstrued by the taxpayer as a solicitation of the delinquent tax return. However, based on the definition of solicitation set forth above, Letter 3164(C) technically does not solicit a return because it does not mention any specific returns or tax years at issue. In fact, the letter does not expressly request anything from the taxpayer, let alone the filing of a specific return. The letter quite clearly conveys its point, *i.e.*, to inform the taxpayer the Service may contact other persons to obtain information. Any perception the letter solicits a return is inferential and contrary to the express purpose of the letter. This position may be weakened by the letter's reference to prior notices sent to the taxpayer which could provide context to specific returns or tax years at issue. Nevertheless, this position rests on a plain reading of the definition and should be given substantial deference should its application be challenged in court. See generally, Auer v. Robbins, 519 U.S. 452, 461 (1997) (citation omitted) (agency's interpretation of its own regulations will prevail unless it is "plainly erroneous or inconsistent" with the plain terms of the disputed regulations).

While we concede such misconstruction could occur, we question whether any notification which purports to inform nonfiling taxpayers that the Service may contact third parties for information would not be similarly misconstrued by some as a solicitation. In other words, this notice may have an inherent, albeit unintended, "solicitation issue" which cannot be completely avoided.

Solicitation issues are highly factual determinations and can complicate criminal prosecutions. The Department of Justice considers the active solicitation of a return as detrimental to a criminal case in that the defense can be expected to argue that the

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prosecution was instituted because of the unsuccessful attempt to dispose of the matter civilly or as a substitute for unsuccessful collection. CCDM 31.3.6.1(2)b. Such claims, even though unfounded, also introduce a possible basis for jury nullification, *i.e.*, jurors ignore evidence of guilt beyond a reasonable doubt in favor of acquitting the defendant based on the erroneous perception the prosecution was vindictive or unfair.

Mere solicitation, not aggressively pursued by the revenue officer, is not considered as significantly weakening a criminal failure to file case, particularly where no return is subsequently filed or if an unreasonable period of time passes before a return is filed. What is a reasonable amount of time in this context depends on the facts and circumstances of each case, including the number of returns involved, complexity of the returns, and the condition of the taxpayer's records. Solicitation will be a detracting factor if the taxpayer submits the delinquent return either before the criminal investigation commences or within a reasonable time period following the last solicitation for any return, whichever occurs later. CCDM 31.3.6.1(2)b.1. Prosecution generally is not recommended in cases where a solicited return is received prior to the taxpayer being contacted by CID or within a reasonable amount of time following the solicitation. CCDM 31.3.6.1(2)b.2. Prosecution may still be recommended in unusual circumstances.

Moreover, the Second Circuit has held that "[t]he CCDM in no way prohibits prosecution in every case where there has been a solicitation and cannot possibly be construed as a grant of immunity to a taxpayer who files a return in response to solicitation. United States v. Tenzer, 127 F.3d 222, 228 (2d Cir.1997). Although an individual might be entitled to relief where an agency fails to adhere to its rules or regulations, *see* Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1994), the solicitation policy of the Service does not implicate a rule or regulation of the IRS. *Id.* The policy, as characterized by the Second Circuit, "is purely an internal one, designed for the guidance of agents" and "is not directed to the public or publicized." *Id.*

Conclusion

We do not find the present language of Letter 3164(C) solicits a return and therefore, does not run afoul of the Service's solicitation policy. An inherent solicitation issue may attend the issuance of this letter regardless. Solicitation issues may not be fatal to referral of a case for criminal prosecution. This is particularly true where no return is subsequently received or an unreasonable period of time passes before a return is filed. While the facts and circumstances of each case substantially influence criminal referral recommendations involving solicitation issues, we believe any such challenges arising in connection with the issuance of Letter 32164(C) can be resolved in the Service's favor based on a plain reading of applicable policy guidance and the letter itself.

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If you have any questions or comments, please feel free to contact Brian Townsend on (202) 622-4470.

**cc: Assistant Chief Counsel (General Litigation)
Chief, Criminal Investigation**