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January 10, 2005

MEMORANDUM FOR: Thomas Mathews, Director, Office of Advisory, Insolvency, & Quality

FROM: Neil B. Worden, Chief
Claims, Labor and Personnel Law Branch

SUBJECT: Request for Advisory Opinion – Applicability of RRA Section 1204 and Regulation 801 to the Collection Quality Measurement System Program

This memorandum responds to your request for an opinion whether RRA '98 Section 1204 and 26 C.F.R. Part 801 concerning the use of tax enforcement results and business quantity results apply to activity performed in the Collection Quality Measurement System (CQMS) program. Specifically, it appears that you want to set a target review rate and track the number of cases closed by reviewers in order to determine best practices and to determine possible training or accountability issues.

Legal Standards

Section 1204

Section 6231 of the Taxpayer Bill of Rights (TBOR 1), Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3734 (1988) prohibited the use of records of tax enforcement results (ROTERRs) to evaluate or impose or suggest quotas for Collection employees and supervisors.¹ Section 1204, repealed section 6231, but replaced it with an expanded restriction on the use of tax enforcement results covering all Service employees, not just Collection employees. Section 1204 of RRA '98 provides as follows:

The Internal Revenue Service shall not use records of tax enforcement results –
(1) to evaluate employees; or

¹ By "Collection employee" or "Collection unit" we mean employees or work units whose primary function is to collect taxes owed, i.e. Revenue Officers and their work groups.

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(2) to impose or suggest production quotas or goals with respect to such employees.

Section 1204 did not define the term "tax enforcement results." That term, however, was subsequently defined in 26 C.F.R. § 810.6(d)(1) as, "the outcome produced by an Internal Revenue Service employee's exercise of judgment recommending or determining whether or how the Internal Revenue Service should pursue enforcement of the tax laws." 26 C.F.R. § 810.6(d)(1)(ii) excluded from this definition "case closures . . . inventory information . . . and data derived from a quality review or from a review of an employee's or a work unit's work on a case, such as the number or percentage of cases in which correct examination adjustments were proposed or appropriate lien determinations were made." As such, outcome neutral production statistics are generally not considered tax enforcement results for the purpose of section 1204.

26 C.F.R. Part 801

While section 1204 focuses on precluding the use of tax enforcement results to evaluate or set goals for employees, the primary emphasis of 26 C.F.R. Part 801 is to define a balanced system for measuring organizational and employee performance. The system developed by the Service measures Customer Satisfaction, Employee Satisfaction, and Business Results. 26 C.F.R. § 801.1(a)(2).

Business Results is further divided into quality measures and quantity measures. The quality measure is determined from reviews by dedicated staff of a "statistically valid sample of work items handled by certain functions or organizational units." 26 C.F.R. § 801.6(b). For Collection units, the quality review is to focus on timeliness of actions, proper analysis of issues, correct application of law, and compliance with law, regulation, and procedures. 26 C.F.R. § 801.6(b)(1). Quantity measures are limited to outcome-neutral data, for example, "cases closed, work items completed, . . . hours expended and similar inventory, workload and staffing information, that does not contain information regarding the tax enforcement result reached in any case involving particular taxpayers." 26 C.F.R. § 801.6(c).

Part 801 contains specific prohibitions against using quantity measures to evaluate employees who exercise judgment with respect to tax enforcement results or organizational units with such employees. 26 C.F.R. § 801.3(e)(3). With respect to organizational units, 26 C.F.R. § 801.2(b) prohibits using quantity measures to impose or suggest production goals for any organizational unit with employees who exercise judgment with respect to tax enforcement results, except in conjunction with an evaluation or goals based on customer satisfaction, employee satisfaction, and quality measures. The limitations of Part 801 do not apply to the use of production statistics if neither the employee nor the organizational unit exercises judgment with respect to tax enforcement results.

Facts

CQMS "is designed and intended as a useful tool for executive and top level managers to use in determining strengths and weaknesses in the quality of work performed by Collection employees." Internal Revenue Manual (IRM) 5.13.1.4(1). CQMS provides information useful in measuring the Business Results (Quality) aspect of the Service's balanced measurement system. IRM 5.13.1.7.2(1). This information comes from Revenue Officer Reviewers' (RORs) examinations of closed field Collection case files to measure customer service, observation of taxpayer rights, technical ability, timeliness, and judgment. CQMS is not used, under any circumstances, to measure individual enforcement statistics or establish records of tax enforcement results. IRM 5.13.1.4 (1) & (2).

In performing CQMS closed case reviews, RORs use a computer-based check sheet which records numerous items, including disposition of the case and dates the case was assigned to the field Collection function, assigned to a field Collection employee, first contact with the taxpayer, and date the case was closed. The ROR also examines, among other things, whether enforcement was used, whether the taxpayer was accorded their rights and was treated fairly and courteously, whether the field Collection employee complied with specific procedural requirements, whether actions on the case were timely, whether the file was adequately documented, and whether it was properly closed. The ROR's inputs generally consist of dates, reason codes, and yes/no or met/not met entries. See IRM 5.13.3.

Analysis

As stated above, the limitations of Part 801 regarding the use of production statistics pertain to employees who exercise judgment with respect to tax enforcement results and to work units that contain such employees. If there is no "exercise of judgment with respect to tax enforcement results," the limitations of Part 801 do not apply. Consequently, before addressing your question as to whether you appropriately applied the decision table, an even more fundamental issue needs to be addressed. That is, do the RORs exercise the requisite judgment with respect to tax enforcement results? Based on the information you presented, the answer appears to be "no."² The determination of tax liability or the ability to pay was established by the Revenue Officer assigned to the case before its being forwarded to the quality review section for review. The ROR reviews the case for quality against specific review standards and makes no determination as to tax liability or ability to pay. Because the ROR does not exercise

² This conclusion is reached based solely on the information presented which did not reflect duties which may be considered exercising judgment with respect to tax enforcement results. We would need more detailed information regarding the RORs specific duties and responsibilities to make a more definitive determination. See also "Question 134A" found at <http://www.hq.irs.gov/programs/NRC/P120/p0134.htm>, which advises that Revenue Agents and Tax Auditors who work in the Quality Measurement Section do not exercise judgment in determining tax liability or ability to pay.

the requisite judgment, there is no prohibition within Part 801 that would prevent you from imposing a production quota or goal.³

Application of decision table in IRM 1.5.2-2.

Your inquiry asks whether you have properly applied the decision table in IRM 1.5.2-2 in determining that Section 1204 and Part 801 do not apply to CQMS. We believe your conclusion is correct. The initial step in the decision table is determining whether the data is a ROTER. A ROTER is defined as "data, statistics, compilations of information or other numerical or quantitative recordings of the tax enforcement results reached in one or more cases." 26 C.F.R. § 801.6(d)(2). However, "[d]ata derived from a quality review or from a review of an employee's or a work unit's work on a case" is not considered a tax enforcement result. 26 C.F.R. § 801.6(d)(1). IRM 1.5.2.17 further advises that, "[g]enerally, statistics that measure quality or timeliness of actions (cycle time) and quantity measures [] are not ROTERs." Therefore, it appears that CQMS data is not considered a ROTER, and therefore Section 1204 does not apply to use of CQMS data.

The next inquiry in the decision table is whether the CQMS data is limited in use by Part 801. With respect to the CQMS staff, you advise that the CQMS data would not be used to directly determine the evaluation of a supervisory employee; therefore, according to the decision table its use is not prohibited. As discussed above, use of CQMS data to evaluate or suggest quotas for an ROR is not specifically prohibited by the regulation because the ROR does not exercise judgment with respect to tax enforcement results.⁴

While neither Section 1204 nor Part 801 prohibits use of CQMS data with respect to evaluating or suggesting quotas for CQMS staff, there are limits and cautions regarding the use of such data. IRM 1.5.1 contains cautionary and limiting provisions with respect to quantity data. See IRM 1.5.1.10.3(4) and 1.5.1.11.2(2). Use of statistics is also limited in the Article 12, Section 8 of the National Agreement between the Service and the NTEU.

Sharing the annual case review sample size.

You asked whether you could share with the CQMS staff the annual case review sample size (overall target size of 19,000 as well as any area office targets). It appears that the annual case review sample size may be shared with CQMS staff. We emphasize, however, the restrictions and cautions from the IRM and the National Agreement. In sharing the annual case review sample size with CQMS staff, care must

³ Please note that Article 12, Section 8, of the National Agreement between the Service and the National Treasury Employees Union retains limitations on the use of statistics in evaluating employees.

⁴ As a practical matter, however, most of the CQMS data would not be useful in evaluating the ROR. The only useful data might be the number of cases reviewed and amount of time from receipt of the case by the ROR to review. This data is not considered a tax enforcement result under Part 801.

be exercised to ensure that it is used in conjunction with the other balanced measures, does not become a performance goal or objective for employees, and is not used in individual performance evaluations.

May you share the expected review rate and methodology for determining it.

The expected review rate and methodology for determining it may be shared with the CQMS staff because they are not considered ROTERs. As again noted, however, the rate and methodology should be "discussed in conjunction with customer satisfaction, employee satisfaction, and quality goals," should not be addressed in a fashion in which it becomes a performance goal or objective, and cannot be used in individual performance evaluations.

Using the plan rate in connection with the critical element of Business Results – Efficiency.

You advise that your objective in sharing the expected review rate with RORs is not to evaluate them on the number of cases reviewed, but rather to make sure they know that their manager will be using the expected review rate as a barometer with respect to the ROR's critical element of Business Results – Efficiency. If the ROR exceeds or is below the rate, the ROR's work will be reviewed more closely for accuracy, complexity, training, and best practices purposes. This does not appear to violate Section 1204 or Part 801. Nevertheless, you should remember that any discussion of the rate plan also addresses the other balanced measures and not in a fashion which indicates the rate is a performance goal or objective. Should you have any questions regarding this opinion, please contact Nancy Kelley at (202) 283-7919.