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March 12, 2009

MEMORANDUM FOR BERNIE WEBERMAN
DIRECTOR, HEADQUARTERS OPERATIONS
DIVISION COUNSEL, SB/SE

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

SUBJECT: Fraud Digest and Section 1204

This memorandum responds to your request for our opinion regarding whether the SB/SE Fraud Digest violates RRA '98 Section 1204 when it utilizes records of tax enforcement results (ROTERS)¹ to train agents about best practices and developments in combating fraud. You provided excerpts, found in the November 2008 issue, which SB/SE's Section 1204 Program Support believes violate RRA '98 Section 1204's prohibition against using ROTERS. Your overarching question is whether the use of ROTERS is prohibited by Section 1204 in the context of a training/developmental document that is not evaluative. In our opinion, the use of ROTERS in training materials does not violate Section 1204. However, the use of ROTERS to suggest a production quota or goal does constitute a violation of Section 1204 and the relevant regulations.

Section 1204 prohibits the Service from using records of tax enforcement results (1) to evaluate employees; or (2) to impose or suggest production quotas or goals. 26 C.F.R. Section 801.3T(e). The fundamental purpose of the restrictions on the use of ROTERS is to ensure IRS employees make recommendations and decisions on pursuing

¹ A "tax enforcement result" is defined as the "outcome produced by an IRS employee's exercise of judgment in recommending or determining whether or how the IRS should pursue enforcement of the tax laws," and includes such things as liens filed; levies served; seizures executed; amounts assessed and collected; and fraud referrals. 26 C.F.R. Section 801.6T(d)(1); IRM 1.5.2.6. A record of tax enforcement results is 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. Section 801.6T(d)(2); IRM 1.5.2.7.

enforcement of tax laws (including but not limited to determining tax liability and ability to pay) based solely on the correct application of the law to the facts of each case and on the exercise of reasonable judgment. IRM 1.5.2.1. RRA'98 Section 1204 and the relevant regulations at 26 C.F.R. Section 801 prohibit tax enforcement results from being used in ways that might inappropriately influence IRS personnel to act in a manner inconsistent with these principles.

Because the Fraud Digest is not an evaluation within the meaning of 26 C.F.R. Section 801.3T(e)(1), the use of ROTERs in the Fraud Digest does not violate the prohibition against using ROTERs to evaluate employees. However, the regulation also precludes using ROTERs to impose or suggest quotas or goals. 26 C.F.R. Section 801.3T(e)(1). "To suggest a production quota or goal means to engage in conduct from which a reasonable person would infer that a manager would evaluate the employee more favorably if the employee achieved a specific enforcement result regardless of the merits of the particular case(s)." IRM 1.5.2.13. In our opinion, where the use of ROTERs in the Fraud Digest creates the perception that specific enforcement results are the more desirable ones, a violation of Section 1204 occurs. Consequently, the context of a ROTER in the Fraud Digest determines whether its use violates Section 1204.

We note that some of the excerpts you provided for our review mention ROTERs under headings such as Collection Success Stories ("The developed acts of fraud led to a criminal referral and prosecution") and Examination Success Stories ("The evidence gathered during the examination led to a potential criminal fraud referral"). When ROTERs are used in this context they could improperly influence the handling of taxpayer cases. Agents' decisions regarding how, or whether, to investigate cases might be based on a desire to achieve the "successful" tax enforcement result as opposed to being based on the correct application of the law to the facts of each case. In such cases, a Section 1204 violation may be avoided by a change of wording and focus so that the emphasis is on the methods used to properly identify and develop badges of fraud as opposed to the end result of the case.

While we do not believe every mention of a ROTER in the Fraud Digest automatically constitutes a Section 1204 violation, care must be taken to avoid conveying an underlying message that certain tax enforcement results are the goal. The chart you provided for our review,



Section 1204 was enacted to reinforce that the successful end of the fraud process, and the point of the criminal process, is the correct application of the law to the facts of each case and on the exercise of reasonable judgment - - which may or may not result in a conviction.

You have explained to us that the Fraud Digest is distributed to agents to provide them assistance in developing fraud cases. You indicated the purpose of the Fraud Digest is to “set out underlying cases’ facts and how the case was developed, and give the outcome of the case with *what worked and what didn’t*. . . .” (emphasis added) If the Fraud Digest provides training by pointing to a fraud referral, or a prosecution, or a conviction to illustrate what “worked,” then we believe that use of ROTERs impermissibly suggests a goal. By contrast, if the ROTER is used in a manner and context which do not suggest that the specific tax enforcement result was the preferred goal, we do not believe the ROTER was used in violation of Section 1204. For example, we do not believe the mention of a ROTER is improper where the Fraud Digest describes investigative steps taken by an Agent and then notes that the resulting ROTER was proper as the Agent had taken the necessary steps to determine whether the badges of fraud were present. In that example, the emphasis is on the fact that the Agent investigated the case properly, and the resulting ROTER – which could be any number of outcomes - is beside the point. By contrast, a description that lauds an Agent for producing a fraud referral as the end result of his or her investigative work is using the fraud referral to suggest a goal. Guidance on criteria to consider when trying to determine whether use of a ROTER suggests a goal may be found at IRM 1.5.2.13 through 1.5.2.18.

If you have any further questions regarding this matter, please contact Jennifer Gabel at (202) 927-0862.