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From:
Sent: Tue 12/15/2009 8:58 AM
To:
Cc:

Subject:

I am sending this e-mail to memorialize our discussion of last week. You have asked whether Appeals may treat a request for a CDP hearing as if it were never submitted pursuant to Internal Revenue Code section 6330(g) if the request contains nothing but a statement that the taxpayer wishes to discuss the underlying liability as well as a frivolous argument regarding the Form 1099-OID scheme. [redacted]

On December 6, 2006, Congress passed the Tax Relief and Health Care Act of 2006 (TRHCA) Pub. L. 109-432, 120 Stat. 2922 (2006). Section 407 of TRHCA added section 6702(b) (the frivolous submission penalty), which imposes a $5,000 penalty on a person who submits a CDP hearing request that either is based on a position that the Secretary has identified as frivolous in a published list or that reflects a desire to delay or impede the administration of federal tax laws. TRHCA section 407 also added section 6330(g), which provides that the Service may disregard any portion of a CDP hearing request if the portion meets either of those requirements necessary for assertion of the frivolous submission penalty. Sections 6320(b)(1) and 6330(b)(1) were amended to require CDP hearing requests to be in writing and to state the grounds for the hearing.

This office believes that Appeals may treat a CDP hearing request of the type described above as if it were never submitted, because on its face it both is a wholly frivolous request and it reflects a desire to delay or impede the administration of federal tax laws. Asserting the legitimacy of the 1099-OID scheme is a frivolous (and fraudulent) position. *See* Fraud Digest - August 2009, Form 1099 OID Refund Scheme Update; *Accord* Rev. Rul. 2005-21 (regarding the frivolous "straw man" theory); Rev. Rul. 2004-31 (regarding the frivolous "taxpayer redemption" theory); Notice 2008-14 (the frivolous position notice). Thus, the issue is whether the request to "discuss the liability" is a non-frivolous position that would provide legitimacy to the request.

To be clear, if a taxpayer were to submit a Form 12153 that stated only that the taxpayer wished to discuss the underlying liability, then it is unlikely that Appeals could disregard the request under section 6330(g). Assuming that the taxpayer were entitled to raise liability issues under section 6330(c)(2)(B), then the request at worst would be vague. It would not be apparent from the face of the document whether the taxpayer had any legitimate issue regarding the liability or instead was making only frivolous arguments. Moreover, it may not be appropriate to use information received in response to a Letter 4382 (ATM letter requesting follow-up information) to color Appeals' interpretation of the CDP hearing request. Section 6330(g) cross-references the requirements of section 6702(b)(2)(A)(i) and (b)(2)(A)(ii) to

determine whether a CDP hearing request is frivolous. The prevailing view, though not embodied in any published guidance, is that post-submission oral statements or written material from a taxpayer should not be considered in determining whether the taxpayer submitted a request based on an identified frivolous position for which the section 6702 penalty may be imposed. Accordingly, if the requirements must be read consistently as between sections 6702 and 6330, then it might be difficult to assert that a naked disagreement with an assessed liability is frivolous.

As you know, post-TRHCA section 6330(b)(1) provides that an Appeals hearing must be held if a person both requests a hearing in writing and states the grounds for the requested hearing. The naked challenge to an underlying liability may not be a very articulate statement of the grounds for the requested hearing, but it likely would be a sufficient statement to satisfy (b)(1), notwithstanding whether or not section 6330(c)(2)(B) was applicable. For these reasons, if a CDP hearing request simply states something along the lines of "I do not understand the liability," or "I want to discuss the liability," then it most likely would not be a frivolous request that may be disregarded.

The situations at issue, however, are distinguishable. In the types of cases that the Settlement Officer described, below, the taxpayers in fact have made affirmative assertions in the CDP hearing requests regarding the underlying liabilities that were wholly frivolous. In such cases, the addition of a categorical statement explaining that the taxpayers wanted to discuss their liabilities would not be affirmative non-frivolous assertions that may save the CDP hearing requests from being disregarded under section 6330(g). These taxpayers not only indicated their desire to discuss (c)(2)(B) issues, but they affirmatively went ahead and informed Appeals what it is about the liabilities with which they disagree. In this context, a statement explaining that the taxpayer wanted to discuss the underlying liability is not an affirmative assertion that may be categorized either as frivolous or non-frivolous. It more properly may be viewed as prefatory information leading up to the assertions that follow, which in these cases are wholly frivolous. Thus, the stated desires to dispute the underlying liabilities may properly be viewed as parts of the affirmative and frivolous assertions in the CDP hearing requests. Because such CDP hearing requests would be composed completely of the frivolous 1099-OID arguments, Appeals may treat such requests as having never been submitted.

In these situations, the Appeals manual would direct the Settlement Officers to solicit the taxpayers to amend or withdraw the frivolous CDP hearing requests by issuing Letters 4382. IRM Part 8.22.2.2.10.3.2(1). This would allow the taxpayers to "cure" the initial frivolous requests by affirmatively providing non-frivolous reasons why the liabilities properly are being questioned (or by raising non-frivolous collection alternatives or spousal relief issues). However, the information received pursuant to Letters 4382 solicitations would not be used retroactively to determine that the initial requests were frivolous.

Now, to briefly address the Settlement Officer's concern regarding the Tax Court's decision in Hoyle v. Commissioner, 131 T.C. No. 13 (2008). In Hoyle, the Tax Court held that it would review whether Appeals properly verified compliance with applicable laws under section 6330(c)(1), regardless of whether the taxpayer raised the issue with Appeals, notwithstanding Giamelli v. Commissioner, 129 T.C. 107 (2007) (holding that a petitioner in a CDP matter may not raise the underlying tax liability on appeal if it was not raised in the hearing, below). Hoyle was decided in 2007, after the enactment of the TRHCA. The holding in Hoyle must be read in context and the issue did not involve a frivolous CDP hearing request that properly could be disregarded. Accordingly, Hoyle does not address the question of whether subsection (g) of section 6330 "trumps" subsection (c)(1). Indeed, the plain language of section 6330(g) would seem to compel this result, because it begins "[n]otwithstanfing any other provision of this section," which must be read to include subsection (c)(1). Note also that the verification requirement in section 6330(c)(1) is not limited to cases in which section 6330(c)(2)(B) is triggered. In other words, we could not limit the Hoyle verification mandate as being limited to (c)(2)(B) cases, while allowing Appeals to completely disregard CDP hearing requests in which only (c)(2)(A) issues properly may be raised. Accordingly, it likely would eviscerate section 6330(g) if Appeals were required to properly verify compliance with applicable laws under section 6330(c)(1), balance the government's need for collection under section 6330(c)(3), and issue a notice of determination, all in situations in which Appeals properly treats a frivolous CDP hearing request as never having been submitted. Accordingly, Hoyle should present no additional obstacle should section 6330(g) apply in the first instance.

Please let me know if I have mischaracterized anything and feel free to call me directly if you have any questions or wish to discuss this matter further.

Regards,