CHIEF COUNSEL ADVICE

QUESTIONS AND ANSWERS

Questions were raised in response to the National Office training sessions on Chief Counsel Advice (CCA). To ensure that everyone had the benefit of the answers to those questions, we compiled a number of significant questions and answers. The questions and answers, dated September 21, 1998, were distributed. After that distribution, because of some confusion, answers to some questions have been clarified. In addition, the answers to some of the questions required updating. The revised responses to those questions have been incorporated into the attached compilation. The September 21, 1998 Q & A's is superceded by these revisions; the prior version should be disregarded and destroyed.

WHAT IS CCA?

Question 1:

Is all advice from the national office to the field included within the definition of CCA?

No. Only advice that conveys legal interpretations or positions of the Service concerning existing or former revenue provisions. The term "revenue provisions" includes the Code, regulations, revenue rulings, revenue procedures, or other administrative interpretations or guidance, tax treaties, court decisions and opinions. CCA also includes legal interpretations of state law, foreign law or other federal law relating to the assessment or collection of liabilities under revenue provisions. Thus, certain types of advice provided by GLS (e.g., labor law, procurement law) are expressly excluded in the legislative history of section 3509 of the Internal Revenue Service Restructuring and Reform Act (RRA98) from being CCA. In addition, the Office is considering whether advice or instruction written by, for example, Criminal Tax, that addresses Federal statutes that do not relate to the assessment or collection of liabilities under the revenue laws (e.g., money laundering or "pure" Title 31 cases) that literally do not meet the definition of CCA should be treated as CCA.

Question 2:

What about e-mail? Does an e-mail response constitute written instructions provided to the field?

First, e-mail is a writing. However, following the CASE business rules, if the e-mail you are providing to the field consumed less than two hours of research and preparation, such that you need not open a case file, then, the e-mail is to be treated like informal telephone advice (which is memorialized in writing, also). The legislative history to section 3509 clarifies that informal advice is not considered to be CCA. Conversely, if the time expended in researching and preparing an e-mail response consumes two or more hours, or your local office practice is to open a case file because of the significance of the matter, then the e-mail is not informal advice and is CCA. The "two-hour" rule may appear to be artificial for determining whether the e-mail writing is CCA; however, this rule has historically been the touchstone for determining, for numerous business reasons, whether advice is considered "informal" or "formal." Because the "informal/formal" dichotomy has been incorporated into the concept of CCA, and since the Office is committed to retaining its business rules and document characterizations without regard to disclosure results, the Office has retained the "two-hour" rule (subject to other business rules defining informal advice) as indicative of CCA. The most important thing to remember is that the business rule as to what is informal advice has not, and will not, change regardless of the manner of delivery of the advice.

Question 3:

What about nondocketed significant advice review (NSAR)? Are they Chief Counsel Advice?

Advisories that are written by our field offices and reviewed in the national office under the large case procedures (CCDM (35)3(19)4) are not themselves CCA because they are not written or issued by a national office component. The response of the national office may or may not be CCA depending on the nature of that response. The response should be treated as informal advice (not CCA) or as formal advice (FSA and CCA) based upon the response in the particular case. The large case procedures of the Chief Counsel's Office contemplate that the field will prepare large case advice for review by the

national office only if the "advice involves the application of well-settled principles of law to the facts of a particular case" (CCDM (35)3(19)4:4). Our existing business rules with respect to the response are that telephone contact sheets are prepared if there are no controversies or changes to the field advisory. If changes or more formal advice is needed, the normal formal advice processes (usually FSA) are to be used. The normal business rules are not affected by the new disclosure rules. Thus, consistent with the business rules, if the informal telephone sheet is appropriate, the advice is not CCA; if formal advice is provided, the advice is CCA.

Question 4:
CCA at this time includes only documents issued from the national office to the field. What if we issue a document to a national office field component, for example, to the Office of the National Director of Appeals, knowing that it is acting as a "conduit" for the field office, that is, it will merely forward the advice to a requesting field office.

As currently enacted, CCA reaches only those documents that emanate from the national office of Counsel to field offices; it does not include any advisory or instructional document that the national office of Counsel provides to national office program executives. However, if the incoming request for assistance makes clear that the origination of the query is the field, and that the advice being provided will be directed to the field, we would treat the advice as CCA. The regulatory authority to treat other types of national office advice and instruction as CCA in the future will afford us the opportunity to consider whether other types of documents we write to national office program executives, regardless of the use to which that advice/instruction is put, should be added to the CCA procedures.

Question 5:
If a memorandum of a conference is prepared in the National Office where both national office and field personnel attended (in person or by telephone), and that memorandum is circulated to field participants of that conference, is that memorandum CCA?

Legal advice issued by the national office and distributed to field employees in writing is generally CCA regardless of the form or title of that writing. Memoranda of conference are not governed by any internal written procedures, and the existence of such memoranda, or the content of such memoranda, differ from office to office, and from case to case. If advice was provided by the national office during the conference and such advice is memorialized or repeated in any writing reflecting that conference, that writing would normally be issued as CCA. Ordinarily, the best practice would be to issue such advice,

not in the form of a conference memorandum, but rather in a more traditional form, i.e., field service advice, technical assistance to the field, or field advisory. However, if a conference memorandum is prepared and disseminated, whether the memorandum is CCA depends on what it conveys. If it conveys advice as described in the statute and legislative history as covered by Chief Counsel Advice, then the memorandum is CCA subject to the disclosure procedures. The rules with respect to CCA will not be avoided by use of nontraditional documents to convey advice. Chief Counsel is firmly committed that the Office will adhere to its business rules with respect to creation of advisory documents irrespective of the disclosure result. Attempts to artificially avoid that result will not be tolerated.

Question 6:

Some offices, if not all, issue a memorandum to the field when a PLR is withdrawn. In general, in that memorandum, the national office notifies the field that a pending request was withdrawn because the office was tentatively adverse and to be on the lookout for the transaction. Does this type of notification to the field constitute CCA?

Yes, if the memorandum reports more than the fact that the PLR was withdrawn and the Office was tentatively adverse, and explains the national office reasoning why it was tentatively adverse, the memorandum would meet the definition of CCA. It would be written advice issued to the field and would convey the Office's position or policy relating to a revenue provision or other provision affecting a person's tax liability.

PROCEDURES/PROCESS

Question 7:

How does this process affect PLRs and TAMs?

Although section 3509 does not require that PLRs and TAMs be made publicly available on the Internet, as it does for CCA, RRA98 section 2309(d) does mandate that the IRS place tax forms and publications, and consider placing other forms of taxpayer guidance, on the Internet. In the spirit of openness and that

direction by Congress, it is planned that PLRs and TAMs will also be made publicly available in an electronic format and released on the IRS Web Site some time after October 20, 1998. Procedures are currently being distributed to assist in processing these documents.

Question 8:

In light of our already heavy workloads, when will we have time to do all of the extra work contemplated by this redaction process?

When we draft our documents in the new format, the computer instructions for the various versions will require only a minimal amount of time to complete the task. Computer processing instructions have been distributed by an e-mail from Thomas Carroll, dated October 15, 1998. The computer processing instructions function under WP8.0. Follow the instructions for installation. A redaction toolbar has been developed. To get that toolbar to appear on your screen, after you have finished following the above instructions for configuring WP8.0, select “Tools>Settings >Customize” from the main menu. Under the “Toolbars” tab where there is a list of “Available toolbars”, click on the box next to “Redaction.” To use the new redaction toolbar, block the text intended to be affected and use the appropriate toolbar button. We recognize that at first there will be some slowing of the issuance/redaction/closure process. This slowing should not materially affect the timely issuance of CCAs because the redaction process occurs after the issuance. While drafting the CCA to ensure the appropriate placement of privileged information and the use of a legend in lieu of specific taxpayer details throughout the text may slow down the drafting process and take some time to get accustomed to, we expect that, in time, there will not be any appreciable delay caused by the section 3509 procedures.

Question 9:

What are the procedures for processing nontaxpayer-specific CCAs?

Instructions for processing these documents are being distributed. The procedures will obviously not require the use of a legend and the deletion of taxpayer identifiers. It is still important to draft these documents in the new format to simplify the redaction of any privileged information.

Question 10:

In a case in which coordination or assistance is requested and received, does the assisting or coordinating office have any redaction responsibilities?

Only the issuing office is responsible for the redaction process. As a matter of courtesy, if assistance or coordination is provided and suggestions for redactions would be helpful (e.g., additional facts were requested from the field to respond more fully to an assistance request), the assisting or coordinating office is encouraged to identify any suggested redactions.

Question 11:

Does the CCA process change Techmis case closing procedures?

The CCA does not change Techmis case closing rules. If the CCA is taxpayer-specific, the file, however, should be retained by the author for at least 90 days thereafter in case there are further § 6110 redaction questions. Then, local file closing and retention procedures apply.

MISCELLANEOUS

Question 12:

In the past, the dissemination of documents, which are now considered CCA, has been strictly limited. Now that these documents are publicly available in redacted form, which version can we share with other Counsel and Service employees?

Only the publicly available version (the black and white version) may be shared. Any dissemination of the original unredacted version beyond those who have direct authority over the matter for which the advice was issued may waive otherwise applicable governmental privileges to those portions that were redacted from the publicly available version. Our clients have been advised of these rules and are committed to this restricted dissemination for the protection of sound tax enforcement goals.

Question 13:

How will we learn what information constitutes privileged information?

The CCA training overview was intended as a starting point to familiarize you with the privileges recognized by the Freedom of Information Act (FOIA). The distributed materials contain a more detailed discussion of each of those privileges, with examples to edify our understanding of the privileges. Individuals within each assistant's office will be designated as "local experts" and will serve as contacts with Disclosure Litigation as to novel or difficult disclosure questions as they arise. Preliminarily, it is contemplated that these local experts will review CCA to ensure consistency in the assertion of privileges and determination of "foreseeable harm" under the discretionary disclosure policy. Remember that the new format for drafting CCA will simplify and help focus us on the types of information that fall within the privileges recognized by FOIA. First-line managers who are reviewing attorneys' CCAs, along with assuring technical accuracy, are expected to consider the appropriateness of the information claimed to be privileged as they review CCAs before they are finalized and issued.

Question 14:

What is the effective date of the CCA legislation? When does this process begin?

The legislation, RRA98, was signed on July 22, 1998. The effective date of the provision is for CCA issued more than 90 days after the date of enactment - October 20, 1998. The legislation provides that (1) for nontaxpayer-specific CCA, the CCA will be released within 60 days after its issuance, and (2) for taxpayer-specific CCA, the CCA will generally be released within 90 days after its issuance (unless the taxpayer requests an extension as provided in the statute, or challenges our redactions of taxpayer-identifying details). There is also a retroactive part of this legislation for documents issued from Domestic, EBEO and International. Because of this retroactive effective date, and to get into the habit of using the new format for CCAs, we recommend that all national office components begin to use the new format beginning now. As for the new redaction procedures, they become necessary only for CCA documents issued on or after October 20, 1998.

Question 15:

When all these CCAs are released, my name will be on some or many, and, since the Chief Counsel telephone directory is public, I will likely receive a number of telephone calls from practitioners wanting to talk about or debate my conclusions or analysis. What should I do?

Based principally on this consideration, the format of CCA was devised so that only the reviewer's name will appear on the document. Thus, managers will receive these calls, and it is felt that Chief Counsel managers have the experience and judgment to handle them. Chief Counsel Advice is not intended as public guidance, and managers are under no obligation to discuss these documents or to justify or debate them with the public. On the other hand, oftentimes public comments are extremely useful in coming to the correct legal answer. Thus, managers must exercise good judgment in determining the extent of the discussion. In all events, managers need to be cognizant of the section 6103 disclosure restrictions as to taxpayer information, and also need to ensure that no privileged information is discussed. Likewise, good judgment must be exercised to ensure that the tax practitioner is not receiving, and could not be perceived as receiving, advantageous information that the general public is not receiving. Employees, other than managers, whose names appear on pre-October 20, 1998, documents released under the retroactive part of the legislation, should exercise similar care and consult with their managers concerning such calls.

Question 16:

What should we do if our opinion or analysis on an issue is reconsidered and modified, but yet a CCA document has been issued with contrary analysis?

We are <u>not</u> creating a system to revisit, modify, obsolete, or revoke previously issued CCA. CCA is not intended to be precedential or relied upon for any future analysis. If the issue is reconsidered, it may be appropriate to issue another CCA, but not having any affect on the publication of the initial CCA. It is perfectly appropriate to have both CCAs released to the public.
