January 13, 2023

Mr. Douglas W. O'Donnell
Acting Commissioner
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224

The Honorable Lily Batchelder
Assistant Secretary for Tax Policy
Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: Proposed Regulations to Implement Section 7803(e) Regarding IRS Independent Office of Appeals

Dear Acting Commissioner O'Donnell and Assistant Secretary Batchelder:

The American Institute of CPAs (AICPA) submits comments on proposed regulations (REG-125693-19, 87 FR 55934) ("proposed regulations") issued by the Department of the Treasury ("Treasury") and Internal Revenue Service (IRS) to implement section 7803(e).[1] Section 7803(e) codifies the role of the administrative function of appeals as the IRS Independent Office of Appeals ("Appeals") and establishes that review by Appeals is generally available to taxpayers facing a proposed deficiency. The proposed regulations include a lengthy list of cases to be excluded from the Appeals process. While the AICPA agrees that not every case is appropriate for Appeals' consideration, we request Treasury and the IRS reconsider the exclusion of the following types of cases from Appeals' review:

1. Challenges to the validity of a Treasury regulation or Revenue Procedure/Notice
2. Section 9100 missed election relief and change in method of accounting

BACKGROUND

Since the establishment of Appeals in 1927, the IRS has provided taxpayers an avenue to administratively appeal the results of a federal tax examination.[2] Appeals generally considers whether to resolve federal tax controversies without litigation based on the likelihood of either the taxpayer's or the IRS's position prevailing in litigation. The IRS Restructuring and Reform Act of 1998 (RRA)[3] directed the Commissioner to restructure the IRS by establishing and implementing an organizational structure that ensured an independent appeal function within the IRS. On July 1, 2019, the President signed into law the Taxpayer First Act of 2019 (TFA)[4] that added section 7803(e) to the Code. Section 7803(e)(1) establishes the IRS Independent Office of Appeals "to

[1] All references to "section" or "§" are to the Internal Revenue Code of 1986, as amended, and all references to "Treas. Reg. §" and "regulations" are to U.S. Treasury regulations promulgated thereunder.
[2] See H.R. Rep. No. 39 Part 1, 116th Cong., 1st Session (House TFA Report), 28-29, fn. 4 (2019).
[3] P.L. 105-206 (112 Stat. 685, 689 (1998)).
[4] P.L. 116-25 (133 Stat. 981 (2019)).

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codify the role of the independent administrative appeals function within the IRS." See House TFA Report, at 29. Section 7803(e)(4), also enacted by the TFA, provides that "the resolution process [to resolve federal tax controversies] shall be generally available to all taxpayers."

The TFA did not require that the IRS grant all requests for Appeals to consider any dispute regarding a federal tax controversy. The Secretary of the Treasury or her delegate (Secretary) may provide exceptions that allow the IRS to deny requests for Appeals consideration of a federal tax controversy. In general, it has been the historic practice of the Treasury Department and the IRS to publish limitations on the access to the Appeals resolution process in IRS guidance, such as regulations, Revenue Procedures, and the Internal Revenue Manual (IRM). The proposed regulations include a list of 24 types of cases that would be excluded from Appeals' consideration.[5] We write to provide specific comments on cases that should not be excluded from access to Appeals' review and resolution.

SPECIFIC COMMENTS

1. Challenges to the Validity of a Treasury Regulation, Notice, or Revenue Procedure

Overview

The proposed regulations under section 301.7803-2(c)(19) and section 301.7803-2(c)(20) provide that Appeals consideration is not available for any issues based on a taxpayer's argument that a regulation, a Notice, or a Revenue Procedure is invalid. The proposed regulations do not apply if there is "an unreviewable decision from a federal court invalidating" the regulation, Revenue Procedure, or Notice. Pursuant to the proposed regulations, an unreviewable decision for this purpose is a decision that can no longer be appealed to any federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed, such as a final determination under section 7481. The precise application of this provision is unclear. We believe that this provision should be interpreted to mean that "an unreviewable decision" means an unreviewable decision of any court, regardless of where the taxpayer is located, and if these circumstances exist, whether the regulation, Notice, or Revenue Procedure is invalid can be considered as a hazard of litigation by Appeals.[6] Although this is our understanding, we believe that this point needs to be clarified, and specifically should be clarified to conform to our understanding of how the term should be interpreted as expressed above.

[5] Proposed Reg. § 301.7803-2(c)(1)-(24).
[6] Our understanding assumes the decision can no longer be appealed to any federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed.

Recommendations

- Appeals should be able to hear arguments and consider the hazards of litigation where the taxpayer is raising a non-frivolous challenge to the validity of a regulation, Revenue Procedure, or Notice.

- If the above recommendation is not adopted, the regulations should be clarified to provide that a taxpayer can challenge the validity of a Treasury regulation, Revenue Procedure, or Notice with Appeals if the taxpayer is based in a circuit where there is no case law on point, but case law on point does exist in another circuit, or where there is case law on point either in the taxpayer's circuit or in another circuit with respect to another guidance item that is similar in nature to the guidance item under dispute.

Analysis

Allowing Appeals to consider all the taxpayer's arguments does not harm the government, but instead provides taxpayers and the government an opportunity to resolve the issue without litigation. Not considering decisions of the federal courts in circuits other than the one where the taxpayer is located will force taxpayers into litigation where hazard considerations might have resulted in a settlement. Forcing taxpayers to litigate where there is a clear hazard of litigation is a waste of taxpayer and government resources. The mission of Appeals is to attempt to resolve cases without the IRS and the taxpayer having to go to litigation. The proposed exclusion of challenges to the validity of regulations and other guidance from Appeals' consideration is contrary to the mission because it will force the IRS and taxpayers into litigation where there could be an opportunity for Appeals to resolve the case.

Based on their training and qualifications, Appeals Officers are qualified to consider all hazards of litigation, including challenges to the validity of regulations, Notices, or Revenue Procedures when the challenges are not frivolous. Especially in the case where a court has already considered the validity of the regulation or other published guidance item, an Appeals Officer should be able to consider all relevant arguments in making its hazards of litigation assessment. If Appeals Officers do not possess the necessary training and qualifications, we recommend the IRS provide the necessary training in lieu of a rule that prevents Appeals from considering such issues.

The proposed regulations provide an exception for when there is an "unreviewable decision from a federal court invalidating" the regulation, Revenue Procedure, or Notice, but it is unclear from the proposed regulations when this exception applies and the hazards of a challenge to the validity of a regulation or other guidance could be considered by Appeals. For instance, does the exception only apply where there is a taxpayer-favorable unreviewable decision in the circuit where the taxpayer resides or has its principal place of business, or does it apply if there is a taxpayer-favorable unreviewable decision in a circuit other than the taxpayer's circuit? How about if there is a taxpayer-favorable unreviewable decision in more than one circuit other than the taxpayer's

circuit? Accordingly, if the exclusion is finalized as proposed, the final rule should be clarified to provide that Appeals can consider the hazards in a challenge to the validity of a Treasury regulation, Revenue Procedure, or Notice if there is no case law on point in the taxpayer's circuit, but taxpayer-favorable unreviewable case law does exist in another circuit. In addition, there should be a clarification of what case law would be considered on point so that it is broad enough to encompass certain variations in the taxpayer's facts and circumstances, such as being broad enough to encompass case law with respect to another guidance item that is similar in nature to the guidance item under dispute.

2. Section 9100 Missed Election Relief and Change in Method of Accounting

Overview

A request for a ruling to obtain section 9100 missed election relief ("section 9100 relief") and a request for consent to change a method of accounting is decided at the branch level in the office of the Associate Chief Counsel. The "front office" of the Associate Chief Counsel, and sometimes even the Associate Chief Counsel, might agree to discuss a denial of a ruling request by a branch with the taxpayer, but the annual revenue procedure makes it clear this is not a right.[7]

Given the stakes that could exist for a taxpayer that is not granted section 9100 relief or that is not allowed to change their method in accounting, a right to appeal the branch decision to at least the Associate Chief Counsel level, or more likely to the Chief Counsel level to get a more independent review of the decision, is necessary. However, as stated above, no such right exists.

The proposed regulations do not propose incorporating a provision specifically excluding section 9100 relief and changes in method of accounting from Appeals consideration; however, the preamble does point out that the IRM currently precludes Appeals from considering a decision issued by an Associate Office denying section 9100 relief (IRM 8.6.3.11(4)) (10-06-2016) or consent for a change in method of accounting where the decision is reviewable by a court under an abuse of discretion standard.[8]

The Treasury Department and the IRS request comments on whether items relating to requests for changes in methods of accounting and requests for section 9100 relief should continue to be excluded from Appeals review.

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[7] Rev. Proc. 2022-1, §10.02.

[8] See IRM 8.6.3.3(2) (10-06-2016) (relating to procedures if Appeals conclusion is contrary to Service position), IRM 8.6.3.10(3) (10-06-2016) (relating to change in accounting practice or method), (IRM 8.6.3.11(4) (10-06-2016) (relating to extension of time for making certain elections).

Recommendation

Unless there is a formal process for appealing a branch determination to the Associate Chief Counsel, and if denied there, the Chief Counsel, taxpayers should be able to go to Appeals to appeal the determination of a branch to not grant a request for section 9100 relief or consent to change a method of accounting based on hazards of litigation.

Analysis

An opportunity to appeal a branch determination to Appeals would arise in cases that are already under the IRS exam, where an IRS examiner discovered a missed election that could be fixed by bringing a section 9100 request for relief. In these cases, the IRS exam has jurisdiction over the case and may disagree with an unfavorable determination granted by the IRS Office of Chief Counsel. Not allowing such taxpayers to have a denial of a section 9100 request for relief reviewed by the Appeals will push taxpayers into premature and expensive litigation, skipping the important step in the IRS exam process – Appeals consideration of hazards of litigation. For this reason, there should be an option to go to Appeals to appeal denial of a request for section 9100 relief.

Similarly, there should be an option to have an independent review of a denial of a request for consent to change a method of accounting short of going to court. Court is not an option for many taxpayers and requires significant resources on both sides. Unless taxpayers have a formal mechanism within Counsel to "appeal" a denial of relief or permission to change a method or period, the only option is to provide an opportunity to go to the Independent Office of Appeals. As discussed above, there is no right to appeal to the Associate Chief Counsel office. If that does not change, then a right to go to appeals is necessary.

Specifically, regarding changes in method of accounting, the branch will deny a request to make a change in method of accounting if the requested change would not clearly reflect income or would otherwise not be in the interest of sound tax administration.[9] Consequently, consent may be denied for many different reasons. First, consent may be denied because the branch believes the proposed method of accounting does not clearly reflect income as required by section 446(b). Such determinations generally reflect the position of the Associate Chief Counsel Office regarding the proper application of timing provisions of the Code and regulations, such as sections 451 (year of inclusion for gross income) and 461 (year of deduction). Appeals consideration of a denial of consent to a change in method of accounting would allow Appeals review of these substantive positions in cases similar to Appeals review of the substantive issue if it arose in examination or a docketed case. Foreclosing the opportunity to have Appeals hear a challenge to a consent denial by a branch in an Associate Chief Counsel office creates inconsistencies and is counterproductive tax administration.

[9] Rev. Proc. 2015-13, § 11.02.

A consent request can also be denied because the Associate Chief Counsel office believes that the taxpayer has not complied with all the procedural terms and conditions required to obtain consent under section 446(e)[10] such as filing requirements and deadlines. Finally, a consent request can be denied because the Associate Chief Counsel office believes that issuing consent is not in the best interests of tax administration. For example, the Associate Chief Counsel office could take the position that it will not issue consent to change methods of accounting if the item or method involved is subject to an ongoing published guidance project.

Thus, a wide range of legal issues can give rise to denials of requests for method change consent, and these issue present different considerations in determining what degree of Appeals review is warranted. A denial based upon based upon the proposed method failing to provide a clear reflection of income presents the question of whether the IRS is properly interpreting substantive tax accounting provisions of the Code or regulations. A denial based upon failure to follow IRS procedural rules for obtaining consent presents a significantly different question of whether the IRS is properly exercising its administrative authority. We urge the government to look through the superficial similarities of these denials to the underlying legal issues when determining whether Appeals review is warranted.

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The AICPA is the world's largest member association representing the accounting profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of our recommendations and welcome the opportunity to further discuss our comments. If you have any questions, please contact Rochelle Hodes, Chair, AICPA IRS Advocacy and Relations Committee, at (202) 552-8033, or Rochelle.Hodes@crowe.com; Peter Mills, Senior Manager — AICPA Tax Policy & Advocacy, at (202) 434-9272, or Peter.Mills@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,

Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

[10] Rev. Proc. 2015-13 and other applicable guidance.

cc: Andy Keyso, Acting Chief of Appeals, Internal Revenue Service
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