DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

CHIEF COUNSEL

AUG 2 6 2002

MEMORANDUM FOR ASSOCIATE CHIEF COUNSEL
DIVISION COUNSEL

FROM: B. John Williams, Jr.
Chief Counsel

SUBJECT: Respective Roles of Associate and Division Counsel in Published Guidance, Litigation, and Legal Advice

Since taking office, I have announced a number of decisions concerning the overall goals of the Office of Chief Counsel. To achieve these goals, I have implemented a plan to increase the volume of published guidance that we issue. I have also stated my conviction that tax policy should not be made through litigation, but rather our litigating positions should be derived from, and consistent with, the Internal Revenue Code and our published guidance. Novel and unresolved issues are too often addressed in legal advice memoranda under existing practice. These types of issues should be addressed in revenue rulings or revenue procedures, whenever practicable. In nondocketed cases, we should be utilizing the technical advice memoranda procedures more extensively. Both the Associate Chief Counsel and the Division Counsel have integral and often integrated roles to play in achieving the goals of the Office of Chief Counsel.

Guiding Principles

Published Guidance and Litigation

The role of the Associate Chief Counsel is to interpret the Code and to issue the technical positions of the Internal Revenue Service in published guidance. These technical positions must be applied in the development, litigation, or other resolution, of cases. The role of Division Counsel is to develop and execute the litigation strategy that implements those positions as well as to ensure that the position taken in specific cases is one that is reasonable, based on the facts of the case, and contributes to sound tax administration. In most cases, litigation decisions, such as whether to try or settle a case, whether to use mediation/arbitration, whether to employ an expert witness, etc., should be made by Division Counsel. In every case, it is the role of the Office of Chief Counsel to ensure the uniform application of the tax laws and it is, therefore, important that Division Counsel and Associate Chief Counsel, individually and collectively, ensure that we fulfill that objective.

To the extent that a regulation or ruling does not provide clear guidance on the position to be taken in litigation, or the position of the Internal Revenue Service is not clear from existing case law or the unambiguous language of the Code, Division Counsel must seek advice from the Associate Chief Counsel concerning the position of the Service. In addition, where there is a statutory change or new regulations, or there are no reported opinions or when published guidance is pending, or there is a significant new court opinion, Division Counsel, in appropriate coordination with the Associate Chief Counsel, must ensure that the position they intend to take in litigation is consistent with the Service's position on the law. Any disagreement between Division Counsel and the Associate Chief Counsel concerning the legal positions to be pursued in litigation or other resolution of the case shall be resolved through the existing reconciliation procedures.

Legal Advice

As should be evident from these guiding principles, I believe that the roles of technical interpretation of the Code, including the development of positions of the Service, and directing litigation should be separated, although the latter is dependent upon and, therefore, cannot be divorced from, the former. Consistent with that view, I further believe that this division of labor and responsibility should extend to furnishing legal advice. Specifically, Division Counsel will be responsible for providing legal advice relating to case development to their respective clients that is consistent with the Service's position, as reflected in published guidance of the Service or well established case law. Where the law or the Service's position is unclear, or when the law is being applied in a setting that is significantly different from the context in which it was developed, however, Division Counsel must coordinate with the Associate Chief Counsel with subject matter jurisdiction over the technical issue involved before rendering the requested legal advice. Any doubts with respect to whether an issue should be coordinated should be resolved in favor of coordination. I expect this coordination to occur as early in the process as is practicable and to continue, as appropriate, through case development, litigation and resolution of the case.

There are three typical scenarios in which legal advice is provided to the client in the Field. First, with respect to routine matters, such as assisting Examination with IDRs, local Division Counsel attorneys render advice directly to the client without consultation with the Associate Chief Counsel. This practice should continue. Second, when the advice involves the application of well-settled principles of law to the facts of a particular case, local Division Counsel attorneys sometimes render advice directly to the client without first obtaining formal, written advice from the Associate Chief Counsel, but a copy of the nondocketed advice (NSAR) is sent to the Associate Chief Counsel for post review. This practice will change to a pre-review procedure as set forth in more detail below. Third, local Division Counsel attorneys request field service advice (FSA) from the Associate Chief Counsel before rendering advice to the client. Since this body of legal advice overwhelmingly tends to be case or taxpayer specific, it naturally follows

that it is more closely related to the case development and litigation function, which is more appropriately handled by Division Counsel, than interpretations of the Code, which are more appropriately addressed in published guidance issued by the Associate Chief Counsel. Accordingly, in the future, the Division Counsel will be responsible for furnishing this advice, subject to the coordination requirements with the Associate Chief Counsel, discussed above. [1/] Once again, I expect that the legal advice provided to the client will reflect a collaborative effort between the Division Counsel and Associate Chief Counsel.

This coordination requirement can be satisfied in the vast majority of cases through the use of the existing informal advice procedures. In cases where questions cannot be resolved informally, such as where the case is factually or legally complex, the Division Counsel attorney and the Associate Chief Counsel attorney shall determine whether pre-review of the legal advice by the Associate Chief Counsel is appropriate. Procedures similar to those currently in place for NSARs will be followed. When local Division Counsel and the Associate Chief Counsel agree that a more formal memorandum should be prepared prior to rendering advice to the client, the Associate Chief Counsel will prepare, as appropriate, a strategic advice memorandum. The strategic advice memorandum should discuss appropriate factual case development, evaluate the strengths and weaknesses of the case, and analyze the hazards concerning the recommended technical position. Under these new procedures, the strategic advice memorandum prepared by the Associate Chief Counsel should not contain an extensive discussion of the law or the Service's position.[2/]

In a small percentage of cases, the local Division Counsel and the Associate Chief Counsel may determine that a more extensive discussion of the law and the Service's position is needed. If the case is nondocketed, consideration first should be given to pursuing a technical advice memorandum (TAM) or technical expedited advice memorandum (TEAM), as appropriate. If the TAM or TEAM procedures are not appropriate, the Associate Chief Counsel may prepare a background advice memorandum, separate from the strategic advice memorandum discussed above, that is limited to a discussion of the law and the Service's position. That background advice memorandum will be sent to the requesting local Division Counsel attorney and subsequently will be released to the public in accordance with section 6110.

[1/] Occasionally, the client requests advice directly from the Associate Chief Counsel, rather than going to local Division Counsel. The Associate Chief Counsel should review these requests and, generally, refer the request to the local Division Counsel for a response. If the response is to be issued by the Associate office, that office should coordinate the response with the local Division Counsel as early as possible before issuance.

[2/] In contrast, no change is intended regarding the nature of the advice furnished to the client by the local Division Counsel attorney.

Consideration should also be given to issuing a revenue ruling, revenue procedure or Chief Counsel Notice concerning the matter or recommending changes to the IRM to reflect the substance of the background advice memorandum.

The procedures for private letter rulings (PLRs) and TAMs are set forth in annual revenue procedures. Currently, the procedures are set forth in Rev. Proc. 2002-1 (rulings and determination letters) and Rev. Proc. 2002-2 (TAMs). The pilot program for TEAMs, for issues under the jurisdiction of the Associate Chief Counsel (Income Tax & Accounting), was recently issued in Rev. Proc. 2002-30. We are currently developing another pilot program for PLRs. We hope that these programs will shorten the process and lessen the amount of time spent on these documents, thereby freeing up more time to devote to published guidance and encouraging and facilitating the use of TAMs and TEAMS. These pilots, in conjunction with the previously discussed changes regarding the issuance of legal advice memoranda by Division Counsel and the Associate offices, are designed to help shift the deployment of the Associate Chief Counsel's resources away from taxpayer and case specific guidance, and towards more published guidance, which can be relied upon by all taxpayers.

The discussion below provides a more detailed application of these guiding principles on the respective roles of the Division Counsel and Associate Chief Counsel to the various forms of published guidance, litigation, and legal advice that are currently issued by the Office of Chief Counsel.

Litigation

Pre-review of Tax Court Documents

Before the reorganization, certain Tax Court documents, such as selected motions, answers, and discovery, were pre-reviewed by the Field Service Division. In general, except for certain discovery motions and briefs and motions for summary judgment or with certain novel and significant issues, discussed below, mandatory pre-review of Tax Court documents by the Associate Offices should be required only in exceptional circumstances where the subject matter is of unusual sensitivity, such as treaty related matters. Division Counsel, together with the Associate Chief Counsel (Procedure & Administration), shall establish procedures to ensure consistency of Service position with respect to filings with the Tax Court. These procedures should include specific provisions for identifying issues that affect more than one Division Counsel and raising those issues with the appropriate Associate, as well as when and how to submit technical or mixed factual and technical questions to the appropriate Associate Offices for review, including during the drafting phase.

Pre-review of General Litigation Documents

Before the reorganization, many summons matters, suit letters, defense letters, and settlement letters to the Tax Division in general litigation matters required pre-review by the General Litigation Division. In general, except with certain novel and significant issues, discussed below, mandatory pre-review of such documents by the Associate

Offices should be required only in exceptional circumstances where the subject matter is of unusual sensitivity, such as treaty related matters. Division Counsel, together with the Associate Chief Counsel (Procedure & Administration) shall establish procedures to ensure consistency of Service position with respect to these documents. These procedures should include specific provisions for identifying issues that affect more than one Division Counsel and raising those issues with the appropriate Associate, as well as when and how to submit technical or mixed factual and technical questions to the appropriate Associate Offices for review, including during the drafting phase.

Pre-review of Refund Documents

The current practice is that while Standard defense letters receive Associate Office review, Settlement Option Procedure (SOP) cases do not, except that with respect to Court of Federal Claims cases, pursuant to Notice CC-2002-024, all letters are pre-reviewed in the Associate Offices. Classification as SOP or Standard depends on criteria included in the CCDM. This practice should continue. The Associate and Division Counsel Offices should, on an annual basis, review the criteria to define SOP and Standard cases. In addition, the Division Counsel should perform the review of litigation hazards in settlement of Standard cases and make recommendations to the Department of Justice, after consultation with the Associate Offices, as appropriate.

Pre-review of Briefs, Summary Judgment Motions

The Associate Offices currently pre-review briefs and summary judgment motions that relate to certain issues to ensure consistency in the positions taken in the courts and that the appropriate technical positions are taken in documents submitted to the Tax Court. This practice should continue. The list of issues requiring review and issues not requiring review is presently contained in the CCDM and Desk Guide, both of which are under review as part of the CCDM rewrite project. The Associate and Division Counsel offices should, on an annual basis, review and revise the list of issues that require pre-review.

Novel and Significant Issues

On certain novel and significant issues, closer coordination between the Associate Offices and Division Counsel is required. Closer coordination is evidenced in the current Large Case Coordination Procedure, under which both the Associate and Division Counsel have the opportunity to identify novel and significant issues in which the Associate Counsel should be involved on a continuing basis. These types of procedures are intended to ensure that appropriate technical input is given at earlier stages of the development of an issue.

Novel and significant issues include issues relating to recently enacted legislation, issues of first impression, and issues relating to the validity of a regulation or revenue ruling. For example, RRA '98 established many new procedures for the administration of the tax law, including Collection Due Process, Spousal Immunity, Third Party Contacts and Ex Parte Communication with Appeals; similarly, many emerging issues will present issues of first impression. As such new areas of the law are developed, the

appropriate Associate Chief Counsel should decide, in conjunction with the Division Counsel, whether to pre-review filings in cases. This is to ensure that uniform positions and procedures are adopted and that the published guidance being prepared by the Associate Office is informed by the practical information to be derived from this review. The Associate Chief Counsel and Division Counsel will consult regarding establishing these requirements for new and emerging issues on an issue by issue basis. The Associate Chief Counsel and Division Counsel will also consult regarding the prompt removal of any established pre-review requirements when, once the Service position becomes appropriately established and published guidance has been issued, the issue no longer is considered novel and significant.

Motions Sessions

Currently, in general, the Associate Offices handle Tax Court motions sessions, except in those cases where Division Counsel sends attorneys to argue their motions. This practice should continue. In addition, the use of video conferencing (which would allow Division Counsel to perform this function) should be pursued.

Motions for Reconsideration

All motions for reconsideration of Tax Court opinions are reviewed in the Associate Office and must be approved by the Chief Counsel. These motions are rare and should only be proposed in extraordinary situations.

Appellate Matters

With respect to appeals, the Associate Office is currently responsible for reviewing decisions, making recommendations for appeal after consultation with Division Counsel, and writing appeal and settlement letters. This practice should continue. In addition, Division Counsel may prepare, by memorandum, a recommendation regarding appeal. The Associate Offices should consider and describe the Division Counsel's recommendations in the transmittal to the Chief Counsel recommending appeal. Any letter recommending appeal must be prepared for signature by the Chief Counsel.

Actions on Decision

Currently, Associate Offices are responsible for determining whether an AOD should be written, and then writing and approving the AOD. In general, this practice should continue. In addition, Division Counsel may prepare, by memorandum, a recommendation regarding whether an AOD should be prepared. The Associate Office should consider this recommendation, in addition to other recommendations, in drafting the AOD for the signature of the Chief Counsel.

Recommendations for Certiorari

Action memoranda are currently prepared, after consultation with Division Counsel, by the Associate Offices for signature by the Chief Counsel. Division Counsel may prepare, by memorandum, a recommendation regarding certiorari. The Associate Offices should consider and describe the Division Counsel's recommendations in the transmittal to the Chief Counsel recommending certiorari. Any letter recommending

certiorari must be prepared for signature by the Chief Counsel and must be approved by the General Counsel's office. This practice should continue.

Sanctions and Attorneys Fees

All Sanctions matters, as required by Executive Order 12988, including referrals on Circular 230 or the Tax Court or raising such matters with opposing counsel either orally or by letter, will continue to be pre-reviewed by the Sanctions Officer, the Associate Chief Counsel (Procedure & Administration). Procedure & Administration also currently pre-reviews objections to requests for awards of attorneys fees. In addition, certain attorneys fees settlements must be approved by the Associate Chief Counsel (Procedure & Administration), with the remaining settlements approved by the Area Counsel. Also, technical issues regarding qualified offers must be coordinated with Procedure & Administration. Since attorneys fees issues cut across all Division Counsel offices and all Associate offices and there is a need for consistent standards and application of the rules nationwide, this practice should continue, including the continued coordination with other appropriate Associate offices, as necessary. With respect to qualified offers, close coordination with Procedure & Administration should continue, until further guidance is issued. Because of the sensitivity of these issues and the need to provide a detached and balanced perspective on the Office's response, this process as to Sanctions and Attorneys Fees should continue.

Tax Court Liaison

Since many issues in the procedural area cut across more than one Division Counsel, the Associate Chief Counsel (Procedure & Administration) continues to fill a vital role for the office in the overall administration of the tax law. Thus, the Associate Chief Counsel (Procedure & Administration) should continue to be the liaison with the Tax Court and the Court of Federal Claims and should continue to be responsible for matters of Tax Court procedure. Procedure & Administration should coordinate with Division Counsel on Tax Court administrative matters, as appropriate.

Legal Advice

Informal Advice

To ensure that the Service's position on an issue or in a particular case is fully understood by all Chief Counsel and Service employees involved in handling the matter, coordination is required with respect to certain issues, and strongly encouraged in cases involving nonroutine issues where a Division Counsel attorney is in any doubt regarding the Service position. As previously stated, coordination should occur as early in the process as is practicable and should continue, as appropriate, through case development, litigation and resolution. In most instances, informal advice from the Associate office should be sufficient.

To obtain informal advice, Division Counsel attorneys may consult either by telephone or email with the subject matter experts in the Associate Offices concerning the Service's position on the issue(s) under consideration and may also discuss how that

position may change if, upon further development, the facts change. As part of the process, documents may be provided to the Associate Chief Counsel attorney to assist in understanding the facts or transaction. The advice provided by the Associate Chief Counsel attorney should generally be memorialized on either an informal advice form or in an email. The memorialization of the advice should be very short and contain only a brief description of the facts (if necessary), issue and conclusion. Little or no legal analysis will be included.

Formal Advice

Presubmission Telephone Call
Prior to submitting a formal request for advice to an Associate Chief Counsel office, the Division Counsel attorney and reviewer should informally discuss the matter with a docket attorney and reviewer in the Associate Chief Counsel office. The purpose of the telephone call is to determine whether formal advice is actually needed and, if it is, what type of advice, including a TAM or a TEAM, would be most appropriate. The benefits of involving the taxpayer at this stage will also be discussed. It is anticipated that in the vast majority of cases, informal advice under existing procedures should suffice.

Reviewed Advice Memorandum
If, after receiving informal advice from the Associate Chief Counsel office and preparing a written response to the Operating Division, the local Division Counsel attorney is uncertain about (some portion of) the analysis or conclusion, the local Division Counsel attorney may submit to the Associate Chief Counsel office a copy of the advice for pre-review. This should be unnecessary with respect to most routine issues, such as who should sign a form 872 for a consolidated group that was involved in a merger, etc. The procedures for review and processing of reviewed advice will be similar to those currently in place for NSARs, including the release to the public, as appropriate. It is expected that the need for this type of reviewed advice will decrease over time.

Strategic Advice Memorandum
When, after conducting a presubmission telephone call, it is agreed that formal advice should be provided by the Associate Chief Counsel office, the local Division Counsel attorney shall submit to the Associate Chief Counsel office a memorandum setting forth the issues upon which advice is being sought, together with a discussion of the facts, law and conclusions or course of action proposed by the local Division Counsel attorney. This is similar to the existing procedures for requesting a field service advice. The Associate Chief Counsel office's response in a strategic advice memorandum, in general, should be limited to a discussion of nonroutine factual development, an evaluation of the strengths and weaknesses of the case, and an analysis of the hazards regarding the Service's technical position. The strategic advice memorandum should not contain a lengthy dissertation on the law or an extensive recitation of the facts. Only the most pertinent facts and legal principles as are necessary to understand the advice being given should be included in the strategic advice memorandum. These

memoranda will be processed appropriately, but it is envisioned that much of these memoranda will be redacted.

Background Advice Memorandum
In a small percentage of cases, it may be decided, following a presubmission telephone call, or in conjunction with the review of the reviewed advice or strategic advice, that a background advice memorandum with a more extensive discussion of the law and the Service's position should be provided to the local Division Counsel attorney by the Associate Chief Counsel office. The background advice memorandum shall be limited to a discussion of the law and the Service's position, and include only those facts necessary to adequately describe the transaction or issue upon which advice is being rendered. As appropriate, a background advice memorandum may be provided in lieu of, or in addition to, a strategic advice or a reviewed advice memoranda. If the background advice memorandum and strategic advice memorandum are issued at the same time, they should be issued as separate documents. Background advice memoranda will be processed like other CCA under section 6110 and released to the public. It is anticipated that there will be very few redactions to such documents.

If the Associate Chief Counsel office determines that the issue being addressed in a background advice memorandum may affect a number of taxpayers and has sufficient importance, the Associate Chief Counsel office should consider issuing published guidance with respect to the issue. In making this determination, the Associate Chief Counsel office will coordinate with Division Counsel, who in turn will coordinate with the Operating Division. If it is determined that general guidance is desirable, a published guidance project will be initiated. The issuance of the background advice memorandum, in general, should not be delayed, however, while the published guidance is being drafted.

Program Advice
Associate Chief Counsel offices may be called upon to provide legal advice on program issues to the Operating Divisions, or other components of the Service and Division Counsel. The advice will not be case specific but may be focused on a specific problem or issue. This advice may originate in the course of the review of forms, publications, manuals or in response to a specific request. The Associate Chief Counsel offices, after appropriate coordination with the affected Division Counsel, will provide this advice.

Reconciliation Procedures

With respect to <u>any</u> of the areas discussed in this memorandum, to the extent Division Counsel and Associate Chief Counsel are unable to reach a consensus, the reconciliation procedures should be utilized. Any remaining unresolved issues should be raised to the Chief Counsel for resolution.