

N(30)000-320

May 20, 1999

Subject: Section 3468 of the RRA

Cancel Date: November 16, 1999

This notice is intended to remind Counsel employees of the prohibition on requesting taxpayers to waive rights to file suit against the Government or Government employees for actions taken in connection with the internal revenue laws, except under specified circumstances. The controlling statutory provision, section 3468 of the RRA, became effective upon enactment of the RRA.

## General Rules

Section 3468 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 206, 105<sup>th</sup> Cong., 2d Sess, 112 Stat. 685, 770 (1998), prohibits *officers or employees of the United States* from requesting a taxpayer "to waive the taxpayer's right to bring a civil action against the United States or any officer or employee of the United States for any action taken in connection with the internal revenue laws." The law provides three exceptions, where:

- (1) the taxpayer waives the right knowingly and voluntarily;
- (2) the request by the officer or employee is made in person and the taxpayer's attorney or other federally authorized tax practitioner is present; or
- (3) the request is made in writing to the taxpayer's attorney or other representative.

The RRA Conference Report explains that the prohibition against requesting waivers of civil actions (except under the circumstances enumerated above) is not meant to apply to "[t]he waiver of claims for attorneys' fees or costs or to the waiver of one or more claims brought in the same administrative or judicial proceeding with other claims that are being settled." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 293 (1998).

Chief Counsel attorneys should not seek a taxpayer's waiver of a right to bring a civil action (as addressed by section 3468), unless the taxpayer is represented by an attorney or other federally authorized representative. See I.R.C. §7525(a)(3)(A). If the taxpayer is

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represented by an attorney or other representative, and a waiver is sought, the Chief Counsel attorney should obtain it in one of the ways described in subparagraphs (2) and (3) above. If an unrepresented taxpayer undertakes to make such a waiver on his or her own initiative, the taxpayer can make the waiver (and Counsel may accept it), provided it is made in a manner that shows a "knowing and voluntary" waiver of right. However a waiver is obtained or received, the Counsel attorney should maintain proper documentation of the manner by which it was obtained or received.

As the prohibition of the section is directed at United States officers or employees generally, AUSAs (and other DOJ attorneys) are subject to the requirements of RRA § 3468. While Counsel management will take steps to ensure that the Department of Justice is apprised of the requirements of section 3468, Counsel attorneys are encouraged to remind AUSAs (or other DOJ attorneys) of the requirements, when necessary and appropriate.

### **Further Information**

Attached are Q&As on section 3468 developed by the Assistant Chief Counsel (General Legal Services). Direct questions about this notice, the Q&As, or the application of section 3468 in particular circumstances to General Legal Services. General Legal Services may be reached by phone at (202) 283-7900. The fax number is (202) 283-7979.

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MARLENE GROSS  
Deputy Chief Counsel

Attachment: (1)

**Questions and Answers**  
IRS Restructuring and Reform Act of 1998  
Section 3468

This paper anticipates and answers a few basic questions likely to arise in applying section 3468 of the Internal Revenue Service Restructuring Act and Reform Act of 1998 (RRA). This section provides that:

(a) No officer or employee of the United States may request a taxpayer to waive the taxpayer's right to bring a civil action against the United States or any officer or employee of the United States for any action taken in connection with the internal revenue laws.

(b) Subsection (a) shall not apply in any case where -

(1) a taxpayer waives the right described in subsection (a) knowingly and voluntarily, or

(2) the request by the officer or employee is made in person and the taxpayer's attorney or other federally authorized tax practitioner (within the meaning of section 7525(a)(3)(A) of the Internal Revenue Code of 1986) is present, or the request is made in writing to the taxpayer's attorney or other representative.

Q1. May a Counsel employee request a taxpayer to waive any rights under the Code?

A1. In many circumstances, yes. The restrictions of section 3468 only pertain to requesting a taxpayer to waive "*a right to bring a civil action . . . for any action taken in connection with the internal revenue laws.*" Consequently, the restrictions of the law pertain to waivers of right to bring suit. Waivers of other rights or privileges are not addressed by the statute.

Q2. Should Counsel employees ever propose that an unrepresented taxpayer waive their rights to bring a civil action for any action taken in connection with the internal revenue laws?

A2. No. The prohibition against requesting a taxpayer to waive his or her right to bring a civil action applies unless the taxpayer waives the right "knowingly and voluntarily," or unless the taxpayer is represented by an attorney or other federally authorized tax practitioner and the request is made in the presence of the practitioner or to the practitioner in writing. The first exception would presumptively be met if an unrepresented *taxpayer initiated the discussion* regarding the waiver of rights and the Government employee could assess that the taxpayer made the waiver knowingly and voluntarily. However, if the unrepresented taxpayer did not initiate the discussion, a Government employee would risk a violation of the section by raising the subject in any way reasonably construed as a request for waiver.

The propriety of the Government employee's conduct does not hinge on whether the taxpayer actually waives any right to bring suit. Even if an unrepresented taxpayer decides against a waiver suggested by a Counsel employee, the employee could be found to have violated the provision, since the prohibition applies to making a request (not a successful request). Because of these difficulties, Counsel's policy is that it will not propose to an unrepresented taxpayer a waiver of the taxpayer's right to bring a civil action as covered by section 3468.

Q3. If an unrepresented taxpayer undertakes to make such a waiver on his or her own initiative, can a Counsel employee assume the waiver is made "knowingly and voluntarily" and accept it?

A3. Yes, in the absence of conduct or statements by the taxpayer that would imply to a reasonable person that the waiver is being made under misapprehended facts or law or under circumstances of duress. For example, a Counsel employee should question the unsolicited proffer of any waiver made by an unrepresented taxpayer that appears mentally incompetent or emotionally strained. Similarly, a Counsel employee should question the proffer of any waiver made by an unrepresented taxpayer where it appears that the taxpayer is making the offer to placate what the taxpayer incorrectly perceives as a request from Counsel for a waiver. Finally, a Counsel employee should question the proffer of any waiver made by an unrepresented taxpayer who demonstrates an obviously incorrect view of the law or facts.

Q4. May a Department of Justice attorney request an unrepresented taxpayer to waive his or her right to bring a civil action against IRS for an action taken in connection with the internal revenue laws?

A4. A Department of Justice employee, being an "officer or employee of the United States" is covered by the restrictions of section 3468. Prohibited conduct covers not only requests to waive the right to bring a civil action against the Service or Counsel or its employees -- but against the United States or any officer or employee of the United States -- including the Department of Justice and other organs, officers, and employees of the United States for any action taken in connection with the internal revenue laws.

Q5. How will section 3468 impact settlement of tax liabilities or settlement of claims for attorneys fees or other costs?

A5. The RRA Conference Report explains that the prohibition against requesting waivers of civil actions is not meant to apply to "[t]he waiver of claims for attorneys' fees or costs or to the waiver of one or more claims brought in the same administrative or judicial proceeding with other claims that are being settled." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 293 (1998). Nevertheless, it is generally Chief Counsel policy that the tax liability of a taxpayer will be litigated, settled, or conceded solely on the merits of that tax liability, i.e., the correct tax liability should be determined. This is customarily done without regard to whether the resolution of the tax liability would indicate that the taxpayer "substantially prevailed" in the proceeding which would potentially qualify the taxpayer for administrative or litigation costs. The issue of administrative or litigation costs would then be litigated, settled, or stipulated on its own merits.

Q6. The Chief Counsel Notice on section 3468 encourages Counsel employees to remind AUSAs (or other DOJ attorneys) of the requirements, when necessary and appropriate. What is the reasoning behind this statement and what are we to do?

A6. It is expected that Counsel employees will sometimes have a greater familiarity with RRA provisions than certain DOJ employees. If a Counsel employee learns that a DOJ employee appears disposed towards taking action that would risk violating the provision, he or she is encouraged to remind the DOJ employee of the requirements. The Counsel employee should also notify his or her supervisor of any situation threatening a potential violation. Counsel management will escalate the issue as appropriate.

Q.7. May a Counsel employee request a taxpayer to waive rights to bring a civil action for actions taken by the agency under a provision of law not contained in the Internal Revenue Code?

A.7. In some cases. The restrictions of section 3468 pertain to requesting a taxpayer to waive “a right to bring a civil action . . . *for any action taken in connection with the internal revenue laws.*” Legislative history suggests that the provision was enacted to prevent the agency and its employees from taking advantage of taxpayers by conditioning resolution of a disputed tax matter on a waiver of right to sue the agency over actions or injuries argued to be sustained through improper assessment or enforcement action taken under the internal revenue laws. While the quoted expression can be expected to include actions beyond those taken “under authority of the Internal Revenue Code,” given the history of the provision, it is likely that the covered actions were only intended to include actions taken on or with respect to a tax matter. It is unlikely that the prohibition would be applied to waivers of right to bring suit over actions taken by the agency in connection with general governmental activities (e.g., internal labor matters, government contract matters, FOIA disputes), unless those activities were somehow intertwined with a tax case or cases. These situations must be assessed on a case by case basis.