OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR Chief, Special Procedures Branch

FROM: Lawrence H. Schattner
Chief, Branch 3 (General Litigation)

SUBJECT: Claim for Damages:

This responds to your memorandum to District Counsel,
District dated October 30, 1998. This document is not to be cited as precedent.

LEGEND:

Taxpayer
District
Office X
Service employee
Chief of Collection
Amount A $
Amount B $
Amount C $
Amount D $
Date A

ISSUES:

(1) Whether there has been a violation of I.R.C. § 7433?

(2) Whether the taxpayer has filed a proper administrative claim under section 7433?

(3) If the administrative claim is proper, what information should the Service request in order to evaluate the amount of the claim?

CONCLUSIONS:

(1) There does not appear to be a violation of section 7433.

(2) The taxpayer has properly filed an administrative claim under the provisions of Treas. Reg. § 301.7433-1(e).

(3) The taxpayer seeks actual damages of Amount B, liquidated damages for direct disclosures of Amount C, and liquidated damages for publication as a result of disclosure to a newspaper of Amount D. The alleged unlawful collection actions apparently took place after July 31, 1996. Therefore, the taxpayer can only recover the lesser of $1,000,000, or the sum of his direct, economic damages. The taxpayer has not provided documentation for direct, economic damages incurred as the proximate result of the alleged unlawful collection actions. The taxpayer has also not described in detail the injuries suffered as the proximate result of the alleged unlawful collection actions. While these facts are necessary to evaluate a claim under section 7433, the taxpayer would need to establish as an initial matter that a specific code provision or regulation was violated in connection with the collection of his taxes.

FACTS:

A Service employee sued the government alleging that the Chief of Collection for the District, discriminated against white males and females in the promotion process. The Service employee is represented by an attorney (the taxpayer). In 1997, the attorney/taxpayer owed delinquent taxes totaling approximately Amount A. The collection case was assigned to a revenue officer who was supervised by the Service employee. The Chief of Collection believed that the taxpayer's representation of the Service employee in the suit against the government constituted a conflict of interest and testified to that effect during the civil trial. In his letter to the Service dated , the taxpayer states that the contents of his tax file were disclosed in the civil trial and at meetings with the district director. The taxpayer's claim states that "a number of actions . . . appear to be inappropriate collection actions." He states that he continues to receive collection notices for an erroneous amount of taxes alleged to be owed. He also alleges that the injuries that he has sustained have primarily been to his reputation and business, and that Service employees who considered retaining him in employment matters, sought other counsel as a result of the disclosure of his individual tax case.

LAW AND ANALYSIS:

Under I.R.C. § 7433, a taxpayer may bring a civil action for damages up to $1,000,000 if, in connection with the collection of any federal tax, an officer or employee of the Service recklessly or intentionally disregards any provision of the Code or the regulations promulgated thereunder. Section 7433 was amended by section 3102 the Internal Revenue Service Restructuring and Reform Act of 1988 (RRA 98) to allow civil actions for damages up to $100,000 where an officer or employee of the Service negligently disregards any provision of the Code or the regulations promulgated thereunder. However, the amendments to section 7433 enacted by RRA 98 apply to actions of officers or employees of the Service after July 22, 1998. Therefore, the provisions of section 7433 prior to amendment by RRA 98 apply to this case since the alleged unlawful collection actions appear to have taken place prior to July 22, 1998. Accordingly, the taxpayer can not recover damages for negligent disregard of the Code or regulations.

Section 7433(d)(1) provides that the amount of damages awarded may be reduced if the court determines that the plaintiff has not exhausted the administrative remedies available within the Service. This provision applies to proceedings commenced after July 30, 1996. However, RRA 98 section 3102(d) provides that the amendments to section 7433 apply to actions of officers or employees of the Service after the date of enactment, which was July 22, 1998. Accordingly, the plaintiff is not required to exhaust administrative remedies since the actions complained of occurred after July 30, 1996, and prior to July 22, 1998, but the court could reduce the amount of damages for failure to exhaust administrative remedies.

Treas. Reg. § 301.7433-1(e) contains the procedures for filing an administrative claim for damages. The claim must be sent in writing to the district director and marked for the attention of the Chief, Special Procedures Function of the district in which the taxpayer resides. The claim must include: (1) the name, current address, current home and work telephone numbers and any convenient times to be contacted, and the taxpayer's identification number; (2) the grounds for the claim, including copies of substantiating documents or correspondence with the Service; (3) a description of the injuries incurred by the taxpayer, including any substantiating documentation; (4) the dollar amount of the claim, including damages not yet incurred but which are reasonably foreseeable, and any substantiating documentation; and (5) the signature of the taxpayer or duly authorized representative.

Under I.R.C. § 7433, the taxpayer must show that the Service intentionally or recklessly disregarded the Code or the regulations. In order for disregard or misconduct to be reckless the actor must have intentionally acted or failed to act either knowing, or knowing facts that would lead a reasonable man to realize, that it is highly probable that harm will result. See, 57A Am. Jur. 2d, Negligence § § 290-

304 (1989). Reckless misconduct differs from negligence. Negligence consists of mere inadvertence or a failure to take precautions while reckless misconduct involves a conscious choice of a course of action or inaction. Conduct cannot be in reckless disregard unless the conduct itself is intended. See, 57A Am. Jur. 2d, Negligence § § 300, 302 (1989).

In the instant case, it does not appear that any unlawful actions were taken in connection with the collection of the taxpayer's individual tax liability. The conference memoranda which are contained in the documents that we reviewed show that the taxpayer's individual tax account was discussed at these meetings in the context of the conflict of interest issue. However, there is nothing in the documents that we reviewed or in the taxpayer's letter that show that any specific unlawful collection action took place. The taxpayer alleges that he continues to get collection notices for erroneous amounts of taxes, and that he has not received an explanation for the reassignment of his tax case to Office X after the Chief of Collection was detailed to Office X. Neither of these allegations, if true, would be unlawful collection actions and would not fall within the meaning of reckless or intentional disregard of the Code or regulations for purposes of section 7433. Therefore, unless the taxpayer can produce some substantiating documents or evidence of specific unlawful collection actions, it does not appear that he is entitled to recover under section 7433.

CASE DEVELOPMENT:

The taxpayer's letter dated , should be treated as an administrative claim. However, more information is required in order to evaluate the claim. The taxpayer has not yet provided you with substantiating documents or evidence of damage to his business. Section 7433 only allows recovery for direct economic damages. The taxpayer can not recover for damages to his reputation unless it results in actual economic loss. More importantly, he can not recover under section 7433 for unlawful disclosure of his tax case unless the disclosure was made "in connection with the collection" of his tax liability. See, generally, Schipper v. United States, et al, 97-1 USTC ¶ 50,126 (E.D. N.Y. 1997), vacating and remanding 95-2 USTC ¶ 50, 537 (E.D. N.Y. 1995). The taxpayer has only alleged that the illegal disclosures or browsing occurred during the investigation of the conflict of interest case, and the Service employee's discrimination suit. Thus even assuming that the disclosures were illegal, such disclosures were not made in connection the collection of the taxpayer's liability, and therefore would not be actionable under section 7433.

The taxpayer also alleges that the collection activities regarding his account were made for retaliatory purposes in violation of the Taxpayer Bill of Rights and the IRS rules of conduct. However, the taxpayer admits that the Service initiated collection action against him before he was retained by the Service employee. Even

assuming the collection notices contained the incorrect amount of taxes owed, that fact does not suggest a retaliatory motive. Nor does it explain why it is inappropriate to pursue a collection matter begun before the taxpayer was retained for a liability which the taxpayer does not deny owing, and which presumably remains unpaid in part. Hence, the facts provided so far by the taxpayer do not support a finding that the collection action was initiated or pursued against him for retaliatory motives. Even if the taxpayer could establish retaliatory motives, the taxpayer has not specified what provision of the Code or regulations would be violated by initiating a collection action based on such improper motives.

You should review Service records and determine what collection actions have been taken. If the attorney submits additional substantiating documents or evidence regarding unlawful collection actions, you should submit the case to us for additional evaluation.

If you have any further questions please call (202) 622-3630.

cc: Assistant Regional Counsel (GL), Midstates Region