INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Industry Director

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Years Involved:
Date of Conference:

LEGEND:

Taxpayer =

a =

b =

c =

ISSUE(S):

1. Whether the "listed transactions" Information Document Request (IDR), IDR No. 2 described below, placed the issue of Taxpayer's method of accounting for deductions of certain employer contributions under consideration, within the meaning of § 3.09(1) of Rev. Proc. 2002-9.

2. Whether Taxpayer may obtain automatic consent, pursuant to Rev. Rul. 2002-46, to change its method of accounting for deductions of employer contributions.

CONCLUSION(S):

1. On the date issued, June 4, 2002, the "listed transactions" IDR No. 2 placed the issue of Taxpayer's method of accounting for deductions of certain employer contributions under consideration for the taxable years under examination.

2. Taxpayer's method of accounting for deductions of employer contributions became an "issue under consideration" for taxable years under examination before Taxpayer filed its Form 3115 seeking automatic consent to change its method of accounting on July 18, 2002. Therefore, Taxpayer may not obtain automatic consent, pursuant to Rev. Rul. 2002-46, to change its method of accounting under Rev. Proc. 2002-9.

FACTS:

Section 401(k) Accelerated Deductions

For purposes of this memorandum, Taxpayer refers to the parent and an affiliated group of corporations engaged in the business of selling and servicing a and b at c. Taxpayer files a consolidated federal income tax return and uses an overall accrual method of accounting. Taxpayer's returns for , , and were timely filed. Taxpayer is not a Coordinated Industry Case (CIC) taxpayer.

Taxpayer maintains an employee plan qualified under § 401(a) of the Internal Revenue Code (Code) -- the Salary Reduction Profit Sharing Plan (the Plan). The Plan includes a qualified cash or deferred arrangement within the meaning of § 401(k) and also provides for matching contributions within the meaning of § 401(m). Taxpayer has a taxable year beginning January 1 and ending December 31; the Plan has a taxable year beginning December 31 and ending December 30. During the years under examination, Taxpayer's Board of Directors regularly deducted certain contributions to the Plan as follows.

During its taxable year ending December 31, , Taxpayer's Board of Directors adopted a resolution binding Taxpayer to make a specified minimum employer contribution to the Plan for the plan year beginning December 31, , and ending December 30, . The guarantee was to be fulfilled by contributions made before the extended due date of Taxpayer's federal income tax return. Taxpayer filed its return on . On its return, Taxpayer took an income tax deduction for the amount specified in the resolution. That is, Taxpayer deducted in its taxable year amounts that were paid after the end of that taxable year, on the theory that the amounts were "on account of" the taxable year within the meaning of §

404(a)(6). Taxpayer's Board of Directors adopted similar resolutions in December

and December concerning contributions during Plan years ending on December 30, , and December 30, , respectively. On its and income tax returns, Taxpayer again deducted similar amounts that were not actually paid during those taxable years.

On April 23, 2002, through its corporate officers, Taxpayer executed a voluntary Disclosure Statement under the provisions of Announcement 2002-2, 2002-1 C.B. 304. That statement effectively informed the IRS that Taxpayer had accelerated deductions for employer contributions in its , , and taxable years.

Examination and IDRs (Chronology)

On April 29, 2002, an Internal Revenue Agent notified Taxpayer by telephone that she was commencing an audit of the taxable year. Taxpayer gave the Agent a Form 2848, Power of Attorney and Declaration of Representative, appointing accountants to represent the Taxpayer during the examination of its and returns. The Agent spoke with one of Taxpayer's representatives by telephone on May 13, 2002, scheduling a meeting for June 4. On May 14, the Agent sent letters to Taxpayer and its representatives confirming the June 4 appointment and stating that the purpose of the meeting was to discuss the audit plan for the taxable year.

At the June 4 meeting, the Agent gave Taxpayer's representatives a number of information document requests (IDRs). IDR No. 2, dated June 4, was a "listed transactions" IDR that referenced §§ 1.6011-4T(b)(2), 301.6111-2T(b), and Notice 2001-51, 2001-2 C.B. 190. IDR No. 2 requested Taxpayer to provide specific information and documentation which would allow the Service to determine whether Taxpayer had entered into any transactions which were the same as or substantially similar to certain "listed transactions" described in the IDR. Each type of transaction was identified by a citation and a brief description. The first transaction on the list was:

> (1) Rev. Rul. 90-105, 1990-2 C.B. 69, (transactions in which taxpayers claim deductions for contributions to a qualified cash or deferred arrangement or matching contributions to a defined contribution plan where the contributions are attributable to compensation earned by plan participants after the end of the [Taxpayer's] taxable year).

At the June 4 meeting, it was agreed that the Agent would begin reviewing Taxpayer's books and records for its taxable year on July 18.

On June 28, the IRS released Rev. Rul. 2002-46, 2002-2 C.B. 117, described below.

At a meeting on July 19, Taxpayer's representative gave the Agent a copy of the Disclosure Statement, filed April 23, 2002; a Consent Resolution of the Taxpayer's Board of Directors effective December 30, 1999; an Amendment to Taxpayer's Plan effective the same date; and a copy of a Form 3115, Application for Change in Accounting Method, executed on July 18, 2002, by two of Taxpayer's corporate officers and its representative. The Form 3115 is labeled as an "Automatic Change Filed under Rev. Rul. 2002-46." The application was filed for Taxpayer's taxable year. Taxpayer mailed a signed duplicate of the Form 3115 to the IRS National Office on July 18, 2002.

The Agent met with Taxpayer's representatives again on July 23, 2002. During this meeting she repeated her request for the documentation set out in IDR No. 2, specifically as the IDR related to the Plan transaction described in Taxpayer's Disclosure Statement. The Agent emphasized this request by giving Taxpayer's representatives a copy of the first two pages of the "Listed Transactions" IDR No. 2 itemizing the documents being requested.

Taxpayer's representatives responded that additional information and documentation were unnecessary because Taxpayer had filed a Form 3115 requesting automatic consent to change its method of accounting for employer contributions pursuant to Rev. Rul. 2002-46, before the IRS placed the issue under consideration. Taxpayer's representatives stated that they did not consider IDR No. 2, referencing Rev. Rul. 90-105, sufficient to place their issue (more explicitly described in Rev. Rul. 2002-46) under consideration. Taxpayer's representatives also stated that they had provided the IRS with all documents pertaining to the resolution and funding of the contributions at the July 19, 2002, meeting. The parties discussed the necessity of issuing an updated "listed transactions" IDR, but the Agent declined to issue another IDR at that time.

On August 6, 2002, the Agent issued IDR No. 10, an expanded "listed transactions" IDR, to Taxpayer's representative. The updated IDR added four items to the ones listed in IDR No. 2. IDR No. 10 requested information about any transaction entered into which was the same as or substantially similar to the transactions listed in the document, including the following:

> (19) Rev. Rul. 2002-46, 2002-29 I.R.B. 117 (June 28, 2002) (identifying as substantially similar to Rev. Rul. 90-105 a transaction in which a taxpayer makes contributions to a qualified cash or deferred arrangement under § 401(k) or a defined contribution plan as matching contributions under § 401(m) and the contributions are designated as satisfying a liability established before the end of the [Taxpayer's] taxable year but are attributable to compensation earned by plan participants after the end of that taxable year). See Notice 2002-48, 2002-29

I.R.B. 1 (July 22, 2002) for certain variations of Rev. Rul. 90-105 that are not listed transactions.

TAXPAYER'S POSITION:

On November 5, 2002, Taxpayer provided a four-page written response to IDRs No. 2 and No. 10. Taxpayer took the position that its method of accounting for (accelerating) deductions for employer contributions is described in Rev. Rul. 2002-46, not Rev. Rul. 90-105. Therefore, IDR No. 10, citing Rev. Rul. 2002-46, placed Taxpayer's method of accounting under consideration. Taxpayer contends that it applied for an automatic method change on July 18, 2002, before the IDR No. 10 placed Taxpayer's issue under consideration on August 6, 2002. Taxpayer disputes that IDR No. 2 (citing the transaction in Rev. Rul. 90-105) placed the Taxpayer's issue (described in Rev. Rul. 2002-46 and raised in IDR No. 10) under consideration. Taxpayer characterizes the transaction in IDR No. 10 as separate and distinguishable from the transaction in IDR No. 2.

LAW AND ANALYSIS:

1. On June 4, 2002, "listed transactions" IDR No. 2 placed the issue of Taxpayer's method of accounting for deductions of certain employer contributions under consideration for the taxable years under examination.

Acceleration of Deductions for Employer Contributions

Rev. Rul. 90-105 holds that contributions to a qualified cash or deferred arrangement within the meaning of § 401(k), or to a defined contribution plan as matching contributions within the meaning of § 401(m), are not deductible by the employer for a taxable year, if the contributions are attributable to compensation earned by plan participants after the end of that taxable year. This holding applies regardless of whether § 404(a)(6) deems the contributions to have been paid on the last day of that taxable year, and regardless of whether the employer uses the cash or an accrual method of accounting.

The IRS has determined that transactions that are the same as, or substantially similar to, transactions described in Rev. Rul. 90-105 are tax avoidance transactions. These transactions are identified as "listed transactions" for purposes of § 1.6011-4T(b)(2) of the Temporary Income Tax Regulations and § 301.6111-2T(b)(2) of the Temporary Procedure and Administration Regulations. See Notice 2000-15, 2000-1 C.B. 826, supplemented and superseded by Notice 2001-51, 2001-2 C.B. 190. Transactions that are the same as, or substantially similar to, transactions described in Rev. Rul. 90-105 are also identified as "listed transactions" for purposes of §§ 1.6011-4(b)(2) and 301.6111-2(b)(2). See Notice 2003-76, 2003-49 I.R.B. 1181 (Nov. 7, 2003).

Rev. Rul. 2002-46 holds that grace period contributions to a qualified cash or deferred arrangement within the meaning of § 401(k) or to a defined contribution plan as matching contributions within the meaning of § 401(m) are not deductible by the employer for a taxable year, if the contributions are attributable to compensation earned by plan participants after the end of that taxable year. Rev. Rul. 2002-46 clarifies that the holding of Rev. Rul. 90-105 applies regardless of whether the employer's liability to make a minimum contribution is fixed before the close of that taxable year.

Change in Method of Accounting

Section 446(e) of the Code provides that, except as otherwise expressly provided in Chapter 1 of the Code, a taxpayer who changes the method of accounting on the basis of which he regularly computes his income in keeping his books shall, before computing his taxable income under the new method, secure the consent of the Secretary.

Section 1.446-1(e)(2)(i) of the Regulations provides that, except as otherwise expressly provided in Chapter 1 of the Code and the regulations thereunder, a taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. Consent must be secured whether or not such method is proper or is permitted under the Code or regulations thereunder.

Section 1.446-1(e)(3)(ii) provides that the Commissioner may prescribe administrative procedures under which taxpayers will be permitted to change their methods of accounting. The administrative procedures shall prescribe those terms and conditions necessary to obtain the Commissioner's consent to effect the change and to prevent amounts from being duplicated or omitted.

Rev. Proc. 2002-9, 2002-1 C.B. 32, provides the exclusive procedures by which a taxpayer may obtain the automatic consent of the Commissioner to make the changes in method of accounting described in that revenue procedure's APPENDIX. (Rev. Proc. 2002-9 has been modified and clarified by Announcement 2002-17, 2002-1 C.B. 561, modified and amplified by Rev. Proc. 2002-19, 2002-1 C.B. 696, and amplified, modified and clarified by Rev. Proc. 2002-54, 2002-2 C.B. 432.)

Rev. Rul. 2002-46 adds the method it describes to the list of methods eligible for automatic consent procedures in the APPENDIX of Rev. Proc. 2002-9. Further, Rev. Rul. 2002-46 (as modified by Rev. Rul. 2002-73, 2002-2 C.B. 805) permits a taxpayer under examination to make such an automatic change for its first taxable year ending on or after October 16, 2002, unless the taxpayer's method of accounting for contributions addressed in Rev. Rul. 2002-46 is an "issue under consideration" for taxable years under examination within the meaning of Rev. Proc. 2002-9, § 3.09(1).

Section 3.09(1) of Rev. Proc. 2002-9 provides that a taxpayer's method of accounting for an item is an issue under consideration for the taxable years under examination if the taxpayer receives written notification (for example, by examination plan, information document request (IDR), or notification of proposed adjustments or income tax examination changes) from the examining agent(s) specifically citing the treatment of the item as an issue under consideration.

Accelerated Deduction is the "Issue under Consideration"

The Agent gave Taxpayer "listed transactions" IDR No. 2 on June 4, 2002. That IDR cited the accounting treatment of a very specific item-- Taxpayer's "…deductions for contributions to a qualified cash or deferred arrangement or matching contributions to a defined contribution plan where the contributions are attributable to compensation earned by plan participants after the end of the [Taxpayer's] taxable year." The IDR language clearly identifies the accelerated deduction as the issue under consideration.

Taxpayer's Arguments

Taxpayer disagrees and makes several arguments as to why its method of accounting for Plan contributions is not an "issue under consideration" for taxable years under examination. We reject Taxpayer's arguments for the following reasons.

Transactions v. Issues

Taxpayer's primary argument is that Rev. Rul. 90-105 and Rev. Rul. 2002-46 address separate and distinguishable issues. Taxpayer submits that the reference to Rev. Rul. 90-105 in IDR No. 2 limits the issue to the transaction described in that Revenue Ruling and is insufficient to notify Taxpayer that the transaction described in Rev. Proc. 2002-46 is an "issue under consideration." Taxpayer's reasoning is flawed, because it confuses the transactions (fact patterns) discussed in the revenue rulings with the issue that the revenue rulings address. As discussed above, Rev. Rul. 90-105 and Rev. Rul. 2002-46 address only one issue, i.e., whether Taxpayer may accelerate its deductions for its employer contributions attributable to compensation earned by plan participants after the end of Taxpayer's taxable year. IDR No. 2 inquired about that issue and thus placed it under consideration.

The additional reference to Rev. Rul. 90-105 in IDR No. 2 was not meant to limit the basic issue under consideration to the context of the fact pattern described in Rev.

Rul. 90-105. Such a reading disregards the literal description of the issue in Rev. Rul. 90-105 (and the IDR) and ignores the fact that Rev. Rul. 2002-46 addresses the same issue in a slightly different context. Taxpayer's logic would, as a condition to placing an issue under consideration, require IRS examiners to specify every context and fact pattern in which an issue could arise, which would practically prevent the IRS from placing an issue – as opposed to a collection of transactions – under consideration.

One Method of Accounting

Taxpayer relies heavily upon the first of the examples in § 3.09(1) of Rev. Proc. 2002-9, clarifying when written notice to a taxpayer is sufficient to place an issue under consideration. This example states that written notice identifying last-in, first-out (LIFO) inventory pooling as a matter to be examined is sufficient to place a taxpayer's method of dollar-value LIFO inventory pooling under consideration, but written notice inquiring generally about LIFO inventories is not sufficient to place dollar-value LIFO inventory pooling under consideration. Taxpayer argues that its situation is analogous to the example, i.e., IDR No. 2 (requesting information on transactions "the same as or similar to" the transaction in Rev. Rul. 90-105) is too broad to notify Taxpayer that its method of accounting for its Plan contributions is an issue under consideration.

Taxpayer correctly summarizes the principle illustrated by the example: the written notice must be sufficiently specific to identify the particular method of accounting under consideration. IDR No. 2 does exactly that. It identifies a single method of accounting for a particular item (Taxpayer's deductions for employer contributions). As explained above, the IDR's reference to the fact pattern in Rev. Rul. 90-105 does not limit the request or issue description to that transaction. The phrase "the same as or similar to" does not convert IDR No 2 to a general request about several possible methods of accounting, like the example asking about potentially all LIFO methods.

Specificity of IDR No. 2

Taxpayer also argues that IDR No. 2 was not sufficiently specific to place its method of accounting for Plan contributions "under consideration" for taxable years under examination as defined in § 3.09(1) of Rev. Proc. 2002-9. As just discussed above, we do not see how IDR No. 2, which focuses on a single item and method of accounting, could be more specific. Nevertheless, we will address Taxpayer's major arguments regarding the specificity of IDR No. 2.

Taxpayer first argues that the words "the same as or substantially similar to" preclude IDR No. 2 from meeting the specificity requirement in § 3.09(1) of Rev. Proc. 2002-9 for placing an "issue under consideration." Taxpayer stresses that IDR No. 2 conceivably covers an open-ended category of "listed transactions" including the transaction specifically described in Rev. Rul. 90-105. In Taxpayer's view, the standard is inherently too vague to give taxpayers sufficient notice of all the transactions that might be under consideration.

As explained in *Transactions v. Issues*, above, Taxpayer confuses referenced transactions with issues under consideration. IDR No. 2 addressed the issue of accelerated deductions, not limited to the fact pattern of the transaction described in Rev. Rul. 90-105. Indeed, the notion of similar transactions is subsumed in the concept of “issue under consideration.” No two transactions are identical. An issue may occur in a large number of transactional settings. Consequently, an IDR seeking information about an issue must contemplate receiving information about the varied fact patterns presenting the issue.

Taxpayer next argues that even if the “same as or substantially similar” language is not a per se violation of the specificity requirement for “issue under consideration,” the terms of IDR No. 2 were not sufficiently specific to place under consideration Taxpayer’s particular method of accounting for Plan contributions. This argument contains the same flawed premise discussed above: Taxpayer confuses a transaction with a method of accounting. Again, IDR No. 2 and IDR No. 10 raise one issue, i.e., accelerating deductions for employer contributions attributable to compensation earned by plan participants after the end of the taxpayer’s taxable year. The IDRs’ references to two slightly different fact patterns described in two separate revenue rulings do not change the nature of the single issue raised.

We conclude that Taxpayer’s method of accounting for Plan contributions became an issue under consideration on June 4, 2002, when Taxpayer was given IDR No. 2. Taxpayer’s method of accounting for Plan contributions remained an issue under consideration on July 19, 2002, when Taxpayer gave to the Agent a copy of its Form 3115 requesting consent to change such method of accounting.

Revenue Agent’s Subjective Knowledge

Taxpayer argues that IDR No. 2 was not sufficient to create an "issue under consideration" with respect to any particular listed transaction because the agent who issued the IDR had no “subjective knowledge” that Taxpayer had engaged in any of the listed transactions. Taxpayer submits that the agent could not have known about the transactions, because the agent issued IDR No. 2 during the planning or preliminary phase of the examination—before the agent looked at any information about the Taxpayer. These arguments run counter to both the express definition and underlying policies of the "issue under consideration" concept.

Taxpayer’s attempt to impute a subjective knowledge requirement into the “issue under consideration” concept is flatly contrary to the definition of such term in § 3.09(1) of Rev. Proc. 2002-9. The standard is an objective, “written notification” to the taxpayer.

The taxpayer, not the IRS, has knowledge of and custody of the information concerning the taxpayer’s affairs. By definition, IRS agents do not have independent knowledge of those affairs before an examination. The IRS must inquire to identify issues.

The written notification standard in § 3.09(1) of Rev. Proc. 2002-9 simply reflects reality. IDRs are typically issued at the beginning of the examination when the agent has little or no specific knowledge about the transactions related to the requested documents. An examination plan often lists transactions and issues about which the examining agent has limited knowledge and tentative or no conclusions. That the examining agent need not have subjective knowledge of the taxpayer’s transaction is reflected in the two examples provided in § 3.09(1) of Rev. Proc. 2002-9.

Taxpayer cites two private letter rulings (PLRs) in support of its theory that the sufficiency of an IDR to place an “issue under consideration” depends on a revenue agent having some knowledge of the transaction. We note that a private letter ruling is directed to a specific taxpayer regarding a certain transaction or set of facts, and may not be cited or relied upon as precedent. See § 6110(k)(3). Moreover, the PLRs do not support Taxpayer’s position.

Taxpayer analogizes to PLR 9732002, addressing whether the taxpayer’s method of accounting was an “issue raised” for purposes of determining whether the taxpayer could request consent to change its accounting method under Rev. Proc. 91-51, 1991-2 C.B. 779. The revenue procedure prohibited a change if the taxpayer was under examination or before appeals or a federal court, and the accounting method to be changed was "an issue that has been raised." See § 3.02 of Rev. Proc. 91-51. The PLR is off point.

“Issue raised” under Rev. Proc. 91-51 is a different matter than “issue under consideration” under Rev. Proc. 2002-9. The analysis in PLR 9732002 indicates that an issue is raised when the taxpayer would have objective knowledge that the agent was determining the propriety of its accounting method. As explained above, “issue under consideration” is a concept arising far earlier in the examination process, i.e., when an agent is trying to identify potential issues. Such preliminary inquiries produce an "issue under consideration" when the IRS gives the taxpayer written notice that the IRS is specifically reviewing the treatment of an item. PLR 9732002 simply does not pertain to the "issue under consideration" standard.

Moreover, the analysis in PLR 9732002 is at odds with Taxpayer's proposed subjective knowledge standard. PLR 9732002 treats "issue raised" as a question of what "objective knowledge" a taxpayer could reasonably gain from communications (such as IDRs) from the examining agents. The PLR rejects the subjective approach to defining issues.

PLR 200142001 discusses the specificity requirements necessary for IDRs to place an "issue under consideration" for a taxpayer subject to continual audit under the Coordinated Examination Program (CEP). PLR 200142001 contains nothing that supports Taxpayer's argument that an agent must have some subjective knowledge of the transaction before an IDR can place an "issue under consideration." To the contrary, PLR 200142001 expressly recognizes that an examining agent can place an issue under consideration in the planning stages of the examination, prior to the agent performing substantive work to identify improprieties or deficiencies in a specific accounting method.

Finally, we note that the subjective knowledge requirement advocated by Taxpayer would be detrimental to most if not all taxpayers. Under the objective standard, both parties know the rules and have ready and equal access to written documentation of the issues under consideration. Under the subjective knowledge standard advocated by Taxpayer, taxpayers could only guess about the agent's subjective knowledge. We doubt that either the IRS or most taxpayers desire such an unwieldy standard.

Sound Tax Administration

Finally, Taxpayer argues that interpreting IDR No. 2 as placing its method of accounting for Plan contributions under consideration would be contrary to sound tax administration and the policy of encouraging voluntary method changes. Our interpretation of IDR No. 2 does deny Taxpayer automatic consent under Rev. Proc. 2002-9 and Rev. Rul. 2002-46, but the denial is perfectly consonant with the IRS's long standing policy on voluntary method changes.

Prior to the issuance of Rev. Rul 2002-46, any taxpayer could request consent under the advance consent procedures of Rev. Proc. 97-27 to change its accounting method for deducting employer contributions attributable to compensation earned by plan participants after the end of the taxable year. Following the issuance of Rev. Rul. 2002-46, taxpayers can request such consent under the automatic procedures of Rev. Proc. 2002-9. In addition, Rev. Rul. 2002-46 (as modified by Rev. Rul. 2002-73) provides that taxpayers under examination are permitted to use the automatic consent procedures for their first taxable years ending on or after October 16, 2002, provided that the method of accounting for those contributions is not an "issue under consideration" for taxable years under examination within the meaning of Rev. Proc. 2002-9, § 3.09(1).

Rev. Proc. 97-27 and Rev. Proc. 2002-9 are both designed to encourage prompt and voluntary compliance with proper tax accounting principles. The revenue procedures provide incentives for taxpayers to voluntarily request a change from an impermissible method of accounting prior to being contacted for examination. A taxpayer required to change its method of accounting by the Service pursuant to examination (an involuntary change) generally receives less favorable terms and conditions than the taxpayer who voluntarily changes its method of accounting before detection (a voluntary change). For example, an involuntary change generally is made with an earlier year of change and a shorter § 481(a) adjustment period for a positive adjustment, and a voluntary change generally is made with a current year of change and a longer § 481(a) adjustment period of a positive adjustment. See generally Rev. Proc. 97-27, § 1 and Rev. Proc. 2002-18, § 1.

To discourage the use of the "audit lottery," the IRS permits a taxpayer using an improper accounting method to change (voluntarily) to a proper method, only if the taxpayer requests consent to change its method before it is contacted for examination. Once the taxpayer is placed under examination, the voluntary consent procedures and their favorable terms and conditions are no longer available (subject to certain exceptions) because the taxpayer's attempt to change is no longer truly voluntary. See, generally, Rev. Proc. 97-27, § 6.01; Rev. Proc. 2002-9, § 4.02(1).

Indeed, PLR 200142001 (cited by Taxpayer) explains that "…allowing taxpayers to voluntarily change methods of accounting after they have had an opportunity to peruse the examination plan would encourage taxpayers to wait until they were notified of the contents of the examination plan before requesting accounting method changes. Thus, allowing an examining agent to place an issue under consideration during the planning stage encourages taxpayers to file accounting method changes prior to being notified that the issue will be examined."

The general prohibition of voluntary method changes from improper accounting methods by taxpayers under examination draws a line between more compliant taxpayers and less compliant taxpayers. This line and the differential treatment implement the compliance incentive system. As the Tax Court has recognized, the Commissioner has a legitimate interest in limiting the ability of taxpayers under examination to change improper accounting methods where such restriction is necessary to prevent circumvention or frustration of the examination process. Capital Federal Savings & Loan Association and Sub. v. Commissioner, 96 T.C. 204, 220 (1991).

Taxpayer had the opportunity to seek its desired accounting method change under Rev. Proc. 97-27. Taxpayer simply chose to delay initiating a method change until a voluntary accounting method change was no longer available. Denial of consent to change method under those circumstances is consistent with the policy of encouraging voluntary changes before examination and with sound tax administration.

2. Taxpayer's method of accounting for deductions of employer contributions became an "issue under consideration" for taxable years under examination before Taxpayer filed its Form 3115 seeking automatic consent to change its method of accounting on July 19, 2002. Therefore, Taxpayer may not obtain automatic consent, pursuant to Rev. Rul. 2002-46, to change its method of accounting under Rev. Proc. 2002-9.

On July 19, 2002, Taxpayer filed its Form 3115 seeking automatic consent pursuant to Rev. Rul. 2002-46 to change its method of accounting for employer contributions for its 2002 taxable year. Rev. Rul. 2002-46 permits a taxpayer under examination to make such an automatic change for its first taxable year ending on or after , unless the taxpayer's method of accounting for employer contributions described in Rev. Rul. 2002-46 is an "issue under consideration" for taxable years under examination within the meaning of Rev. Proc. 2002-9, § 3.09(1). As explained more fully above, Taxpayer's method of accounting for employer contributions was an "issue under consideration" before Taxpayer filed its Form 3115.

IDR No. 2 placed Taxpayer's method of accounting for Plan contributions under consideration for taxable years under examination on June 4, 2002, i.e., six weeks before Taxpayer filed its Form 3115 request for automatic consent to change its method of accounting. Because Taxpayer was under examination at the time it filed its Form 3115, Taxpayer may not obtain automatic consent, pursuant to Rev. Rul. 2002-46, to change its method of accounting under Rev. Proc. 2002-9.

CAVEAT(S):

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.