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OUTLINE OF ANTICIPATED TESTIMONY ON PROPOSED SECTION 7602 REGULATIONS RELATING TO PARTICIPATION OF NON-GOVERNMENTAL ATTORNEYS IN AUDITS

I. My background

- 30 years of tax controversy practice (20 with DOJ, 10 in private practice)
- Principal contributor to Section 6103 discussion in Saltzman/Book treatise on IRS Practice and Procedure
- Author of published material on issues addressed in proposed regulations

II. Summary of comments

- Describe four categories of non-governmental participants in audits addressed by proposed regulations
- Are the regulations lawful?
- Are the regulations needed?
- What should IRS do before issuing final regulations?

III. Categories of Non-governmental Participants Addressed by Proposed Regulations

- non-legal experts, foreign law specialists, domestic non-tax law experts, litigation experts
- Non-legal experts
 - appraisers, economists, industry practice
 - law treats them as qualified to offer opinions on facts
- Foreign Law Specialists
 - explain application of foreign law (e.g., foreign tax credit issues)
 - law allows them to testify and opine on foreign law
- Domestic non-tax law specialists
 - regulations reference patent, environmental, property law
 - law typically does not allow anyone to testify domestic law
- Litigation experts
 - never allowed to testify
 - not considered experts
- Answer to questions of legality and wisdom differ from category to category

IV. Legality of the Proposed Regulations

- Two interrelated issues
 - Section 7602 authority to audit
 - Section 6103 limitation upon disclosures of tax returns and return information

- A. Analysis under Section 7602¹ and regulations
- The statute is silent on whether non-IRS employees can participate
 - Under *Mayo*, the ambiguity produces an area where the IRS can issue regulations
 - Service has issued a regulation interpreting the statute
 - Reg. §301.7602-1(b)² governs and allows participation of persons described in **section 6103(n) and § 301.6103(n)-1(a)** of the regulations
- As a result, the issue under Section 7602 is resolved under Section 6103
- B. Analysis under Section 6103
- Section 6103(a) bars disclosure of returns and return information absent an applicable exception
 - Subsection (n) is the exception applicable here

¹ Section 7602 provides:

(a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

² **(3) Participation of a person described in section 6103(n).**

For purposes of this paragraph (b), a person authorized to receive returns or return information under section 6103(n) and § 301.6103(n)-1(a) of the regulations may receive and review books, papers, records, or other data produced in compliance with a summons and, in the presence of and under the guidance of an IRS officer or employee, participate fully in the interview of a witness summoned by the IRS to provide testimony

- (n) CERTAIN OTHER PERSONS

Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person, including any person described in section 7513(a), to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, **and the providing of other services**, for purposes of tax administration.

- Two observations

- focus of statute is allowing disclosures to information technology providers
- question of meaning of “providing of other services”
 - language is from a 1990 amendment of the statute³
 - legislative history supports construction which allows disclosure to “expert witnesses”

C. Legal summary

- Sections 7602 and 6103 authorize disclosure to persons who qualify as expert witnesses
- Other contractors are not authorized to receive tax information or participate in audits
- Economic experts and foreign law experts are authorized to participate
- Domestic law subject matter specialists would not qualify
 - Likely to generate litigation if implemented
- Litigation specialists do not qualify

³ Pub. L. No 101-508. See House Report on §13313 of House bill.

IV. Recommendations

- The regulations are fine with respect to subject matter and foreign law experts
 - The result is consistent with existing practice
- Regulations still have problems with domestic law subject matter specialists and litigation specialists
- IRS cannot solve this problem with changes to the proposed regulations
 - the obstacle is a statute, which can only be changed in legislation
 - any regulation authorizing retention would be invalid
 - IRS cannot legally promulgate Prop. Treas. Reg. §301.7602-1(b)(3)(ii) and should also drop the cross-reference in (i)
- Should the agency seek legislation?
 - Litigation specialists
 - Regulations do not authorize retention so this is unimportant
 - I have written about why this is a bad idea
 - Cannot hire the most qualified tax litigators
 - Sacrificing agency credibility by having outsiders exercising governmental function
 - Sacrifices morale and motivation of counsel lawyers
 - Goals of retention would not be accomplished because of additional time and cost
 - issue would involve litigation

- Congress has noted opposition to retention
- Domestic law specialists are of marginal value and need
 - IRS has hundreds of smart and talented lawyers who know or can learn other topics
 - There are legal subject matter specialists elsewhere in the government who are available for a really technical question
 - Most problems will involve technicalities of industry practice which can be explained by a traditional subject matter expert
- Questions?
- Thank you