

INTERNAL REVENUE SERVICE

Number: **200104002**

Release Date: 1/26/2001

UIL # 20.02.03-00

9999.98-00

CC:EL:GL:Br3

GL-611399-99

March 17, 2000

MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (GL), SOUTHEAST REGION

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

SUBJECT: Potential Application of I.R.C. § 7433

This constitutes our response to your December 22, 1999, request for an opinion on whether I.R.C. § 7433 applies to certain actions taken by Service employees involved in a Regional Compliance Program (RCP) project in the district. We believe that section 7433 would not provide a means of redress for the affected taxpayers.

ISSUE: Does the Service's failure to treat all _____ which were the subjects of an RCP project alike in the course of determining that some were liable for additional taxes, which may have resulted in some incorrect determinations, provide a cause of action for the affected taxpayers pursuant to I.R.C. § 7433?

CONCLUSION: It is our position, based on the general description of the RCP project contained in your memorandum, that section 7433 does not apply to the actions of the Service in this instance. The violations of the Internal Revenue Code, Revenue Ruling 87-41, and Section 530 of the Revenue Act of 1978 alleged by _____ would have occurred in the determination of tax liabilities. Neither _____ nor the TIGTA report alleges violations of any Code provision even remotely connected to the collection of taxes. Even though revenue officers conducted this program and their motives may have been influenced by collection, these considerations do not change the conclusion that any alleged violations occurred during the determination process, before assessments were made.

BACKGROUND: The facts relevant to your request for advice are fully documented in your memorandum requesting our advice and in a memorandum dated November 30, 1999, to your Regional Counsel from the Chief

Compliance Officer,
involved taxpayers who were

. 1/ The specific RCP project at issue

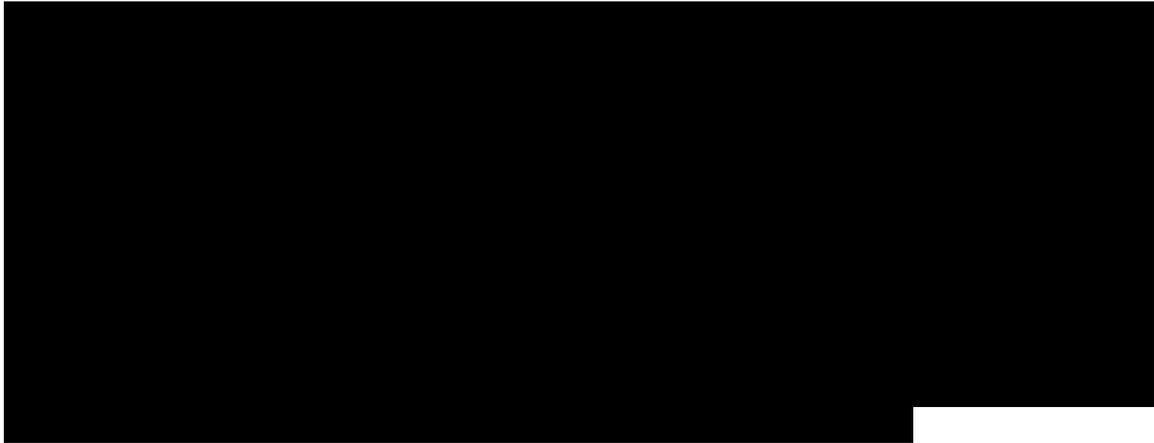
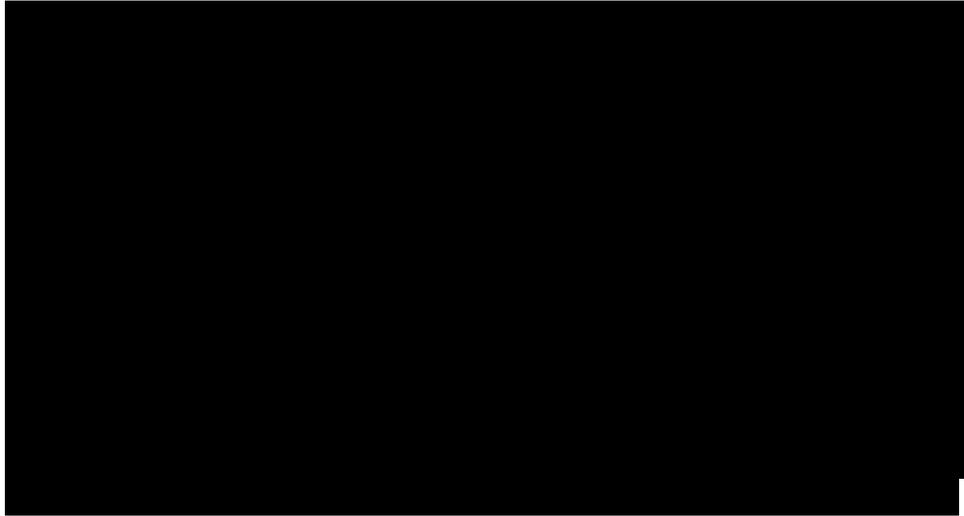
Subsequently, _____, the
former Collection Division Chief for the _____ office, alleged that certain
irregularities had occurred in the conduct of the RCP project.

The RCP project took place during _____, at which time the project was terminated because of changes
in National Office policy directives. In _____, the _____ district
requested that the Region review the RCP project to assess the district's
compliance with the Internal Revenue Code and the Internal Revenue Manual.
The Region did not issue a written report of its review of the project.

The allegations were
ultimately investigated by the Treasury Inspector General for Tax Administration
(TIGTA). The TIGTA investigated 267 closed cases and issued its formal report
on the subject in _____. The TIGTA report contained the following
observations:

■ 

1/ The facts are also well documented in the report ultimately issued by TIGTA,
discussed infra.



The specific question you have asked us is whether these taxpayers might have a remedy under I.R.C. § 7433. Thus, our discussion below is limited to that specific legal issue.

LAW AND ANALYSIS: Section 7433 was added to the Internal Revenue Code in 1988. The version of this provision which was effective from 1988 until mid-1996, while the events relevant to the RCP project occurred, states, in pertinent part:

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section

7432 [providing a damage remedy for failure to release lien], such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

I.R.C. § 7433(a)(1995). 2/

The legislative history of section 7433 reflects that this provision was intended to provide redress for only actions taken with respect to the collection of, rather than also actions taken with respect to the determination of, taxes. Although the Senate version of the provision would have afforded a damage remedy for both types of actions, the conference report explicitly provides that “[a]n action under this provision may not be based on alleged reckless or intentional disregard in connection with the determination of tax.” H. R. Conf. Rep. No. 100-1104, 100th Cong., 2d Sess. 228 (1988), reprinted in 1988 U.S.C.C.A.N. 4515, 5289. This means that section 7433 affords no remedy for any act which is related solely to the assessment of a tax. See, e.g., Shaw v. United States, 20 F.3d 182 (5th Cir. 1994), cert. denied, 513 U.S. 1041 (1994); Gonsalves v. Internal Revenue Service, 975 F.2d 13 (1st Cir. 1992), cert. denied, 510 U.S. 851 (1993); Photographic Assistance Corp. v. United States of America, 1999 U.S. Dist. LEXIS 12738 (N.D. Ga. 1999). The case law has defined an assessment in this context as “the decision to impose liability for” a tax, which is not actionable, as opposed to “improper conduct of an agent trying to collect the taxes owed,” which is. Shaw, supra.

In the RCP project situation, it appears that any errors committed occurred in the course of discerning whether the subject taxpayers

in other words, the errors all appear to have been committed during the assessment stage of the project. According to your memorandum, the only Code sections alleged by _____ to have been violated are sections 3509 and 3402(d). Furthermore, the only Code provisions cited as inconsistently applied in the TIGTA report are sections 3509 and 6020(b). These provisions all pertain to the determination, rather than the collection, of taxes. Thus, any conduct violative of these provisions would not be actionable under section 7433. See, e.g., V-1 Oil Co. v. United States of America, 813 F. Supp. 730, 731 (D. Idaho 1992)(where payment was made voluntarily, no enforced collection occurred and, therefore, no potential violation of I.R.C. § 7433 occurred); Crowd Management Services, Inc. v. United States of America, 792 F. Supp. 87 (D. Ore. 1992), aff'd. in relevant part in unpublished opinion, 1994 U.S. App. LEXIS 24476 (9th Cir. 1994)(even if Service employed wrong test for determination of taxpayer liability, error is not actionable under section 7433 since application of

2/ The version of section 7433 which currently is applicable allows a cause of action based on reckless, intentional, or negligent conduct. See I.R.C. § 7433(a) (1999). Negligent disregard of Code or regulatory provisions is not actionable under the version of section 7433 which applies to the RCP project.

test occurred during determination, rather than collection, of tax). Moreover, section 7433 applies to violations of only the Internal Revenue Code or its regulations. See 1988 U.S.C.C.A.N. at 5289, supra. In this instance, it appears that some of the allegations of Service misconduct focus on the presumed failure to follow procedures established by the Internal Revenue Manual, rather than the Internal Revenue Code or regulations. Such violations of internal procedure are not actionable under section 7433. See Kachougian v. United States of America, 1998 U.S. Dist. LEXIS 2059 (D. R.I. 1998). See also Ludtke v. United States of America, 1999 U.S. Dist. LEXIS 20297 (D. Conn. 1999). For the same reason, any violations of Section 530 of the Revenue Act of 1978 would also not be actionable under section 7433.

Of note is that your memorandum indicates that [REDACTED] hearing testimony alleges that [REDACTED]

[REDACTED] We do not find any factual support for these allegations in the TIGTA report. However, even if these allegations were valid and the assessments had no appropriate foundation, section 7433 still would not apply since, as noted previously, an improper determination of tax, without more, will not support an action under section 7433. [REDACTED]

[REDACTED], the affected taxpayers might have an action against individual revenue officers based on violations of their constitutional rights, pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Finally, we note that section 7433 contains its own statute of limitations, in that the provision requires any action to be initiated within two years of the date the right of action accrues. I.R.C. § 7433(d)(3)(1995). In this case, the relevant events clearly occurred more than two years ago. However, the regulations and case law indicate that, unlike the statute of limitations for a refund action, the limitations period provided by section 7433 does not begin to run until “the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.” Treas. Reg. 301.7433-1(g)(2)(1992); Photographic Assistance Corp., supra. We believe that even if unlawful collection action occurred in this case, the taxpayers involved in the RCP project should have known at the time any questionable assessments were made that the additional taxes were being improperly collected; at the very least, the taxpayers should have inquired as to the Service’s basis for making the assessments. Even if [REDACTED] the taxpayers should have been aware of a potential irregularity at the time the amounts were obtained from them. As a result, even if section 7433 did apply to this situation on substantive grounds, we believe it is arguable that actions under this provision would be procedurally barred because the limitations period would have already run.

In summary, we believe that section 7433 does not apply to the taxpayers

affected by the RCP project, primarily because any alleged “irregularities” appear to have occurred in the course of determining, rather than collecting, additional taxes from the subcontractors involved in the project. Our conclusions are based on the descriptions contained in your memorandum of allegations and of the general facts attendant to the group of taxpayers involved in the project.

Thank you for soliciting our opinion on this matter. If you have further questions, please call 202/622-3630.

cc: Office of Assistant Chief Counsel (EBEO)
Attn: Jerry Holmes