

ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

**Office of Chief Counsel
Internal Revenue Service**

memorandum

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RMWeber

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date: SEP 17 1997

to: National Director, Submission Processing T:S

from: Assistant Chief Counsel (Income Tax and Accounting) CC:DOM:IT&A

subject: Authority to Deny Employer Identification Numbers

This is in response to your request for assistance regarding the Service's authority to deny employer identification numbers (EINs) to certain taxpayers.

DISCLOSURE STATEMENT

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in paragraph V.B.6 of Notice N(35)000-143. This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

ISSUE

Whether the Service may refuse to issue an EIN to a trust that appears to be a potentially abusive trust as described in Notice 97-24?

CONCLUSION

The Service should not refuse to issue an EIN to a trust solely because the trust appears to be a potentially abusive trust under Notice 97-24. However, the Service has the authority to refuse to issue an EIN to any taxpayer if the Service determines that the taxpayer has not fully or correctly completed the Form SS-4. Thus, in the case of a potentially abusive trust, the Service may refuse to issue an EIN, or withdraw an EIN issued under the Tele-TIN procedures, if the Service does not receive

the requisite Form SS-4 or the Form SS-4 is submitted but is incorrect or incomplete.

FACTS

The materials we reviewed indicate that certain taxpayers establish trusts that they describe as "pure, private, non-associated, common law, unincorporated, business organization trusts", "pure trusts", "pure trust organizations", "business trusts", "unincorporated business organizations", "unincorporated business trusts", and various combinations of these terms (collectively referred to as UBO's or abusive trusts). These and similar trust arrangements have been identified as abusive in Notice 97-24 because the arrangements purport to reduce or eliminate federal taxes in ways that are not permitted by federal tax laws.

The circumstances you describe further indicate that trustees for potentially abusive trusts primarily request EINs for these entities through the Tele-TIN process. Some trustees request blocks of EINs for numerous trusts. Certain Service Centers have delayed processing these requests pending Headquarters' advice regarding whether a request for an EIN should be denied if an EIN applicant claims that the entity is a UBO or is identified as a promoter of abusive trusts.¹

The materials we reviewed also illustrate that taxpayers involved in potentially abusive trust arrangements are sending numerous letters to Service Centers challenging the filing requirements in CP575 EIN notification letters. The CP575 letter informs the taxpayer of the new EIN and the filing requirement associated with that EIN.² Taxpayers are challenging the accuracy of the filing requirement, claiming that their

¹ The rationale for denying a request for an EIN, as we understand it, is two-fold: (1) issuing an EIN could be viewed as Service approval of the taxpayer's choice of entity and filing obligation (or lack thereof); and (2) from a compliance stand point, denying the EIN may stop these trusts from operating in the first place.

² Depending on an entity's classification, it may be required to file a Form 1041 (U.S. income tax return for estates and trusts), a Form 1120 (U.S. income tax return for corporations), or a Form 1065 (U.S. income tax return for partnerships). We understand that the filing requirement is input on the Master File at the time the EIN is issued. This information allows the Service to send computerized notices to taxpayers who do not timely file the identified form.

particular trusts are not properly classified as trusts, partnerships, or corporations. Consequently, the taxpayers are demanding that the entity filing requirement listed on the CP575 letter be deleted from their accounts. Certain taxpayers have made multiple demands. The letters fail to mention whether or how the taxpayers or trustees intend to report the trusts' income.

DISCUSSION

Section 6011(a) provides in part that every person required to make a return or statement shall include therein the information required by the forms or regulations.

Section 6109(a)(1) provides that when required by regulations prescribed by the Secretary, any person required under the authority of title 26 to make a return, statement, or other document must include in the return, statement, or other document the identifying number as may be prescribed for securing the proper identification of such person.

Section 6109(c) provides that for purposes of § 6109, the Secretary is authorized to require the information as may be necessary to assign an identifying number to any person.

Sections 301.6109-1(a)(1)(ii)(C) and (D) of the Regulations on Procedure and Administration require that nonindividuals, including trusts, partnerships, or corporations, required to furnish a taxpayer identifying number and certain individuals required to furnish a taxpayer identifying number use an EIN.

Section 301.6109-1(a)(2)(i) of the regulations provides that if a trust does not have a taxpayer identification number (TIN) and the trustee furnishes the name and TIN of the grantor or other person treated as the owner of the trust and the address of the trust to all payors pursuant to § 671-4(b)(2)(i)(A), the trustee need not obtain a TIN for the trust until either (a) the first taxable year of the trust in which all of the trust is no longer owned by the grantor or another person, or (b) until the first taxable year of the trust for which the trustee no longer reports pursuant to § 671-4(b)(2)(i)(A). If the trustee has not already obtained a TIN for the trust, the trustee must obtain an EIN for the trust in order to report pursuant to § 671-4(a), (b)(2)(i)(B), or (b)(3)(i).

Section 301.6109-1(d)(2)(i) of the regulations provides that any person required to furnish an EIN must apply for one, if not done so previously, on Form SS-4. The Form SS-4, together with any supplementary statement, must be prepared and filed in

accordance with the form, accompanying instructions, and relevant regulations, and must set forth fully and clearly the requested data.

Section 301.7701-12 of the regulations defines an EIN to mean a taxpayer identifying number of an individual or other person (whether or not an employer) which is assigned pursuant to § 6011(b) or corresponding provisions of prior law (relating to employment taxes), or pursuant to § 6109, and in which nine digits are separated by a hyphen, as follows: 00-0000000.

Section 6109 provides the Service with broad authority to prescribe rules for using and assigning TINs. Pursuant to this authority, the Service has published regulations providing that an EIN is the required TIN for certain individuals and nonindividuals, including trusts, partnerships, and corporations. See §§ 301.6109-1(a)(1)(ii)(C) and (D) and 301.6109-1(a)(2)(i) of the regulations.³ The regulations require a taxpayer to apply for an EIN by filing a Form SS-4, Application for Employer Identification Number. Under the Tele-TIN process, taxpayers are permitted to apply for an EIN over the telephone and subsequently file a Form SS-4.

Although § 6109 does not preclude the Service from refusing to issue an EIN, we recommend against taking such action in the case of potentially abusive trusts except in very limited circumstances. First, denying the EIN prevents its use as a compliance tool. The legislative history indicates that § 6109 was designed "to improve enforcement and collection of internal revenue taxes by facilitating the expanded use of automatic data processing equipment by the Internal Revenue Service and by enabling the Service to match information returns...filed with tax returns." S. Rep. No. 1102, 87th Cong., 1st Sess. 1, 1961-2 C.B. 475, 476. Taxpayer account numbers were deemed "basic to a satisfactory identification system" because use of such numbers would enable the Service to develop a single file containing information regarding all of a taxpayer's tax transactions. Id.

Thus, the legislative history of § 6109 demonstrates that the use of TINs was intended to enable the Service to establish accurate taxpayer accounts. This, in turn, enables the Service to more effectively review all of a taxpayer's tax transactions and to verify a taxpayer's compliance with federal tax law.

³ Depending on the method of reporting used by a trustee, a grantor trust's TIN is either an EIN or the social security number of the grantor or owner. See § 301.6109-1(a)(2)(i) of the regulations and the rules under subchapter J of chapter 1.

Accordingly, EINs should be issued in the case of potentially abusive trusts for precisely the reason that Service Centers seek to deny the numbers, i.e., to enable the Service to improve taxpayer compliance.

Second, at the time the taxpayer applies for an EIN it is unlikely that the Service has sufficient information to determine whether the taxpayer will use the trust in an abusive manner. As discussed above, most taxpayers involved in potentially abusive trusts apply for an EIN through the Tele-TIN process. As we understand that process, the telephone analyst lacks the resources and training to determine whether the taxpayer has properly classified the entity or whether the caller is a promoter of abusive trusts. Further, in some cases the Service cannot determine if the trust is abusive until after it begins operations.

These recommendations should not be viewed as limiting the Service's authority to deny an EIN if the SS-4 is incorrect or incomplete. The Service uses the Form SS-4 to collect the information it deems necessary to assign an EIN. Pursuant to §§ 6011(a) and 6109 and the regulations thereunder, to obtain an EIN, the taxpayer must fully and correctly provide all the data requested on the Form SS-4. In the Tele-TIN process an EIN is temporarily assigned over the telephone pending a properly filed Form SS-4. If the taxpayer fails to fully or correctly complete the Form SS-4, the Service has the authority to deny the taxpayer's request for an EIN.

In conclusion, we believe the Service should not refuse to issue an EIN to a trust solely because the trust appears to be a potentially abusive trust under Notice 97-24. However, the Service has the authority to refuse to issue an EIN to any taxpayer if the Service determines that the taxpayer has not fully or correctly completed the Form SS-4. Thus, in the case of a potentially abusive trust, the Service may refuse to issue an EIN, or withdraw an EIN issued under the Tele-TIN procedures, if the Service does not receive the requisite Form SS-4 or the Form SS-4 is submitted but is incorrect or incomplete.

In addition to the question of the Service's authority to deny a request for an EIN, the materials we reviewed raise two other issues regarding the process of applying for an EIN: (1) what is the proper filing requirement for a UBO and (2) whether the CP575 is legally and technically correct. The first issue is currently under study in the Office of the Assistant Chief Counsel (Passthroughs and Special Industries). With regard to the second issue, we recommend that all CP575 notices contain the same language and that Headquarters approve and/or develop this language. We offer whatever assistance your office deems

necessary to ensure the technical and legal accuracy of the CP575.

We hope you find this information helpful. If you need further information please contact Rose Weber at 622-4910.

JODY J. BREWSTER

By: _____/s/_____
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