DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR CHIEF, POLICY AND PROCEDURES W:CP:EX:P
                        WAGE AND INVESTMENT COMPLIANCE

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                (ADMINISTRATIVE PROVISIONS AND JUDICIAL PRACTICE)

SUBJECT: Significant Service Center Advice Request:
                New Certified Mail Procedure

This responds to a request for a Significant Service Center Advice dated May 1, 2001, in connection with a question posed by Remote Exam. This document is not to be cited as precedent.

ISSUE:

Whether the Postal Forms 3877 under the proposed procedure will be accepted as valid by a federal court.

CONCLUSION:

The omission of the taxpayer identification number from "the A list" Form 3877 would not render Form 3877 inadmissible in a federal court.

BACKGROUND:

The new certified mail procedure as proposed mirrors the way certified mail is processed for cases subject to the Tax Equity and Fiscal Responsibility Act of 1986 (TEFRA). It is our understanding that a request been made to modify current procedures to delete taxpayer identification numbers from Postal Service Form 3877 before presenting it to the Postal Service for Postmark. There are concerns whether presenting a taxpayer's social security number (SSN) to the United States Post Office on Form 3877 is necessary.

Current Form 3877 includes taxpayer identification numbers, but under the new certified mail procedure as proposed, the taxpayer identification number will be deleted on the Form that is actually presented to the United States Postal Service. Under the proposed procedures, two Forms 3877 would be generated, rather than one. The

taxpayer identification number would be deleted from the copy presented to the Postmaster for postmark. The postmark stamped list, "the A list," would then be associated with the list containing the identifying numbers, i.e., "the B list."

LAW AND ANALYSIS

Section 6212 of the Internal Revenue Code provides, in part, that if the Secretary determines that there is a deficiency in respect of any tax imposed by Subtitle A or B of chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Section 6212(b)(1) provides a safe harbor for the Internal Revenue Service (Service) where the taxpayer fails to actually receive a notice of deficiency. Under the safe harbor, a notice of deficiency will be valid regardless of actual receipt by the taxpayer if it is mailed to the taxpayer's last known address. King v. Commissioner, 88 T.C. 1042 (1987), affd. 857 F.2d 676 (9th Cir. 1988). The Service is entitled to treat the address on the taxpayer's most recently filed return as the last known address absent clear and concise notification of a new address. Abeles v. Commissioner, 91 T.C. 1019, 1035 (1988); Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), affd. without published opinion 538 F.2d 334 (9th Cir. 1976).

Petitioner has the burden of proving that the notices of deficiency were not sent to his last known address. Mollet v. Commissioner, 82 T.C. 618, 625 (1984), affd. without published opinion 757 F.2d 286 (11th Cir. 1985). However, the government bears the burden of proving proper mailing of the notice of deficiency by competent and persuasive evidence. August v. Commissioner, 54 T.C. 1535, 1536-1537 (1970). See also, Coleman v. Commissioner, 94 T.C. 82, 90 (1990) (government is required to show by competent and persuasive evidence that the notice of deficiency was mailed); Cataldo v. Commissioner, 60 T.C. 522, 524 (1973), aff'd per curiam 499 F.2d 550 (2nd Cir. 1974).

The Service has historically and routinely used Postal Service Form 3877 to establish that a notice of deficiency was mailed to a taxpayer. A properly completed Form 3877 reflects compliance with established procedures of the Service for mailing notice of deficiency. Keado v. United States, 853 F.2d 1209, 1212-1213 (5th Cir. 1988). Accordingly, where the existence of the notice is not disputed, a properly completed Form 3877 by itself is sufficient absent evidence to the contrary, to establish that the notice was properly mailed to a taxpayer. United States v. Zolla, 724 F.2d 808, 810 (9th Cir.), cert. denied 469 U.S. 830 (1984); United States v. Ahrens, 530 F.2d 781, 784 (8th Cir. 1976). Compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of the government. United States v. Ahrens, 530 F.2d at 785-786. This presumption may shift the burden of going forward to the taxpayer. Fed. R. Evid. 301. To prevail, the taxpayer must rebut the presumption by affirmatively showing that respondent failed to follow his established procedures.

United States v. Ahrens, 530 F.2d at 785-786.

The omission of the taxpayer identification number from "the A list" Form 3877 would not render these documents inadmissible in a federal court. For example, the omission of this information would have no effect on the foundation requirements of Fed. R. Evid. 803(6) should a hearsay objection be made nor would it effect the procedure to authenticate the Form 3877 as a record of regularly conducted activity under Fed. R. Evid. 902.

Likewise,"the B list" Form 3877 should be admissible. To the extent a problem arose with respect to taxpayers with identical or almost identical names living at the same address, "the B list" Form 3877 could be submitted to the court. This would establish the taxpayer identification number of the taxpayer listed on "the A list" Form 3877. We would recommend that you set out the certified mail article number in the notices of deficiency or other appropriate notice for identification purposes.

If you have questions or need additional assistance in this matter, please contact Branch 3 of the Office of Assistant Chief Counsel (Administrative Provisions and Judicial Practice) at 202-622-7940.