

17926

BY THE COMPTROLLER GENERAL
**Report To The Joint Committee
On Taxation
Congress Of The United States**
OF THE UNITED STATES

Streamlining Legal Review Of Criminal Tax Cases Would Strengthen Enforcement Of Federal Tax Laws

IRS expends extensive resources investigating many criminal tax cases which do not lead to prosecutive recommendations or convictions. While this is understandable and unavoidable to some extent, readily available legal assistance during investigations could reduce those resource expenditures and improve IRS' productivity.

The existing legal review process for criminal tax cases consists almost entirely of sequential, postinvestigative reviews by three separate groups of Government attorneys. This process is time-consuming and duplicative and needs to be restructured. GAO presents various alternatives for doing so.



GGD-81-25
APRIL 29, 1981

016698



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-201235

The Honorable Daniel Rostenkowski
Chairman, Joint Committee on
Taxation

The Honorable Robert Dole
Vice Chairman, Joint Committee
on Taxation
Congress of the United States

This report, in response to your committee's request, discusses the need to restructure the existing time-consuming and duplicative legal review process for criminal tax cases. Together, the actions proposed by the Department of Justice and the Internal Revenue Service do not adequately address the problems cited in the report. Therefore, the Congress ultimately may have to decide whether revisions to the legal review process are needed and what form those revisions should take.

As arranged with your committee, we are sending copies of this report to other congressional committees, individual members of the Congress, and other interested parties.

A handwritten signature in black ink, reading "Milton F. Aoulan". The signature is written in a cursive style with a large, stylized 'M' and 'A'.

Acting Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT
TO THE JOINT COMMITTEE ON
TAXATION
CONGRESS OF THE UNITED STATES

STREAMLINING LEGAL
REVIEW OF CRIMINAL
TAX CASES WOULD
STRENGTHEN ENFORCE-
MENT OF FEDERAL
TAX LAWS

D I G E S T

The efficiency and effectiveness of the Federal Government's tax enforcement efforts have been hampered by a time-consuming and duplicative legal review process for criminal tax cases. Each year, about 75 percent of the investigations conducted by the Internal Revenue Service's (IRS) Criminal Investigation Division do not lead to prosecutive recommendations or convictions. These investigations consume over 100,000 staff days annually.

Readily available legal assistance during investigations could reduce such staff day expenditures, thus improving the Criminal Investigation Division's productivity in terms of the quality and timeliness of its investigations. However, it routinely does not obtain that assistance until after investigations are completed. The current legal review process is not conducive to providing timely assistance because it consists almost entirely of sequential, postinvestigative reviews by IRS' District Counsel, the Justice Department's Tax Division, and, finally, the cognizant U.S. Attorney.

Many criminal tax cases are declined for prosecution by IRS or Justice Department attorneys who determine that such cases do not meet certain legal standards. Often, an attorney could have detected legal deficiencies during the investigative process. Earlier detection would result in more timely Criminal Investigation Division decisions to discontinue certain investigations, thus freeing special agents to investigate other cases. (See pp. 5 to 10.)

IRS recognized that the Criminal Investigation Division needs legal assistance during its investigations. It established a means whereby special agents can seek such assistance by pre-referring a case to IRS attorneys at any point

during an investigation. While this prereferal mechanism has proven useful in some instances, it has not been used in many cases and has not fully met the Criminal Investigation Division's needs. (See pp. 10 and 11.)

The present legal review system for criminal tax cases is time-consuming. Despite a 1978 reorganization of the IRS Chief Counsel's office aimed at enhancing the quality and timeliness of all IRS legal services, District Counsel attorneys still take about 6 months, on the average, to review recommendations for prosecution. Cases approved by IRS attorneys are forwarded to Justice's Criminal Section for a second review. Despite recent managerial improvements, the Criminal Section's review often consumes another 6 months. Then, approved cases are forwarded to U.S. Attorneys for a third legal review and prosecution, if warranted. Delays caused by the legal review process for criminal tax cases reduce IRS' effectiveness in various ways. (See pp. 11 to 17 and pp. 19 to 21.)

The sequential legal review process for criminal tax cases is also duplicative and unnecessary. In conducting their separate legal reviews, both IRS and Criminal Section attorneys seek to determine whether sufficient evidence exists to prove a tax crime has been willfully committed, and whether a reasonable probability of conviction exists. (See pp. 17 to 19.)

Although the legal review process clearly needs restructuring, the best means for doing so is not clear. GAO presents various alternatives for revising the process, all of which call for partial or complete elimination of one of the three current review levels. Each of the alternatives has advantages and disadvantages, as well as cost implications. The Justice Department and IRS need to consider these and other alternatives and develop a more efficient and effective legal review process for criminal tax cases. (See pp. 24 to 35.)

GAO proposes that any revised process (1) provide a means through which the Criminal Investigation Division can obtain timely legal assistance during its investigations, (2) improve timeliness and eliminate any unnecessary duplication and costs, (3) ensure that criminal tax cases receive a high quality, independent legal review before they are prosecuted, and (4) safeguard the legal rights of taxpayers. (See p. 24)

RECOMMENDATION

The Attorney General and the Commissioner of Internal Revenue should jointly develop a streamlined legal review process for criminal tax cases. (See p. 35.)

RECOMMENDATION TO THE CONGRESS

Because enforcing the tax laws involves separate governmental entities with their own budgets, the Congress should ensure that the Treasury and Justice Departments develop a streamlined legal review process for criminal tax cases and that any revised system realizes potential cost savings while safeguarding taxpayers' legal rights. (See p. 35.)

AGENCY COMMENTS

Both IRS and Justice agreed that (1) the existing legal review process for criminal tax cases needs to be streamlined and (2) any revised process must meet the criteria proposed by GAO. They were unable to develop a mutually agreeable approach to streamlining the process, however. (See pp. 21 to 23 and pp. 35 to 37.)

Justice reevaluated its policies and procedures and planned to significantly revise its process for reviewing criminal tax cases. IRS, however, presented no specific plan for changing its procedures. IRS did state that it would try to provide increased legal assistance to the Criminal Investigation Division during its investigations. (See pp. 15 to 16 and pp. 35 to 37.)

IRS cited its basic philosophy and existing delegation orders as reasons why it must retain its separate postinvestigative review of criminal tax cases and why it cannot consider a major restructuring of the legal review process.

Justice, on the other hand, referred to IRS' current legal review as duplicative of that conducted by the Tax Division. It described the role of IRS attorneys as that of conducting a thorough technical review and providing assistance to special agents during investigations. In this regard, Justice suggested that GAO's first alternative for revising the current legal review process be considered and tested. (See pp. 35 to 37.)

The American Bar Association's Section on Taxation agreed that the present legal review process for tax cases can and should be improved and accelerated. However, it believes that the present tiered review process should be retained. (See p. 37.)

Recognizing that the responsibility for ensuring the legal quality of criminal tax cases rests primarily with the Attorney General, GAO sees no need for IRS to duplicate Justice Department legal review functions. IRS' principal responsibility is to investigate criminal tax violations and recommend prosecution. GAO believes, therefore, that the most appropriate role for IRS attorneys is to provide legal assistance to the Criminal Investigation Division during investigations, as needed. (See pp. 35 to 37.)

Together the actions proposed by IRS and Justice do not adequately address the legal review processing problems cited by GAO. Therefore, the Congress ultimately may have to decide whether revisions are needed and what form those revisions should take. (See pp. 35 to 37.)

Justice, IRS, and the American Bar Association's Section on Taxation made many specific comments, which are discussed, as appropriate, in the body of the report.

C o n t e n t s

		<u>Page</u>
DIGEST		i
CHAPTER		
1	INTRODUCTION	1
	IRS' role: to investigate criminal tax violations and recommend prosecution	1
	The Justice Department's role: to review and prosecute criminal tax violations	2
	Objectives, scope, and methodology	3
2	SEQUENTIAL, POSTINVESTIGATIVE LEGAL REVIEWS REDUCE IRS' EFFECTIVENESS IN ENFORCING THE CRIMINAL TAX LAWS	5
	Legal assistance during investigations would enhance CID's productivity	5
	Sequential legal reviews of CID prosecutive recommendations are time-consuming and duplicative	11
	Sequential legal reviews reduce IRS' effectiveness	19
	Conclusions	21
	Agency comments and our evaluation	21
3	ALTERNATIVE APPROACHES TO RESTRUCTURING THE LEGAL REVIEW PROCESS FOR CRIMINAL TAX CASES	24
	Concurrent District Counsel review of ongoing CID investigations	25
	Expanding District Counsel's pre-referral process and streamlining the review process for certain cases	29
	Eliminating District Counsel's criminal tax functions	30
	Expanding the prereferral process and eliminating legal review by the Criminal Section of Justice's Tax Division	31

	<u>Page</u>
 CHAPTER	
3	
Providing for concurrent legal re- views by District Counsel, the Criminal Section, and U.S. Attor- neys	32
Eliminating District Counsel and Criminal Section legal reviews of criminal tax cases	33
Conclusions	34
Recommendation	35
Recommendation to the Congress	35
Agency comments and our evalua- tion	35

APPENDIX

I	Digest of GAO report entitled "Improved Planning for Developing and Selecting IRS Criminal Tax Cases Can Strengthen Enforcement of Federal Tax Laws" (GGD-80-9, Nov. 6, 1979)	38
II	Letter dated December 31, 1980, from the Assistant Attorney General for Administration	43
III	Letter dated January 7, 1981, from the Acting Commissioner of Internal Revenue	47
IV	Letter dated January 5, 1981, from the American Bar Association's Section on Taxation	57

ABBREVIATIONS

CID	Criminal Investigation Division
GAO	General Accounting Office
IRS	Internal Revenue Service

CHAPTER I

INTRODUCTION

To maintain the integrity of our Nation's voluntary compliance tax system, the Federal Government must seek out and prosecute persons who willfully violate the tax laws. The growing complexity and diversity of our economic and tax systems, however, have increased the opportunities for and the incidence of tax fraud. The news media is replete with reports about tax protesters, corporate slush funds, tax haven abuses, multiple false claims for refunds, and other tax evasion schemes. In August 1979, the Internal Revenue Service (IRS) estimated that, for tax year 1976, individuals failed to report up to \$135 billion of income from legal and certain illegal sources involving tax revenue losses to the United States of up to \$25 billion.

IRS' Criminal Investigation Division (CID) is responsible for enforcing the criminal provisions of the tax laws. The most frequently prosecuted tax law violations are willful attempts to evade tax and failure to file returns. CID has about 2,800 special agents to deal with the tax fraud problem. Its fiscal year 1980 appropriation was \$139 million. CID's organization, like IRS in general, is highly decentralized among 7 regions, 58 districts, and 10 service centers.

This report, which was done at the request of the Joint Committee on Taxation, deals with the legal review and processing of criminal tax cases by IRS and the Department of Justice. It is the companion to our November 1979 report on the case development and selection aspects of IRS' criminal investigative activities. ^{1/} In that report, we pointed out the need for better long- and short-range planning and better management guidance at the front end of the criminal tax investigative process, that is, when information is developed and investigations are initiated. (Appendix I contains the digest of that report.) Together, the two reports provide a comprehensive overview and assessment of the Federal Government's criminal tax enforcement efforts.

IRS' ROLE: TO INVESTIGATE CRIMINAL TAX VIOLATIONS AND RECOMMEND PROSECUTION

As discussed in detail in our companion report, district office CID special agents develop criminal tax cases through preliminary investigation and evaluation of three basic sources

^{1/}"Improved Planning for Developing and Selecting IRS Criminal Tax Cases Can Strengthen Enforcement of Federal Tax Laws" (GGD-80-9, Nov. 6, 1979).

of information concerning alleged criminal tax violations:
(1) referrals from IRS' Examination and Collection Divisions,
(2) self-initiated information gathering efforts, and (3) information items received from the public and other sources.

Once CID initiates a detailed criminal investigation, there are three possible results--cases may be discontinued at any point, completed without a recommendation for prosecution, or completed and recommended for prosecution. Those criminal tax cases which district CID chiefs believe warrant prosecution are forwarded to the appropriate IRS District Counsel for legal review. District Counsel attorneys are located in 44 offices throughout the Nation and operate under the general guidance of IRS' Chief Counsel in Washington, D.C., and 7 regional counsels. Within the Chief Counsel's office, the Director of IRS' Criminal Tax Division has primary responsibility for establishing policies and procedures governing criminal tax matters.

In reviewing criminal tax cases, District Counsel attorneys seek to determine whether a crime has been committed and whether a reasonable probability of conviction exists. Criminal tax cases approved by the District Counsel are forwarded to the Justice Department for legal review and prosecution, if warranted.

THE JUSTICE DEPARTMENT'S ROLE:
TO REVIEW AND PROSECUTE
CRIMINAL TAX VIOLATIONS

The Criminal Section of the Justice Department's Tax Division has principal responsibility for reviewing and processing criminal tax cases referred by IRS for prosecution. The Tax Division is headed by an Assistant Attorney General and three Deputies, one of whom heads the Criminal Section. The section is staffed by a chief, five assistant chiefs, and 55 attorneys.

Like IRS District Counsel attorneys, Criminal Section attorneys seek to determine whether a crime has been committed and whether a reasonable probability of conviction exists. However, the Criminal Section has the additional responsibility of ensuring a consistent and uniform prosecutive policy for criminal tax cases throughout the Nation. Cases which meet Justice's standards are forwarded to the cognizant U.S. Attorney for review and prosecution.

The 94 U.S. Attorneys located throughout the Nation are under the general supervision of the Attorney General and Justice's Executive Office for U.S. Attorneys. U.S. Attorneys are responsible for prosecuting suspected Federal criminal law violators on behalf of the Government. Thus, they also must conduct legal reviews of criminal tax cases in preparation for actual case prosecutions.

If a U.S. Attorney concurs with the Criminal Section's prosecutive recommendation, he or she will prosecute the case. However, U.S. Attorneys often request and receive assistance from Criminal Section attorneys in prosecuting tax cases. When U.S. Attorneys disagree with Criminal Section prosecutive determinations, Section attorneys can prosecute on their own initiative.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our objective in performing this review centered on answering the following questions:

- How efficient is the legal review process for criminal tax cases?
- Is there any duplication of effort in the existing process?
- Does IRS use its attorneys in the most effective manner in its criminal tax enforcement efforts?
- Does the length of the review process have any effects on IRS efforts to promote voluntary compliance?
- Are there alternative approaches to the existing legal review process which might yield better results?

We did not seek to compare the quality of legal decisions at one review level with those made at another level; we did, however, evaluate the functional roles and degree of specialization of the attorney groups involved in the legal review process.

To achieve our objectives, we reviewed randomly selected samples of (1) active and closed criminal tax cases, (2) cases which required supplemental CID investigation after they were reviewed by IRS attorneys, (3) cases declined for prosecution by IRS attorneys, (4) cases declined for prosecution by attorneys assigned to the Criminal Section of Justice's Tax Division, (5) cases under review by IRS attorneys, and (6) cases under review by Criminal Section attorneys. Details concerning the specific purpose and scope of each sample are included in the text of the report.

In carrying out this review, we sought to evaluate the existing legal review process for criminal tax cases from the standpoint of the affected taxpayer and the Government as a whole. The report is based on the principle that the Justice Department is the Federal Government's prosecuting attorney in light of its legally prescribed functions and responsibilities.

In carrying out this evaluation, we reviewed the laws, plans, policies, and procedures IRS and the Department of Justice follow in reviewing and prosecuting criminal tax cases. We interviewed IRS and Department of Justice officials and performed audit work at IRS headquarters in Washington, D.C.; IRS regional offices in Chicago, Dallas, New York, and San Francisco; and IRS district offices in Boston, Chicago, Dallas, and Los Angeles. We also did work at the Department of Justice in Washington, D.C.; and U.S. Attorneys' offices in Boston, Chicago, Dallas, and Los Angeles.

CHAPTER 2

SEQUENTIAL, POSTINVESTIGATIVE

LEGAL REVIEWS REDUCE IRS' EFFECTIVENESS

IN ENFORCING THE CRIMINAL TAX LAWS

Each year, about 75 percent of CID's investigations do not lead to prosecutive recommendations or convictions. These cases are either discontinued during the investigative process or declined during the legal review process after being recommended for prosecution. These investigations consume over 100,000 CID staff days annually. Such resource expenditures are understandable and unavoidable to some extent. However, readily available legal assistance during investigations could reduce those staff day expenditures and improve CID's productivity in terms of the quality and timeliness of investigations.

Despite CID's need for legal assistance during investigations, it does not routinely obtain such assistance until after investigations are completed and, if warranted, recommended for prosecution. The current legal review process is not conducive to providing timely assistance because it consists almost entirely of sequential, postinvestigative reviews by IRS' District Counsel, the Justice Department's Tax Division, and, finally, the cognizant U.S. Attorney. These sequential reviews are time-consuming and duplicative.

The current legal review process does little to promote CID's efficiency and effectiveness or the equitable treatment of taxpayers. Thus, there is a clear need to revise it. But, the best means for doing this is not so clear. There are various alternatives, each having advantages and disadvantages. These alternatives are discussed in chapter 3.

LEGAL ASSISTANCE DURING INVESTIGATIONS WOULD ENHANCE CID'S PRODUCTIVITY

Many CID cases declined for prosecution by IRS or Justice Department attorneys contain legal deficiencies which could have been detected during the investigative process. Earlier detection of such problems could allow for their timely correction during the investigative process. Earlier detection could also result in more timely CID decisions to discontinue certain investigations, thus freeing special agents to investigate other cases.

Despite the substantial resources CID expends on each recommendation for prosecution, IRS and Justice Department attorneys consistently deem many of them defective, as evidenced by the following IRS statistics.

	<u>Fiscal year (note a)</u>				
<u>Legal review level</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>
District Counsel:					
Cases reviewed	2,386	2,425	2,414	2,759	2,089
Declinations	349	264	261	376	367
Percent declined	14.6	10.9	10.8	13.6	17.5
Criminal Section:					
Cases reviewed	1,726	1,595	1,945	1,810	1,436
Declinations	240	222	336	424	431
Percent declined	13.9	13.9	17.3	23.4	30.0
U.S. Attorneys:					
Cases reviewed	1,547	1,910	1,993	2,245	1,818
Declinations	216	274	269	425	369
Percent declined	14.0	14.3	13.5	18.9	20.3

a/These statistics must be viewed from the standpoint of an overall trend because opening and closing inventories vary from year to year and because cases which enter the legal review process one year often remain active in subsequent years. Also, fiscal year 1980 statistics are through June 30, 1980.

Some criminal tax cases are declined for reasons beyond CID's control, such as the death of a taxpayer or his/her conviction for other violations. On the other hand, as shown by the following table, many cases are declined by IRS or Justice Department attorneys who determine that such cases do not meet certain legal standards.

<u>Reasons for declination</u>	<u>Fiscal years 1976 through 1979</u>			
	<u>Number of declinations by IRS attorneys</u>	<u>Percent of total IRS declinations</u>	<u>Number of declinations by Justice attorneys</u>	<u>Percent of total Justice declinations</u>
Insufficient evidence	198	15.8	276	11.5
Amount of additional tax due too small	166	13.3	220	9.1
Investigation failed to prove willful intent	201	16.1	152	6.3
Lack of jury appeal	64	5.1	168	7.0
Key witnesses unavail- able or unreliable	54	4.3	105	4.4
Investigation did not clearly show who was responsible	90	7.2	76	3.1

Our analysis of randomly selected cases in four districts--Boston, Chicago, Dallas, and Los Angeles--for the 18 months ended June 30, 1978, disclosed that earlier attorney involvement could have, in many instances, prevented unnecessary resource expenditures. Specifically, we analyzed 38 of the 83 cases in which District Counsel attorneys determined, through their post-investigative review, that CID would have to do supplementary investigative work to resolve legal questions in an effort to make the cases prosecutable. We also reviewed 26 of the 44 cases declined for prosecution by District Counsel attorneys and all 27 cases declined by attorneys from the Criminal Section of Justice's Tax Division.

For the cases involving supplemental investigative work, we determined that 13, or 35 percent, contained legal problems which could have been detected by an attorney during the investigative process. Similarly, 20, or 75 percent, of the 26 cases declined by IRS attorneys and 10, or 37 percent, of the 27 cases declined by Justice attorneys contained legal problems that an attorney could have detected during the investigative process.

For example:

- CID recommended prosecution of an individual who diverted corporate proceeds and failed to report them as income. In its subsequent review of the case, District Counsel detected numerous legal deficiencies. In his memorandum referring the case back to CID for further investigation, the responsible attorney stated, "We cannot urge you too strongly to discuss such matters in a prereferral setting because it will save much time and effort for both your office and ours. We simply do not have the manpower to review cases twice which is the practical result of having to ask for extensive supplemental information."
- CID investigated a taxpayer and his corporation and recommended prosecution on the basis of unreported income for 3 consecutive years. The District Counsel review, however, disclosed that CID had not clearly shown whether the individual, the corporation, or both parties were culpable. District Counsel declined prosecution. However, the attorney who reviewed this case told us that he could have detected the legal deficiency during the investigation if he had been given the opportunity to do so.
- CID opened an investigation on an individual who allegedly failed to report consulting and architectural fees he had earned. CID was involved in the investigation for 19 months and did not consult with District Counsel before submitting a prosecutive recommendation. District Counsel's review disclosed deficiencies in the testimony of some witnesses, a failure by CID to interview other prosecutive witnesses, and a general absence of sufficient information to convict. District Counsel declined prosecution. However, if legal advice had been sought during the investigation, the deficiencies could have been remedied earlier, or the case could have been identified as one lacking prosecutive merit.
- A narcotics trafficker understated his income by about \$130,000 during a 3-year period. Justice declined prosecution because the taxpayer already was serving a 9- to 10-year jail sentence on narcotics charges. The District Counsel attorney who reviewed and approved this case told us that he recognized that Justice would decline prosecution on the basis of its "dual prosecution" policy. That policy requires that all offenses arising out of a single transaction, such as drug trafficking and evasion of taxes on the resulting profits, must be tried together. The attorney further stated, however, that because the taxpayer had not exhausted all appeals on the drug charges,

he had no choice but to forward the tax case to Justice. An IRS attorney, involved in this case from the outset, could have advised CID to discontinue its investigation during its early stages, thus saving resources.

Overall statistics on (1) the number of staff days CID spends annually on discontinued cases and (2) the number of investigations requiring supplemental work are further evidence of CID's need for ongoing legal assistance. For fiscal years 1978 through 1980, CID expended an average of 113,282 staff days annually on an average of 5,265 investigations which did not lead to recommendations for prosecution. Such resource expenditures are, to a certain extent, understandable and unavoidable. Nevertheless, a stated CID goal is to minimize the number of staff days applied to such cases. As demonstrated above, legal assistance during investigations would enable CID to better achieve that goal. This is because early detection of legal deficiencies in cases would lead to more timely CID decisions to discontinue low-potential cases.

Similarly, legal assistance during investigations would obviate the need for supplemental investigative work. In reviewing cases recommended by CID for prosecution, IRS attorneys may detect various legal deficiencies. Rather than declining prosecution on such cases immediately, IRS attorneys can request CID to perform supplemental investigative work to remedy case deficiencies.

In fiscal year 1979, for example, 229, or 8 percent, of 2,759 cases reviewed by District Counsel attorneys required supplemental investigative work. According to IRS officials, these statistics do not include informal and/or unrecorded supplemental requests which frequently are made by District Counsel attorneys. Conducting such additional work is time-consuming. For example, the 38 supplementals we reviewed took an average of 73 calendar days to complete. Also, supplementals affect CID's effectiveness in that special agents' attention to ongoing cases necessarily declines as they devote time to supplemental investigations.

In commenting on a draft of this report, the American Bar Association's Section on Taxation pointed out that criminal tax investigations which do not result in convictions may not necessarily represent a waste of Federal money. Because such investigations certainly affect the compliance attitude of the subject taxpayers, as well as other taxpayers who become aware of the investigations, they cannot be considered wasteful. Also, such investigations often lead to civil tax adjustments and penalties.

A stated CID goal, however, is to achieve the maximum deterrent effect on would-be tax law violators by bringing recent violations to the public's attention. In our view, the deterrent effect of an essentially private investigation cannot match the effect of a conviction which receives local, regional, or national publicity.

The Section also pointed out that declinations often occur because special agents have not recognized fatal case weaknesses. Agreeing with our assessment, the Section noted that the "declination problem begins at the agent and supervisor level, and it is less expensive and more productive to cure the problem at this level."

IRS has recognized that CID needs legal assistance during its investigations. It has established a means whereby CID can seek such assistance by prereferring a case to IRS attorneys at any point during an investigation. Although this prereferral mechanism has proven useful in some instances, it has not been used in many cases and has not fully met CID's needs.

We reviewed 219 of 1,302 cases initiated by 4 IRS districts--Boston, Chicago, Dallas, and Los Angeles--during the 18 months ending March 31, 1978. In assessing the complexity of the 219 cases, CID managers indicated a need for legal assistance in 147 cases. Legal assistance was requested, however, in only 63, or 43 percent, of the 147 cases. Fifty-eight, or 69 percent, of the 84 cases in which CID did not seek legal assistance subsequently were discontinued. CID managers, special agents, and District Counsel attorneys gave us numerous reasons why IRS' prereferral mechanism has not been fully effective.

- CID personnel often prefer not to take the time to seek prereferral advice because their performance is measured in part on the basis of timely completion of investigations.
- District Counsel attorneys feel that CID personnel want almost instantaneous responses to complex legal questions which must be researched in detail.
- Initiating a prereferral meeting requires extra paperwork for special agents. Similarly, District Counsel attorneys are required to document the results of such discussions. The additional paperwork involved does little to encourage use of the prereferral mechanism.
- According to CID personnel, District Counsel attorneys often render one legal opinion during a prereferral conference and a different one during their final review of a case. Conversely, many attorneys feel that CID personnel fail to present all the facts during prereferral discussions, thus causing them to render different opinions.

- Many special agents perceive an adversary relationship between CID and District Counsel. This, of course, does not promote cooperative efforts on investigations.
- The effectiveness of IRS' prereferral mechanism depends primarily on CID's ability to recognize legal issues as they develop. Attorneys do not get involved in the investigative process unless CID initiates a request for legal assistance.
- Prereferral discussions, when held, usually center on narrow issues. Attorneys rarely take the time to fully evaluate a developing case.

There are various ways in which IRS can ensure that CID systematically obtains needed legal assistance during investigations. These are discussed in detail in chapter 3, which presents various alternative means for revising the existing legal review process for criminal tax cases.

SEQUENTIAL LEGAL REVIEWS OF CID PROSECUTIVE RECOMMENDATIONS ARE TIME-CONSUMING AND DUPLICATIVE

Although CID needs ongoing legal assistance to conduct effective and efficient investigations, it does not routinely seek and/or obtain such assistance. Instead, its investigations are subjected to a time-consuming, duplicative, postinvestigative legal review process. As a result:

- Cases which are successfully prosecuted produce less deterrent effect. They do so because tax crimes often are brought to the public's attention many years after violators commit them.
- Cases declined by legal reviewers can, in many instances, involve inequitable treatment of taxpayers by IRS. This can happen because certain taxpayers, who are legally innocent unless and until found guilty, undergo potentially traumatic criminal tax investigations for unnecessarily long time periods.

Legal reviews are time-consuming

With few exceptions, CID completes its investigations in less than 18 months with the average case completed in less than 12 months. But sequential reviews by IRS' District Counsel, the Criminal Section of Justice's Tax Division, and U.S. Attorneys prevent early prosecution of those cases.

District Counsel review: recent
reorganization has not improved
timeliness

In July 1978, IRS reorganized its Chief Counsel's office with a view toward upgrading the quality and timeliness of all legal services. However, with respect to legal reviews of criminal tax cases, timeliness has not improved. IRS attorneys still require at least 6 months time, on average, to review and approve or decline CID recommendations for prosecution.

IRS' Chief Counsel has set forth 3 months as the maximum acceptable processing time for District Counsel reviews of CID prosecutive recommendations. To determine if IRS attorneys were meeting that goal, we analyzed 75 of 156 cases under review by IRS attorneys in 4 locations on June 30, 1978. For the most part, as evidenced by the following statistics, District Counsel attorneys were not meeting the 3-month goal.

<u>Location</u>	<u>Number of cases reviewed</u>	<u>Processing time (months)</u>		
		<u>Average</u>	<u>Range</u>	
			<u>Minimum</u>	<u>Maximum</u>
Boston	19	8.4	1	17
Chicago	25	5.7	1	15
Dallas	12	5.3	3	9
Los Angeles	19	6.2	1	14

Our analysis of these sample cases and extensive discussions with IRS attorneys and CID group managers disclosed that numerous factors contributed to case processing delays. Chief among these were the following:

- In accordance with IRS policy, a taxpayer has a right to a conference with District Counsel attorneys. During the conference, the taxpayer may cite possible defenses that will be used should the case eventually go to court. Generally, IRS attorneys prefer to conduct their detailed case reviews after conferences have been held. This enables them to analyze cases in light of anticipated defenses. However, it generally takes at least 1 month to schedule and conduct a conference. Thus, detailed legal reviews of CID prosecutive recommendations usually are not initiated until at least 1 month after CID officially forwards a case to District Counsel.
- Some IRS attorneys had responsibility for civil tax cases as well as criminal tax cases. Invariably, civil cases take priority over criminal cases simply because civil cases must be handled as scheduled court dates near.

Criminal cases, on the other hand, need only be handled before expiration of the statute of limitations. As discussed on the following pages, a recent reorganization within IRS has compounded this problem.

--Cases often are reassigned from one IRS attorney to another, thus causing processing delays.

--IRS attorneys often spot legal flaws in cases which must be corrected before a decision can be made on prosecutive potential. In such instances, attorneys issue requests for supplemental investigative work by CID. Then they suspend further case review pending a response from CID.

The July 1978 reorganization of the IRS Chief Counsel's office mandated a multifunctional role for IRS line attorneys. Since then, each IRS line attorney has had responsibility for three legal functions--tax litigation, general litigation, and criminal tax matters. As a result, IRS no longer has any line attorneys who specialize in criminal tax matters.

The reorganization did make more line attorneys available to review criminal tax cases. But, every line attorney now handles civil tax cases as well, and many of those cases have specifically designated court docket dates. Since criminal cases under review by IRS attorneys do not have such dates, civil cases tend to take precedence. As a result, the overall timeliness of criminal tax case processing by IRS attorneys has not improved.

IRS region	Percentage of cases in process on 3/31/77			Percentage of cases in process on 6/30/80		
	0-6 months	7-12 months	13 or more months	0-6 months	7-12 months	13 or more months
North-Atlantic	52	36	12	51	27	22
Mid-Atlantic	63	26	11	56	34	10
Southeast	88	10	2	77	18	5
Central	70	24	6	87	12	1
Midwest	75	22	3	68	22	10
Southwest	64	16	20	69	22	9
Western	78	15	7	62	29	9
Nation-wide	68	23	9	64	26	10

Thus, IRS' reorganization of its Chief Counsel's office has done little to promote quicker processing of criminal tax cases by IRS attorneys.

In commenting on a draft of this report, IRS stated that Chief Counsel has, since the fall of 1979, sought to reduce its inventory of cases in process for more than 90 days. IRS further

stated that, as a result of Chief Counsel's efforts, the average number of cases in process has declined significantly. However, as IRS states, its statistics disregard cases involving a request for supplemental investigative work as well as cases scheduled for declination pending a final discussion between District Counsel and CID. Both exclusion categories cited by IRS consist primarily of cases which have been reviewed in full by IRS attorneys. Thus, such cases are likely to fall into the overage category. By excluding them, IRS' statistical analysis shows a marked improvement in case processing timeliness. In our view, the above table, which contains IRS-provided statistics on all cases in process, more accurately depicts the timeliness of Chief Counsel's recent case processing. Those statistics show that 36 percent of all cases in process on June 30, 1980, had been under review by District Counsel attorneys for more than 6 months.

Review by Justice's Criminal Section:
recent efforts to speed case processing
have met with some success

Criminal tax cases which already have been reviewed in detail by IRS attorneys undergo a second, independent legal review by attorneys assigned to the Criminal Section of Justice's Tax Division. Justice's review process takes another 6 months on the average. However, in response to our review, Justice attempted to speed case processing through various managerial and procedural changes. Its efforts met with some success.

Before 1977, the Chief of the Criminal Section had established 6 months as a case processing time goal. In early 1977, however, the Attorney General set 45 days as a goal. The Chief of the Criminal Section considered that goal infeasible and suggested 3 months as a more reasonable time frame for processing cases. Meanwhile, Criminal Section line attorneys often referred to the statute of limitations expiration date on each case as a real processing deadline.

Regardless of goals, the Criminal Section was experiencing serious difficulties processing criminal tax cases in a timely manner when we initiated our review. For example, in February 1978, the Criminal Section had 662 cases in process. Of these cases, 133, or about 20 percent, had been under review for 7 to 12 months. Sixty, or about 10 percent, had been with the Section for 12 months or longer.

To determine the reasons for case processing delays, we analyzed 24 randomly selected cases under review by Justice in December 1978. When we completed our work in June 1979, Justice had finished processing 18 of the 24 cases. As of June 1979, the 24 cases had, on the average, required slightly

more than 6 months' review time, and 6 cases were still with the Section. Our analysis of the 24 sample cases and extensive discussions with Criminal Section attorneys disclosed numerous reasons for the slowness in processing cases.

- A loosely defined organization structure resulted in a lack of management controls over case processing timeliness. Basically, no one in the Criminal Section had the authority over and responsibility for assuring timeliness.
- Criminal Section attorneys often were called on to prosecute cases under the general supervision of the cognizant U.S. Attorney. Prosecuting a tax case often takes weeks or months. Meanwhile, cases pending review often received no attention.
- The Criminal Section lacked a basic management information system. Top managers did not have data on which to base needed revisions to the case processing system.
- Multiple review levels within the Criminal Section consumed time. Several attorneys at different levels reviewed each case before a final decision to accept or reject was made.
- Despite a heavy caseload per attorney, the Section was slow in filling vacancies.
- Justice attorneys may, but are not required to, accede to taxpayer requests for conferences. When held, however, conferences often delay the review process because of scheduling difficulties.

Recognizing that improvements were needed in case processing timeliness, the Chief of the Criminal Section initiated several actions during our review. He reorganized the Section to improve management controls over case processing. He implemented a policy directed at minimizing case processing delays caused by attorney reassignments. The Chief also initiated development of a management information system to better control the case review process, streamlined case processing by requiring fewer levels of review within the Section, and required line attorneys to expedite the scheduling and conduct of taxpayer conferences. Finally, he brought the Criminal Section up to its authorized attorney staffing level by filling vacancies. By May 1979, as a result of these actions, only 20, or 4 percent, of 499 cases in process had been under review by the Criminal Section for more than 6 months.

Justice, in its comments on a draft of this report, cited additional steps it planned to implement on January 1, 1981, in an effort to further expedite the Criminal Section's review process. First, it planned to begin classifying cases as

complex or noncomplex on the basis of an initial reading. Non-complex cases would be forwarded directly to U.S. Attorneys for review and prosecution--a significant revision to the existing process. Complex cases would continue to receive a comprehensive review by Criminal Section attorneys--an appropriate decision, in our view. Justice also planned to assist U.S. Attorneys' offices in clearing up their existing backlog of criminal tax cases by reconsidering previous prosecutive authorizations and providing U.S. Attorneys with additional trial assistance. Finally, Justice planned to establish procedures to monitor cases referred to U.S. Attorneys to prevent future backlogs.

U.S. Attorney review: prosecution
of tax cases is time-consuming

Although reviewed from a legal standpoint by both IRS and Criminal Section attorneys, criminal tax cases usually are prosecuted by U.S. Attorneys. For numerous reasons, the actual prosecution of a tax case, like the various legal reviews, is a time-consuming matter.

In fiscal year 1979, U.S. Attorneys sought indictments in 1,820 criminal tax cases. On the average, over 6 months elapsed between the time U.S. Attorneys received cases from Justice's Criminal Section and the time indictments were returned. Also, U.S. Attorneys took a long time to reach final resolutions on criminal tax cases after obtaining indictments. The following table illustrates the extent of total processing time for the U.S. Attorneys' offices we visited and for all 94 offices.

<u>Location</u>	<u>Number of cases in process as of 6/30/80</u>	<u>Length of time in process</u>			
		<u>0-6 months</u>	<u>7-12 months</u>	<u>13-18 months</u>	<u>Over 18 months</u>
Boston	28	14	5	4	5
Chicago	144	37	29	29	49
Dallas	113	24	20	12	57
Los Angeles	142	38	45	18	41
Nation-wide	2,936	932	673	438	893

There are various reasons why the prosecution of criminal tax cases is so time-consuming. They relate in part to the nature of tax cases. Aside from the various review levels, criminal tax cases generally take longer than most criminal cases to develop because of their complexity. Thus, by the time a U.S. Attorney receives a criminal tax case for prosecution, the case has usually "aged." Dated evidence may have lost jury appeal; witnesses may have forgotten their prior statements, moved, or died; or the defendant may have developed poor health. Resolving such problems often takes U.S. Attorneys a great deal of time.

Also, upon completing his or her initial legal review of a case, a U.S. Attorney may deem it inappropriate for prosecution. In such circumstances, negotiations with the Criminal Section and efforts to resolve differences of opinion as to the merits of particular cases ensue. This, of course, takes time.

Another reason for the time-consuming nature of these prosecutions, as pointed out in several of our prior reports, ^{1/} is that U.S. Attorneys' offices historically have been beset with various problems which impede their timeliness and effectiveness. Chief among these has been too much work for too few attorneys. This and crowded court dockets have delayed the prosecution of criminal tax cases as well as other criminal cases. In light of these constraints on U.S. Attorneys, it becomes even more important to ensure rapid processing of CID prosecutive recommendations through the legal review levels that precede prosecution.

Legal reviews are duplicative

In addition to being time-consuming, the sequential legal review process for criminal tax cases is duplicative. Although their perspectives differ, both IRS attorneys and attorneys assigned to the Criminal Section of Justice's Tax Division have similar basic objectives in reviewing tax cases for potential prosecution.

Since the 1978 reorganization of the Chief Counsel's office, most IRS attorneys have been responsible for handling both civil and criminal tax matters. Their primary function with respect to criminal matters is to conduct detailed legal reviews of CID recommendations for prosecution. In doing so, District Counsel attorneys seek to determine if sufficient evidence exists to prove a tax crime has been willfully committed, and whether a reasonable probability of conviction exists.

Cases approved by IRS attorneys are forwarded to the Criminal Section of Justice's Tax Division. Criminal Section attorneys, who are specialists in tax matters, then review these cases to make the same determinations, thus generally duplicating the objectives and efforts of IRS attorneys. Also, Criminal Section attorneys sometimes prosecute the cases rather

^{1/}Prior reports: "The U.S. Magistrates: How Their Services Have Assisted Administration of Several District Courts; More Improvements Needed" (B-133322, Sept. 9, 1974); "U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws" (GGD-77-86, Feb. 27, 1978); "Reducing Federal Judicial Sentencing and Prosecuting Disparities: A Systemwide Approach Needed" (GGD-78-112, Mar. 19, 1979); "More Guidance and Supervision Needed Over Federal Grand Jury Proceedings" (GGD-81-18, Oct. 16, 1980).

than having U.S. Attorneys perform that function. For example, in June 1979, Criminal Section attorneys had primary responsibility for 104 pending criminal tax case trials.

In addition to reviewing and prosecuting tax cases, Criminal Section attorneys have the unique responsibility of ensuring that national policies and procedures for criminal tax cases are uniformly applied. As a result of their basic functions, they are in the best position to fulfill this responsibility. They are very familiar with Justice Department prosecutive policies and procedures and generally have an excellent feel for how a case will do in court. Also, since only eight Criminal Section attorneys have the authority to authorize tax prosecutions, it is easier for them to ensure the uniform application of national policies and procedures.

The importance of the Criminal Section's review is demonstrated by statistics on the number of cases approved by IRS attorneys, but subsequently declined for prosecution by Criminal Section attorneys. This approval and declination syndrome has been especially apparent since the 1978 reorganization of the IRS Chief Counsel's office when generalists rather than specialists began reviewing cases. During fiscal years 1976 through 1978--prior to the reorganization--Criminal Section attorneys declined to prosecute 798, or 15 percent, of 5,266 cases approved and referred to them by IRS attorneys. In contrast, Criminal Section attorneys rejected 424, or 23 percent, of 1,810 cases referred to them in fiscal year 1979; and 431, or 30 percent, of 1,436 cases referred to them during the first 9 months of fiscal year 1980.

These statistics raise a basic question with respect to the need for a separate, postinvestigative review by IRS attorneys prior to recommending criminal tax cases to the Justice Department for prosecution. This question seems particularly pertinent in light of (1) CID's demonstrated need for legal assistance during, rather than after, its investigations, (2) the independent reviews that are conducted by two separate groups of Justice attorneys, (3) the tax expertise of Justice headquarters attorneys, and (4) the role of Justice headquarters in maintaining a uniform prosecutive policy for criminal tax cases.

In commenting on a draft of this report, both the Justice Department and the American Bar Association's Section on Taxation agreed with our assessment of the Criminal Section's role and capabilities. Justice cited the education and work experience of its small group of expert criminal tax lawyers. The Section referred to Criminal Section attorneys' "truly

national perspective," their expertise as trial lawyers, and their insulation from local politics and pressures as reasons why these attorneys

"* * * are in a vastly better position than any District Counsel or any United States Attorney to perceive a lack of uniformity in the treatment of taxpayers from one district to another."

In discussing the effects of the 1978 reorganization of the IRS Chief Counsel's office, the Section stated that it has resulted in a loss of criminal tax expertise on the part of IRS attorneys. IRS disagreed, stating that multifunctional attorneys are in a better position than specialists to evaluate both the substantive tax and criminal aspects of a case. However, IRS qualified its position by stating that regional and district offices have flexibility in determining the extent to which attorneys should in fact handle multifunctional responsibilities. With that modification, IRS' position seems reasonable in that its attorneys should, over time, develop the appropriate level of criminal tax expertise needed to carry out their mission. The issue, however, is not whether IRS' attorneys should be multifunctional or specialized; rather, it centers on what their proper role ought to be in light of the existing time-consuming and duplicative legal review process.

SEQUENTIAL LEGAL REVIEWS REDUCE IRS' EFFECTIVENESS

Delays caused by the current process for reviewing criminal tax cases reduce IRS' effectiveness in two critical ways. First, taxpayers under investigation have a right to expect speedy resolution of matters which can significantly affect their personal and professional affairs. To do otherwise violates a basic IRS policy--equitable treatment of taxpayers. Second, the potential deterrent effect of criminal tax cases declines as they age. Yet, a stated IRS goal is to achieve maximum deterrent effect through a balanced criminal tax enforcement program.

When CID decides to initiate a detailed criminal tax investigation, the responsible special agent generally begins by interviewing the subject taxpayer and reading the taxpayer his or her rights. Thus, the taxpayer is immediately placed on notice that this is not a routine IRS audit. Yet, often, years go by before a decision is made to seek indictment or to decline prosecution. Meanwhile, the taxpayer has suffered, for a long period of time, the anxiety that accompanies such an investigation.

Both Justice and IRS officials have cited cases in which a taxpayer's health has declined significantly during the course of an investigation. The Attorney General's Advisory Committee pointed out that many judges believe that being the subject of a lengthy criminal tax investigation is punishment enough for the

average tax violator. Yet, many taxpayers, though legally innocent until proven guilty, suffer through this process for inexcusably long periods of time only to have a legal reviewer decline prosecution. In such instances, taxpayers have hardly been treated equitably.

Such occurrences do little to inspire confidence in our Nation's tax system. Rather, according to Justice and IRS officials, it is the publicizing of recent, successful prosecutions of a broad range of individuals and businesses which promotes voluntary compliance with the tax laws. But the present legal review system clearly deters early prosecution of many criminal tax cases.

The American Bar Association's Section on Taxation disagreed with our assessment. It essentially stated that any taxpayer would prefer an ongoing, lengthy legal review process over a public indictment, trial, conviction, fine, and/or imprisonment. Although that position has merit, it hardly justifies a multi-tiered, lengthy legal review process. We doubt that the length of the current process affects its ultimate result--a determination of guilt or innocence. Most important, the Government should not unnecessarily compound the burden on a taxpayer who has been subjected to a criminal tax investigation which leads only to a declination by a legal reviewer. Both Justice and IRS officials concur with our view on this matter.

Legal review and processing delays also reduce the impact of successfully prosecuted cases in three other ways. First, because of the statute of limitations, delays have resulted in a loss of the number of counts on which a person can be tried. For example, an individual who has failed to file a tax return for 3 consecutive years might only be convicted for 1 or 2 of those years because of the statute of limitations, thus receiving a lighter sentence. Second, according to U.S. Attorneys, the lapse of time between the commission of a crime and its prosecution makes it very difficult to persuade trial judges to impose meaningful sentences. In such situations, it is not uncommon for tax evaders to avoid jail terms and receive minimal fines. Finally, delays in prosecuting and convicting tax evaders prevent the early collection of past due taxes, penalties, and fines.

The American Bar Association's Section on Taxation again disagreed with our assessment. It does not believe there is any conclusive evidence that a lengthy legal review process detracts from the successful prosecution of a case. Although

the length of the process may have little effect on a determination of guilt or innocence, processing delays, as a general proposition, can (1) result in loss of counts to the statute of limitations, (2) affect sentencing decisions, and (3) prevent early collection of overdue taxes. In light of recent interest rate levels, it behooves the Government to collect such taxes as quickly as possible.

CONCLUSIONS

IRS seeks to promote voluntary compliance with the tax laws by treating taxpayers in an equitable manner and by achieving a balanced criminal tax enforcement program aimed at deterring would-be violators. However, the current legal review process, which requires that cases be reviewed consecutively by three separate groups of Government attorneys, hardly promotes such goals because it is time-consuming and unnecessarily duplicative. Each year, many taxpayers learn that legal reviewers have declined to prosecute them after they have been subjected to the trauma of a lengthy investigation. Moreover, the impact of successfully prosecuted cases is lessened because the cases often are several years old before they are brought to the public's attention and before the Government can collect past due taxes, penalties, and fines.

The present sequential, postinvestigative legal review process continues to exist despite its time-consuming and duplicative nature and IRS' recognition that CID needs legal assistance during, rather than after, its investigations. In addition, the review process seems to be a luxury which the Federal Government can ill afford in light of recent concerns over increased Federal spending and current efforts by the Executive and Legislative Branches to balance the Federal budget.

Thus, it is time to restructure and streamline the criminal tax case legal review process to provide more timely legal assistance to investigators and to ensure more timely prosecutive determinations. Such changes should increase (1) CID's productivity in terms of timely and quality investigations and (2) the deterrent effect of those cases which are successfully prosecuted.

AGENCY COMMENTS AND OUR EVALUATION

In letters dated December 31, 1980, and January 7, 1981, both the Assistant Attorney General for Administration and the Commissioner of Internal Revenue, respectively, concurred with our findings and conclusions. (See apps. II and III.)

Justice agreed that

--sequential, postinvestigative legal reviews are time-consuming and duplicative;

- case processing delays detract from the deterrent effect of successfully prosecuted cases;
- centralized and expert review is required to maintain evenhanded justice in the criminal tax area, and that the Criminal Section can best provide that centralization and expertise; and
- District Counsel review of criminal tax cases duplicates review by the Criminal Section of the Tax Division.

IRS agreed that CID should have more legal assistance at the investigative stage and that the postinvestigative review process should be streamlined. IRS also concurred with our conclusion that action by the responsible agencies is needed to remedy existing problems.

IRS stated that the draft report did not discuss one matter which significantly affects the quality of prereferral legal advice to CID--the extent to which Justice's Criminal Section effectively communicates its views to IRS' Chief Counsel. IRS pointed out--correctly--that its attorneys cannot provide meaningful guidance to CID unless they clearly understand why the Criminal Section and U.S. Attorneys decline cases they have approved. We specifically addressed this issue in an earlier report. ^{1/} We recommended that Justice provide IRS with that information. And Justice has, in fact, been providing such information to IRS since January 1980.

In a letter dated January 5, 1981, (see app. IV) the American Bar Association's Section on Taxation disagreed with our conclusion that there presently are three duplicative reviews of criminal tax cases. The Section stated that the U.S. Attorney's case review is cursory in comparison to the Criminal Section's review. It further stated that the U.S. Attorney

"* * * simply familiarizes himself with the file in order to permit him to present a summary of the case to the grand jury for indictment, and then to prepare for trial."

We disagree with the Section's assessment. First, we did not conclude that there presently are three duplicative legal reviews of criminal tax cases. We concluded that reviews conducted by IRS and Criminal Section Attorneys are duplicative.

^{1/}"Improved Planning for Developing and Selecting IRS Criminal Tax Cases Can Strengthen Enforcement of Federal Tax Laws" (GGD-80-9, Nov. 6, 1979).

We cannot agree that U.S. Attorneys simply "familiarize" themselves with cases before presenting them to grand juries or trying them. We recognize that U.S. Attorneys and their assistants are very busy people, but they do not generally seek indictment nor go to trial without first developing a thorough knowledge of the case at hand.

CHAPTER 3
ALTERNATIVE APPROACHES TO RESTRUCTURING
THE LEGAL REVIEW PROCESS FOR
CRIMINAL TAX CASES

As discussed in the previous chapter, the existing legal review process for criminal tax cases clearly needs to be revised. However, the best means for doing so is not clear. There are various ways in which the process can be restructured.

On the basis of our review, we believe there are at least four criteria that any modification to the present legal review process should meet. Specifically, it should (1) provide a means through which CID can obtain timely legal assistance during its investigations, (2) improve timeliness and eliminate any unnecessary duplication and costs, (3) ensure that criminal tax cases receive a high quality, independent legal review before they are prosecuted, and (4) safeguard the legal rights of taxpayers.

Our analyses of sample cases and discussions with various Federal officials and private sector attorneys enabled us to formulate several alternative approaches to revising the present legal review process.

- Rather than conducting postinvestigative reviews, District Counsel attorneys could conduct their legal reviews concurrently with ongoing CID investigations and provide legal assistance on a continuing basis, as needed. Completed prosecutive recommendations could then be forwarded jointly by CID and District Counsel to the Criminal Section of Justice's Tax Division.
- The District Counsel could continue conducting postinvestigative legal reviews of CID prosecutive recommendations. It could expand its prereferral program to provide CID needed legal assistance on a more timely basis during investigations. In addition, it could send certain kinds of cases directly to cognizant U.S. Attorneys for prosecution.
- District Counsel's functions with respect to criminal tax cases could be eliminated. CID could seek any needed legal assistance from Justice Department attorneys and send prosecutive recommendations directly to the Criminal Section of Justice's Tax Division.
- The legal review of criminal tax cases by the Criminal Section of Justice's Tax Division could be eliminated.

District Counsel attorneys would continue to conduct post-investigative reviews of CID prosecutive recommendations and send all approved cases directly to cognizant U.S. Attorneys for review and prosecution.

--CID prosecutive recommendations could be sent directly to cognizant U.S. Attorneys for review and prosecution. However, the District Counsel and Criminal Section could conduct time-limited concurrent reviews, provide input to U.S. Attorneys, and be afforded the right to protest U.S. Attorneys' decisions.

--District Counsel and Criminal Section legal reviews could both be eliminated. CID would then seek any needed legal assistance from cognizant U.S. Attorneys and send prosecutive recommendations directly to them for review and prosecution.

Each of these alternatives has advantages and disadvantages, as well as cost implications. There are also variations and combinations of each, as well as perhaps other alternatives not addressed here. Justice and IRS need to jointly consider the various alternatives and take prompt action to implement a streamlined legal review process which will promote efficient and effective enforcement of the tax laws. The Congress should ensure that any process realizes potential cost savings while properly safeguarding taxpayers' legal rights.

CONCURRENT DISTRICT COUNSEL REVIEW OF ONGOING CID INVESTIGATIONS

Under this alternative, the District Counsel's postinvestigative legal review of criminal tax cases would be eliminated. Instead, District Counsel attorneys would conduct their legal reviews concurrently with ongoing CID investigations and provide legal assistance on a continuing, as needed basis. Thus, legal issues would be resolved during, rather than after, investigations. Upon completion of investigations, recommendations for prosecution would be forwarded jointly by CID and District Counsel directly to the Criminal Section of Justice's Tax Division. It, of course, has principal responsibility for determining whether a tax case, once developed by IRS, should be prosecuted.

This alternative has several advantages over the existing system. CID would get meaningful, consistent, and timely legal assistance throughout investigations. This assistance would enhance CID's productivity to the extent that early detection of major legal deficiencies would lead to more timely discontinuance of cases with little potential for prosecution. Since

legal issues would be resolved as they arose during the investigations, CID no longer would have to conduct supplemental investigations. Elimination of District Counsel's postinvestigative review would improve the timeliness and the deterrent effect of successfully prosecuted cases.

Also, IRS would need fewer District Counsel attorneys under this alternative. Presently, District Counsel expends about 130 staff years annually on CID-related matters. These staff year expenditures could be reduced by 50 percent or more if this alternative were adopted. Direct cost savings to the Government would range from \$1.75 million to \$2.63 million recurring annually. ^{1/} Finally, criminal tax cases would still receive an independent, high quality legal review by attorneys assigned to the Criminal Section of Justice's Tax Division. Of course, they would also continue to be reviewed by the prosecuting U.S. Attorneys. Together, these reviews would serve as an effective means for safeguarding taxpayers' legal rights.

This alternative does have two potential disadvantages. First, the effect it would have on the Justice Department's workload is unknown. On the one hand, IRS attorneys, by working closely with CID, could upgrade the quality and reduce the quantity of criminal tax cases sent to Justice, thus reducing Justice's workload. On the other hand, that workload might increase if CID, through productivity gains, forwarded more cases to Justice for review.

Second, CID officials have expressed concern over the extent to which District Counsel attorneys would have authority over investigative decisions under this alternative. They fear that District Counsel attorneys rather than CID personnel would

^{1/}In discussing our concept of this alternative with IRS officials, we estimated that each of IRS' 58 district offices would, on the average, need 1 full-time attorney to handle CID matters. The CID Director agreed that while some of IRS' larger districts would need 2 attorneys, certain smaller districts could probably be grouped together and handled by 1 attorney. Our estimate also provided for 7 supervisory headquarters attorneys to oversee the district office attorneys. In total, therefore, we estimate IRS would need 65 attorney staff years under this alternative, rather than the approximately 130 staff years it presently uses annually on CID matters. Thus, 65 positions could be eliminated. Using the annual salary of a GS-12, \$26,951, as a base, the elimination of 65 attorney staff years would result in definitive annual savings of \$1.75 million. Using a loading factor of 1.5 to estimate costs, such as travel, clerical assistance, and office space, associated with each attorney staff year, annual savings would be about \$2.63 million.

manage investigations, thus having a negative impact on CID's capabilities. Also, they suspect that the existing District Counsel postinvestigative review might simply be tacked on to CID's investigative process, thus causing the merger to have no real effect on timeliness.

This concern, however, seems to overlook the potential benefits of a strong, cooperative relationship between District Counsel and CID--the intent of this alternative. To the extent that attorneys are used effectively by CID, its productivity and the quality of its cases would improve. Also, one means for handling this concern would be to assign attorneys to CID from an organizational standpoint. The CID Director could then specify the roles and responsibilities of attorneys within the context of a single IRS division.

In commenting on a draft of this report, the Department of Justice said that this alternative deserves serious consideration. Justice further stated that it had suggested to IRS that it implement the contemplated procedure on a trial basis in selected district offices.

In its comments, however, IRS stated that this alternative assumes detailed, close involvement by Chief Counsel attorneys in all cases at the investigative level. On the basis of that interpretation, IRS concluded that its Chief Counsel's office would need to significantly increase the size of its staff to carry out that mission.

On the contrary, this alternative does not assume detailed attorney involvement in all cases, nor does it assume a need for Chief Counsel to review every case. Rather, the extent of assistance provided by IRS attorneys, if any, would depend in large measure on the legal complexity of each case.

As discussed in chapter 2, the existing legal review process is duplicative. This alternative seeks to eliminate that duplication. To fulfill its balanced enforcement goal, CID annually investigates a certain number of straightforward cases such as simple failure to file cases, specific item cases, and certain trust fund violations. IRS attorneys need not get involved in such cases in light of subsequent legal reviews conducted by Justice attorneys. On the other hand, CID also investigates many cases involving complex legal issues. We envision that, under this alternative, IRS attorneys would devote most of their time to such cases. Relieved of the burden of having to review every case regardless of its complexity, Chief Counsel would then need fewer attorneys to carry out a more meaningful mission.

IRS also stated that close Chief Counsel involvement in the investigative process would affect attorneys' independence. This would be a serious concern if it were not for the fact that every criminal tax case receives a completely independent legal review

from Justice attorneys. There seems little need for two independent reviews of criminal tax cases. And, as discussed in chapter 2, Justice's Criminal Section Attorneys are in a much better position than IRS attorneys to afford each case a completely independent legal review.

The American Bar Association's Section on Taxation stated that, under this alternative, District Counsel would be unable to conduct a thorough case review, because such a review cannot be made until an investigation has been completed and all evidence has been collected and analyzed. It also said that elimination of District Counsel's postinvestigative review would encourage less careful and less thorough CID investigations.

Although the Section is correct in pointing out that District Counsel attorneys would not conduct postinvestigative reviews, the attorneys would conduct thorough reviews, when necessary, during the investigative process. Moreover, each case would undergo detailed postinvestigative review by the group, which according to the Section, is best equipped to carry out that function--Justice's Criminal Section Attorneys.

Concerning the Section's second point, readily available legal assistance should enable CID to conduct more careful and thorough investigations than at present. Under the contemplated process, CID cases still would receive independent, detailed legal review from Justice Attorneys, but IRS special agents would be better able to prepare cases for that review. This is because special agents would have access to meaningful legal assistance during the investigative process.

Finally, both IRS and the American Bar Association's Section on Taxation pointed out that the existing District Counsel review process, as a practical matter, provides the taxpayer the only opportunity for a conference. During a conference, IRS provides the taxpayer an opportunity to present defenses to potential criminal tax charges. Both IRS and the Section assume that, under this alternative, Justice Attorneys would conduct conferences in Washington, D.C., thus inconveniencing the taxpayer and his attorney, from a time and cost standpoint.

We see various ways in which this concern could be alleviated. IRS attorneys would in many instances be in a position to conduct these conferences. This is because we anticipate some District Counsel involvement in many CID cases. Moreover, for those cases District Counsel has not been involved in, Justice Attorneys could conduct conferences. When appropriate, these conferences could be held in Washington, D.C. However, we know of no reason why Justice could not conduct conferences in other locations, if appropriate. Also, to minimize travel costs, U.S. Attorneys could handle a portion of the conference workload.

EXPANDING DISTRICT COUNSEL'S
PREREFERRAL PROCESS AND
STREAMLINING THE REVIEW
PROCESS FOR CERTAIN CASES

Presently, District Counsel attorneys get involved in some ongoing CID cases through the prereferral process discussed on pages 10 and 11. This alternative envisions expanding that process to ensure that CID consistently receives timely legal assistance during investigations.

District Counsel attorneys still would continue to conduct, postinvestigative legal reviews of CID prosecutive recommendations. However, Justice could delegate authority to District Counsel attorneys to authorize prosecution in certain kinds of cases. Thus, the Criminal Section of Justice's Tax Division would no longer review every case. Instead, it would receive copies of key documents at the time IRS attorneys send a case to a U.S. Attorney for prosecution. It could then decide whether to concur in IRS' prosecutive authorization or reserve the right to conduct its own detailed case review. This alternative has been proposed by the Director of IRS' Criminal Tax Division, who has primary responsibility for criminal tax matters within the IRS Chief Counsel's office.

By expanding the prereferral process, District Counsel could more adequately meet CID's need for legal assistance during investigations. This would result in improved CID productivity. Also, certain categories of cases, like "simple failure to file" cases, would be processed in a more timely manner and possibly have a greater deterrent effect. Still, each case would, at a minimum, be reviewed by IRS attorneys and a U.S. Attorney; these reviews would serve as an effective means for safeguarding taxpayers' rights.

On the negative side, many criminal tax cases would still be subject to sequential, time-consuming legal reviews by IRS and Justice attorneys. IRS would need to hire additional attorneys to handle the increased prereferral workload. Finally, the Chief of the Criminal Section of Justice's Tax Division questions the wisdom of allowing IRS attorneys, who do not specialize in criminal tax matters, to authorize prosecution in criminal tax cases. This authorization could affect Justice's ability to maintain a uniform national enforcement policy for criminal tax matters because the Criminal Section would not review every case for adherence to its standards.

In commenting on this alternative, IRS stated that Chief Counsel is prepared to take all possible steps to provide CID with legal assistance on a more timely basis. The American Bar Association's Section on Taxation described direct referral by IRS of any criminal tax cases to U.S. Attorneys as a "fundamental mistake." As previously discussed, it believes that Justice's Criminal Section should review every case in light of the need to maintain uniform national prosecution standards for tax cases.

ELIMINATING DISTRICT COUNSEL'S CRIMINAL TAX FUNCTIONS

Another means for revising the present legal review process would be to eliminate District Counsel's involvement in criminal tax matters. Under this alternative, CID would seek needed legal assistance from Justice attorneys during investigations and send recommendations for prosecution directly to the Criminal Section of Justice's Tax Division.

Some advantages of this alternative include (1) assurance that taxpayers' rights would be protected through case legal reviews by the Criminal Section and U.S. Attorneys, (2) improved case processing timeliness resulting from elimination of the District Counsel's legal review, and (3) potential cost savings of from \$3.5 to \$5.26 million, recurring annually, due to IRS' elimination of 130 attorney staff years from its budget. 1/

This alternative, on the other hand, has a serious disadvantage. Without revisions to the Internal Revenue Code as it pertains to disclosure of tax information and third-party summonses, CID could not seek legal assistance from Justice in ongoing investigations. Even if the law were amended, it seems doubtful that Justice attorneys, located in Washington, D.C., could provide consistent, timely assistance to 58 district CID offices. Also, Justice's Criminal Section would need additional staff to even attempt to provide CID that assistance. This, in turn, would reduce the net savings associated with deletion of District Counsel's criminal tax functions. These disadvantages prompted both IRS and the American Bar Association's Section on Taxation to reject this alternative in their comments on a draft of this report.

1/Potential cost savings associated with deletion of 65 attorney staff years were computed as set forth in the footnote on page 26. The potential savings associated with the deletion of 130 attorney staff years--from \$3.5 to \$5.26 million--were computed by doubling those figures.

EXPANDING THE PREREFERRAL PROCESS AND
ELIMINATING LEGAL REVIEW BY THE CRIMINAL
SECTION OF JUSTICE'S TAX DIVISION

Under this alternative, the Criminal Section of Justice's Tax Division would no longer conduct legal reviews of criminal tax cases. Instead, District Counsel attorneys would forward cases directly to U.S. Attorneys for review and prosecution. Concurrently, District Counsel would expand its present prereferral process to ensure the provision of timely legal assistance during investigations.

This alternative certainly would improve the timeliness of the present legal review process thereby enhancing the deterrent effect of successfully prosecuted cases. Cost savings of \$1.09 million would be realized on an annually recurring basis as Justice's budget reflected deletion of the Criminal Section's case review functions. ^{1/} An expanded District Counsel prereferral process could increase CID's productivity through the provision of more timely legal assistance during investigations. Legal reviews by IRS attorneys and U.S. Attorneys could also effectively safeguard taxpayers' legal rights.

This alternative approach also has disadvantages. The Criminal Section no longer would carry out two of its key functions--maintaining a uniform national prosecution policy for criminal tax cases and prosecuting certain cases. Criminal tax cases would not receive a single, independent legal review by attorneys who specialize in criminal tax matters. Also, since Criminal Section attorneys prosecute over 10 percent of all criminal tax cases, U.S. Attorneys would probably need additional staff to assume that workload. Likewise, IRS would need to hire additional attorneys to handle the increased prereferral workload. As a result, the net savings realized by adopting this alternative would be reduced.

As discussed on pages 15 and 16, Justice planned to implement a revised review process for complex and noncomplex cases effective January 1, 1981. Thus, Justice's Criminal Section already has taken action to essentially eliminate its detailed review of some criminal tax cases. IRS, in its comments, agreed that an expanded prereferral process is needed, but specified no action plan to implement a revised process. The American Bar Association's Section on Taxation reiterated its assertion that elimination of the Justice Criminal Section review process would be a "fundamental mistake."

^{1/}For fiscal year 1980, the Justice Department spent about \$1.09 million on the Criminal Section's criminal tax case review activities.

PROVIDING FOR CONCURRENT LEGAL
REVIEWS BY DISTRICT COUNSEL,
THE CRIMINAL SECTION, AND
U.S. ATTORNEYS

Under this alternative, CID would forward all completed prosecutive recommendations directly to U.S. Attorneys while concurrently forwarding case summaries to District Counsel and the Criminal Section of Justice's Tax Division. District Counsel and the Criminal Section would be required to provide their comments on cases to cognizant U.S. Attorneys within a specified time period. Thereafter, U.S. Attorneys, using prosecutive guidelines to be developed by IRS and the Criminal Section, would decide whether each case warrants prosecution. Procedures would be established to afford IRS district directors, District Counsel, and the Criminal Section a means to protest U.S. Attorneys' decisions. The Criminal Section would retain the right to make the final decision to prosecute.

This alternative, which has some advantages, was recommended to the Attorney General on July 30, 1980, by his Advisory Committee, a group which represents the views of all U.S. Attorneys. This approach would resolve the timeliness problem associated with the existing process because a U.S. Attorney could initiate action on a case shortly after CID completes its recommendation for prosecution. With IRS and Justice attorneys involved in all cases, taxpayers' legal rights should be adequately protected.

This alternative also envisions District Counsel attorneys providing CID special agents legal assistance during investigations. This could be done by expanding the prereferral process, by having District Counsel concurrently review ongoing investigations (as envisioned in the alternative discussed on pages 25 to 28), or by some other means. Regardless of how this assistance is provided, it will probably require additional District Counsel staff, particularly since the postinvestigative review would be retained. It is possible, of course, that since this review would be conducted concurrently with those of the Criminal Section and U.S. Attorneys, it would not be as intense and time-consuming. Also, depending on the extent of District Counsel's involvement in ongoing CID investigations, the amount of time devoted to its postinvestigative review could be reduced.

This alternative approach does not resolve other problems associated with the existing legal review process. Duplicative legal reviews by District Counsel and the Criminal Section would be retained even though they would be concurrent. U.S. Attorneys' workloads would increase substantially in that they would have to deal with every CID prosecutive recommendation, as well as a potentially time-consuming series of protests. Presently, U.S. Attorneys never receive cases declined by District Counsel or the Criminal Section and, thus, they presently expend no resources on a significant percentage of CID's prosecutive recommendations.

Finally, it is unclear how the Criminal Section could ensure maintenance of a uniform national policy for prosecuting criminal tax cases through unspecified protest procedures. True, the Criminal Section would retain the authority to make final prosecutive decisions on all cases. Also, the 94 U.S. Attorneys presumably would be following prosecutive guidelines set forth by IRS and Criminal Section Attorneys. However, the Criminal Section's actions on every case would be based solely on an analysis of CID's summary of the case. U.S. Attorneys would have in their possession all the backup material related to each case, including the exhibits which constitute the actual evidence used in court.

Without access to complete case files, Criminal Section Attorneys would be hard pressed to dispute U.S. Attorneys' initial decisions to prosecute or to ensure that national standards and priorities were being followed. Even if complete information were provided the Criminal Section, its policy decisions on every case would be open to criticism by U.S. Attorneys. Recognizing that U.S. Attorneys can be subject to local pressures and problems, successive Attorneys General have reaffirmed the need for centralized control of prosecutive decisions in matters involving the Government's tax revenues.

Both IRS and the American Bar Association's Section on Taxation, in their comments on a draft of this report, rejected this alternative primarily because, in their view, the cited disadvantages far outweigh any potential benefits that might accrue from this case processing method.

ELIMINATING DISTRICT COUNSEL AND CRIMINAL SECTION LEGAL REVIEWS OF CRIMINAL TAX CASES

Under this alternative, both the District Counsel and the Criminal Section legal review of criminal tax cases would be eliminated. CID would obtain needed legal assistance in ongoing cases from U.S. Attorneys and would forward completed cases directly to them for review and prosecution.

This approach immediately eliminates two areas of concern regarding the present legal review process--timeliness and duplication. Moreover, direct cost savings of from \$4.59 to \$6.35 million would accrue to the Government on a recurring basis annually. ^{1/} In addition, CID would obtain needed legal assistance in ongoing cases directly from the prosecuting U.S. Attorney, as opposed to an attorney not involved in prosecuting those cases.

^{1/}These estimates were arrived at by combining the potential cost savings figures discussed in the footnotes on pages 30 and 31.

This alternative has several disadvantages. The Justice Department could not ensure maintenance of a uniform national prosecution policy for criminal tax cases. U.S. Attorneys would no longer be able to call on a group of expert criminal tax attorneys--the Tax Division's Criminal Section--to assist in prosecuting cases. At no point in the process would expert criminal tax attorneys review CID cases. This could lead to a decline in the overall quality of the Government's criminal tax cases and certainly would lessen assurance that taxpayers' legal rights would be protected.

U.S. Attorneys' workloads--already heavy--would increase substantially as CID cases, which previously might have been declined by legal reviewers, were forwarded to U.S. Attorneys for review. Finally, revisions to the Internal Revenue Code concerning disclosure and third-party summonses would be needed to enable U.S. Attorneys to provide CID with legal assistance during investigations. Even if such revisions were enacted, however, U.S. Attorneys would need additional staff to assist CID in ongoing cases. This, of course, would reduce the net savings realized by adopting this alternative.

Referring to the cited disadvantages associated with adoption of this alternative, both IRS and the American Bar Association's Section on Taxation commented that this alternative is infeasible. Again, each felt that the disadvantages far outweighed any potential benefits that would be derived from adoption of this procedure.

CONCLUSIONS

Although the present sequential legal review process for criminal tax cases needs to be revised, the best method for doing so is not clear. There are various ways the process could be restructured. The alternatives range from having IRS attorneys provide legal assistance to CID on an as needed basis during, rather than after, investigations to eliminating all but the U.S. Attorneys from the review process.

Each of the alternatives has advantages and disadvantages, as well as cost implications. Some have more merit than others. For example, in our view, having District Counsel attorneys carry out ongoing, rather than postinvestigative, legal reviews has merit because it would reduce delays in the present legal review process while safeguarding taxpayers' legal rights. CID's productivity should increase as attorneys, through early involvement in the investigative process, identify problem cases and/or help ensure efficient development of good cases. Two important IRS goals--equitable treatment of taxpayers and voluntary compliance--would be more effectively promoted. Annually recurring cost savings of up to \$2.63 million could be realized through the elimination of a postinvestigative review level.

On the other hand, the alternative proposed by the Attorney General's Advisory Committee may have some merit. It would resolve the timeliness problem because cases, when completed by CID, would immediately be brought to the attention of prosecuting U.S. Attorneys. It also provides a means for safeguarding taxpayers' rights.

There are variations and combinations of the specific alternatives we have discussed and, perhaps, even other ways to streamline the current system. Most importantly, the Justice Department and IRS need to consider various alternatives and develop a legal review process for criminal tax cases which is more efficient and effective than the present system. Such a process should (1) provide a means through which CID can obtain timely legal assistance during its investigations, (2) improve timeliness and eliminate any unnecessary duplication and costs, (3) ensure that criminal tax cases receive a high quality, independent legal review before they are prosecuted, and (4) safeguard the legal rights of taxpayers. In restructuring the present legal review process, Justice and IRS may want to test various alternatives or variations thereof before formally implementing any new system.

Because enforcing the tax laws involves separate governmental entities, with their own budgets, the Congress should ensure that this matter is pursued and that any revised process realizes potential cost savings and safeguards taxpayers' legal rights.

RECOMMENDATION

We recommend that the Attorney General and the Commissioner of Internal Revenue jointly develop a streamlined legal review process for criminal tax cases.

RECOMMENDATION TO THE CONGRESS

Because enforcing the tax laws involves separate governmental entities with their own budgets, the Congress should ensure that the Treasury and Justice Departments develop a streamlined legal review process for criminal tax cases and that any revised system realizes potential cost savings while safeguarding taxpayers' legal rights.

AGENCY COMMENTS AND OUR EVALUATION

By letters dated December 31, 1980 and January 7, 1981, the Assistant Attorney General for Administration and the Commissioner of Internal Revenue, respectively, agreed that (1) the existing legal review process for criminal tax cases needs to be streamlined and (2) any revised process must meet the criteria we set forth on page 24 of this report. However, despite interagency discussions, when commenting on a draft of this report, Justice and IRS officials were unable to develop a mutually agreeable approach to streamlining the existing legal review process.

Justice sought to respond to our recommendation by independently reevaluating its policies and procedures and informing us that it planned to significantly revise its legal review process as of January 1, 1981. Nevertheless, Justice is only one of the agencies involved in the legal review of criminal tax cases.

IRS recognized the need to consider ways to improve the quality and availability of legal assistance at the investigative level. However, it specified no action plan for responding to our recommendation, except to state that its Chief Counsel would try to (1) provide more timely, effective assistance to CID and (2) shorten its review time. IRS cited its basic philosophy and existing delegation orders as reasons why it must retain its separate postinvestigative review of criminal tax cases and why it cannot consider a major restructuring of the legal review process. In this regard, it specifically stated that

- sound and equitable tax administration requires full and independent review by Chief Counsel before any taxpayer's case is referred to the Department of Justice for prosecution;
- because the Treasury Department is responsible for providing legal advice to IRS and referring tax cases to Justice, it is inconceivable that any tax case could be referred for prosecution without first being reviewed by IRS' own lawyers; and
- the scope, direction, and emphasis of the criminal tax program must be determined by IRS and its lawyers.

We can understand IRS' desire to ensure the legal quality of the cases it sends to another agency. From a broader standpoint, however, the responsibility for the quality of criminal tax cases rests with the Government as a whole, not just IRS. The Attorney General, through the Criminal Section of the Tax Division and the 94 U.S. Attorneys, has the authority over and responsibility for the prosecution of criminal tax cases. As such, Justice is responsible for ensuring the legal quality of criminal tax cases and prosecuting them, as appropriate. IRS' key responsibility is to investigate criminal tax violations and recommend prosecution.

The Justice Department, in its comments, referred to IRS' current postinvestigative legal review of criminal tax cases as duplicative of the review conducted by Justice's Tax Division. Justice stated that IRS attorneys, because of their training and background, should (1) conduct a thorough technical review of cases and (2) provide assistance to agents during investigations. In this regard, Justice suggested that IRS seriously consider and test, in selected IRS districts, our first alternative for restructuring the legal review process (See pp. 25 to 28.)

Recognizing that the responsibility for ensuring the legal quality of criminal tax cases rests primarily with the Attorney General, and not with Treasury and IRS, we see no need for IRS to duplicate the Justice Department's legal review functions.

Since IRS' principal responsibility is to investigate and recommend criminal tax cases for prosecution, it seems that a more appropriate role for IRS attorneys is to provide on-the-spot legal assistance to CID, as needed, and to ensure that cases are technically sound from a legal standpoint. It seems that these functions could best be conducted while investigations are in progress.

The American Bar Association's Section on Taxation, in its comments, cited the high percentage of successful prosecutions under the existing process as the primary reason why tiered reviews ought to be retained. The Section did agree, however, that the present review process can and should be improved and accelerated.

In summary, the actions proposed by IRS and Justice do not adequately address the legal review processing problems discussed in chapter 2. The time-consuming, duplicative review process still exists. Therefore, the Congress ultimately may have to decide whether revisions are needed and what form those revisions should take.

COMPTROLLER GENERAL'S REPORT
TO THE JOINT COMMITTEE ON
TAXATION
CONGRESS OF THE UNITED STATES

IMPROVED PLANNING FOR
DEVELOPING AND SELECTING
IRS CRIMINAL TAX CASES CAN
STRENGTHEN ENFORCEMENT OF
FEDERAL TAX LAWS

D I G E S T

Taxpayers who truthfully report their income and pay the taxes required expect the Internal Revenue Service (IRS) to do all it can to make sure that everyone pays his or her fair share. IRS tries to do so through audits, collection actions, and criminal investigations.

Each year, IRS' Criminal Investigation Division recommends prosecution of more than 3,000 people who try to evade paying taxes. About 1,400 are convicted, fined, and/or jailed.

IRS has 2,800 agents to specifically work on tax fraud problems. It must use these agents as effectively as possible. Careful planning is essential if the Criminal Investigation Division is to carry out a balanced and effective enforcement program. The Division attempts to balance its cases among all types of violations in many income tax brackets, occupations, and geographical locations to promote voluntary compliance with tax laws.

However, the Division's long- and short-range plans need improvement. The national office needs to clearly define its national strategy and needs to establish additional, more specific goals for detecting and deterring tax fraud. Improved plans would

- help IRS to better ensure that its criminal investigation agents are used as productively as possible (see pp. 5 to 11),
- provide additional criteria to measure how well the Criminal Investigation Division is achieving its mission (see pp. 9 to 11), and
- improve case development activities which produce the information that Criminal

GGD-80-9
November 6, 1979

Investigation Division managers use in selecting cases (see pp. 26 to 46).

BETTER PLANNING NEEDED

The Criminal Investigation Division's present long-range plan is general and does not clearly define a national strategy. Its short-range plans specify various pockets of noncompliance requiring national attention. But the short-range plans include only a limited number of specific, measurable goals; as a result, 58 district chiefs have overall program direction responsibility. Each District Criminal Investigation Division chief is responsible for directing a tax fraud program within the context of broad, general guidelines. (See pp. 5 to 9.)

In 1975, the Division recognized the deficiencies in these plans and began to improve them. Assisted by the National Academy of Public Administration, the Division conducted a planning model study during fiscal years 1977 and 1978. In fiscal year 1980, it will test a more rigorous long-range planning process. (See pp. 11 to 13.)

However, the Division's revised planning process lacks one vital component--more information on a regular basis from the Department of Justice's Tax Division and from U.S. attorneys. IRS recommends prosecution of alleged tax evaders, but it is Justice's Tax Division which reviews IRS recommendations and decides whether to prosecute. Similarly, U.S. attorneys prosecute most criminal tax cases. Thus, Justice plays a key role in administering the criminal provisions of the tax laws; this is why Justice officials' views must be considered in the Criminal Investigation Division's planning process. (See pp. 13 to 20.)

The Attorney General and the Commissioner of Internal Revenue need to develop a system whereby Justice provides the Criminal Investigation Division with useable input to program plans and with better guidance on case requirements. (See pp. 20 and 21.)

CASE DEVELOPMENT AND SELECTION
ACTIVITIES NEED IMPROVEMENT

The basic data that Criminal Investigation Division managers use in deciding which cases warrant detailed investigation is generated by referrals from the Examination and Collection Divisions, information gathering efforts by special agents, and information item evaluations (referred to collectively as case development activities). Selection decisions are important because they determine the focus of the Division's program. Cases selected for detailed investigation require substantial resource expenditures; however, many cases selected do not lead to prosecution recommendations, let alone convictions. (See pp. 24 to 26.)

Improved planning would provide Division managers with better guidance for conducting case development activities and making case selection decisions. IRS can further strengthen case development and selection activities by

- providing its employees better and more consistent training on referrals (see pp. 26 to 34),
- affording managers better guidance for initiating and conducting information gathering efforts (see pp. 34 to 43), and
- developing criteria against which the Criminal Investigation Division can measure the potential value of information items (see pp. 43 to 46).

The Criminal Investigation Division can also further improve its case selection process by requiring that each district use the "case pool" approach. Under that system, Division managers need not consider whether staff is available before initiating a case. Rather, a "pool" of unassigned cases results, and managers can select the best case from that pool as staff becomes available. Besides affording Division

managers alternative cases to select from, the case pool approach serves as a management control over staff resource allocations. (See pp. 46 and 47.)

RECOMMENDATIONS

To improve the Criminal Investigation Division's planning process, GAO recommends that the:

--Attorney General and the Commissioner of Internal Revenue develop specific methods through which Justice and IRS can better coordinate their efforts to combat tax fraud. (See p. 21.)

--Commissioner further refine the Criminal Investigation Division's short-range program plans in light of data developed through its long-range planning process. (See p. 21.)

To improve case development activities, the Commissioner should:

--Clarify the guidance provided to referring agents by developing guidelines for referral training applicable to each district office. (See p. 48.)

--Develop guidelines which district directors and higher level IRS officials can use to evaluate the appropriateness of Division-proposed information gathering projects. (See p. 49.)

--Revise guidelines pertaining to individual information gathering activities so that files on such efforts contain clear documentation describing investigative steps performed and results leading to disposition decisions. (See p. 49.)

--Revise IRS' information item form as appropriate to ensure the future availability of data needed to analyze and improve information item evaluations. (See p. 49.)

The Commissioner should also require that each district Criminal Investigation Division chief use the case pool approach in selecting cases. (See p. 49.)

AGENCY COMMENTS

Both IRS and Justice generally agreed with GAO's recommendations. Ongoing or planned actions, described in their official comments, were generally responsive to those recommendations. (See pp. 22, 23, 49 and 50.)



U.S. Department of Justice

DEC 31 1980

Washington D.C. 20530

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for the opportunity to comment on the draft report of your office entitled "A Streamlined Legal Review Process for Criminal Tax Cases Would Strengthen Enforcement of Federal Tax Laws."

The Department of Justice (Department) concurs with many of the report's findings and conclusions. Specifically, we agree with the conclusion that the current system of sequential post-investigation legal reviews of the Internal Revenue Service's (IRS) Criminal Investigation Division (CID) recommendations for prosecution is overly time-consuming and unnecessarily duplicative. We also acknowledge that delays in commencing criminal prosecutions are detrimental to their deterrent effect. We further agree that the system should be streamlined in accordance with the criteria set forth at page 24 of your draft report, wherein it provides that the review process should "(1) provide a means through which CID can obtain timely legal assistance during its investigations; (2) improve timeliness and eliminate any unnecessary duplication and costs; (3) ensure that criminal tax cases receive a high quality, independent legal review before they are prosecuted; and (4) safeguard the legal rights of taxpayers."

We share your view that any high-quality, independent legal review must be conducted in a manner which ensures that national policies and procedures for criminal tax cases are uniformly applied. The federal tax laws impact on all of us. Our system of voluntary compliance demands that our tax enforcement program be perceived as a fair and just one, treating all taxpayers equally. Centralized and expert review is required to maintain evenhanded justice in this specialized and often treacherously complex area of the federal criminal law. We fully concur with your conclusion on pages 17-18 of the draft report that Tax Division review now provides this necessary centralization and expertise.

The growing sophistication of fraudulent tax schemes makes it increasingly important to have criminal tax cases reviewed by attorneys experienced in tax accounting and substantive tax law. The Criminal Section of the Tax Division employs over 60 attorneys, many with 10 to 30 years of experience in criminal tax law as trial attorneys. Many have accounting backgrounds, Master's Degrees in Taxation, and work experience as agents with the IRS. Division attorneys develop unmatched criminal tax expertise through

-2-

reviewing, investigating and trying criminal tax cases. Nowhere else in Government can there be found such a cadre of expert criminal tax prosecutors.

The decentralization in 1976 of IRS's legal activities has also increased the need for Tax Division review of criminal tax cases. There are now 48 offices of District Counsel which screen from thousands of potential criminal tax cases those to be forwarded to 95 United States Attorneys' offices for prosecution. Without centralized responsibility for the decision to prosecute, uniformity in standards of criminal tax prosecutions and balance in our enforcement program would be seriously compromised. At a time when this Department is striving to achieve consistency in all areas of federal criminal enforcement,*/ the Tax Division, through its centralized review of criminal tax cases, maintains balance and uniformity in the administration of criminal tax laws.

Thus, we agree with the findings of the report that Tax Division review serves an essential purpose in the processing of criminal tax cases and believe that such review must be retained. No other office involved in the criminal tax review process is sufficiently centralized, or has the necessary expertise and time, to perform the Tax Division's function.

Your report makes reference to the steps recently taken by the Chief of the Criminal Section of the Tax Division to expedite our review of criminal tax cases. Those steps have already resulted in a significant reduction in the inventory of cases pending review, from over 500 a year ago to under 200 today, which is a little more than 1 month's receipts. On January 1, 1981, the Tax Division will put into effect additional measures to expedite the Department's review of criminal tax cases. These measures will further streamline the review process without threatening the uniformity of prosecution standards, the quality of cases prosecuted, or the high conviction rate we have so long maintained.

As a preliminary step, the Tax Division will assist the United States Attorneys' offices in clearing up their existing backlog of criminal tax cases awaiting action. This backlog and the resulting delays in processing are largely attributable to perennial manpower and resource shortages in these offices. The Department will reconsider the prosecution potential of authorizations given over 18 months ago and will provide immediate trial assistance wherever necessary. This initial step is essential to the success of a revised criminal review system, as it will do little good to expedite review at any level if authorized cases merely accumulate in United States Attorneys' offices.

The Tax Division will continue to review all criminal tax cases referred by IRS. Upon receipt, however, cases will be designated Category I (complex) or Category II (noncomplex). A case is defined as complex

*/This concern is reflected in the recent Department of Justice publications Principles of Federal Prosecution (July 1980), and National Priorities for the Investigation and Prosecution of White Collar Crime (August 1980).

-3-

when it presents significant technical, legal, or sensitive tax issues or is based on an indirect method of proof. New indirect methods of proof are being developed and tested, and cases involving novel criminal tax issues, such as the taxability of bartering income, commodities straddles, and real estate exchanges under Internal Revenue Code Section 1031, are received with increasing frequency. In the future, CID will be investigating and referring for prosecution an even greater number of complex cases. All other cases, including most misdemeanors and certain felonies to be proved by the specific items method of proof, will be classified noncomplex.

Noncomplex cases will be forwarded directly to the appropriate United States Attorney's office for review and prosecution. United States Attorney's offices will have 2 months in which to commence prosecution or return those cases they believe should not be prosecuted. If the Tax Division objects to the recommendation to decline, the decision of the Assistant Attorney General of the Tax Division shall be final.

Complex cases will continue to receive a comprehensive review by the Tax Division. Because of the significant reduction in the Tax Division's backlog and the streamlining procedures for processing noncomplex cases, this review will be completed within a substantially shorter period of time. Once a complex case is transmitted to a United States Attorney's office, criminal proceedings will be instituted within 6 months or the Tax Division informed as to the reasons why prosecution should be declined.

Finally, procedures will be established to monitor cases referred to United States Attorneys' offices to prevent future backlogs. The IRS CID will establish a system to furnish 2 month status reports on criminal tax cases in each judicial district. The Tax Division will use this information to identify developing backlog problems, and will provide assistance where necessary to nip such problems in the bud.

We believe these changes address the problem of delay at both review levels which are subject to this Department's control. Furthermore, these changes can be implemented to expedite criminal tax case processing regardless of what internal procedures are instituted at IRS.

With respect to the IRS review, your report points out that District Counsel attorneys review cases after the completion of a CID investigation to determine if sufficient evidence exists to prove a tax crime and whether a reasonable probability of conviction exists. To that extent, we agree that District Counsel review duplicates the subsequent review by Justice Department attorneys.

To avoid this duplication, we have proposed to the IRS that its review be principally directed at technical issues arising in each case. IRS agents and lawyers, because of their training and background, are best qualified to perform this critical function. We have urged the IRS to reinstitute a thorough technical review, similar to that once provided by the Offices of Assistant Regional Commissioners - Intelligence (ARCI). The old ARCI review staff independently determined whether CID had proven a prima facie case, checked and verified documentation and evidence, checked the accuracy of criminal computations, and returned insufficient cases to

-4-

CID for a supplemental investigation or for civil disposition. This type of technical review is indispensable to the successful prosecution of a given case. The Tax Division could, then, without unnecessary duplication, continue to provide the high-quality, independent review called for in your report to determine the sufficiency of the evidence and the probability of conviction and ensure that national policies and procedures for criminal tax cases are uniformly applied.

We also recognize the desirability of providing CID with legal assistance during the investigative process. Your first alternative proposal calls for District Counsel attorneys to provide such advice. We believe that this proposal should be given serious consideration and have suggested to the IRS that it be implemented on a trial basis in selected districts.

Thank you for this opportunity to comment on the draft report. Should you have any further questions please feel free to contact us.

Sincerely,



Kevin D. Rooney
Assistant Attorney General
for Administration

COMMISSIONER OF INTERNAL REVENUE

Washington, DC 20224

JAN 1981

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Anderson:

We welcome and appreciate the opportunity to comment on the draft report by your office entitled, "A Streamlined Legal Review Process for Criminal Tax Cases Would Strengthen Enforcement of Federal Tax Laws." Criminal tax prosecutions are vitally important to the Internal Revenue Service's overall compliance program, and it is essential that our efforts not only be perceived to be, but in fact be, effective and fair. To this end, representatives of CID, Chief Counsel, and the Tax Division have been meeting to address many of the problems raised in the report.

I. Introduction

The draft report identifies two problems and attempts to identify their cause. First, significant resources are being spent investigating cases which do not lead to prosecution recommendations or convictions. Because of this the full potential of the criminal tax program is not being realized. Second, the post-investigative review process is taking too long, and, in some instances, is duplicative.

To address these problems, the draft report concludes that (1) CID should have more legal assistance at the investigative stage, and (2) the post-investigative review process should be streamlined. We concur in these conclusions and in the report's recommendation that the responsible agencies take remedial action. We also concur that any legal review process must be consistent with the four criteria set forth at page 30 of the draft report, namely, a process which (1) provides for timely assistance at the investigative level, (2) improves

- 2 -

timeliness of review and eliminates unnecessary duplication and costs, (3) ensures high quality, independent legal review, and (4) safeguards the rights of taxpayers. However, a cornerstone of our position is that sound and equitable tax administration, as a general principle, requires full and independent review by Chief Counsel before any taxpayer's case is referred to the Department of Justice for prosecution.

The draft report acknowledges that the best means of revising the process, consistent with these four criteria, is not readily apparent. Six alternatives are proposed, but none is embraced, recognizing that variations and combinations of the specific alternatives and perhaps other alternatives may be appropriate. There is merit to elements of several of the alternatives; others are simply not viable. We will comment, in broad terms, on each of the alternatives, but first it would be helpful to comment on Chief Counsel's relationship to CID and Counsel's role in the criminal tax process.

II. Chief Counsel's Role as Advisor and Reviewer

The draft report correctly points out that CID requires legal assistance at the investigative level. That assistance can take two complementary forms. First, assistance is required in identifying and resolving legal issues as they arise in the context of a particular case. Second, clearly defined prosecution guidelines must be made available to CID -- at the time of investigation -- to assure that a properly investigated case will ultimately be accepted for prosecution. While the draft report focuses on the pre-referral legal assistance, the dissemination of clear prosecution guidelines is equally important.

A. Chief Counsel Investigative Assistance

The Office of the Chief Counsel is aware of the need to provide greater assistance to CID during criminal investigations. Toward that end, we believe that the 1978 reorganization of Chief Counsel -- intended to parallel the field structure of the Service -- ultimately will improve the delivery of "on-the-spot" legal assistance to CID. 1/ As a part of that reorganization

1/ Although the authors of the draft report are aware of this reorganization and its impact on the validity of statistics and conclusions of the report, we deem it important to emphasize that the report studies a period when Chief Counsel was in major transition. Thus, to that extent, the timing of the study is unfortunate and may affect some findings.

- 3 -

each of the 44 District Counsel Offices handling criminal cases is now responsible for working closely with CID personnel located in the related field offices. In our view, this step, which makes legal counsel available where the agents are located, represents an important improvement.

The reorganization involved two other important changes designed to provide more effective assistance to CID. First, a Deputy Regional Counsel for criminal matters was established in each of the seven regions. These deputies are responsible for overseeing Chief Counsel's criminal tax work within their respective regions. They assure uniformity and consistency of advice and assure the availability in each region of a knowledgeable, senior criminal tax expert. Close coordination between the various district counsel offices and the seven deputies is maintained and controlled through the Director of the Criminal Tax Division and his staff of 12 attorneys in the National Office of Chief Counsel.

A second major change implemented by the reorganization involved the concept of "cross-assignment" for docket attorneys. Under this concept, attorneys are required to serve in each of the three major functions in a district office: (1) Tax Court and Refund Litigation, (2) Criminal Tax, and (3) General Litigation. By being involved in each of these functions, attorneys develop a better overall tax perspective. Criminal tax cases are substantive tax cases as well as criminal cases and require analyses by attorneys experienced in substantive tax matters. Of particular benefit is the review by one experienced in litigation in the Tax Court or experienced in summons matters.

Cross-assignment has, however, been criticized both by you and by others for diffusing responsibility for criminal work and thereby lessening the degree of expertise that formerly resulted from specialization. Chief Counsel's Office recognizes that to some extent an initial effect of the reorganization was to expose lawyers to areas in which they had not previously worked. This problem was acute only in the large district offices that historically had not been doing criminal tax work on a cross-assignment basis. The Chief Counsel has made it clear that Regional Counsel and District Counsel have flexibility in determining the extent to which attorneys should be cross-assigned and the extent to which there should be more specialization in criminal tax matters. We believe that this modification of the

- 4 -

cross-assignment concept will permit the development and retention of the necessary criminal tax expertise and yet preserve much of the beneficial aspects intended by cross-assignment. Thus, the reorganization of the Office of Chief Counsel, with the proposed modifications will place Chief Counsel in a much improved position to provide assistance to CID.

"Alternative 1" of the draft report's recommendations contemplates detailed, close involvement by Chief Counsel attorneys at the investigative level, so that the attorneys will know the details of a case sufficiently to concur in a proposed prosecution without the need for a post-investigation review. Chief Counsel simply does not have sufficient staff to perform such a mission.

Intimate involvement by Chief Counsel at the investigative level cannot be achieved at Counsel's present or predictable staffing levels. CID currently has approximately 2,600 agents and 240 first-line supervisors. We estimate that your "Alternative 1" would require about one attorney for each group. If Chief Counsel were to provide just one attorney to assist each supervisor, over one-third of Chief Counsel's entire field strength -- including attorneys in supervisory positions -- would be involved in providing that assistance. That patently would not be workable. Moreover, we question whether it would be desirable. Continuous, detailed involvement by Chief Counsel attorneys in all cases would make the investigative process too cumbersome. Much valuable attorney time would be consumed, and we question whether there would be a benefit commensurate with the expenditure of resources.

Moreover, daily involvement by Chief Counsel attorneys in the development of criminal cases would have an undesirable impact on Chief Counsel's independent "lawyer's role." In our view, attorneys must remain independent of their client -- in this instance, the Internal Revenue Service -- and yet remain close enough to render effective, meaningful advice. This is a traditional lawyer's role, and one which is appropriate in these circumstances. Thus, we believe that Chief Counsel attorneys should be close enough to CID to provide effective assistance, but not so directly and intimately involved in CID's work that the attorneys lose their independence and effectiveness.

Nonetheless, as you recognize, Chief Counsel and CID must consider ways to improve the quality and availability of legal assistance at the investigative level. As a step in the right direction, Chief Counsel's Director of Criminal Tax has

- 5 -

proposed a program of periodic pre-referral review of CID's case inventory. The purpose of this program would be to formalize a mechanism whereby legal issues are identified and resolved during the investigative stage. The details of this program have yet to be completed, but it would represent a commitment by Chief Counsel -- consistent with its proper role and available resources -- to enhance its pre-referral assistance.

One further matter, which was not discussed in the draft report but which would materially improve the helpfulness of pre-referral advice, involves better communication between Chief Counsel and the Tax Division. If Chief Counsel is to provide meaningful advice to CID, both must be aware of the reasons the Tax Division and U. S. Attorneys are declining to prosecute some cases. In order to make certain that reasons for declinations were agreed to and understood, meetings were held between the Director of CID, the Criminal Tax Division of Chief Counsel and the Criminal Section of the Tax Division. The results of these meetings were disseminated to the field. In addition, the planning of CID's program goals for fiscal 1981 was coordinated with Chief Counsel and the Department of Justice so that cases selected for criminal investigation would be those most likely to survive legal review. There will be continuing communication between CID, Chief Counsel and the Tax Division with respect to the criminal program.

B. Chief Counsel Review Function

"Alternatives 2 - 6" all deal principally with the review process and only secondarily with providing direct assistance to CID. Our basic position is that Chief Counsel's review of criminal tax investigations is essential to insure that all prosecutions are fully justified by sound tax administration considerations. Before commenting specifically on those alternatives, therefore, we believe that it is essential to understand and appreciate Chief Counsel's role in the review process.

Responsibility for administration and enforcement of the tax system, including the criminal tax program, resides in the Treasury Department and has been delegated to the Internal Revenue Service. Responsibility for legal advice to the Internal Revenue Service and the referral of tax cases to the Department of Justice also resides in the Treasury Department and has been delegated to the Office of the Chief Counsel for the Internal Revenue Service. Given that responsibility and structure, it is inconceivable that any tax case could be referred for prosecution by the Service without first being reviewed by the Service's own

- 6 -

lawyers. The scope, direction, and emphasis of the criminal tax program must be determined by the Internal Revenue Service and its lawyers. Thus, any alternative for revising the review process which called for the elimination of Chief Counsel review would be unacceptable.

Chief Counsel, with its national and field offices, is well-equipped to perform its review function:

--Chief Counsel is decentralized (with appropriate control at the regional and national levels) with district offices located throughout the country where cases are investigated and litigated. Thus, attorneys are readily available to work closely with CID, during both the investigation and review. Review is conducted by attorneys who are familiar with the local community, local U. S. Attorneys, and local IRS personnel.

--Through its decentralized structure, Chief Counsel has the ability to respond to the local compliance problems of District Directors and to more effectively balance them with the national program.

--Chief Counsel is in a position to recommend supplemental investigation, where needed, which may be accomplished by use of administrative summonses. Direct referral to either the Tax Division or to the U. S. Attorney would raise substantial "LaSalle" problems on supplemental investigations, since the Service would have reached a determination to prosecute. As you know, the Supreme Court in United States v. LaSalle National Bank, 437 U.S. 298 (1978), decided that the Service lacked statutory authority to issue an administrative summons for a criminal investigative purpose after the case had been referred to the Department of Justice with a recommendation for prosecution.

--Chief Counsel attorneys possess both substantive tax expertise and trial experience from their cross-assignment to Tax Court work. They are particularly attuned to the overall tax compliance efforts of the Service.

- 7 -

--Chief Counsel, because of its decentralization, is in the best position to afford taxpayers (or their counsel) an opportunity for a low-cost, post-investigative conference. Approximately 90 percent of the taxpayers avail themselves of this opportunity. 2/

--Criminal tax cases have substantive civil aspects that should be addressed at the time of recommendation to assure consistency between criminal and civil positions. Moreover, Chief Counsel is responsible for balancing civil and criminal considerations of cases referred for prosecution. For example, the great majority of criminal investigations, whether or not resulting in prosecutions, raise significant civil tax deficiencies that are usually litigated by the same District Counsel office that assisted in the criminal case. Many times the civil fraud penalty, based on the same facts as the criminal case, must be litigated.

--Chief Counsel knows and applies national standards for criminal tax prosecutions. The Criminal Tax Division of Chief Counsel, in the national office, plays a principal role in establishing, disseminating, and reviewing the application of uniform national criminal tax policy. Suggestions that Chief Counsel does not serve such a function are simply incorrect.

--Chief Counsel is able to exercise free, independent judgment whether to refer a case for prosecution. Chief Counsel is counsel to the Service; it is not part of the Service.

Thus, we believe that Chief Counsel is both able and well-positioned to provide legal review on behalf of the Service and the Treasury Department for tax prosecution referrals.

2/ Taxpayers (or their representatives) avail themselves of the opportunity for a post-investigative conference with the Tax Division only 20 percent of the time, presumably because of the high cost of traveling to Washington, D.C. for such conferences.

- 8 -

C. Necessity to Streamline the Review Process

All parties recognize the need to streamline and expedite the legal review process. Three levels of review, one within the Treasury Department and two within the Department of Justice, each consuming an average of six months ^{3/} is unacceptable. Chief Counsel and the Tax Division have both been working diligently to streamline their review processes and are exploring new avenues to expedite review, at least with respect to certain categories of cases. We commend the steps mentioned in the draft report which the Tax Division has already taken.

Chief Counsel has also been active in reducing its inventory of overage cases. In the Fall of 1979, reduction of criminal cases over 90 days old was made a high priority in the SES performance expectations of all Regional Counsel and was an important measuring standard in performance ratings of District Counsel. As a consequence of those efforts, active cases over 90 days old (exclusive of cases pending "supplemental" investigations or "pre-declination" conferences with CID) have decreased in the past year from 691 to 257 (a 63 percent reduction), and cases over 6 months old have decreased from 346 to 105 (a 70 percent reduction). Continued improvement is expected this year.

With these general observations as background, we turn to a brief comment on the six alternatives described in the draft report. In doing so, we note that no single alternative was embraced and that elements of several fused together may be appropriate.

III. Specific Comments on the 6 Alternatives

Alternative 1.

Only part of this alternative is possible. To the extent that it contemplates daily involvement by Chief Counsel attorneys at the investigative level or elimination of Chief Counsel post-investigative review, it is not feasible. To the extent it contemplates more timely assistance at the investigative stage we heartily endorse the alternative.

^{3/} It should be noted that the computation of the average life of a case in Chief Counsel review includes the period during which necessary "supplemental" investigations are being conducted and also the period when conferences are being held with CID.

- 9 -

Alternative 2.

To the extent that this alternative requires "legal assistance on a more timely basis" at the investigative stage, Chief Counsel is prepared to take all possible steps to provide such assistance.

Alternative 3.

This alternative is unworkable. It would eliminate all Chief Counsel involvement, both in providing investigative assistance and post-investigative review. It would substitute legal assistance either from U. S. Attorneys, who generally have little substantive tax expertise, or from Tax Division attorneys who are located in Washington, D.C. Thus, it would sacrifice both the tax expertise of Chief Counsel and the availability of that expertise at the field level. It is our opinion that the only governmental legal office with the necessary resources, substantive and trial skills, and awareness of the total compliance program is the Office of the Chief Counsel. Further, the alternative would raise substantial "LaSalle" problems in the conducting of supplemental investigations.

Alternative 4.

To the extent that this alternative could be modified to embrace an expedited review by the Tax Division in selected categories of cases, we understand that the Tax Division has already moved in that direction.

Alternatives 5 and 6.

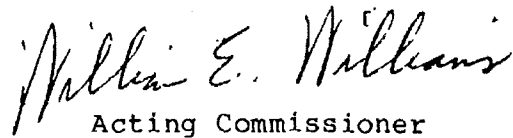
These alternatives are unacceptable. They would either eliminate or sharply curtail both Chief Counsel and Tax Division review, and would eliminate taxpayer conferences at those levels. More importantly, they would place primary or exclusive prosecutorial review in the hands of the U. S. Attorneys who typically have little tax expertise, have no clear understanding of the Service's national compliance program, and, may not have a particular interest in criminal tax prosecutions.

In conclusion, we reiterate our concern for the problems which are raised in the draft report and already are taking steps to address those problems. In developing options, Chief Counsel will attempt to provide more timely, effective assistance to CID

- 10 -

and to shorten the review time. We are, however, firmly of the view that Chief Counsel is a vital element in the criminal review process.

Sincerely,


Acting Commissioner



AMERICAN BAR ASSOCIATION

1980-81

SECTION OF
TAXATION

1800 M STREET N.W., 2ND FL., SOUTH LOBBY WASHINGTON, D.C. 20036 TELEPHONE 202/331-2230

WRITER'S DIRECT TELEPHONE NUMBER

202 223 4260

HAND DELIVERY

January 5, 1981

Mr. William J. Anderson
Director, General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Your letter of November 17, 1980, forwarded two copies of a GAO draft report entitled "A Streamlined Review Process For Criminal Tax Cases Would Strengthen Enforcement of Federal Tax Laws". While initially a thirty-day comment period was provided, that time was extended to January 5, 1981.

Enclosed, is a report that a Task Force of knowledgeable Section members have prepared. This report has been reviewed by the Management of the Section and has been cleared through the procedures of the American Bar Association that authorizes us to submit this report to you as the views of the Section of Taxation.

The report is not a report of the American Bar Association itself.

We appreciate the opportunity you have given us to review the draft report and submit comments. We stand ready to meet with you, or your associates, to discuss our comments. If this is any way in which we can be of help to you in this matter, please telephone me at the writer's direct telephone number set out above.

Very truly yours,

Edward N. Delaney

END/mj
Enclosures

CHAIRMAN
Harvie Branscomb Jr.
Box 129
1700 Bank & Trust Tower
Corpus Christi TX 78477

CHAIRMAN-ELECT
John S. Nolan
Suite 800
1700 Pennsylvania Ave. NW
Washington DC 20006

VICE CHAIRMEN
Administration
Charles B. Stacy
P.O. Box 273
Charleston WV 25321
Committee Operations
Hugh Calkins
1700 Union Commerce Bldg
Cleveland OH 44115

Government Relations
Edward N. Delaney
Suite 301
1000 16th St. NW
Washington DC 20036

Publications
James B. Lewis
345 Park Ave
New York NY 10154

SECRETARY
Irwin L. Treiger
Suite 2100
The Bank of California Center
Seattle WA 98164

ASSISTANT SECRETARY
Albert C. O'Neill, Jr.
P.O. Box 1102
Tampa FL 33601

SECTION DELEGATE TO THE
HOUSE OF DELEGATES
Mac Asbury Jr.
Suite 800
1666 K St. NW
Washington DC 20005

COUNCIL
The Officers
Section Delegate and
Charles M. Walker
22nd Floor
555 S. Flower St.
Los Angeles, CA 90071
Last Retiring Chairman
Ex Officio

John M. Bixler
Washington DC
Frederic W. Hickman
Chicago IL

James P. Holden
Washington DC
John B. Jones, Jr.
Washington DC

William A. Kelley Jr.
Philadelphia PA
Boris Kostelanez
New York NY

Warren V. Ludlam, Jr.
Jackson MS

Robert E. McQuiston
Philadelphia PA
William H. Smith
Washington, DC

LIAISON FROM
ABA BOARD OF GOVERNORS
Merrill R. Bradford
P.O. Box 1210
Bangor ME 04401

LIAISON FROM
YOUNG LAWYERS DIVISION
Michael G. Frankel
4700 First International Bldg
Dallas, TX 75270

LIAISON FROM
LAW STUDENT DIVISION
Jack J. Scheske
3119 Randolph #101
Topeka KS 66604

STAFF DIRECTOR
Pamela J. Arnold
1800 M St. NW
2nd Fl. South Lobby
Washington DC 20036

January 5, 1981

REPORT OF THE AMERICAN BAR ASSOCIATION
SECTION OF TAXATION TASK FORCE
REGARDING THE NOVEMBER 17, 1980
DRAFT REPORT OF THE GENERAL ACCOUNTING OFFICE
ENTITLED "A STREAMLINED REVIEW PROCESS
FOR CRIMINAL TAX CASES WOULD STRENGTHEN
ENFORCEMENT OF FEDERAL TAX LAWS

These Comments reflect only the position of the Section of Taxation and should not be construed as representing the position of The American Bar Association.

Introduction

Tax cases are different from all other types of prosecution in that the criminal enforcement of tax laws is a delicate, carefully nurtured showpiece whose principal function is to use the approximately 2,000 annual tax prosecutions to maximum deterrent advantage for the more than 100,000,000 taxpayers who finance government through the voluntary compliance system. The extraordinarily high conviction rate in tax cases is well in excess of that in federal criminal cases generally. That rate must be maintained in order to make clear to that large body of taxpayers that tax cheating will be punished; obviously dismissals and acquittals in tax cases have the opposite effect - and that is very harmful to voluntary compliance. The high conviction rate can be sustained only by an extremely careful review of cases by skilled specialists expert in weeding out those cases which involve significant legal and factual weaknesses.

Tax cases are typically more detailed and technical and are less clearly criminal than most other prosecutions

- 2 -

under federal criminal law, and no human victim calls for vindication. Income reconstructions by the net worth or bank deposits method often are hard for lay juries to accept beyond a reasonable doubt. Because the taxpayer's right to minimize tax is well understood, even slight legal uncertainty as to the taxability of the items in issue can lead to a defense of mistake and therefore lack of willfulness, and the involvement of a tax return preparer or tax adviser can lead to a defense of reliance on professional advice. Weak criminal tax cases can become a battle also of competing sets of numbers or competing experts and can degenerate into an apparent fight merely over the amount of taxes owed. Some involve tax schemes so complex that a jury will have difficulty understanding them, and that jury will refuse to find willfulness beyond a reasonable doubt.

These concerns are heightened by the need to continue the effort to provide a fair degree of equitable treatment of similar taxpayers on a nation-wide basis. This has always been a goal of the criminal tax program, and although perfection will never be achieved, the effort is clearly warranted to apply uniform standards to differentiate between non-criminal tax avoidance and criminal tax evasion, to differentiate justified reliance on advisors from post litem motam claims, and to establish margins, tolerances and de minimis limits to distinguish mistakes from intentional cheating.

- 3 -

All of this is most likely of accomplishment by a system of specialized post-referral review of criminal prosecution recommendations for federal tax offenses. It is the unanimous view of the Tax Section's task force that that review is sufficiently critical to the accomplishment of the unique goals of the Service's criminal enforcement program to warrant its function in the current tiered fashion by District Counsel of the Internal Revenue Service and Tax Division of the Department of Justice.

The GAO Draft Report

Several fundamental findings of the GAO report are believed to be wrong.

1. "Dual review means waste of money". Elimination of one level of review would not save the cost of the lawyers who now conduct that review. Quite the contrary; the cases now reviewed at that level would simply have to be reviewed at the other. In addition, there would be further cost involved if District Counsel were to become part of the investigation on a continuing basis; indeed it might well be that that involvement would cost more than the current review process. Furthermore the experience of various task force members confirms that special agents tend to be even less careful and less thorough if they know that their work will be subjected to less review. Indeed it is not unlikely that one reason for the recent increase in the rate of declinations

- 4 -

by the Tax Division, and even by District Counsel, is a decrease in care by special agents because they had less concern for District Counsel review by non-specialist lawyers (see pages 5, 9, and 10). If such a decrease in care should develop, there would be a corresponding increase in cases and therefore in cost - far beyond the current costs. Tiered review is clearly warranted as part of the effort to screen out cases with serious weaknesses which, if pursued, run the risk of wasting the additional and more costly government resources (the time of attorneys, judges, court personnel, and grand and petit jurors) because of a likely acquittal which in many cases will cause serious harm to the criminal enforcement effort.

It is important to note here the differences which distinguish review at different levels. Although lawyers in both District Counsel and Tax Division generally apply the same standards, lawyers in District Counsel's office are more apt to be "tax specialists" than Tax Division lawyers who tend to be more criminal law and trial oriented. In addition, the concentration of the latter lawyers in one office under the Assistant Attorney General, Tax Division makes it easier to apply a uniform standard for prosecution in this all-important area.

2. "Delay adversely affects taxpayers". The task force disagrees. Review is generally welcomed by taxpayers who willingly endure the difficulties of the case gestation period in order to have their cases carefully considered. They know it is well worth the private wait to have a chance of avoiding public

- 5 -

indictment. Moreover, many of those who are indicted grudgingly accept the fact that their cases were more fairly and carefully judged before a charge was brought.

The GAO's observation that taxpayers under investigation would welcome speedier determinations even at the price of less review is not shared by those experienced in representing such taxpayers. In most cases, the strain of being under a relatively private investigation is not in any respect comparable to the trauma of a public indictment. Admittedly there are some instances where taxpayers are concerned about delay; conceivably the rules should specify that taxpayer has the right to ask that his case skip one level of review, probably the District Counsel review.

3. "Delay adversely affects the criminal tax enforcement program." We do not believe there is any conclusive evidence that the time required by the review itself ^{1/} detracts measurably from the successful prosecution of most criminal tax cases. Tax cases are and will continue to be based on conduct that is older than that underlying other federal criminal charges. The additional six to twelve months that may permit careful review seldom will have a measurably adverse impact on the case.

The task force believes that the tiered review process can be refined and expedited, but that neither the District Counsel nor Tax Division review should be eliminated.

4. The GAO report suggests that a Criminal Investigation Division investigation that does not result in a prosecution represents a significant loss of time and money. The task force

- 6 -

disagrees. First, the very fact of the investigation provides a significant contribution to the criminal tax enforcement program. Taxpayers know that prosecution is a possibility and, although that information is generally not known to the public at large, it does become known to customers and employees; and that also produces the type of deterrent effect that is the very essence of the program. In addition in virtually every case, tax deficiencies and civil fraud or negligence penalties result from the investigation.

5. The task force disagrees with the GAO report's conclusion that there are presently three duplicative reviews of criminal tax cases. The third is supposedly the pre-indictment "review" of the case by the U.S. Attorney's Office. In the experience of task force members, this "review" is of a wholly different nature, totally different from the procedure contemplated by the GAO report. The U.S. Attorney does not and frequently is not qualified to give the case the kind of careful legal and factual review now given by the Tax Division. Instead, the U. S. Attorney simply familiarizes himself with the file in order to permit him to present a summary of the case to the grand jury for indictment, and then to prepare for trial^{2/}. That is an unavoidable part of the process of prosecuting the case and is separate and apart from the independent objective review, supervisory in function, required to determine the fairness and soundness of the case as part of the government's criminal tax program.

- 7 -

District Counsel review of all criminal cases is critical to a sound criminal tax enforcement program.

District Counsel provides the Revenue Service's only legal review of the adequacy, legal/policy propriety and overall merit of a criminal tax case. The task force does not believe that a criminal tax charge should be brought without the IRS' own lawyers scrutinizing the case for overall legal and factual adequacy and without their judgment that, in all respects, the case should be treated as criminal and should be used as one of the cases that will make up the publicly visible portion of the IRS' own criminal enforcement program.

The perspective of IRS' own lawyer is critical. It is - or used to be - the first objective look at the case by a Revenue Service lawyer who is a tax expert with special knowledge in criminal tax matters and whose expertise is especially useful in cases involving substantive and complex tax questions, which are more and more frequently seen in criminal tax recommendations.^{3/} This is particularly important also because of the increasing sophistication of tax evasion schemes. The tax lawyers in District Counsel bring to bear a desirable extra degree of tax knowledge which is then appropriately supplemented by the trial lawyers in the Tax Division.

In addition, the first legal review by a Revenue Service lawyer can screen out cases pushed by an agent who is overzealous or who has simply heavily invested his reportable time in the case. In this way the IRS lawyer can effectively implement the Commissioner's criminal tax enforcement program.

Moreover, District Counsel will not be called upon to try

- 8 -

the case if it goes forward. He is free therefore to make his judgment that a case deserves to be brought without concern for the natural reluctance to go forward with an unpleasant, difficult or tedious case. Those considerations do not inhibit District Counsel's review since those burdens will fall into a Justice Department lawyer.^{4/}

In addition, the District Counsel review procedure provides the only conference available to the taxpayer as a practical matter in the majority of cases. The IRS estimates that District Counsel conferences are held by taxpayers in about 90% of the cases reviewed by District Counsel. The conference is available in a location near the taxpayer's home. By contrast, in only about 20% of the cases reviewed at the Justice Department does the taxpayer seek a conference. The expense of coming to Washington for the conference is a major factor, especially in small cases. Although, of course, more conferences would be sought at the Tax Division if it were the only reviewing agency, that would be unfair to taxpayers who would have the expense of sending counsel to Washington.

The task force is of the view however that District Counsel review can be improved by modification of the present District Counsel cross assignment practice in order to develop greater criminal tax expertise.

The present cross assignment practice under which each District Counsel attorney handles some Tax Court cases, some general litigation matters (levy, collection, etc.) and some criminal tax cases should be changed so as to develop greater criminal tax expertise in District Counsel's office.

- 9 -

The GAO report recommends that greater pre-referral assistance be given by District Counsel to special agents. The task force is aware that there are existing procedures for such pre-referral assistance^{5/} but they are infrequently used by agents in various parts of the country. For such procedures to be effective at all they must make available to the agents not just the advice of a lawyer, but the readily available advice of someone with expertise in criminal tax matters.

The need for this type of assistance is highlighted by recent Supreme Court decisions announcing important rules for handling the procedural problems that occur during a criminal tax investigation. See e.g., LaSalle National Bank (summons restrictions); Caceres (consensual monitoring); Payner (questionable investigation tactics); Edge (handwriting exemplars). In addition, counsel must deal with new statutory problems relating to disclosure of tax return information (§6103); new procedures relating to the handling of possible attorney conflicts of interest in summons interrogations (Manual Supp. 9G-117); new procedures for granting immunity to reluctant witnesses; and new procedures relating to seeking assistance of grand juries in tax cases (Manual Supp. 9G-85). These examples underscore that without some greater specialization in criminal tax issues than now exists in District Counsel under the cross assignment system, pre-referral advice is not likely to be very useful.

- 10 -

The task force believes also that an expanded pre-referral system should be limited to specific questions submitted by the Criminal Investigation Division, such as those listed in the preceding paragraph. We do not believe that District Counsel should be involved on a day-to-day basis during the investigative phase. Such involvement would be certain to cause even more delay in the investigation and would require additional lawyers in District Counsel's office, without any real offsetting benefit.

The task force believes that pre-referral assistance by District Counsel is desirable if properly staffed and conducted, but that it should not be substituted for the post-referral review as a means of assuring that a criminal tax case is sufficiently sound to warrant prosecution. According to the GAO draft report, the high percentage of declinations is attributable to insufficient evidence, absence of willfulness, inability to determine culpability of the person targeted and lack of jury appeal. Obviously, such judgments can be made only after the evidence is fully gathered.

Pre-referral assistance, if rendered by criminal law specialists, may well assist, however, in leading special agents to shore up or correct deficiencies in some cases before it is too late (and thus salvage some meritorious prosecutions) or to identify insuperable obstacles and thereby justify early withdrawal from the case (and thus conserve the time of the agent).^{6/}

- 11 -

Tax Division review of all criminal tax cases is equally critical to a sound criminal tax enforcement program.

The attorneys in the Criminal Section the Tax Division work out of a common location at the Department of Justice in Washington, D. C. Virtually all criminal tax cases are reviewed in that office. The volume of cases vests them with an expertise in this sensitive and complex area that is itself a considerable resource of the U.S. Government. Moreover, they have a truly national perspective because they see the cases which are generated from every part of the country. They are in a vastly better position than any District Counsel or any United States Attorney to perceive a lack of uniformity in the treatment of taxpayers from one district to another. They receive much more accurate, detailed and regular information on the outcome of criminal tax cases and on the reactions of judges and jurors to various recurring fact patterns seen in criminal tax cases. Their ability to perceive potential fatal weaknesses in cases before the government embarks on the most costly step of a public prosecution is unmatched elsewhere.

They are the expert trial lawyers in criminal tax cases and bring to bear a dimension not available elsewhere: an ability to make the ultimate judgment for the government that, since their client, the Internal Revenue Service, has determined that the case fits within the criminal tax enforcement program, the likelihood

- 12 -

of a conviction is sufficiently good to warrant the expenditure of the additional resources of government involved in grand jury presentation and trial.

In addition, the Tax Division is removed from the local politics and pressures of the district in which prosecution of a tax offense is to occur. The task force's discussions with present and former IRS and Justice Department officials confirm that Tax Division review provides a healthy and much needed insulation of the decision whether or not to prosecute a tax offense from local fear, favoritism or outright pressure.

The special expertise of the Tax Division Criminal Section cannot be underestimated. Most U.S. Attorneys' Offices have no prosecutor who has any significant background in the immensely complex tax law, the tax reporting system, the many tax forms, the IRS service center procedures, the special agent procedures and CID techniques for documenting financial transactions and preparing bank deposit and net worth income reconstructions. While certain major city U.S. Attorneys' Offices have one or sometimes more assistants skilled in tax cases, their number is not enough to justify nationwide elimination of the Tax Division Criminal Section's review function - and clearly there is no merit in eliminating such review with respect to some but not other judicial districts. That would seem to add new disadvantages without any benefits at all.

- 13 -

Conferences

Implicit in the foregoing discussion is the very strong conviction of the task force in support of the retention of the conference available to taxpayers as part of each step of the review process. Since the conference itself takes only a few hours at the most, the retention of the conference procedure obviously does not cause any significant delay. Nor is there any evidence to the effect that scheduling the conference is a serious problem.

Equally important is that the task force experience makes clear that a properly run conference can be very helpful to both the government and the taxpayer in learning more about the real issues in the case. In this connection it might be noted that the conference would be made more meaningful if the lawyers in District Counsel and in the Tax Division were required to be thoroughly familiar with all aspects of the case prior to the conference.

The task force strongly recommends against
direct referral of criminal tax cases to
the United States Attorney

Inherent in the foregoing discussion is the opinion of the task force that it would be severely detrimental to a sound criminal tax enforcement program to adopt the recommendation of certain U.S. Attorneys that all criminal tax cases be referred directly from IRS special agents to the local U.S. Attorney's Office.^{7/}

- 14 -

This report has already listed a number of critically important arguments against any such procedure: local pressure; lack of tax expertise in most U.S. Attorneys' Offices and a resultant inability adequately and properly to review and screen weak or defective cases; increased risk that tax laws will be used in a punitive way against local citizens out of favor; impossibility of any effort to accomplish a policy of national uniformity; and elimination of any meaningful conference opportunity prior to indictment.

Principal among those reasons is the overwhelming lack of expertise in most U.S. Attorneys' Offices, which would prevent the kind of specialized review of criminal tax cases that the task force deems essential to accomplish the principal functions of the criminal enforcement program of the IRS. This lack of tax specialty is clearly demonstrated by the fact that with the exception of some few U.S. Attorneys' Offices, most criminal tax cases are in fact tried by a Tax Division lawyer (and that system works well).

A principal complaint running through the report of the ad hoc committee to the Attorney General's Advisory Committee is that U.S. Attorneys have no opportunity to express their views on cases arising within their district as to which prosecution is declined at the District Counsel or Tax Division level. In fact,

- 15 -

there is and has for several years been a procedure in effect under which the U.S. Attorney receives a copy of the District Counsel's recommendation (whether in favor of or declining prosecution), together with a copy of the special agent's report, and is given 21 days to express his views to the Assistant Attorney General.^{8/} Our interviews with present and former Tax Division personnel indicate that this right of comment is virtually never exercised by U.S. Attorneys' Offices, that indeed, there are probably only two cases within memory in which significant comments were received from U.S. Attorneys' Offices under this procedure.

Certain U.S. Attorneys appear concerned over the declination of prosecution in certain marginal cases. The task force suggests that simply proves the vitality of the current procedures: declination in certain marginal cases after a careful review by experienced District Counsel or Tax Division prosecutor probably reflects policy and uniformity considerations unknown and of no interest to a U.S. Attorney. Furthermore, although of course he does not like to lose cases, he does not have the same concern for the critical importance of maintaining a high rate of convictions in tax cases; he is a prosecutor with no real interest in tax policy. Moreover, the cost of case preparation and review by IRS special agents, IRS lawyers and Department of Justice lawyers seldom will equal the additional cost of invoking the full judicial system, including a grand jury, to prosecute a marginal case which runs the serious risk of an acquittal,

- 16 -

or even worse, reversal on appeal for a defect that rendered the case marginal at the time of review.

Conclusion

The GAO review of procedures for processing criminal tax cases has served the useful purpose of focusing attention on one of the more important aspects of the internal revenue system. In fact the study really establishes a fundamental point: the present system works well. With a conviction or plea of guilty in approximately 94% of the criminal tax cases, the system reflects an astounding degree of success with due regard for the rights of taxpayers and the protection of the national fisc.

Accordingly, for all of the foregoing reasons, the task force recommends ⁹ that:

1. Since current procedures involve only two substantive reviews, and each of them performs both separate and complementary functions, both should be preserved.

2. However, each review can and should be improved and accelerated by:

- a. providing for more specialization by the lawyers in District Counsel's office ; and

- 17 -

b. making those specialized lawyers more easily available to the Criminal Investigation Division to answer specific legal questions which arise during the investigation.

MEMBERS OF THE ABA
SECTION OF TAXATION
TASK FORCE

John M. Bray
Mary Ann Cohen
Marvin J. Garbis
Frederick G. Helmsing
James E. Merritt
Cono Namorato
Lipman Redman
Jules Ritholz
Michael I. Saltzman
Harvey M. Silets
Sherwin P. Simmons

FOOTNOTES

1/ Some contend that delay dilutes potential deterrent effect. This would be true, as to deterrence of others, only if the fact of investigation were known to them. When others hear of a case for the first time, the deterrent effect is achieved, regardless of the year under investigation. As to the taxpayer, delay probably increases deterrence especially if he suffers as a result of it, as the report says he does. Subjects of investigation seldom, if ever, cheat during investigations. Thus, delay tends to increase deterrence.

2/ Although the GAO draft report states that a significant number of cases is dropped by U.S. Attorneys, it does not disclose the reasons. The experience of members of the Task Force shows that many of the cases are dropped after indictment and in most instances because of the death of the taxpayer or a key witness or because the defendant is indicted on a non-tax crime and prosecution for the tax violation is dropped because of the Department of Justice's "dual prosecution" policy.

3/ Certain types of cases involve no real tax question, such as a "clear W-4 case" where the tax protester claims 500 exemptions. Conceivably, subject to careful definitional standards, such cases might not be subjected to District Counsel review; they might instead go directly from CID to the Tax Division.

4/ Declinations often occur because special agents have not recognized (stayed on a case after) a fatal weakness. The failure to recognize a weakness in an investigation is not uniquely a legal problem. It is a matter a competent investigator specializing in a particular type of investigation can handle if he is properly trained and supervised by senior agents. The declination problem begins at the agent and supervisor level, and it is less expensive and more productive to cure the problem at this level. IRS management should more clearly instruct agents that they will not be judged adversely if they withdraw from a case to move on to a more promising one.

5/ See attached Chief Counsel's Notice, "Procedures for Review of Dual Prosecution Issues During Investigative Stages."

6/ Sequential post-investigative legal reviews do not reduce Internal Revenue Service effectiveness. Lack of pre-referral legal advice does. Preoccupation with the number of CID investigations which do not lead to prosecution is misleading because it overlooks the effect of the investigation itself as (1) deterrent on the tax-

payer, (2) deterrent on witnesses and others reached by the wide ripple effect of investigations, (3) the substantial revenue generated by the tax deficiencies, penalties and interest collected even in CID declined cases, and (4) in the nature of things, most investigations will not lead to prosecution due to effective case filtration. The time involved in post-referral review does not affect case rejection in any meaningful way. The time consumed is most likely pipeline time and is a treatable administrative problem.

7/ Task force members have varying degrees of familiarity with the recurring efforts of U. S. Attorneys in various districts to wrest from the Department of Justice Tax Division jurisdiction over the handling of both civil and criminal tax cases for many years. The fact of this historical battle for greater jurisdiction and greater "turf" is documented in the Manual for Criminal Tax Trials. (Ch. 1, p. 3, fn. 1) It states:

"From time to time, proposals have been made for direct referral of all income tax fraud cases by the Revenue Service to the United States Attorneys. Successive Attorney Generals have considered and refused such proposals on the ground that the vital matter of the Government's revenues should be subject to their close supervision. Equally cogent considerations of uniform prosecution policy and procedure have dictated rejection of direct referrals. It has generally been the experience of the United States Attorneys that they were relieved of intense local pressures by centralized prosecutive decisions."

8/ See attached Title 6 -- Tax Division, U.S. Attorney's Manual 6-2.110.

9/ Stated in terms of the format of the GAO report, the task force's conclusions are as follows:

1. The GAO report's first alternative calls for District Counsel to conduct a concurrent review and render pre-referral legal assistance on cases. The task force believes that review of the sufficiency of the evidence and of the overall propriety of prosecution cannot be made during the investigation, but must await the marshalling and analysis of all of the evidence. While pre-referral legal assistance is desirable, it will not solve the problems addressed by the GAO report.

2. The GAO report's second proposal is to retain District Counsel's post-referral review but expand pre-referral assistance and send some cases directly to the U.S. Attorney. The task force believes that any attempt to eliminate Tax Division review would be a fundamental mistake.

3. As to the GAO report's third alternative (eliminating District Counsel's function entirely and permitting CID to get legal assistance from the Department of Justice Tax Division), elimination of the District Counsel function would save nothing and would sacrifice a review process which is critical to a sound criminal tax enforcement program. Moreover, under the LaSalle National Bank case, Department of Justice participation in rendering legal assistance to CID during the investigation would pose an unnecessary legal problem in the conduct of the investigation.

4. The GAO report's fourth proposal would eliminate Tax Division review and refer cases directly from District Counsel to the U.S. Attorney. As with the proposals to eliminate post-referral review by District Counsel, the task force believes it would be a fundamental mistake to eliminate Tax Division review.

5. The GAO report's fifth alternative - direct referral by CID to U.S. Attorneys coupled with concurrent review by the Department of Justice Tax Division - is objectionable in the most fundamental sense: it would be tantamount to elimination of Tax Division review in actual practice and would concentrate the real review in the hands of U.S. attorneys around the country who have neither the special expertise nor the extensive experience now possessed by the Department of Justice Tax Division to review these cases. Such a procedure would destroy all the benefits of any review system and would render impossible any national uniformity in the criminal tax enforcement program.

6. The GAO report's sixth suggestion is subject to the same comments as under number 5. It calls for direct referral by CID to U.S. Attorneys. The task force believes very strongly that such a system would cause the total abandonment of any meaningful special review of criminal tax cases, a review which we deem essential to accomplish the goals of the IRS criminal enforcement program.

RECEIVED
JUL 27 1978
FBI - NEW YORK

Internal
Revenue
Service

Office of the Chief Counsel

Notice

N 3000.73

July 27, 1978

Cancellation

Subject: Procedures for Review of Dual Prosecution Issues During Investigative Stages **Date:** December 31, 1978

1. **PURPOSE.** To establish procedures for the early identification and review of Dual Prosecution issues in criminal tax cases including review by the Tax Division of the Department of Justice.
2. **SCOPE.** The provisions of this Notice shall apply to all attorneys involved in criminal tax activity matters.
3. **BACKGROUND.** Determining whether the Dual Prosecution policy of the Department of Justice, as applicable to criminal tax cases, precludes subsequent prosecution for tax offenses requires interpretations of law, and judgments as to the exercise of prosecutorial discretion. In the past these decisions were normally made by Regional Counsel and the Department of Justice after a prosecution recommendation was made. If the case was rejected at either of these levels, a great amount of investigative and review time was expended which may have been unnecessary if there had been an early determination of the applicability of the policy. For a discussion of the various aspects of the policy see L.E.M. § 7030.1.
4. **CANCELLATION:** None.
5. **PROCEDURES.**
 - a. The Criminal Investigation Division will be alert to identify the existence or potential existence of Dual Prosecution issues at the earliest possible time during an investigation. When one of these issues is identified, the Criminal Investigation Division will make a written request to Regional Counsel for pre-referral advice. The information to be supplied to Regional Counsel will include that which is necessary to make a determination of whether or not Dual Prosecution policy considerations apply and if they do apply, whether there are "compelling reasons" to prosecute the tax offense. (See L.E.M. § 7030.1.) Appendix 1 is a check sheet of essential facts which should be supplied. "Evidence" to establish the tax offense need not be submitted to Regional Counsel at

Distribution: CC-2
RO NO
AF CT

Initiated by: CC
File in Criminal Tax Binder

N 3000.73

July 27, 1978

At this point except as it bears on the Dual Prosecution issue. The written request for pre-referral advice will be accompanied by a fact sheet (Appendix 2) showing the characteristics of the potential prosecution case. (It is contemplated that this procedure will not be used until the Criminal Investigation Division makes a preliminary determination of the likelihood of developing a prosecutable case.)

- b. Upon receipt of a request under these procedures, Regional Counsel will promptly act upon the request by making one of the following determinations:
- (i) Dual Prosecution policy considerations apply and compelling reasons for prosecution do not exist. Regional Counsel will so advise the Criminal Investigation Division in writing. The determination of whether or not to continue with the investigation will be made by the Criminal Investigation Division.
 - (ii) Dual Prosecution policy considerations clearly do not apply. Regional Counsel will so advise the Criminal Investigation Division in writing.
 - (iii) Dual Prosecution policy considerations apply except that compelling reasons are believed to exist which may warrant seeking prosecution to be authorized by the Assistant Attorney General, Tax Division. In such situations Regional Counsel should initiate a written request to the Criminal Section, Tax Division of the Department of Justice for its opinion on the application of the policy.
 - (iv) There is a serious question as to whether or not Dual Prosecution policy considerations apply. Such questions can arise in attempting to determine such things as what is a "long prison sentence" with respect to an unrelated prior conviction (See L.E.M. § 7030.2); what effect a tax prosecution will have upon rehabilitation efforts resulting from a prior unrelated conviction; and whether or not the prior conviction was based upon the same transactional facts that will be used in the proposed tax case. In this situation Regional Counsel will initiate a request to the Department of Justice for its opinion on the application of the policy.

July 27, 1978

N 3000.73

- (v) Dual Prosecution policy considerations may apply depending upon the outcome of a nontax investigation or prosecution which has not yet terminated in final judgment. If Regional Counsel believes that compelling reasons exist to prosecute the tax offense even though the Dual Prosecution policy will apply in the event of a final judgment against the taxpayer in the nontax case, Regional Counsel may, in his/her discretion, initiate a request to the Department of Justice for its opinion on this question. In the event Regional Counsel determines that compelling reasons would not exist in the event the Dual Prosecution policy eventually applies, that opinion will be given to the Criminal Investigation Division and the determination of whether or not to continue with the investigation will be made by the Criminal Investigation Division.
- (vi) In the event that the facts are not sufficiently developed to make a determination, Regional Counsel will request further development. The Criminal Investigation Division need not develop these additional facts in the event the investigation is discontinued.
- c. Requests to the Department of Justice will be addressed to the Chief, Criminal Section, Tax Division and be prepared for the signature of the Director, Criminal Tax Division. Requests originating in District Counsel offices will be forwarded to Regional Counsel for approval. If approved, such requests will be forwarded to the Director, Criminal Tax, for signature. Regional Counsel should also forward the entire informal file and background documents. Care will be exercised that only material meeting the tests set forth in I.R.C. § 6103(h)(2) is forwarded to the Department of Justice.
- d. Requests to the Department of Justice under this procedure will include the opinion of Regional Counsel as to the application of the Dual Prosecution policy to the case under consideration.
- e. The Department of Justice has agreed to the procedures in this Notice and has agreed to give expeditious consideration to requests for opinions.

N 3000.73

July 27, 1978

- f. These procedures are not meant to preclude the use of informal pre-referral consultation between the Criminal Investigation Division and Regional Counsel, prior to the use of these procedures.
 - g. Opinions of Regional Counsel and the Department of Justice pursuant to these procedures will only apply to the Dual Prosecution policy question as it applies in the context of the limited facts which are known or assumed to exist at the time the opinion is rendered. It must be understood that additional facts, developed after the opinion, may have a bearing on the weight which will ultimately be given to the Dual Prosecution policy aspects of a given case.
6. EFFECTIVE DATE. This Notice is effective as of the date of issuance.

David E. Gaston

DAVID E. GASTON
Director
Criminal Tax Division

UNITED STATES ATTORNEYS' MANUAL
TITLE 6--TAX DIVISION6-2.000 CRIMINAL TAX CASES6-2.001 Appeals

See Title 2.

6-2.010 United States Attorney Responsibility

Although the United States Attorney will normally have the responsibility for the trial of criminal cases, the Tax Division will render substantial aid and assistance relative to many cases handled by the United States Attorney.

6-2.020 Manual for Criminal Tax Trials

The Tax Division's "Manual for Criminal Tax Trials" contains an extensive discussion of the statutes and decisions and recommended procedures in handling criminal tax cases. However, this Title of the United States Attorneys' Manual will prevail in any instance where the "Manual for Criminal Tax Trials" or any other manual is in derogation or conflict.

6-2.100 INITIATION OF PROSECUTION

6-2.110 I.R.S. Investigation and Review

Criminal tax cases are investigated by special agents of the Intelligence Division, Internal Revenue Service. When prosecution is proposed, such cases are processed through the appropriate office of Regional Counsel, where attorneys of the Revenue Service review the recommendations. After the review of the Regional Counsel's office, the case is referred to the Tax Division.

In each case forwarded to the Tax Division, the Internal Revenue Service prepares a criminal reference letter (CRL) stating the Service's recommendations and transmitting the special agent's report (SAR) and exhibits. A copy of the CRL and SAR will be simultaneously forwarded to the United States Attorney by the Internal Revenue Service.

In those cases in which the Office of Regional Counsel does not recommend prosecution, and sends a criminal action memorandum (CAM) to the Tax Division, a copy will also be forwarded to the appropriate United States Attorney.

After receipt of the CRL, SAR or CAM, the United States Attorney will review the matter and transmit his views and comments to the

UNITED STATES ATTORNEYS' MANUAL
TITLE 6--TAX DIVISION

Assistant Attorney General, Tax Division. If the United States Attorney's views are not received within twenty-one (21) days after the United States Attorney has received his copy of the Regional Counsel's CRI, CMI or SAR, or such shorter period as may be required by the statute of limitations or other considerations, the Assistant Attorney General may assume that the United States Attorney does not wish to express his views before a final decision is reached as to whether prosecution will be authorized.

6-2.170 Other Procedures

Examples of cases where other procedures exist include cases designated as organized crime matters and cases of interest to the Department of Justice.

6-2.121 "Case of Interest to the Department of Justice"

In cases of particular interest to the United States Attorney, the United States Attorney may request the Tax Division to designate a specific case as a "case of interest to the Department of Justice." Whenever such a case is designated by the Tax Division as "of interest to the Department of Justice," the criminal tax aspects of the case are not closed by the Regional Counsel, but the case is forwarded to the Tax Division for determination as to whether to initiate or decline prosecution. A copy of the referral letter shall be forwarded to the United States Attorney at the conclusion of the Regional Counsel's review in those cases designated as "cases of interest to the Department of Justice" whether or not the Regional Counsel concludes that prosecution is merited. Thereafter the United States Attorney shall have twenty-one days or such shorter time as may be required by the statute of limitations or other considerations to express his views on the matter to the Tax Division.

6-2.130 Grand Jury Procedures - Non-Tax Investigations

A United States Attorney or grand jury frequently has matters under investigation which are not under the jurisdiction of the Tax Division and in which it appears likely that federal criminal tax violations will be revealed. These matters may become the subject of investigation prior to a referral from the Internal Revenue Service to the Tax Division.

A grand jury investigation of the type described in this section may take place in a "case of interest to the Department of Justice," as designated in accordance with paragraph 6-2.121, or in a case in which the United States Attorney or a grand jury has an investigatory interest resulting from a pending investigation not under the jurisdiction of the Tax Division, subject to the following:

- (1) Notice to the Assistant Attorney General, Tax Division, given in the manner set forth for regular grand jury procedures (6-2.341);

(268056)

Request for copies of GAO reports should be sent to:

**U.S. General Accounting Office
Document Handling and Information
Services Facility
P.O. Box 6015
Gaithersburg, Md. 20760**

Telephone (202) 275-6241

The first five copies of individual reports are free of charge. Additional copies of bound audit reports are \$3.25 each. Additional copies of unbound report (i.e., letter reports) and most other publications are \$1.00 each. There will be a 25% discount on all orders for 100 or more copies mailed to a single address. Sales orders must be prepaid on a cash, check, or money order basis. Check should be made out to the "Superintendent of Documents".