

CC-2013-005

January 23, 2013

Communications with Taxpayers
Unrepresented in Tax Court

Subject: Litigation

Effective Until Further

Cancel Date: Notice

Purpose

This Notice provides guidance regarding communications with a taxpayer appearing pro se in a case docketed in the United States Tax Court when the taxpayer has filed with the Internal Revenue Service a valid Form 2848, Power of Attorney and Declaration of Representative (POA), for a representative named in the Form 2848 who has not entered an appearance in the Tax Court case.

Discussion

Practitioners in the Tax Court, including Chief Counsel attorneys, are required to carry on their practice in accordance with the letter and spirit of the American Bar Association Model Rules of Professional Conduct. T.C. Rule 201(a). The ABA Model Rules provide that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer *in the matter*, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rules of Prof'l Conduct R. 4.2 (emphasis added.) This rule does not “preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client *in the matter*.” ABA Model Rules of Prof'l Conduct R. 4.2 cmt. [4] (emphasis added). The ABA Model Rules are directly applicable to practitioners representing parties in the Tax Court, and Model Rule 4.2 is also consistent with state bar ethics rules applicable to members of the bar in their respective states, many of which are modeled after the ABA rules. See, e.g., Rule 4.2, Virginia Rules of Professional Conduct; Rule 4.2, Utah Rules of Professional Conduct.

An attorney is only considered to be representing a party in a matter in litigation in the Tax Court if that attorney enters an appearance in the case. See T.C. Rule 24(b) (“[i]n the absence of an appearance by counsel, a party will be deemed to appear on the party's own behalf. An individual party may *represent* himself or herself.”) (Emphasis added.) The Tax Court provides specific rules regarding how an attorney enters an appearance in a case. Under T.C. Rule 24(a),

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a petitioner's attorney enters an appearance either by subscribing the attorney's name to the original petition (or other initial document or pleading) or by filing a separate entry of appearance in the case. A petitioner's attorney may also enter an appearance by following the "Substitution of Counsel" procedure prescribed by T.C. Rule 24(d). If none of these actions occur, the Tax Court considers the taxpayer to be pro se. Accordingly, because the Tax Court does not consider the taxpayer to be represented in the matter before it without an appearance by an attorney in conformance with T.C. Rule 24, not only is there no prohibition against communicating directly with the taxpayer concerning the Tax Court case, Chief Counsel attorneys are specifically authorized by the court's rules to communicate directly with the taxpayer concerning the Tax Court case.

A taxpayer may file with the Internal Revenue Service a valid Form 2848, Power of Attorney and Declaration of Representative, which names an attorney as the taxpayer's representative. In Tax Court litigation, pro se taxpayers may incorrectly expect our Office to deal exclusively with that attorney or other representative named in the Form 2848 even if the attorney has not entered an appearance in the Tax Court case. This situation may arise in connection with taxpayers who obtain assistance from academic or nonacademic clinic or bar-sponsored calendar-call programs when the clinic or bar-sponsored representative does not enter an appearance in the Tax Court case but a valid Form 2848 exists. In these situations, Chief Counsel attorneys may communicate with a representative named in a valid Form 2848 covering the taxable years at issue in the Tax Court case, but are not required to do so if the attorney has not entered an appearance. Including an attorney or other representative designated in a Form 2848 in discussions with a pro se taxpayer may lead to a more efficient and effective resolution of the Tax Court litigation.

Communication with a representative regarding a Tax Court case who has not entered an appearance in the case is at the discretion of the Office. The Form 2848 designates a named individual "to represent the taxpayer before the Internal Revenue Service for [certain specifically mentioned] matters . . ." Form 2848, Box 3. Those "matters" do *not* include litigation, which is the "subject of the representation" in a Tax Court case. See Conference and Practice Requirements section 601.509, Statement of Procedural Rules ("The Tax Court has its own rules of practice and procedure and its own rules respecting admission to practice before it."). A pro se taxpayer's granting of permission to talk to a representative with a valid Form 2848 does not alter the taxpayer's status as being unrepresented in the Tax Court. Until that appointed representative formally enters an appearance in the case, the taxpayer is unrepresented in the Tax Court. Communicating directly with a pro se taxpayer, therefore, does not violate Model Rule 4.2 even if the taxpayer has filed a valid Form 2848 with the Service covering the tax years at issue in the docketed case. Moreover, attorneys should not formally serve documents on an attorney named in a Form 2848 if that attorney has not entered an appearance in the case. Such service will be treated by the Tax Court as improper because the taxpayer is not represented in the Tax Court matter.

Please contact Branch 1 or 2 of Procedure and Administration at (202) 622-4910 and (202) 622-4940, respectively, if you have questions concerning these procedures or if the propriety of your communicating directly with a pro se petitioner is raised in a Tax Court case.

/s/

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