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Communications With Pro Se
Petitioners and Form 2848
Representatives in Tax Court
Subject: Litigation

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PURPOSE

This Notice provides updated guidance regarding communications with pro se petitioners in cases docketed in the United States Tax Court when a petitioner has filed with the Internal Revenue Service a valid Form 2848, Power of Attorney and Declaration of Representative, appointing a representative who has not entered an appearance in the Tax Court case. This Notice also provides information on changes announced by the Tax Court to enhance its procedures for the benefit of self-represented petitioners. Chief Counsel Notice CC-2013-005, Communications with Taxpayers Unrepresented in Tax Court Litigation (January 23, 2013), is superseded.

DISCUSSION

The Tax Court has established clinical, student practice, and bar sponsored calendar call programs to assist pro se taxpayers at trial sessions. See <http://www.ustaxcourt.gov/clinics.htm>. Some attorney participants in these programs do not enter formal appearances in the Tax Court pursuant to Tax Court Rule 24, preferring to represent the petitioner — at least in the beginning of the case — only with a Form 2848, Power of Attorney and Declaration of Representation. In these instances, when Counsel attorneys find it necessary to communicate directly with the pro se petitioner, questions have arisen as to whether such communication violates American Bar Association Model Rule of Professional Conduct 4.2.¹

Communication with Pro Se Petitioners

The Tax Court's Rules of Practice and Procedure define when a petitioner has a representative for purposes of appearance in the Tax Court. Rule 24(b) states that "[i]n the absence of appearance by counsel, a party will be deemed to appear on the party's own behalf. An

¹ **ABA Model Rules of Prof'l Conduct R. 4.2: Communication With Person Represented by Counsel.** 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.

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individual party may represent himself or herself.” This is so even if a pro se petitioner has an attorney representative pursuant to a Form 2848 or other power of attorney – that petitioner is still unrepresented in the Tax Court for purposes of the Tax Court Rules. See Conference and Practice Requirements, § 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.”). Nevertheless, the Office of Chief Counsel recognizes the significant assistance that Low Income Taxpayer Clinic (LITC) and other pro bono representatives provide to pro se litigants, as does the Tax Court, as evidenced by its recently revised procedures for cases involving pro se petitioners, discussed below. Both the court and our office expect and encourage Counsel attorneys to work with authorized representatives on their Tax Court cases even though no formal entry of appearance has been made in a particular case.

Counsel attorneys should, to the maximum extent possible, interact with the Form 2848 representative, whether the representative is an attorney or other authorized representative, with the goal of resolving the case on a mutually agreeable basis. Even though a Form 2848 representative has not entered a formal appearance in the Tax Court, it is generally advantageous and in the best interests of all parties to include a Form 2848 representative in discussions about the case and provide copies of relevant documents in the case, such as a copy of the trial memorandum or the pleadings filed in the case. Providing these documents may make it easier for the representative to become familiar with the issues in the case, facilitate more productive settlement negotiations or trial preparation, and lead to more effective and timely resolution of the case.

The Tax Court’s Standing Pretrial Order directs the parties to communicate for purposes of settlement and/or developing a stipulation for trial. See Chief Counsel Notice CC-2011- 003, New Standing Pretrial Order, Standing Pretrial Notice, and Requirement to File the Pretrial Memorandum (October 22, 2010). The standing order provides that if a party has difficulty communicating with another party, the affected party should promptly advise the court in writing or request a telephone conference with the presiding judge. Because of the court’s strong interest in facilitating the use of calendar call program representatives, consideration should be given to contacting the court for assistance in situations in which there is a calendar call program attorney representing the petitioner before the Service under a Form 2848 or other power of attorney for the same taxable period and type of tax that is now at issue before the Tax Court, and the Counsel attorney determines that it is necessary to communicate directly with the petitioner. For example, assistance of the court may be appropriate when a Chief Counsel attorney has tried unsuccessfully to reach a calendar call program attorney to discuss a settlement proposal or develop a stipulation for trial.

Although Counsel attorneys may provide copies of documents served on the petitioner as well as other documents relevant to the litigation to the Form 2848 attorney or other authorized representative named on the form, the original documents must be served on the pro se petitioner in accordance with Tax Court Rule 21. See Goodman v. Commissioner, T.C. Memo. 2006-220, 2006 Tax Ct. Memo. LEXIS 224 at *10 (“By Court Rule, papers and documents are generally served on the parties unless there is counsel of record. Rule 21(a) and (b)(2); see also Rule 24(b).”). Serving documents only on the representative named on the Form 2848 does not comply with the Tax Court’s Rules. See, e.g., id.; Swope v. Commissioner, T.C. Memo. 1990-82.

Additionally, while Counsel attorneys are constrained by section 6103 from sharing return information, including trial memoranda, with pro bono representatives who have neither entered an appearance nor provided a Form 2848 or other power of attorney, they can and should

provide the pro bono calendar coordinator with general information about any unsettled pro se cases. Counsel attorneys can indicate, for instance, that there are several unrepresented petitioners having earned income tax credit, dependency exemption, and filing status issues, or pro se cases involving the first-time homebuyer credit or substantiation of Schedule A deductions such as those for charitable contributions and employee business expenses. In providing this general information, Counsel attorneys must be mindful not to identify the individual petitioners or disclose information distinct to individual petitioners whose cases present those issues, or reveal other return information protected by section 6103.

Tax Court's Recent Changes Regarding Self-Represented Petitioners

The Tax Court recently revised its procedures for cases involving pro se petitioners and now sends a notice to pro se petitioners 30 days before the trial date reminding them about the upcoming trial date and referring them, if they are eligible for assistance, to a tax clinic serving the city where the trial is to be held. The notice encourages the petitioner to arrive at court by 9:00 a.m. on the day of the calendar call. The Tax Court also requests that pro bono representatives participating in a calendar call program², as well as respondent's attorneys handling the cases, arrive at the Tax Court by 9:00 a.m. to prepare for the 10:00 a.m. calendar call. Therefore, each office should have at least one attorney present at the court by 9:00 a.m. to discuss matters with petitioners and any calendar call program representatives they may have engaged. It is recommended that the Calendar Administrator also be present at the court by 9:00 a.m. Additionally, in certain cities³, the Tax Court provides rooms for both respondent's and petitioner's counsel where the volunteer tax practitioners can consult with petitioners and discuss settlement with respondent's counsel.

As noted, clinical, student practice, and bar sponsored calendar call programs are an important part of the Tax Court litigation process. We strongly support the Tax Court's calendar call programs and are committed to working with the volunteer participants to successfully resolve pro se cases docketed in the Tax Court while adhering to the letter and spirit of the Tax Court's Rules of Practice and Procedure and the ABA Model Rules of Professional Responsibility.

Questions should be directed to Branch 1 or 2 of Procedure and Administration at (202) 317-6845 and (202) 317-6844.

/s/
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² The Tax Court's calendar call programs permit participants, *inter alia*, to (1) provide procedural advice to petitioners who decide to proceed to trial; (2) consult with petitioners regarding the merits of their cases and evaluate settlement proposals; (3) act as a communicator or mediator between the petitioner and the Counsel attorney to assist in resolving the case; and (4) enter an appearance on the petitioner's behalf.

³ See Tax Court's website at http://www.ustaxcourt.gov/clinics/clinic_program_changes.pdf for list of cities.