In-house tax professionals and Circular 230

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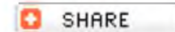

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Given the complexity of modern business, it is hardly surprising that most companies of substantial size have tax professionals on their payroll to handle tax planning and compliance matters. Significant questions exist about whether and to what extent in-house tax professionals are subject to practice standards contained in Circular 230, *Regulations Governing Practice before the Internal Revenue Service* (31 CFR Subtitle A, Part 10). The IRS Office of Professional Responsibility (OPR) has exclusive authority to administer and enforce those standards and for disciplining "practitioners." (See 31 U.S.C. § 330 and Circular 230, §10.1.) This Alert provides guidance on some of the salient issues.

1. *Are in-house tax professionals subject to Circular 230?*

Under Circular 230, the following categories of individuals are authorized to practice before the IRS by virtue of their professional credentials: attorneys, certified public accountants (CPAs), and enrolled agents (EAs). (Circular 230, §10.3(a), (b), and (c).) While there is no iron-clad rule, most — but not all — in-house tax professionals fall within the first two of these three categories. As such, they are eligible to practice before the IRS if they meet one additional requirement: They file a written declaration that they are qualified to represent a person before the IRS who has authorized the practitioner to act on their behalf (i.e., Form 2848, Power of Attorney and Declaration of Representative, signed by both the practitioner and the client/taxpayer).

In addition, under Circular 230's "limited practice" rules, bona fide officers and regular full-time employees of a corporation (including a parent, subsidiary, or other affiliated corporation), association, or organized group may practice before the IRS, even if they are not otherwise a practitioner. (Circular 230, §10.7(c).) As is the case with attorneys, CPAs, and EAs, individuals engaged in limited practice must submit proof of their authority to represent the taxpayer, which is ordinarily done by filing a Form 2848.

2. *Do in-house practitioners "practice before the Internal Revenue Service"?*

Not every action by an in-house practitioner is, by itself, subject to scrutiny by the OPR. To fall within the ambit of Circular 230, an individual must "practice before the IRS," which "comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service." (Circular 230, §10.2(4).) Covered presentations include, but are not limited to —

> preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

While this definition is broad, it does not include activities relating to preparing or reviewing tax returns, unless the in-house practitioner prepares, approves, or submits the returns in connection with representing their employer in a matter before the IRS. For example, if an in-house tax professional prepares an amended return in conjunction with an IRS examination, they would be considered engaged in practice before the IRS.

3. *If an in-house tax professional does not hold an up-to-date certificate or license (as a lawyer, CPA, or EA), can they still engage in practice before the IRS?*

While most in-house tax professionals are either actively licensed attorneys or CPAs, any officer or full-time employee can perform "limited practice" before the IRS without regard to whether any professional credential they hold is current. Thus, an in-house tax professional may represent their company even if they have not renewed their bar license or CPA certificate. This is not the case, however, if the officer or full-time employee has been suspended or disbarred from practice before the IRS. (Circular 230, §10.7(c)(2)(i).) No one under suspension or disbarment can represent any person before the IRS.

4. *Must all in-house tax professionals who work on a company's tax matters and interact with IRS personnel be listed on a Form 2848, Power of Attorney and Declaration of Representative?*

If a company wants a specific full-time employee (irrespective of their title or specific duties) to advocate, defend, negotiate, or dispute issues with the IRS on the company's behalf, then a signed Form 2848 designating that professional must be submitted. Form 2848 formally documents the taxpayer's authorization of the designated in-house professionals as its representatives. It also constitutes the professionals' declaration that —

- They are not currently suspended or disbarred from practice, or ineligible for practice, before the IRS.
- They are subject to the requirements and limitations in Circular 230.
- They are authorized to represent the taxpayer as an attorney, CPA, EA, or an officer or full-time employee of the taxpayer.

Not every corporate employee who interacts with the IRS, however, needs to be included on the Form 2848. When a corporate employee is merely providing information to, or accepting information from, the IRS, there is no representational activity or "practice" occurring and the Form 4764, Communications Agreement, LB&I Examination Plan, will suffice, as will the Form 8821, Tax Information Authorization. As its title indicates, Form 4764 is used in the examination of taxpayers within the purview of the Large Business and International division. (See generally OPR Alert 2014-14, Circular 230 & Form 4764, LB&I Examination Plan-Guidance (September 9, 2014).)

5. *Given their dual roles as advisor/representative and decision-maker/implementer, are there times when an in-house tax professional is a "practitioner" and other times when they are not?*

Whether a tax professional's particular activities constitute "practice before the IRS" depends on all the facts and circumstances, including the size, complexity,

and sophistication of the client/taxpayer and the professional's specific role and duties. There is no authority or basis, however, for concluding that an activity constituting "practice" for an outside professional does not also constitute "practice" for an in-house one. Thus, while an in-house tax professional's relationship with their employer — who is also the client/taxpayer — is different from the relationship that an outside professional has with the same client/taxpayer, except in the possible case of an officer appointed by the board of directors, the in-house professional never becomes the client/taxpayer itself. They — like an outside practitioner — are always acting as an agent, or representative, of the taxpayer.

Conclusion

Every attorney, CPA, EA, or other tax professional who practices before the IRS is subject to Circular 230 regardless of whether they are on their own, with a firm, or are an employee or officer of a taxpayer. The precise application of the Circular's standards to the professional will depend on the facts.

If you have questions about this article, please contact our office by phone at 202-317-6897 or eFax at 855-814-1722.

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