New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

COMMENTS ON ISSUES RELATING TO CIRCULAR 230

February 14, 2003

Mr. Brien Downing
Office of Professional Responsibility
Internal Revenue Service
1111 Constitution Avenue, Room 3412
Washington, D.C. 20224

Dear Mr. Downing:

We write in response to the Notices of Proposed Rulemaking dated December 19, 2002, 67 F.R. 77724-01 and dated February 3, 2003, 2001-5 I.R.B. 397 (the "Notices"), which request comments on or before February 18, 2003 regarding certain proposed modifications to the regulations governing practice before the Internal Revenue Service which are in 31 CFR part 10 and are reprinted as Treasury Department Circular 230. The Notices request comments on a few specific areas, other than tax shelter opinion standards, that were not covered in the more extensive amendments to Circular 230 issued on July 26, 2002.

This letter summarizes comments by individual members of the New York State Bar Association Tax Section. These suggestions have not been considered or approved by the Tax Section's Executive Committee.*

* The principal draftsperson of this letter was Bryan C. Skarlatos, Co-Chair, Committee on Compliance, Practice & Procedure. Helpful comments were received from Kimberly S. Blanchard, Samuel J. Dimon, Michael L. Schler, David Hariton and Diana L. Wollman.

The following comments appear in the order in which they are requested in the Notices.

1. *Section 10.78: Appeals*

The Notices request comments on whether review of an administrative law judge's decision under Section 10.78 should be delegated to the Senior Counselor to the Commissioner. We strongly support moving the jurisdiction to review decisions out of the Office of Professional Responsibility (the "OPR"). Requiring appeals to be made to someone outside the OPR will ensure greater objectivity and will enhance the perception of impartiality and fairness.

2. *Section 10.2(d): Definition of Practice Before the Internal Revenue Service*

The Notices request comments on whether the definition of practice before the Internal Revenue Service (the "Service") should be expanded to include unenrolled tax return preparers. Current section 10.2(d) of Circular 230 provides that

> Practice before the Internal Revenue Service comprehends all matters connected with the presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayers's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communication with the Internal Revenue Service, and representing a client at conferences, hearings and meetings.

The proposed amendment would include the preparation of tax returns by an unenrolled return preparer within the definition of what constitutes practice before the Service. Insofar as the submission of a tax return to the Service by a taxpayer is often the most important interaction between a taxpayer and the Service, it would be appropriate for the Service to regulate the conduct of unenrolled return preparers by bringing them within the ambit of Circular 230. Accordingly, we support the proposed amendment. We are concerned, however, whether the OPR, as currently structured, has the resources to police effectively the existing group of practitioners, much less a dramatically expanded group of practitioners.

3. *Section 10.60: Institution of Proceedings*

The Notices request comment on whether the regulations should be amended to provide for discovery once a proceeding is initiated under Section 10.60. We believe this to be an important addition to Circular 230. To date, a practitioner has had no right to obtain discovery from the government and the question of what information will be provided to the practitioner is determined unilaterally by the OPR or by the administrative law judge hearing the case. Promulgating standardized procedures for discovery will help to insure due process and enhance fairness. We suggest that rules of discovery similar to those set forth in Fed. R. Civ. P. 26 - 37 be incorporated into Circular 230.

In addition, because of the punitive nature of a disciplinary proceeding, practitioners should be given the opportunity to cross examine, in the presence of the administrative law judge, any person whose statement is offered against the practitioner. The OPR should have similar rights to cross examine witnesses to insure fairness.

4. *Section 10.27(b): Contingent Fees*

The Notices request comments on whether practitioners should be permitted to charge contingent fees for amended returns, claims for refund,

requests for private letter rulings and other pre-filing documents. The Notices also request comments on whether contingent fees should be limited to those amended returns or claims for refund on which the taxpayer's taxable income is less than $50,000.

On July 25, 2001, the Tax Section of the New York State Bar Association (the "Tax Section") submitted comments to proposed amendments to Circular 230 that addressed the issue of contingent fees in tax practice. As those comments indicate, the Tax Section supports the prohibition of contingent fees for the preparation of an original return. However, the Tax Section believes that contingent fees should be permitted for any amended return, claim for refund and any other service other than the preparation of an original tax return, such as representing a client in an audit or in filing a request for a private letter ruling.[1]

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[1] Our July 25, 2001 comments suggested, among other things, that current Section 10.27(b), which allows contingent fees for amended returns or claims for refund only if the practitioner reasonably anticipates that the amended return or refund claim will receive substantive review by the Service, be amended. As stated in our prior comments, the Tax Section agrees that a practitioner should not benefit by taking advantage of the audit lottery. Nevertheless, we believe that the "reasonably anticipates . . . substantive review" test is too vague to be applied consistently. Further, we believe that most practitioners who prepare amended returns or refund claims involving any significant amount of money anticipate that the return or claim will be reviewed by the Service. The "substantive review" test may also effectively prohibit contingent fees for returns or claims involving smaller amounts of money that are filed on behalf of the very taxpayers who may be most in need of a contingent fee arrangement. Thus, we believe that the "substantive review" test should be removed from Section 10.27(b).

The purpose for prohibiting contingent fees in connection with the preparation of an amended return was set forth in the Preamble to T.D. 8545 (June 20, 1994) as follows:

> Treasury continues to believe that a rule restricting contingent fees for preparing tax returns supports voluntary compliance with the tax laws by discouraging return positions that exploit the audit selection process.

The Tax Section agrees with the rationale that a practitioner should not be permitted to exploit the limited resources of the Service and benefit financially simply by winning the audit lottery. Nevertheless, the submission of an amended return is materially different from the submission of an original return in that an amended return, by its very nature, puts the Service on notice that the taxpayer is changing a position taken on an original return, thereby disclosing the position at issue. Indeed, as stated in our prior comments, we believe that most practitioners assume that any amended return involving a significant amount of money will be reviewed by the Service.[2] Thus, the rationale for prohibiting contingent fees in connection with original returns does not apply with respect to amended returns.

Similarly, the rationale for prohibiting contingent fees in connection with original returns does not apply in other circumstances, such as preparing requests for private letter rulings or representing a client at audit because, in those cases, the Service is very much aware of the issues involved and there is

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[2] The Service may want to consider requiring disclosure of the existence of a contingent fee arrangement. We do not suggest any requirement that the terms of the arrangement be disclosed. However, it would not be inappropriate to require disclosure that a contingent fee arrangement existed. This could easily be implemented, for example, with a check-the-box system on the form signed by the paid preparer.

no chance that a practitioner will be tempted to take a return position designed to exploit the audit selection process.

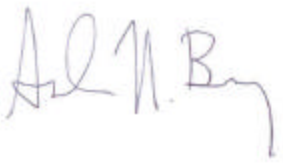
Further, as stated in our July 25, 2001 comments, there are many other provisions in Circular 230 that apply to a practitioner who abuses contingent fee arrangements, such as Section 10.22(a)(1) (regarding due diligence in the preparation and submission of returns), Section 10.34(a) (regarding the realistic possibility of success standard) and 10.34(b) (regarding advice concerning potential penalties). Under these circumstances, there is less need for the Service to further regulate fee arrangements between a practitioner and a client, an area already policed by state bar associations.

5. *Confidentiality Agreements*

The Notices request comments on whether practitioners should be prohibited from entering into agreements with clients that restrict a practitioner from providing relevant tax advice to other similarly situated taxpayers. This issue also was addressed in the Tax Section's comments submitted to the Treasury on July 25, 2001. In those comments, we stated our position that, to the extent that a prohibition against confidentiality is intended to make it easier to detect and scrutinize tax shelters, the tax shelter regulations already address that issue by using confidentiality as one of the triggers requiring disclosure and regulation. To the extent that confidentiality impairs a practitioner's ability adequately and ethically to represent a client, such issues are regulated by state bar rules regarding ethics and professional

responsibility, many of which already prohibit confidentiality under certain circumstances. Such matters affect lawyers practicing in many fields other than tax and, therefore are better left to state regulatory agencies.

Respectfully submitted



Andrew N. Berg
Chair