

IRS Communications with Unenrolled Return Preparers in Tax Court Cases

Cross References

- IRS Chief Counsel Notice CC-2017-007, April 18, 2017

The IRS Office of Chief Counsel recently issued guidance to IRS attorneys on how to communicate with unenrolled return preparers. An unenrolled return preparer is someone other than an Attorney, CPA, or Enrolled Agent who prepared the tax return but does not have any authorization to represent the taxpayer before the IRS. In some situations, a taxpayer may select designation “h,” *Unenrolled Return Preparer*, in Part II of Form 2848. When designation “h” is selected, the Form 2848 is not valid for representation before IRS attorneys.

Revenue Procedure 2014-42 allows an unenrolled return preparer to represent a taxpayer before the IRS during an audit if the unenrolled return preparer has a valid Annual Filing Season Program Record of Completion for the calendar year in which the tax return or claim for refund was signed and filed and has a valid Annual Filing Season Program Record of Completion for the year or years in which the representation occurs. The representation authorized by Revenue Procedure 2014-42 does not permit an unenrolled return preparer to represent a taxpayer before appeals officers, revenue officers, or the Office of Chief Counsel.

Revenue Procedure 2014-42 is effective with respect to tax returns or claims for refund prepared and signed after December 31, 2015. With respect to returns prepared and signed before December 31, 2015, limited practice rights of unenrolled return preparers are governed by Revenue Procedure 81-38, which also prohibits unenrolled return preparers from representing taxpayers before IRS appeals or IRS attorneys. Therefore, under both revenue procedures, unenrolled return preparers may not act as a taxpayer’s representative before IRS attorneys. For example, unenrolled return preparers may not represent a taxpayer at a Branerton conference or other meeting with IRS attorneys or sign any documents on a taxpayer’s behalf.

Author’s Comment

When a taxpayer takes a case to the Tax Court, there is an informal discovery process between the taxpayer’s representative and IRS attorneys before more formal discovery procedures, such as interrogatories, subpoenas, and depositions take place. These informal meetings between the IRS Counsel and the taxpayer’s representative are typically called Branerton conferences, named after a 1974 Tax Court case. The Tax Court expects both sides to at least offer the opportunity for a meeting to each other before allowing formal discovery.

However, if the involvement of an unenrolled return preparer is beneficial to the resolution of a case, IRS attorneys may work with the unenrolled return preparer, in a non-representative capacity, to develop the facts of a case. For example, the unenrolled return preparer might provide records substantiating items reported on a return or otherwise provide information about the facts underlying a particular reporting position. In addition, IRS attorneys may allow the unenrolled return preparer to attend a meeting along with the taxpayer. To avoid confusion, IRS attorneys should clarify with both the taxpayer and the unenrolled return preparer that unenrolled return preparers do not have the authority to represent the taxpayer in dealings with IRS attorneys, even if the taxpayer purports to consent to the representation.

IRS attorneys should interact with an unenrolled return preparer in the same manner and to the same extent that they would interact with any other non-representative that a taxpayer might bring to a meeting about his or her Tax Court case. IRS attorneys are not required to communicate with an unenrolled return preparer or include the unenrolled return preparer in meetings if, for example, the unenrolled return preparer is abusive or disruptive or if the interests of the return preparer conflict with the interests of the taxpayer. Further, because an unenrolled preparer is not the taxpayer's representative, IRS attorneys should not send copies of pleadings or other documents to the unenrolled return preparer. IRS attorneys may only communicate with the unenrolled return preparer while the taxpayer is present, either in person or on the telephone, or in the unenrolled return preparer's capacity as a third party record keeper or a potential witness.