Final Regulations on Giving Tax Advice

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Final Regulations on Giving Tax Advice

(by Neil E. Harl)

In what is candidly referred to in the Preamble as an effort to “. . . replace rigid rules for written tax advice with more flexible rules and eliminate the necessity to provide disclaimers in certain written tax advice. . . .”, the final regulations issued under T.D. 96681 “. . . reduce the burden imposed on small entities that issue written tax advice.” The final regulations follow proposed regulations which were issued on September 17, 2012. In general, the final regulations are expected to be welcomed by tax practitioners as a step toward more reasonable rules for providing written advice to clients and others.

Possible elimination of the use of a Circular 230 disclaimer

In the final regulations, in overhauling the “covered opinion” rules with principles to which all practitioners must adhere in rendering written advice, the Internal Revenue Service and the Department of the Treasury state that “. . . these amendments will eliminate the use of a Circular 230 disclaimer in e-mail and other writings. IRS and Treasury point out, however, that “these rules do not, however, prohibit the use of an appropriate statement describing any reasonable and accurate limitations of the advice rendered to the client.”

Replacing the “covered opinion” rules

Like the proposed regulations, § 10.37 in the final regulations replace the “covered opinion” rules with principles to which all practitioners must adhere when rendering written advice. The final regulation provision states –

A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners’ professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations [which are] marketing or promoting transactions.” (Emphasis added)

The IRS and Treasury conclude “further, the determination of whether a practitioner has failed to comply with the requirements of § 1037 will be based on all facts and circumstances, not on whether each requirement is addressed in the written advice.”

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Consideration of audit risk and likelihood of settlement

The final regulations, consistent with former § 1037, provide that a practitioner must not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit. As stated in the final regulations, “the practitioner must . . . not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.” Obviously, such statements, if made, can have an impact on the behavior of clients.

Negotiation of taxpayer checks

The final regulations (and the proposed regulations) provide that a practitioner may not endorse or otherwise negotiate any check issued to a client by the government in respect of a Federal tax liability, including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated.

General standard of competence

Section 1035 of the proposed regulations provided that a practitioner must possess the necessary competence to engage in practice before the IRS and that competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. The competence standard in § 10.35 of the final regulations contemplates that a practitioner may become competent in a variety of ways, including consulting with experts in the relevant area and studying the relevant law. The explanation goes on to state that whether consultation and/or research are adequate to make a practitioner competent in a particular situation depends upon the facts and circumstances of the particular situation.

ENDNOTES

4 Id.
5 See note 2 supra.
6 See note 1 supra.
7 31 C.F.R. part 10, § 10.37.
8 31 C.F.R., Part 10, § I[B](1).
11 REG-138367-06.
13 Id.
15 Id.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

EXEMPTIONS.

IRA. Prior to the debtor filing for bankruptcy filing, the debtor had received an IRA from a deceased parent. The debtor claimed the monthly payments from the IRA as exempt under Section 522(d)(12) for retirement funds. The court found that an inherited IRA contained additional restrictions on contributions, distributions and rollovers from an IRA owned by a debtor. The differences were sufficient to change the inherited IRA from a retirement account to a time-limited, tax deferral account. Therefore, the court held that the inherited IRA was no longer retirement funds eligible for the Section 522(d)(12) exemption. On appeal, the U.S. Supreme Court affirmed. In re Clark, 2014-1 U.S. Tax Cas. (CCH) ¶ 50,317 (U.S. Sup. 2014), aff’g, 2013-1 U.S. Tax Cas. (CCH) ¶ 50,389 (7th Cir. 2013).

TAX REFUNDS. The taxpayer filed for Chapter 7 in December 2013 and filed the 2013 federal income tax return in April 2014, claiming a tax refund resulting in part from a child tax credit and earned income tax credit. The remainder of the refund was claimed exempt in part as a wild card exemption and cash-on-hand exemption. The trustee objected to the exemption of the refund for the child tax credit because the credit was not refundable. The court agreed and denied the deduction for the child tax credit portion of the refund. The trustee also objected to the entire earned income tax credit (EIC) being exempt, arguing that the refund should be apportioned in amounts equal only to the proportion of the taxes offset by the EIC. The court rejected that position, noting that such a rule would lead to difficult complexity in calculating exempt and non-exempt portions of tax refunds. Thus, the court allowed the full EIC as an exempt portion of the tax refund. In re Yost, 2014-1 U.S. Tax Cas. (CCH) ¶ 50,313 (Bankr. N.D. Ohio 2014).