

Part III - Administrative, Procedural, and Miscellaneous

Contingent Fees Under Circular 230

Notice 2008-43

This notice provides guidance to practitioners concerning contingent fees under Treasury Department Circular No. 230, 31 C.F.R. part 10 (Circular 230). Specifically, this notice provides interim guidance clarifying when a practitioner may charge a contingent fee under section 10.27(b)(2) of Circular 230 for services rendered in connection with any matter before the Internal Revenue Service.

The Treasury Department and the IRS intend to revise section 10.27 to reflect the clarifications described in this notice. The IRS will follow the interim rules in this notice for purposes of enforcing section 10.27 until further guidance is provided.

BACKGROUND

In general, 31 U.S.C. section 330 authorizes the Secretary to regulate attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others who practice before the Service. Regulations under section 330 are promulgated in 31 C.F.R. part 10 and are reprinted as Treasury Department Circular No. 230.

On September 26, 2007, the Treasury Department and the IRS published final regulations in the **Federal Register** (72 FR 54540) modifying rules governing the general standards of practice before the IRS. These final regulations generally preclude a practitioner from charging a contingent fee for services rendered in connection with any matter before the Internal Revenue Service, including the preparation or filing of a tax return, amended tax return or claim for refund or credit.

The final regulations, however, permit a practitioner to charge a contingent fee for services rendered in connection with the IRS examination of, or challenge, to (i) an original tax return, or (ii) an amended return or claim for refund or credit when the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return. Contingent fees are also permitted for interest and penalty reviews and for services rendered in connection with a judicial proceeding arising under the Internal Revenue Code. The final amendments to section 10.27 made by the final regulations apply to fee arrangements entered into after March 26, 2008.

Section 406 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 (120 Stat. 2958) (the Act), which was enacted on December 20, 2006, amended section 7623 of the Internal Revenue Code concerning the payment of awards to certain persons who detect underpayments of tax. Prior statutory authority to pay awards at the discretion of the Secretary was re-designated as section 7623(a), and a new section 7623(b) was added to the Code. Additional off-Code provisions in section 406 of the Act established a Whistleblower Office within the IRS and addressed reward program administration issues. See Notice 2008-4, 2008-2 I.R.B. 253, for interim guidance applicable to award claims submitted under the authority of section 7623(b).

INTERIM GUIDANCE

Several practitioners have contacted the Treasury Department and the IRS to request a clarification of the exception in section 10.27(b)(2)(ii) of Circular 230 permitting a practitioner to charge a contingent fee for services rendered in connection

with an IRS examination of, or challenge, to an amended return or claim for refund or credit when the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return. Specifically, the practitioners are concerned that the “within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return” language in section 10.27(b)(2)(ii) requires the IRS to furnish the written notice of examination to a taxpayer as a prerequisite to a practitioner charging a contingent fee. Other practitioners contacted the Treasury Department and the IRS to discuss whether section 10.27 permits practitioners to charge a contingent fee with respect to whistleblower claims under section 7623.

In response to these requests, the Treasury Department and the IRS have determined that section 10.27(b)(2) should be clarified and amended. Accordingly, the IRS will apply the following interim rules as revised below under section 10.27(b)(2) until the Treasury Department and the IRS amend the regulations:

§ 10.27 Fees.

* * * * *

(b) * * *

(2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to--

(i) An original tax return; or

(ii) An amended return or claim for refund or credit filed before the

taxpayer received a written notice of examination of, or a written challenge to, the original tax return; or filed no later than 120 days after the receipt of such written notice or written challenge. The 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.

(4) A practitioner may charge a contingent fee for services rendered in connection with a claim under section 7623 of the Internal Revenue Code.

(5) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

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EFFECTIVE DATE FOR INTERIM GUIDANCE

These interim rules regarding contingent fees are applicable to fee arrangements entered into after March 26, 2008.