Office of Chief Counsel
Internal Revenue Service
memorandum
CC:PA:B05

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to: Stephen A. Whitlock
Director, Whistleblower Office

from: Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

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subject: Powers of Attorney in the Context of Whistleblower Cases

ISSUE

May the Whistleblower's Office accept a Form 2848, Power of Attorney and Declaration of Representative, or other power of attorney that has been altered and/or modified such that the power of attorney does not comply with the established rules and regulations regarding powers of attorney when the practitioner represents a whistleblower.

CONCLUSION

No, the modifications to the Form 2848 are not operative and all such modified Forms 2848 must be returned to the practitioners, who should be directed to submit Forms 2848 and/or powers of attorney that fully comply with, and do not conflict with, Circular 230, the Conference and Practice Requirements (sections 601.501 et seq.), Form 2848 and the instructions to Form 2848.

BACKGROUND

It has come to our attention that practitioners representing whistleblowers have been submitting modified Forms 2848 or other powers of attorney that deviate from the language contained in Form 2848. Examples of such unauthorized modifications include altering the Form 2848 to authorize the representative to receive and endorse reward payments, naming the representative as a joint claimant, and requiring the signatures of both the represented party and the representative in order to revoke the power of attorney.[1]

[1] [redacted]

ANALYSIS

The rules governing representation under the authority of a power of attorney apply to all offices of the Service in all matters under the jurisdiction of the Service and apply to all practice before the Service. Conference and Practice Requirements, Statement of Procedural Rules, § 601.501(a). Accordingly, representation of a whistleblower before the Whistleblower Office falls within the purview of these rules.

Each power of attorney must contain specific requirements in order to be respected by the Service. Conference and Practice Requirements § 601.503 lists the requirements for a valid power of attorney as follows:

1. Name and mailing address of the taxpayer;
2. Identification number of the taxpayer (i.e., social security number and/or employer identification number);
3. Employee plan number (if applicable);
4. Name and mailing address of the recognized representative(s);
5. Description of the matter(s) for which representation is authorized, which, if applicable, must include:
    a. The type of tax involved;
    b. The Federal tax form number;
    c. The specific year(s)/period(s) involved; and
    d. In estate matters, the decedent's date of death and
6. A clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative(s).

The Service will not accept any power of attorney that fails to include the above information. Conference and Practice Requirements § 601.503(b)(3).

A written declaration by the representative must also be attached to the power of attorney. Only recognized representatives may appear on behalf of another before the Service under a power of attorney. Conference and Practice Requirements § 601.504(a). A recognized representative is an individual who is appointed as an attorney-in-fact under a power of attorney, a member of one of the categories described in Conference and Practice Requirements § 601.502(b),[2] and who files a declaration of representation.

[2] These categories are limited to individuals who: (1) are attorneys in good standing; (2) certified public accountants; (3) enrolled agents; (4) enrolled actuaries; (5) individuals who have obtained temporary recognition as an enrolled agent by the Director of OPR; (6) individuals who have a special relationship with the taxpayer as set forth in 31 CFR 10.7(a)(1)-(6); (7) an unenrolled return preparer who prepared the taxpayer's return that is currently at issue; (8) any individual who, upon written authorization, is authorized by the Director of OPR to represent a taxpayer in a particular matter. Conference and Practice Requirements § 601.502(b).

A written declaration of representation must state the following:[3]

1. The representative is not currently under suspension or disbarment from practice before the Service or other practice of his profession by any other authority;

2. The representative is aware of the regulations contained in Treasury Department Circular No. 230 (31 CFR part 10), concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;

3. The representative is authorized to represent the taxpayer(s) identified in the power of attorney; and

4. The representative is an individual described in Conference and Practice Requirements § 601.502(b).

If an individual is unable to make such representation, such individual may not practice before the Service. Conference and Practice Requirements § 601.502(c).

The represented party must also have the unrestricted right to revoke the power of attorney. See Conference and Practice Requirements § 601.505(a). A power of attorney that requires the agreement of the representative and the represented party to revoke the power is not unrestricted and is unacceptable to the Service. Additionally, any power of attorney that requires that an award be made jointly payable to the whistleblower and the practitioner as joint claimants is contrary to Conference and Practice Requirements § 601.505 because this modification is effectively a restriction on the ability of the whistleblower to change his representation without restriction.

In addition to the problems created under the Conference and Practice Requirements when a representative is named as joint claimant, there are also problems under the Model Rules of Professional Conduct and the Anti-Assignment Act (31 USC § 3727). Model Rule 1.8 provides that a lawyer shall not acquire a proprietary interest in the cause of action the lawyer is conducting for a client. The only exceptions to this rule are that a lawyer may acquire a lien authorized by law to secure the lawyer's fee or expenses and the lawyer may contract with the client for a reasonable contingent fee in a civil case.

Although the practitioner may add his name to the claim to provide him with some security regarding payment of his fee, a joint claimant has a proprietary interest in the cause of action that is not a lien or a contract for a contingent fee. Many lawyers are admitted to state bars that do not incorporate this rule from the model rules, but encouraging the representation described does not serve our interest.

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[3] On Form 2848, this declaration is found in Part II.

The federal Anti-Assignment Act broadly prohibits transfers of contracts involving the United States and assignments of claims against the United States. See 41 U.S.C. § 15 (2000) and 31 U.S.C. § 3727 (2000). The Supreme Court has summarized one purpose of the Act as preventing the possible multiple payments of claims, making unnecessary the investigation of alleged assignments, and enabling the government to deal only with the original claimant. See United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 373 (1949), citing Spofford v. Kirk, 97 U.S. 484, 490 (1878).

Under the Act, a transfer or assignment of any part of a claim against the United States or of an interest in a claim, or the authorization to receive payment for any part of a claim, may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. See 31 U.S.C. § 3727(b). The Act applies broadly and generally prohibits all voluntary assignments. See United States v. Dow, 357 U.S. 17 (1958). The Act applies to tax refund claims authorized under section 6402 and, in our view, likewise applies to whistleblower claims that are submitted by eligible individuals and satisfy the requirements of section 7623 and Notice 2008-4, 2008-2 I.R.B. 253.

Under a plain reading of the Act, any assignment made before the Service had allowed a claim, decided on the amount of the claim, and ordered the payment of the claim is not effective. Accordingly, the Service is statutorily prohibited from honoring any assignment made during this period, including by recognizing the assignment for purposes of paying an award to a third-party assignee.[4]

Nothing in section 7623 alters this result. Section 7623 does not refer to, or create rights in, third parties to a whistleblower claim, other than to provide that whistleblowers may be represented by counsel. Section 7623 does not specifically authorize claim assignments, require the Service to investigate the existence of alleged assignments, or authorize the Service to recognize a third-party arrangement and, thus, does not independently authorize the Service to honor an assignment for purposes of paying an award.

In conclusion, in order for the Whistleblower Office to accept a power of attorney, it must comport with the above requirements and may not contain modifications to the contrary. Otherwise, the Whistleblower Office runs the risk of acting contrary to established Service procedures and guidelines. The Service has an interest in promoting professional, competent and quality representation by those who practice before the agency and the Form 2848 was designed with these interests in mind.

[4] This memorandum does not address the legal effects of an assignment on the parties to the assignment.