

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:B05

date: October 22, 2010

to: Stephen A. Whitlock
Director, Whistleblower Office

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

subject: Powers of Attorney in the Context of Whistleblower Cases

This memorandum addresses the concerns raised in your e-mail dated October 5, 2010 regarding the application of Form 2848 and the Conference and Practice Requirements (the "Requirements") to whistleblower representatives. This memorandum also provides comments on your proposed Form 211R.

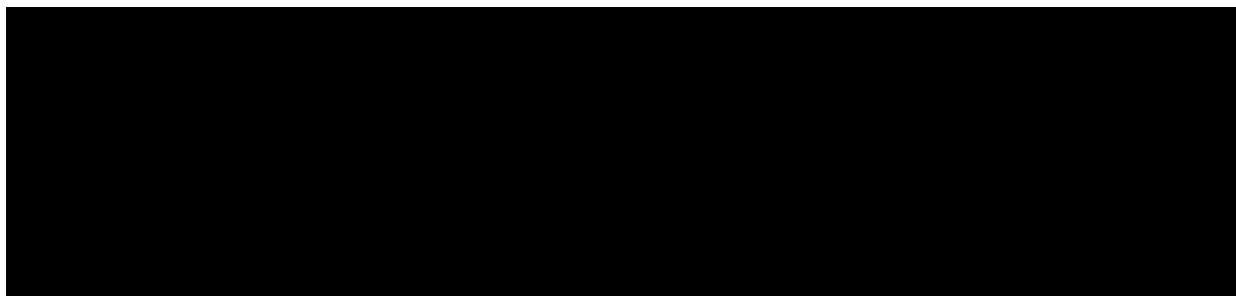
ISSUE

Whether the Form 211R complies with the Requirements and can be accepted by the Service as a valid power of attorney.

CONCLUSION

It is well-settled that whistleblower representation constitutes practice before the Service and, therefore, is governed by the Requirements. Accordingly, any power of attorney used in the context of that representation must adhere to the standards set forth in the Requirements. Form 2848 was specifically designed to comply with the Requirements. In contrast, Form 211R, as currently written, does not adhere to the Requirements and cannot be accepted by the Service as a valid power of attorney.

BACKGROUND



PMTA 2011-33

ANALYSIS

As discussed in our memo dated September 30, 2010, 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. Requirements § 601.501(a). Section 601.501(b)(7) clarifies what constitutes an individual “matter,” explaining that the “application of each tax imposed by the Internal Revenue Code and the regulation thereunder for each taxable period constitutes a (separate) matter.” This clarification does not limit matters under section 601.501(a) to only those matters involving the application of tax, but rather, clarifies what shall constitute separate matters for purposes of representation before the Service. There is no limitation contained in the Requirements that “matters under the jurisdiction of the Service” only pertain to matters in which there is an application of tax.

Additionally, the interpretation that the Requirements apply only in matters in which a tax is imposed ignores the mandate that the Requirements “apply to all practice before the Service.” Requirements § 601.501(a). It is undisputed that the representation of whistleblowers is practice before the Service. Indeed, whistleblower representatives submit legal memoranda advocating the substantive tax merits of their clients’ submissions vis-à-vis substantive tax positions reported by taxpayers on their returns and represent their clients during interviews conducted by Service and/or Counsel personnel. And, as was the case in a recent collection case brought by the United States in a U.S. district court, the credibility of a whistleblower’s representative in representing a client can be relevant to proceedings involving information submitted by a whistleblower. Accordingly, no matter what form a power of attorney takes in the context of whistleblower representation, it must meet the standards set forth in the Requirements.

The proposed Form 211R does not comply with the Requirements for numerous reasons. First, each power of attorney accepted by the Service must contain a clear expression of the taxpayer’s intention concerning the scope of authority granted to the recognized representative(s). Requirements § 601.503(a)(6). While it is true that the Form 211R specifically states that the representative(s) are authorized to provide and receive information with respect to the Form 211R submitted on the referenced taxpayer, it is our understanding that many of these representatives are representing the whistleblower in the debriefings and other matters before the Service. Form 211R would not permit this type of representation and the statement as written is more akin to a taxpayer giving an individual permission for receipt of his tax transcript information, rather than consenting to representation.

Second, Requirements section 601.505(a) states that a new power of attorney revokes a prior power of attorney if it is granted by the taxpayer to another recognized representative with respect to the same matter. A new power of attorney does not

revoke a prior power of attorney, however, if the taxpayer indicates on the form that he does not wish to revoke such prior power of attorney and there is attached to the new power of attorney either: (i) a copy of the unrevoked prior power of attorney; or (ii) a statement signed by the taxpayer listing the name and address of each recognized representative authorized under the prior unrevoked power of attorney. Requirements § 601.505(a). Form 211R only provides that if a whistleblower does not want to revoke a prior filing, he check a box. This sentence alone is not enough to retain previously filed authorizations under the Requirements.

Third, a written declaration by the representative must also be attached to the power of attorney. Requirements § 601.502(c). Only recognized representatives may appear on behalf of another before the Service under a power of attorney. 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 of individuals who may practice before the Service,¹ and who files a declaration of representative.

A written declaration of representation must state the following:

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 authorized to practice before the Service.

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

Although the Form 211R is entitled a "Declaration of Representation for Whistleblower Claim," it does not contain any of the four required elements for a declaration to be effective under section 601.502(c). Instead, Form 211R merely requires the signature

¹ These categories are limited to individuals who are: (1) attorneys; (2) certified public accountants; (3) enrolled agents; (4) enrolled retirement plan agents; (5) enrolled actuaries; (6) individuals who have obtained temporary recognition as an enrolled agent by the Director of OPR; (7) individuals who have a special relationship with the taxpayer as set forth in 31 CFR § 10.7(c)(1)(i)-(vi); (8) an unenrolled return preparer who prepared the taxpayer's return that is currently at issue; and (9) any individual who, upon written authorization, is authorized by the Director of OPR to represent a taxpayer in a particular matter. 31 CFR §§ 10.3, 10.7(c), and 10.7(d).

of the representative and this alone is unacceptable as a declaration under the Requirements. Additionally, the designation section of Form 211R lists only three possible categories of representatives, and does not allow for the possibility that the representative may be one of the other categories of individuals who may practice before the Service (for example, an enrolled actuary or an individual who has obtained temporary recognition as an enrolled agent by the Director of OPR).

In conclusion, whistleblower representatives are governed in their practice before the Service by the Requirements. Accordingly, any power of attorney accepted on behalf of a whistleblower representative must meet the standards set forth by the Requirements. Form 211R does not meet these standards and is unacceptable by the Service as a power of attorney. Form 2848 currently adheres to those standards and we have been provided with no concrete reason as to why that Form is unacceptable in the whistleblower context.

