



Allowing Certified Public Accountants to Represent Taxpayers Before State Administrative Appeals Forums

AICPA POSITION

The American Institute of Certified Public Accountants (AICPA) suggests that state CPA societies strongly encourage state and local tax authorities to uniformly recognize the ability of CPAs authorized to practice in the state to represent clients and taxpayers in currently established administrative appeals forums. State CPA societies should work with state-level policymakers to ensure administrative appeals forums allow CPAs comparable privileges to attorneys when establishing new tax-specific administrative forums.

IMPORTANCE TO CPAs

As more states consider establishing new independent tax appeal forums or revising their existing tax appeal systems, it is important to review the proposals to ensure CPAs authorized to practice in the state are able to represent taxpayers before the tribunal.

As discussed in the [AICPA state tax tribunal position paper](#), state tax tribunals are a good idea for taxpayers, as well as for the broader goal of good tax administration. There are two principal reasons why all states should consider establishing a state tax tribunal for the benefit of taxpayers.

1. Tax tribunals ensure a fair and effective tax administration system for taxpayers. All taxpayers would have a state tax appeal forum for state tax disputes that functions independently from the state tax authority.
2. Tax tribunals, when structured in line with the Model Act, provide taxpayers with greater representation rights and service opportunities.

The AICPA maintains extensive resources on the [State Tax Tribunals](#) page on its website including a [position paper](#) and a [list of states](#) with and without state tax tribunals that is updated periodically.

The AICPA's Tax Executive Committee, AICPA State and Local Tax Technical Resource Panel, and AICPA State Legislative and Regulatory Affairs team continue to monitor state developments on this topic.

BACKGROUND

In 2015, the Pennsylvania Board of Finance & Revenue (“the Board”) began a project to reorganize itself. As part of the reorganization process, the Board reviewed the rules for representation and the qualified individuals who can represent taxpayers before it as part of the appeals process. The Board initially contemplated restricting qualified individuals to only those who are authorized to practice law. This project was finalized in early 2017, and the proposed restriction was not adopted. The final rulemaking language includes a preamble that states that practice before the Board is determined by the Pennsylvania Supreme Court.

A taxpayer’s tax return, regardless of type, is subject to examination by the relevant federal or state tax authority. In almost all cases, if the reviewing authority challenges a position on a return that could result in the imposition of additional tax, the taxpayer may contest the tax authority’s position. Discussions initially occur between the taxpayer, often with the tax adviser of their choice, and the tax authority’s examination team. If an agreement cannot be reached with the examination team, the taxpayer generally is provided a right to further contest the proposed change before the tax authority’s administrative appeals forum. It is well established that a CPA is permitted to represent a taxpayer before tax authority examination teams, and further, that a CPA is authorized to assist a taxpayer before the Internal Revenue Service (IRS) Office of Appeals (the federal administrative appeals forum). However, it is not clear in all jurisdictions that CPAs may assist taxpayers before the state and local administrative appeals forums. The AICPA supports the ability of CPAs to have the privilege to assist taxpayers before a state and local administrative appeals forum, which is fully consistent with well-established principles of federal administrative practice. Therefore, all jurisdictions should permit it.¹

REPRESENTATION OF TAXPAYERS BY CPAS BEFORE THE IRS

CPAs have been authorized to represent others before the IRS (and its predecessor, the Bureau of Internal Revenue) since the enactment of the first Internal Revenue laws in 1913, which now comprise the Internal Revenue Code.² This representation has historically included not only the right to present the factual basis of a return position, but also a discussion and analysis of the underlying federal tax issues developed through the laws, regulations, and other administrative pronouncements as they applied to a taxpayer’s facts. This authority was specifically acknowledged during the enactment of Public Law Number 89-332, which was part of a larger effort to allow qualified professionals to practice before various federal agencies, including the IRS, without first having to qualify through the agency itself.³ Until 1965, to practice before the IRS, attorneys and CPAs had to apply for, and undergo, background checks and undertake other qualifying measures administered by the U.S. Treasury Department.⁴ These background checks were not intended to evaluate an applicant’s technical ability to practice either law

¹ Many states and other tax jurisdictions currently permit CPAs to represent a taxpayer before an administrative appeals forum when properly authorized by the taxpayer, e.g., upon filing of a power of attorney, which is similar to the procedure when representing a taxpayer in a federal tax matter administrative appeal.

² All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury Regulations promulgated thereunder.

³ The general right of a CPA who holds a license in good standing to practice before the IRS is provided through 5 USC §500(c) (2015).

⁴ For example, an applicant had to certify that the applicant was knowledgeable of the rules regulating practice before the IRS commonly referred to as Circular 230.

or accounting.⁵ Rather, it was intended to demonstrate that the applicant had the requisite “good moral character” to practice before the IRS.⁶ In 1965, Congress enacted Public Law No. 89-332,⁷ which provides specific statutory authority for CPAs (and attorneys) to “represent” a taxpayer before the Treasury Department (including the IRS) in federal tax matters. This authority does not prohibit – and in fact it continued to *permit* – CPAs to practice before the IRS albeit without first having to receive pre-qualification from the agency.

The rights and responsibilities of individuals who are authorized to practice before the IRS are set forth in a set of regulations issued under Title 31, section 330 of the United States Code. These regulations are commonly referred to as Treasury Department Circular 230. As in effect when Public Law No. 89-332 was enacted, Circular 230 defined the term “practice before the Internal Revenue Service” to expressly include representing a client at conferences, hearings, and meetings.⁸ This component of the definition continues to be applicable today.⁹

The rationale for permitting CPAs to represent others before the IRS is clear. First, it should be self-evident that the individual who prepares a taxpayer’s return, be it a CPA or an attorney, has the requisite technical skills and familiarity needed to explain why a particular position was reported and the genesis of the overall positions reflected in the return. Second, the Treasury Department and IRS have long acknowledged the CPA’s ability and skill to discuss complex tax principles with IRS personnel. Third, CPAs are subject to ample regulatory and professional practice oversight. To practice before the IRS, a CPA must have a license in good standing. A license to practice public accounting is issued only after the applicant has successfully completed a prescribed course of study and passed a comprehensive (and rigorous) examination. In addition, the Circular 230 provisions requiring competence are similar to the competency requirement contained in the Code of Professional Conduct of the AICPA. CPAs are subject to regulatory oversight by the U.S. Treasury Secretary, state boards of accountancy, and regulatory boards of professional organizations whose ethical standards apply to the CPA and the CPA’s tax practice. With respect to professional organizations, the AICPA, for example, is recognized as a self-regulating forum for the accounting profession. Hence, with this host of oversight, taxpayers are protected from harm which could result from incompetent representation by the CPA. Since the enactment of Public Law 89-332, the historical record of CPA representation of taxpayers in federal administrative appeals demonstrates that CPAs have represented taxpayers well before the IRS and state and local tax authorities. Moreover, CPAs are sensitive to determining and advising their clients with respect to when the nature of the tax issues involved requires the advice or assistance of a lawyer, for

⁵ See H.R. Rept. No. 1141 at p.3, “Providing for the Right of Persons to be Represented in Matters Before Federal Agencies, 89th Cong., 1st Sess. (October 12, 1965) to accompany S. 1758 which was enacted into law through Pub. Law No. 89-332, note 7, below.

⁶ Id.

⁷ 79 STAT. 1282 (November 8, 1965) with respect to practice before the Internal Revenue Service, the legislative history to the statute indicates that previously, to be issued a “Treasury Card” for admission to practice, an applicant needed to submit to an involved admission procedure that was intended to demonstrate the applicant held the requisite moral character to practice. See H.R. Rept. No. 1141 (89th Cong. 1st Sess. (October 12, 1965) at pp. 2-3. The Report reads that “The Treasury assumes that attorneys at law as well as certified public accountants are professionally qualified for tax practice and **no further qualifications are imposed on members of these professions with respect to skill, knowledge, or ability.** Id. at 3 (emphasis added).

⁸ See 31 C.F.R §10.2(b), (as of January 01, 1965) printed by the Office of the Federal Register National Archives and Records Service, General Services Administration, as a Special Edition of the Federal Register pursuant to section 11 of the Federal Register Act as amended.

⁹ See §10.2(a)(4) of the current version of the Circular.

example, when a representation may potentially involve a criminal matter or the need to draft or revise a legal document.

THE CPA PROFESSION’S HISTORICAL RECOGNITION AS QUALIFIED TO APPLY FEDERAL AND STATE TAX STATUTES, REGULATIONS, AND ADMINISTRATIVE PRONOUNCEMENTS

A. In General

As discussed above, since the inception of the laws currently reflected in the Internal Revenue Code and state and local revenue statutes, CPAs have been, and remain, the pre-eminent preparers of complex returns for business entities, individuals, trusts, and tax-exempt organizations. CPAs regularly provide advice concerning income tax matters and interpretations of tax law. As part of the performance of the attest function, a CPA often must evaluate the financial statement issuer’s interpretation of the tax law pertaining to the presentation of the issuer’s income tax provision. This review requires an analysis of whether the entity’s tax positions meet a “more likely than not” threshold of compliance with applicable federal and state and local income tax laws.

B. Matters of Taxpayer “Access” and Financial Burdens Imposed on the Taxpayer

The preparation of virtually any income tax return can result in the tax preparer analyzing tax laws to make appropriate recommendations for a taxpayer’s consideration. It is not only counterintuitive, but unfair, to then require a taxpayer to seek legal representation in an administrative proceeding to defend the taxpayer’s position as it imposes an unreasonable economic burden on the taxpayer. The taxpayer must bear the added costs associated with the attorney learning the taxpayer’s facts and analyzing applicable tax law with which the CPA is also qualified to perform and is often already thoroughly familiar.

Indeed, most state and local income tax statutes and ordinances either begin with a federal (or federal-based state) income measurement or are strongly premised on federal law and, consequently, many disputes arising with a state or local tax authority might well be the subject of a federal challenge of the tax treatment. Thus, it is unfair and expensive to limit a taxpayer for the taxpayer’s choice of representation to a narrow category of persons – particularly an individual who may have had no involvement with the preparation of the return in the first place –.¹⁰

In addition, permitting CPAs to represent taxpayers in state administrative proceedings increases taxpayers’ accessibility to a larger pool of qualified tax practitioners beyond lawyers. This is important

¹⁰ IRC Section 6694 imposes a penalty on tax return preparers for taking or advising on improper or insufficiently disclosed ‘tax positions’ that arise from the preparer’s interpretation of federal tax law. Clearly, in their tax preparation activities, CPAs make determinations of the tax law treatment of items on a federal return. Many states either follow federal statutes in their tax law or their tax laws contain similar provisions. Consequently, CPAs should be entitled to represent taxpayers in state administrative disputes as they are for the same or similar items in a federal administrative dispute. This includes the representation of a taxpayer where the CPA is not the return preparer. When an interpretation of tax law depends on, or is derived from, an interpretation of non-tax law, CPAs have demonstrated their knowledge that an attorney should be consulted for representation of the taxpayer based on the nature of the legal issue and its relevance to the determination of the tax liability and, in fact, seeking consultation in these situations is required under the CPA profession’s ethical standards.

for taxpayers who, given their individual situations, may have difficulty gaining access to a lawyer, but who already have a relationship with the CPA who prepared their tax return. Hence, there is benefit to CPAs representing taxpayers in state administrative proceedings from both an efficiency and accessibility perspective.

Finally, we point out that holding a law license is no guarantee that the holder has the requisite skill, training, or experience to interpret, apply, or explain, the often-difficult concepts embedded within the revenue laws. Attorneys are not required uniformly to demonstrate competence in the area of federal or state tax law through bar licensing requirements, and indeed many law schools do not even require students to complete a course in federal or state income taxes. However, we acknowledge that attorneys' own professional ethical standards require that they possess the requisite training, knowledge, and skills to competently represent taxpayers before federal and state tax administrative appeals forums. Similar professional ethical and conduct requirements apply to the CPA who would represent a taxpayer before federal and state administrative forums and, in the CPA's case, a professional duty to seek legal advice when necessary to such representation.

REPRESENTATION OF TAXPAYERS BY CPAS BEFORE STATE AND LOCAL TAX REGULATORY AGENCIES.

While some state and local governments permit a CPA to represent taxpayers before an administrative forum (similar to federal practices), others impose restrictions on non-attorney representation or prohibit such representation entirely. In some states, there have been efforts to limit the ability or rights of CPAs to represent taxpayers in administrative, non-judicial forums. Generally, the stated reasons for prohibiting the CPA are based on the premise that making an appearance before a state tax authority's appeals forum constitutes the practice of law (i.e., making a legal argument when presenting a client's position). This position is simply not supported by over 100 years of federal precedent as discussed above, nor by the nature of the modern-day practice of tax services as outlined above.

THE AICPA'S POSITION WITH RESPECT TO CPA PRACTICE BEFORE STATE AND LOCAL GOVERNMENT TAX ADMINISTRATIVE APPEALS FORUMS

The AICPA fully recognizes that states have the right to establish rules and criteria with respect to who and how a person may practice before their administrative agencies. However, the AICPA does not believe that it is in the interest of taxpayers or state governments to restrict CPAs from representing taxpayers before state and local tax administrative appeals forums. We believe, consistent with federal law and rules, this representation should include making an argument before an administrative appeals forum that entails an interpretation of *state and local tax authorities*, and not just acting as a fact witness or an interpreter of financial accounting matters.

As implied through the authority the federal government provides, and as a professional practice matter, the practice of tax has moved beyond the mere application of Internal Revenue Code or comparable state and local tax laws to a particular set of facts. The practice of tax now comprehends the preparation of complex tax returns based on a taxpayer's sophisticated circumstances reflected through often complicated financial statements and the ability to clearly explain those positions to seasoned, well-educated employees of both state and local and federal tax agencies. The complexities involved in both calculating and allocating income over a broad set of international, U.S. federal, and U.S. state and local

tax jurisdictions is well acknowledged and the ability of the CPA to meet those challenges, and to explain how income calculations and allocations were made are well documented. The AICPA acknowledges that there are areas in which a CPA's role should be limited. As referenced above, if during an administrative examination or appeal, a civil-tax matter develops into a matter in which a criminal tax provision may be implicated, the CPA should step aside and support legal counsel who clearly should assume a leading role in the taxpayer's representation.

The AICPA, however, equally believes that state and local governments should uniformly permit CPAs to represent taxpayers before state tax administrative appeal forums established for resolving tax disputes in a manner consistent with a CPA's right to represent taxpayers under Circular 230 with respect to federal tax matters. Circular 230 specifically acknowledges that Circular 230 "representatives," including CPAs, provide advice to taxpayers on tax positions (this acknowledgement includes providing written tax advice for both tax return preparation and planning purposes).

CONCLUSION

CPAs have a long and proven history in providing taxpayers with competent representation in federal administrative settings. In contrast, the ability of CPAs to represent taxpayers in administrative forums varies from state to state. We believe it is in both the interests of the states and more vitally, to taxpayers, to permit CPAs to represent taxpayers in all phases of a state administrative proceeding. Circular 230 is an established working framework in the federal setting that states can use as a model for CPA representation of taxpayers in their state administrative proceedings.¹¹ Both state revenue agencies and taxpayers will benefit from the opportunity for more efficient resolution of taxpayer cases and, often, with less economic burden to taxpayers.

RESOURCES

The AICPA maintains extensive resources on the [State Tax Policy and Advocacy Resources Page](#) on its website, including a [position paper](#) on the issue and a [list of states](#) with and without state tax tribunals that is updated periodically.

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¹¹ With regard to the provisions of the Circular specific to representation of a taxpayer.