

SC Revenue Ruling #04-3

SUBJECT: Contingent Fees in State Tax Matters

EFFECTIVE DATE: Applies to all periods open under the Statute

SUPERSEDES: All previous advisory opinions and all oral directives in conflict therewith

REFERENCES: S.C. Code Ann. Section 12-60-90 (2003) as revised by Act No. 69 of 2003
Treasury Department Circular No. 230 § 10.27; 10.3 (Rev. 7-02)
as found in Title 31 Code of Federal Regulations, Subtitle A, Part 10.27
(Rev. 07-26-02)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2000)
S.C. Code Ann. Section 1-23-10(4) (Supp. 2001)
SC Revenue Procedure # 03-1

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public and Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. A Revenue Ruling is an advisory opinion; it does not have the force or effect of law and is not binding on the public. It is, however, the Department's position and is binding on agency personnel until superceded or modified by a change in statute, regulation, court decision, or advisory opinion.

Question:

May a practitioner charge a contingent fee for representing taxpayers in the administrative tax process?

Conclusion:

A practitioner may not charge a contingent fee in the following instances:

1. For preparing an original tax return;
2. For any advice rendered in connection with a position taken or to be taken on an original tax return.

3. For the preparation of, or advice rendered for, an amended tax return or a claim for refund if the practitioner does not reasonably anticipate that the amended return or claim for refund will be substantively reviewed by the Department.

If otherwise allowed, a practitioner may charge a contingent fee for the preparation of, or advice rendered for, an amended tax return or a claim for refund if the practitioner reasonably anticipates that the amended return or the refund claim will receive substantive review by the Department.

Discussion:

Section 12-60-90 of the South Carolina Code of Laws (“Code”) controls the representation of taxpayers during the administrative tax process, including the filing of returns on behalf of taxpayers as well as communications with state and local tax authorities by a practitioner on behalf of a client. Section 12-60-90 of the Code reads as follows:

(A) For the purposes of this section, the administrative tax process includes matters connected with presentation to a state or local tax authority, or their officials or employees, relating to a client's rights, privileges, or liabilities pursuant to laws, regulations, or rules administered by state or local tax authorities. These presentations include the preparation and filing of necessary documents, correspondence with, and communications to, state and local tax authorities, and the representation of a client at conferences and meetings, including conferences with the county boards of assessment appeals. It does not include contested case hearings held by the Administrative Law Judge Division or the courts.

(B) State and local government tax officials and state and local government employees may represent their offices, agencies, or both, during the administrative tax process.

(C) Taxpayers may be represented during the administrative tax process by:

(1) the same individuals who may represent them in administrative tax proceedings with the Internal Revenue Service pursuant to Section 10.3(a), (b), and (c), Section 10.7(a), (c)(1)(i) through (c)(1)(vi), and (c)(2)(viii), and Section 10.7(d) and (e) of United States Treasury Department Circular No. 230; and

(2) a real estate appraiser who is registered, licensed, or certified pursuant to Chapter 60 of Title 40 during the administrative tax process in a matter limited to questions concerning the valuation of real property.

(D) The department may suspend or disbar from practice in the administrative tax process, any person authorized by these rules to represent taxpayers, if the person is shown to be incompetent, disreputable, or fails or refuses to comply with the rules in subsection (E), or in any manner, with intent to defraud, willfully and knowingly deceives, misleads, or threatens any claimant or prospective claimant, by word, circular, letter, or by advertisement. For the purposes of this section, incompetence and disreputable conduct is defined in Section 10.51 of United States Treasury Department Circular No. 230. The department may review a petition for reinstatement as provided in Section 10.81.

(E) Representatives of taxpayers must comply with the duties and restrictions contained in Sections 10.20 through 10.24 and 10.27 through 10.34 of United States Treasury Department Circular No. 230.

(F) For purposes of this section the terms in United States Treasury Department Circular No. 230 must be given the meanings necessary to effectuate this section. For example, unless a different meaning is required:

(1) references to United States Treasury Department Circular No. 230 mean the United States Treasury Department Circular No. 230 as revised through the date provided for in the definition of the Internal Revenue Code in Section 12-6-40(A);

(2) references in United States Treasury Department Circular No. 230 to:

(a) the United States or federal are deemed to include references to this State, any of its political subdivisions, or any two or more of them;

(b) the Internal Revenue Service, the Department of Treasury, Examination Division, or District Director are deemed to include references to any state or local tax authority; and

(c) the Director of Practice is deemed to mean the director or his designee.

(3) references to tax return mean appropriate return, including property tax returns filed with the department;

(4) references to federal tax obligations mean all South Carolina taxes, including property taxes and property tax assessments, where administered by the department.

Section 12-60-90 of the Code relies heavily on US Treasury Department Circular 230 (“Circular 230”) in determining who may practice in South Carolina’s administrative tax process. Section 12-60-90 of the Code also looks to Circular 230 to establish how practitioners are to conduct themselves during the process and the Department’s remedies if practitioners fail to conduct themselves properly. Section 12-60-90(E) of the Code provides that a representative must comply with the duties and restrictions contained in §10.20 through §10.24 and §10.27 through §10.34 of Circular 230. For purposes of Section 12-60-90 of the Code, references in Circular 230 to the United States are deemed to refer to South Carolina and any local taxing authority. References to the IRS and the Treasury Department are deemed to refer to all state and local taxing authorities and references to the Director of Practice are deemed to refer to the Director of the Department or his designee.

Amended as of July 26, 2002, Circular 230 §10.27 prohibits contingency fees in certain instances. The complete pertinent section of the 2002 version of §10.27 discusses contingent fees and explains when a contingent fee will be allowed in connection with a tax matter.

(b) Contingent fees. (1) For purposes of this section, a contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client’s fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not

sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(2) A practitioner may not charge a contingent fee for preparing an original tax return or for any advice rendered in connection with a position taken or to be taken on an original tax return.

(3) A contingent fee may be charged for preparation of or advice in connection with an amended tax return or a claim for refund (other than a claim for refund made on an original tax return), but only if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service.

Based on the above, if an attorney, CPA, enrolled agent, real estate appraiser, or other person eligible to represent a taxpayer under Section 12-60-90 of the Code chooses to charge a contingent fee for preparing an original tax return of any kind (including a property tax return) he or she is subject to suspension or disbarment from the administrative tax process by the Department. Further, a practitioner is also subject to suspension or disbarment from the administrative tax process if he or she charges a contingent fee for advice given on preparation of an original return. For purposes of this revenue procedure, "advice" includes, but is not limited to, (1) providing sufficient counsel to a taxpayer so that the completion of a return, or portion of a return, or a claim for refund, or a portion of a claim for refund, is largely mechanical, even though the person providing the counsel does not prepare or review the return; or, (2) providing advice on specific issues of law when the advice is given with respect to events which have occurred at the time the advice is rendered and is not given with respect to the consequences of contemplated transactions and the advice is directly relevant to the determination or existence, characterization, or amount of an entry on a return or claim for refund.

A practitioner may charge a contingent fee for preparing or advising in connection with an amended tax return or a claim for refund (other than a claim for refund on an original tax return) if the practitioner reasonably anticipates the return will receive a substantive review by the Department or local taxing authority. However, a practitioner may not charge a contingency fee in such instance if he does not reasonably anticipate that the Department will substantively review the amended return or claim for refund. Please note, that all claims for refunds that exceed \$5 million must be reviewed by the Budget and Control Board before a refund may be issued. (See the minutes of the Budget and Control Board meeting of July 14, 1994 which allowed the \$100,000 limit contained in 11-1-45 that applies to settlements of claims to be raised to \$5 million.)

Furthermore, a practitioner may not charge a contingent fee in connection with the job development credit. The South Carolina Coordinating Council for Economic Development has developed a guideline that addresses the charging of a contingent fee in connection with a job development credit matters. The guideline provides that advisors may not charge a contingent fee based on the application for, or collection of, job development credits by their clients.

In addition to the general prohibition of contingent fees found in Circular 230 enforced through the provisions of Code Section 12-60-90, there are also professional rules of conduct for separate professions such as certified public accountants and appraisers. These professional rules of conduct restrictions are in addition to any other legal, ethical, or professional limitations that are imposed on a practitioner by law, regulation, or otherwise. A practitioner engaged in one of these professions should consult their professional rules of conduct to determine any other restrictions on charging a contingent fee in connection with a state tax matter.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/ Burnet R. Maybank III

Burnet R. Maybank, III

March 23, 2004
Columbia, South Carolina