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INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL
(SMALL BUSINESS & SELF EMPLOYED)

CC:SB:

FROM: Richard Goldman
Chief, Administrative Provisions and Judicial Procedure,
Branch 3
CC:PA:APJP:03

SUBJECT: Whether an officer of a corporation, representing the
corporation *pro se* at trial in the Tax Court, may also testify
at trial.

This Field Service Advice responds to your memorandum dated December 12, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

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official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND

X =

Y =

ISSUES

Whether an officer of a corporation, representing the corporation *pro se* at trial in the Tax Court, may also testify at trial.

CONCLUSIONS

An officer of a corporation, representing the corporation *pro se* at trial in the Tax Court, may also testify at trial, so long as the interests of the parties are not materially adversely affected by having the officer appear both as advocate and as witness.

FACTS

In a Tax Court case X (a corporation) appeared *pro se* through Y (an officer of X). Y is not an attorney. Y testified at trial. The government did not object to Y testifying.

LAW AND ANALYSIS

Proceedings before the Tax Court are conducted pursuant to the Tax Court Rules. Pursuant to Rule 24(b), "A corporation ... may be represented by an authorized officer of the corporation." We have identified no Tax Court Rule which addresses the question of whether such an officer may also testify at trial. Rule 143 provides:

Trials before the Court will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. See Code Section 7453. To the extent applicable to such trials, those rules include the rules of evidence in the Federal Rules of Civil Procedure and any rules of evidence generally applicable in the Federal courts (including the United States District Court for the District of Columbia).

The Federal Rules of Civil Procedure contain no rule addressing this issue, nor do the local rules for the United States District Court for the District of Columbia. Research has located no Tax Court opinion, nor any district court opinion, addressing this issue.

Individuals representing themselves at trial are generally permitted to testify. By analogy, we believe that a corporation representing itself through its officer may also testify through its officer. Further, we have found nothing requiring a corporation appearing *pro se* to provide one officer as the corporate representative and a different officer as the witness.

The Tax Court's concern in this situation may be based upon the possibility of a conflict of interest arising out of having the taxpayer's advocate also be a witness. Rule 3.7 of the Model Rules of Professional Conduct provides:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Center for Professional Responsibility, American Bar Association, *Annotated Model Rules of Professional Conduct* 361, (4th ed. 1999). (Hereafter, *Annotated Model Rules*). We recognize that the Model Rules technically do not apply to Y here, since Y is not an attorney. However, the concern regarding conflicts of interest between the corporation, its directors, and the corporation's advocate remain, and the Model Rules provide guidance regarding conflicts of interest between clients and their advocates.

The commentary to Rule 3.7 indicates that the primary reasons offered for prohibiting counsel from testifying are the possibilities for 1) prejudicing the other party, 2) conflict of interest between the counsel-witness and the client, and 3) confusing the jury. *Annotated Model Rules*, p. 361-363. Here, the government did not object at the time and no suggestion has since been made that the government was prejudiced; therefore, we do not perceive that possibility 1) has occurred. Since Tax Court cases have no jury, possibility 3) is impossible; furthermore, to the extent that the judge may be confused, s/he could question Y to clarify matters. With respect to possibility 2), as explained below, we do not perceive that any material conflict of interest exists between Y and X.

Rule 1.7(b) of the Model Rules provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation."

Annotated Model Rules, p. 91. Comment 14 to Rule 1.7 states that

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Annotated Model Rules, p.94.

The conflict of interest provisions of the Model Rules focus on ensuring that the client's best interests are not compromised by the lawyer's other interests. Similarly, therefore, in the instant case, we look to whether X's interests in the Tax Court litigation are materially adversely affected by Y's dual role as representative and as witness. We do not perceive any adverse effect. Indeed, given Y's responsibility for X's compliance with the laws and regulations regarding Federal taxation, it appears that Y's interest in the outcome of this case parallels X's very closely.

Finally, Tax Court Rule 160 provides:

No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties, is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of a case will disregard any error or defect which does not affect the substantial rights of the parties.

Thus, if the Tax Court admits the testimony, and it is later determined that Y should not have testified at trial, the Tax Court's decision would only be subject to modification or other disturbance if the United States suffered substantial harm due to this testimony.

We have located nothing suggesting that Y was prohibited from testifying at trial. Lacking any basis for asserting otherwise, we believe that Y's testimony is permitted and is admissible evidence. The only concern we perceive is whether X's interests are in conflict with those of Y in any material way. In the instant case, we perceive no such conflict of interest.

Please call if you have any further questions.

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By: KELLY ALTON
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