

business operations test, and the various assets tests specified in paragraphs (d) through (h) of §301.7701-13, employing the rules and definitions of paragraphs (j) through (l) of that section. In applying paragraphs (b) through (l) of such section any references to an “association” or to a “domestic building and loan association” shall be deemed to be a reference to a cooperative bank.

§ 301.7701-15 Tax return preparer.

(a) *In general.* A tax return preparer is any person who prepares for compensation, or who employs one or more persons to prepare for compensation, all or a substantial portion of any return of tax or any claim for refund of tax under the Internal Revenue Code (Code).

(b) *Definitions—(1) Signing tax return preparer.* A signing tax return preparer is the individual tax return preparer who has the primary responsibility for the overall substantive accuracy of the preparation of such return or claim for refund.

(2) *Nonsigning tax return preparer—(i) In general.* A nonsigning tax return preparer is any tax return preparer who is not a signing tax return preparer but who prepares all or a substantial portion of a return or claim for refund within the meaning of paragraph (b)(3) of this section with respect to events that have occurred at the time the advice is rendered. In determining whether an individual is a nonsigning tax return preparer, time spent on advice that is given after events have occurred that represents less than 5 percent of the aggregate time incurred by such individual with respect to the position(s) giving rise to the understatement shall not be taken into account. Notwithstanding the preceding sentence, time spent on advice before the events have occurred will be taken into account if all facts and circumstances show that the position(s) giving rise to the understatement is primarily attributable to the advice, the advice was substantially given before events occurred primarily to avoid treating the person giving the advice as a tax return preparer, and the advice given before events occurred was confirmed after events had occurred for purposes

of preparing a tax return. Examples of nonsigning tax return preparers are tax return preparers who provide advice (written or oral) to a taxpayer (or to another tax return preparer) when that advice leads to a position or entry that constitutes a substantial portion of the return within the meaning of paragraph (b)(3) of this section.

(ii) *Examples.* The provisions of this paragraph (b)(2) are illustrated by the following examples:

Example 1. Attorney A, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding a completed corporate transaction. The advice provided by A is directly relevant to the determination of an entry on the taxpayer’s return, and this advice leads to a position(s) or entry that constitutes a substantial portion of the return. A, however, does not prepare any other portion of the taxpayer’s return and is not the signing tax return preparer of this return. A is considered a nonsigning tax return preparer.

Example 2. Attorney B, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding the tax consequences of a proposed corporate transaction. Based upon this advice, the corporate taxpayer enters into the transaction. Once the transaction is completed, the corporate taxpayer does not receive any additional advice from B with respect to the transaction. B did not provide advice with respect to events that have occurred and is not considered a tax return preparer.

Example 3. The facts are the same as Example 2, except that Attorney B provides supplemental advice to the corporate taxpayer on a phone call after the transaction is completed. Attorney B did not provide advice before the corporate transaction occurred with the primary intent to avoid being treated as a tax return preparer. The time incurred on this supplemental advice by B represented less than 5 percent of the aggregate amount of time spent by B providing tax advice on the position. B is not considered a tax return preparer.

(3) *Substantial portion.* (i) Only a person who prepares all or a substantial portion of a return or claim for refund shall be considered to be a tax return preparer of the return or claim for refund. A person who renders tax advice on a position that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund will be regarded as having prepared that entry. Whether a schedule, entry,

or other portion of a return or claim for refund is a substantial portion is determined based upon whether the person knows or reasonably should know that the tax attributable to the schedule, entry, or other portion of a return or claim for refund is a substantial portion of the tax required to be shown on the return or claim for refund. A single tax entry may constitute a substantial portion of the tax required to be shown on a return. Factors to consider in determining whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion include but are not limited to—

(A) the size and complexity of the item relative to the taxpayer's gross income; and

(B) the size of the understatement attributable to the item compared to the taxpayer's reported tax liability.

(ii)(A) For purposes of applying the rules of paragraph (b)(3)(i) of this section to a nonsigning tax return preparer within the meaning of paragraph (b)(2) of this section only, the schedule or other portion is not considered to be a substantial portion if the schedule, entry, or other portion of the return or claim for refund involves amounts of gross income, amounts of deductions, or amounts on the basis of which credits are determined that are—

(1) Less than \$10,000; or

(2) Less than \$400,000 and also less than 20 percent of the gross income as shown on the return or claim for refund (or, for an individual, the individual's adjusted gross income).

(B) If more than one schedule, entry or other portion is involved, all schedules, entries or other portions shall be aggregated in applying the de minimis rule in paragraph (b)(3)(ii)(A) of this section.

(C) The de minimis rule in paragraph (b)(3)(ii)(A) of this section shall not apply to a signing tax return preparer within the meaning of paragraph (b)(1) of this section.

(iii) A tax return preparer with respect to one return is not considered to be a tax return preparer of another return merely because an entry or entries reported on the first return may affect an entry reported on the other return, unless the entry or entries re-

ported on the first return are directly reflected on the other return and constitute a substantial portion of the other return. For example, the sole preparer of a partnership return of income or small business corporation income tax return is considered a tax return preparer of a partner's or a shareholder's return if the entry or entries on the partnership or small business corporation return reportable on the partner's or shareholder's return constitute a substantial portion of the partner's or shareholder's return.

(iv) *Examples.* The provisions of this paragraph (b)(3) are illustrated by the following examples:

Example 1. Accountant C prepares a Form 8886, "Reportable Transaction Disclosure Statement", that is used to disclose reportable transactions. C does not prepare the tax return or advise the taxpayer regarding the tax return reporting position of the transaction to which the Form 8886 relates. The preparation of the Form 8886 is not directly relevant to the determination of the existence, characterization, or amount of an entry on a tax return or claim for refund. Rather, the Form 8886 is prepared by C to disclose a reportable transaction. C has not prepared a substantial portion of the tax return and is not considered a tax return preparer under section 6694.

Example 2. Accountant D prepares a schedule for an individual taxpayer's Form 1040, "U.S. Individual Income Tax Return", reporting \$4,000 in dividend income and gives oral or written advice about Schedule A, which results in a claim of a medical expense deduction totaling \$5,000, but does not sign the tax return. D is not a nonsigning tax return preparer because the total aggregate amount of the deductions is less than \$10,000.

(4) *Return and claim for refund—(i) Return.* For purposes of this section, a return of tax is a return (including an amended or adjusted return) filed by or on behalf of a taxpayer reporting the liability of the taxpayer for tax under the Code, if the type of return is identified in published guidance in the Internal Revenue Bulletin. A return of tax also includes any information return or other document identified in published guidance in the Internal Revenue Bulletin and that reports information that is or may be reported on another taxpayer's return under the Code if the information reported on the information return or other document constitutes a substantial portion of the taxpayer's

return within the meaning of paragraph (b)(3) of this section.

(ii) *Claim for refund.* For purposes of this section, a claim for refund of tax includes a claim for credit against any tax that is included in published guidance in the Internal Revenue Bulletin. A claim for refund also includes a claim for payment under section 6420, 6421, or 6427.

(c) *Mechanical or clerical assistance.* A person who furnishes to a taxpayer or other tax return preparer sufficient information and advice so that completion of the return or claim for refund is largely a mechanical or clerical matter is considered a tax return preparer, even though that person does not actually place or review placement of information on the return or claim for refund. See also paragraph (b)(3) of this section.

(d) *Qualifications.* A person may be a tax return preparer without regard to educational qualifications and professional status requirements.

(e) *Outside the United States.* A person who prepares a return or claim for refund outside the United States is a tax return preparer, regardless of the person's nationality, residence, or the location of the person's place of business, if the person otherwise satisfies the definition of *tax return preparer*. Notwithstanding the provisions of § 301.6109-1(g), the person shall secure an employer identification number if the person is an employer of another tax return preparer, is a partnership in which one or more of the general partners is a tax return preparer, is a firm in which one or more of the equity holders is a tax return preparer, or is an individual not employed by another tax return preparer.

(f) *Persons who are not tax return preparers.* (1) The following persons are not tax return preparers:

(i) An official or employee of the Internal Revenue Service (IRS) performing official duties.

(ii) Any individual who provides tax assistance under a Volunteer Income Tax Assistance (VITA) program established by the IRS, but only with respect to those returns prepared as part of the VITA program.

(iii) Any organization sponsoring or administering a VITA program estab-

lished by the IRS, but only with respect to that sponsorship or administration.

(iv) Any individual who provides tax counseling for the elderly under a program established pursuant to section 163 of the Revenue Act of 1978, but only with respect to those returns prepared as part of that program.

(v) Any organization sponsoring or administering a program to provide tax counseling for the elderly established pursuant to section 163 of the Revenue Act of 1978, but only with respect to that sponsorship or administration.

(vi) Any individual who provides tax assistance as part of a qualified Low-Income Taxpayer Clinic (LITC), as defined by section 7526, subject to the requirements of paragraphs (f)(2) and (3) of this section, but only with respect to those returns and claims for refund prepared as part of the LITC program.

(vii) Any organization that is a qualified LITC, as defined by section 7526, subject to the requirements of paragraphs (f)(2) and (3) of this section.

(viii) An individual providing only typing, reproduction, or other mechanical assistance in the preparation of a return or claim for refund.

(ix) An individual preparing a return or claim for refund of a taxpayer, or an officer, a general partner, member, shareholder, or employee of a taxpayer, by whom the individual is regularly and continuously employed or compensated or in which the individual is a general partner.

(x) An individual preparing a return or claim for refund for a trust, estate, or other entity of which the individual either is a fiduciary or is an officer, general partner, or employee of the fiduciary.

(xi) An individual preparing a claim for refund for a taxpayer in response to—

(A) A notice of deficiency issued to the taxpayer; or

(B) A waiver of restriction on assessment after initiation of an audit of the taxpayer or another taxpayer if a determination in the audit of the other taxpayer affects, directly or indirectly, the liability of the taxpayer for tax.

(xii) A person who prepares a return or claim for refund for a taxpayer with no explicit or implicit agreement for

compensation, even if the person receives an insubstantial gift, return service, or favor.

(2) Paragraphs (f)(1)(vi) and (vii) of this section apply only if any assistance with a return of tax or claim for refund is directly related to a controversy with the IRS for which the qualified LITC is providing assistance or is an ancillary part of an LITC program to inform individuals for whom English is a second language about their rights and responsibilities under the Code.

(3) Notwithstanding paragraph (f)(2) of this section, paragraphs (f)(1)(vi) and (f)(1)(vii) of this section do not apply if an LITC charges a separate fee or varies a fee based on whether the LITC provides assistance with a return of tax or claim for refund under the Code or if the LITC charges more than a nominal fee for its services.

(4) For purposes of paragraph (f)(1)(ix) of this section, the employee of a corporation owning more than 50 percent of the voting power of another corporation, or the employee of a corporation more than 50 percent of the voting power of which is owned by another corporation, is considered the employee of the other corporation as well.

(5) For purposes of paragraph (f)(1)(x) of this section, an estate, guardianship, conservatorship, committee, or any similar arrangement for a taxpayer under a legal disability (such as a minor, an incompetent, or an infirm individual) is considered a trust or estate.

(6) *Examples.* The mechanical assistance exception described in paragraph (f)(1)(viii) of this section is illustrated by the following examples:

Example 1. A reporting agent received employment tax information from a client from the client's business records. The reporting agent did not render any tax advice to the client or exercise any discretion or independent judgment on the client's underlying tax positions. The reporting agent processed the client's information, signed the return as authorized by the client pursuant to Form 8655, Reporting Agent Authorization, and filed the client's return using the information supplied by the client. The reporting agent is not a tax return preparer.

Example 2. A reporting agent rendered tax advice to a client on determining whether its

workers are employees or independent contractors for Federal tax purposes. For compensation, the reporting agent received employment tax information from the client, processed the client's information and filed the client's return using the information supplied by the client. The reporting agent is a tax return preparer.

(g) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after December 31, 2008.

[T.D. 9436, 73 FR 78463, Dec. 22, 2008, as amended by T.D. 9436, 74 FR 5107, Jan. 29, 2009]

§ 301.7701-16 Other terms.

For a definition of the term "withholding agent" see § 1.1441-7(a). Any other terms that are defined in section 7701 and that are not defined in §§ 301.7701-1 to 301.7701-15, inclusive, shall, when used in this chapter, have the meanings assigned to them in section 7701.

(Secs. 1441(c)(4) (80 Stat. 1553; 26 U.S.C. 1441(c)(4)), 3401(a)(6) (80 Stat. 1554; 26 U.S.C. 3401(a)(6)), and 7805 (68A Stat. 917; 26 U.S.C. 7805), Internal Revenue Code of 1954)

[T.D. 7977, 49 FR 36836, Sept. 20, 1984]

§ 301.7701-17T Collective-bargaining plans and agreements (temporary).

Q-1: How did the Tax Reform Act of 1984 (TRA of 1984) change the laws with respect to plans that are maintained pursuant to collective bargaining agreements?

A-1: (a) Many of the requirements and rules applicable to deferred compensation and welfare benefit plans are different for plans maintained pursuant to a collective bargaining agreement. Prior to the TRA of 1984, the Internal Revenue Code provided no clear definition of an employee representative or whether there is a collective bargaining agreement between such employee representative and one or more employers.

(b) Section 526(c) of the TRA of 1984 added a new condition under a new section 7701(a)(46) that must be satisfied in order for a plan to be considered to be a plan maintained pursuant to a collective bargaining agreement between employee representatives and one or more employers for purposes of the Code after March 31, 1984. If more than