

CAUTION: The following advice may be based on a rule that has been revised since the opinion was first issued. Consequently, the analysis reflected in the opinion may be outdated.

IC 6-8.1-3-2(e)

45 IAC 15-3-1

DOR and a former employee sought an advisory opinion on the interpretation and applicability of the agency's conflict of interest statute to former DOR employees.

**93-I-2 Department of Revenue's Conflict of Interest Law
(Decision March 18, 1993)**

FACT SITUATION

The Department of Revenue and a former employee requested an interpretation of the Department of Revenue's conflict of interest statute. The former employee challenged the department's interpretation. The department and the former employee sought an advisory opinion with respect to the interpretation and applicability of the department's statute governing conduct of its former employees.

The relevant law was found at IC 6-8.1-3-2(e) and 45 IAC 15-3-1. A former employee of the Department of Revenue, Tax Appeals Division, had been a hearing officer and later a supervisor responsible for evaluating taxpayers' written and oral appeals, issuing a Letter of Finding to the taxpayer, and issuing legal opinions to field officers and other department personnel. The employee was also involved in the development and discussion of department tax policy.

Nine months prior to asking for the decision, the employee left the department to take a position with a local tax consulting firm which filed claims for refunds, appeared on behalf of taxpayers in ongoing audits, represented taxpayers at hearings conducted in the Appeals Division, and advised clients of their rights and defenses in an audit situation.

The Department of Revenue interpreted its statute to prohibit the former employee for two years from representing in any manner any taxpayer on any type of tax matter, if that taxpayer was identified for audit by the department while the former employee was an employee of the department. The former employee argued the statute was not taxpayer specific but allowed former employees to act in regard to tax issues or tax types that were not the specific tax matter the department examined; that the statute required there be a showing the former employee had actual knowledge of the matter before the former employee was prohibited from representing the taxpayer on that matter; the former employee was permitted to represent the taxpayer, provided the employee did not discuss the matter with the department; and a matter was "pending in the Department" when the auditor started the examination, not when the Audit Division assigned a file number.

Once a taxpayer was selected by the Department of Revenue for audit, the audit was assigned a control number on an internal document. The control number was then sent to an auditor. An audit could be assigned and then rejected by the field auditor. Sometimes the control number was assigned and the audit was not actually started for several months. Taxpayers being audited did not know they had been assigned a control number, but only become aware of the audit at a later time.

QUESTIONS

- 1) Is the Revenue Department's prohibition on former employees taxpayer specific or tax issue or tax type specific?
- 2) Does the statute require a showing of actual knowledge of the represented taxpayer gained by the former employee during employment?

- 3) Is a former employee permitted to represent a taxpayer in tax matters provided the employee does not discuss the matter with the Department of Revenue?
- 4) Is a matter "pending in the Department" once the Audit Division assigns a number or when the auditor starts an examination?

OPINION

The Commission found that the prohibitions of IC 6-8.1-3-2(e):

- 1) did not apply to representation of the taxpayer in other matters distinct from the matter pending before the department, but was specific to matters pending before the department when that employee was employed, and would not prohibit the employee from assisting a taxpayer with respect to later matters that began after the employee's employment ended;
- 2) did not depend upon actual, constructive, or potential knowledge of the particular matter at the time the employee was employed with the department;
- 3) applied to actions in any capacity in the matter that was pending in the department during the period of the former employee's employment, including assistance short of physical appearance, protest letter, or telephone, such as giving behind-the scenes advice, drafting, or other assistance; and
- 4) an examination became a matter in the department when an identification number had been assigned but did not become a "matter pending in the department" until an examination resulted in an assessment or denial of a claim for refund, at which time prohibitions related back to the time when the examination became a matter.

The relevant statute and rules are as follows:

The Department of Revenue's conflict of interest statute IC 6-8.1-3-2(e), provides:
"(e) For a period of two (2) years after the termination of his employment with the Department, a former employee may not act in any capacity for a person (other than the Department, another state agency, or the federal government) in a matter that was pending in the Department during the period of the former employee's employment."

The Department's rules in relation to the statute, 45 IAC 15-3-1, provides:
"Sec. 1 For purposes of IC 6-8.1-3-2(e), for a period of two (2) years after termination of employment with the Department, a former employee may not represent a taxpayer, by physical appearance before the Department, protest letter, or telephone, on any matter pending before the Department during the period of the former employee's employment.

"A matter is defined as a discrete and isolated transaction or set of transactions between identifiable parties. For purposes of IC 6-8.1-3-2(e), a matter does not include work of a former employee in drafting, enforcing and interpreting Department procedures, regulations, or applicable laws because these activities lack identifiable parties involved in a specific tax transaction.

"For purposes of this section 'person' shall include a person as defined by IC 6-8.1-1-3 or a representative of such person.

"A matter pending in the Department shall mean any tax matter where a person has been specifically identified during the former employee's employment by any division of the Department for examination of any of the listed taxes and such examination resulted, either before or after the former employee's termination, in an assessment or the denial of a claim for refund of the listed tax for the tax years specifically identified."