

The Tax Professional as Client: Practical considerations for representing accountants, return preparers, and other tax professionals in civil and criminal tax cases.

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October 14, 2015

Course number for CLE credit: **1507564N**

Presentation Outline

- I. **Tax Return Preparer/Promoter Fraud cases**
 - a. Civil
 - i. Permanent Injunction
 - ii. Preparer Penalties
 - iii. Disgorgement
 - iv. Appointment of Independent Monitor
 - v. Threat of parallel or subsequent criminal case
 - b. Criminal
 - i. Use of Undercover Agents; search warrants; email & social media
 - ii. Credibility of taxpayers vs. return preparer/promoter becomes key
 - iii. Pattern of alleged illegality
 - iv. Try the case or chip away at sentencing factors?
 1. Scrutinize the gov't methodology for computing tax loss
 2. Preserve discovery objections
 - c. Restitution-Based Assessments (RBAs) – intersection of criminal and civil
 - i. Restitution often differs from “tax loss” in a criminal case
 - ii. IRS, since 2010, has been able to use a criminal restitution order to make a civil tax assessment. See 26 U.S.C. § 6201(a)(4).

- iii. Internal Revenue Manual (IRM) contains specific advice for IRS criminal investigators to use in computing restitution in return preparer cases and presenting it to the sentencing court. I.R.M § 25.26.1.3.1 (03-24-2014).
- iv. Tension between the RBA provisions and sentencing court
 - 1. *United States v. Horn*, D Md. Case No. 1:13-cr-00519-MJG, Dkt. No. 66, Decision Re: Restitution.
 - 2. In *Horn*, Judge Garbis declined to enter a restitution order against a return preparer defendant due to “...the complexity of determining the amount of actual loss to the I.R.S., in addition to the disproportionate management burden that a Restitution Based Assessment would impose on the I.R.S. and the Court, renders it inappropriate to issue a restitution order in this case.”

II. Tax Professional as witness

- a. Examination Stage
 - i. Return preparers contacted early
 - 1. Voluntary Interview
 - 2. Summons
 - ii. Coordinate with taxpayer’s counsel?
 - iii. Badges of Fraud – risk of criminal referral
- b. Criminal Investigation
 - i. Overview
 - 1. The players
 - a. IRS Criminal Investigations (CI)
 - b. Department of Justice, Tax Division
 - c. U.S. Attorney’s Office

2. Sources of criminal tax cases
 - a. Fraud referrals from examination or collection divisions
 - b. Informants, whistleblowers, ex-spouses, employee, etc.
 - c. Suspicious monetary transactions via FinCEN
 - d. Other
- ii. Multiple representation issue
- iii. Reliance on advice of counsel/tax professional
- iv. Bottom line is the return preparer or tax advisor will be viewed as either a witness or a co-conspirator
 1. Privilege issues
 2. No state law accountant/client privileges or IRC 7525 privilege in a federal criminal case
 3. Use of *Kovel* accountants – but beware the misconceptions
 4. Recent Tax Shelter prosecutions
- c. Status as a witness -- IRS and DOJ terminology
 - i. IRS CI administrative investigations
 1. General Investigations – IRM § 9.4.1.4
 2. Primary Investigations – IRM § 9.4.1.5
 3. Subject Criminal Investigations – IRM § 9.4.1.6
 - ii. DOJ-led grand jury investigations
 1. Status definitions found in the U.S. Attorney's Manual at 9-11.151:

- a. A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.
 - b. A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.
 - c. Witness = not currently a subject or target
- 2. All criminal tax charges must be first authorized by the DOJ Tax Division in Washington, D.C., before any local U.S. Attorney's Office can present an indictment to the Grand Jury.
 - a. Before authorizing a prosecution, the Tax Division must conclude that the Government has:
 - i. sufficient evidence to support a prima facie case; and
 - ii. a reasonable probability of conviction. USAM 6-4.211.
- iii. Dealing with IRS CI and DOJ
 - 1. Responding to Grand Jury subpoenas
 - 2. Evaluating risk of prosecution – when and how to invoke Fifth Amendment protections
 - 3. Negotiating immunity from prosecution in exchange for testimony
- d. Obstruction of Justice concerns
 - i. Broad statutes – can seemingly encompass innocent, noncriminal, or ambiguous conduct
 - 1. False statements under 18 U.S.C. § 1001
 - 2. General Obstruction of Justice under 18 U.S.C. §§ 1503, 1512
 - 3. Destruction/Falsification of records under 18 U.S.C. § 1519

4. Tax Obstruction under 26 U.S.C. § 7212(a)

5. *Klein* conspiracy to defraud the IRS under 18 U.S.C. § 371

ii. How far will the government stretch these statutes?

1. Townsend, John, "Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough," 9 HOUS. BUS. & TAX L.J. 255 (2009).

2. *Yates v. United States*, 135 S. Ct. 1074 (2015).

3. *United States v. Katakis*, -- F.3d --, (9th Cir. August 31, 2015).

III. Professional Responsibility concerns

a. For the Tax Professional

b. For the Attorney representing the Tax Professional

IV. Questions?