

REPRESENTATION IN CRIMINAL TAX MATTERS BEFORE THE IRS

(A Practical Guide)

by

Cary M. Martinez

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Dedicated to the hardworking employees of the Internal Revenue Service–Criminal Investigation throughout the United States of America, unsung heroes of government service: If I could, I'd still be working at your side today.

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INTRODUCTION

My name is Cary Martinez, and I am a retired Internal Revenue Service Employee. I went to work for IRS in 1987 after earning a bachelor's degree in accounting from the University of Idaho, and took the job of revenue agent in Coeur d'Alene, Idaho. Revenue agents are auditors, or examiners, of tax liability for IRS.

At the end of 2009 IRS had over 90,000 employees¹ nationwide, and most of these employees are involved in its civil functions, such as audits, tax collection, processing returns, and other administrative positions. IRS also has another little-known and little understood department: Criminal Investigation. After working as a revenue agent for a little over four years, I transferred to the Criminal Investigation Division and became a special agent in Idaho Falls, Idaho. I worked in this capacity for nearly 16 years, before retiring.

In my years as a special agent I investigated numerous income, excise, and employment tax evasion cases. I also investigated money laundering crimes, as well as violations of the Bank Secrecy Act. I worked at the Idaho Falls, Idaho; San Juan, Puerto Rico; and Maitland, Florida posts of duty. I retired in Florida.

I have never practiced public accounting, or been a tax return preparer outside of the IRS. You could say that I am a "company man". My reason for writing this book is not because I have some personal vendetta against the IRS, or that I am anti-tax; just the contrary. I strongly believe in the stated mission of the IRS:

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.²

I also believe in IRS Criminal Investigation's Mission Statement:

Criminal Investigation (CI) serves the American public by investigating potential criminal violations of the Internal Revenue Code and related financial crimes in a manner that fosters confidence in the tax system and compliance with the law.³

Although our current tax code is somewhat convoluted and unfair in many ways, I support the concept of income taxation as being one of the "best" kinds of tax, as it is a system based, for the most part, on the individual's ability to pay. So I did not write this book to teach professionals how to cheat the system, or to help their clients to avoid paying their fair share.

¹ Table 30. Internal Revenue Service Personnel Summary, by Employment Status, Budget Activity, and Selected Type of Personnel, Fiscal Years 2008 and 2009, <http://www.irs.gov/taxstats/article/0,,id=207735,00.html>

² <http://www.irs.gov/irs/article/0,,id=98141,00.html>

³ <http://www.irs.gov/compliance/enforcement/index.html>

When it became apparent that I would no longer be working as a special agent, I began to wonder how I could put the knowledge of 20 years of government service to good use. I did not want to go to work for criminal defense attorneys in litigation support. I am still very much a special agent at heart. We special agents refer to former special agents working for defense counsel as having “gone over to the dark side”, (tongue-in-cheek here. Please no hate mail from former special agents!)

I enjoy teaching, but I did not want to teach college accounting, or anything similar. As I thought about my many investigator experiences over the years, I recalled several experiences with various defense attorneys. There was a handful with whom I actually enjoyed working with, but there were also several who were difficult, and I remember a lot of very unpleasant moments. These unpleasant times generally came as a result of the defense attorney not really knowing what he or she was doing when it came to dealing with IRS, or with special agents specifically. They often approached a criminal tax defense the same way one would approach a civil tax matter. After speaking with some of my colleagues, I came to the conclusion that there are several things that most special agents would prefer that defense attorneys understood better; things that would make our lives easier, and would actually enhance attorneys’ ability to represent their clients in criminal tax matters.

That’s what this book is all about. What I would like for you to take away from this book is a better understanding of IRS Criminal Investigation; how it differs from the civil functions of IRS. I would like for you to fully understand the process of a criminal tax investigation. It would be beneficial for you to have a better understanding of the typical special agent’s paradigm, his view of the tax world. I was that typical special agent.

In the process of helping you to understand some of these concepts, I have written some things that you may not agree with. You may not think that I know what I am talking about! That’s OK! Just remember that I am not trying to convert you to my very biased view of the American income tax system, or to get you to move away from “the dark side”! I am simply trying to convey to you how the average special agent thinks, how he or she approaches an investigation, and how the IRS Criminal Investigation process works. If you do not understand these things, your first criminal tax representation could result in a rude awakening. The system that you think you understand will likely roll right over the top of you and your client!

CHAPTER ONE - IRS CRIMINAL INVESTIGATION COMPARED WITH THE CIVIL DIVISIONS OF IRS

The Organization

It is important for you to understand the difference between the civil and criminal sides of the IRS, because they are very different, and their employees play by very different sets of rules. Let's start with the civil side of IRS, the side with which you may most likely be familiar.

There are three primary civil functions within IRS: examinations, collections, and taxpayer assistance. IRS actually used to be physically divided along these functional lines, along with an appeals division for appealing civil determinations. The Criminal Investigation Division was sort of a separate appendage.

The IRS Restructuring and Reform Act of 1998 prompted a comprehensive reorganization of IRS, which had not happened in nearly 50 years. The stated objective was to organize IRS in such a way as to resemble the private sector model of organizing around customers with similar needs. The four primary civil operating divisions are now called Small Business/Self-Employed (SB/SE), Wage & Investment (W&I), Large and Mid-Size Business (LMSB), and Tax Exempt and Government Entities (TEGE). (See Table 1-1)

Other important but lesser known civil offices include Office of Chief Counsel, Taxpayer Advocate Service, Appeals, and Communications and Liaison. Taxpayer Assistance is no longer its own division, but is now managed by the W&I Division. Although the names of these divisions are somewhat self explanatory, it is still more important for you to know what examination and collection functions are performed within each one. I will go into more detail regarding their various functions later in this chapter.

Each of the four primary civil divisions consists of auditors, collectors, and management and support staff. The auditors are known as *tax examiners*, *tax auditors*, and *revenue agents*. The collectors are known as *revenue officers*.

Criminal Investigation (CI), compared to the rest of the IRS, is a very small organization. As of September 30, 2009, there were 2,725 special agents worldwide, a small part of the 93,337 total IRS employees.¹ Besides the 50 United States, there are also agents in Puerto Rico, the Virgin Islands, Guam, and the Interpol office in Lyon, France. There are also a handful of special agent embassy attachés around the globe.

The head of IRS-CI is the Chief, located in Washington, DC. He or she is the highest level non-political appointee in CI, and answers directly to the IRS Commissioner, who

¹ Internal Revenue Service Personnel Summary, by Employment Status, Budget Activity, and Selected Type of Personnel, Fiscal Years 2008 and 2009, <http://www.irs.gov/taxstats/article/0,,id=207735,00.html>

in turn answers to the Secretary of the Treasury. The Chief may come from within or outside the IRS, and may or may not have law enforcement officer experience. The current Chief (as of October 1 2010), Victor S.O. Song, ``joined the IRS in 1981 and became a special agent in 1983. He led numerous CI offices and joined the senior executive service in 2004. He became CI deputy chief in 2007``.¹

Nationally, CI is divided by geographical areas: North Atlantic, Southeast, Mid States, and Pacific Areas. Each area is led by a Director, Field Operations (DFO)². Each area is further organized into field offices, which are directed by a special agent-in-charge (SAC) and an assistant special agent-in-charge (ASAC). Larger field offices may have more than one ASAC. There are 26 field offices around the US³. Some states have more than one field office (Florida has two, one headquartered in Tampa/St. Petersburg, and the other in Miami) and others include multiple states (the Las Vegas Field Office oversees all of Nevada and Utah). Each field office is organized into anywhere between 5 and 10 Groups of special agents (SA). Normally there are about 10 special agents in a group, managed by a supervisory special agent (SSA).

SAs are paid on the Federal Government General Schedule (GS), and start out at a GS-7 or 9, which in 2010 translates to about \$50,600 to \$72,800 per year (SALARY TABLE 2010-RUS (LEO) + 25% LEAP). This includes 25% Law Enforcement Availability Pay (LEAP) for working an additional 10 hours overtime per week, averaged out over each calendar year. The journeyman level is GS-12, or about \$79,000 to \$103,000 per year. Most agents advance to a GS-13, or about \$94,200 to \$122,000 per year. The SSA is a GS-14 position, which pays \$111,000 to \$144,800 per year⁴.

Civil vs. Criminal Tax Matters-Overview

Now let's talk about what the IRS employees in these different divisions actually do.

Examination is the process of review or audit of tax returns filed by taxpayers, or determining the correct tax liability of those who have not filed the required tax returns. Examination is performed by *tax examiners*, *tax auditors*, and *revenue agents*. Tax examiners do all of their work by telephone and correspondence, and deal mainly with wage and investment issues. These reviews are generally wrapped up in a very short period of time, depending on how quickly the taxpayer responds.

¹ IR-2009-113, Dec. 7, 2009

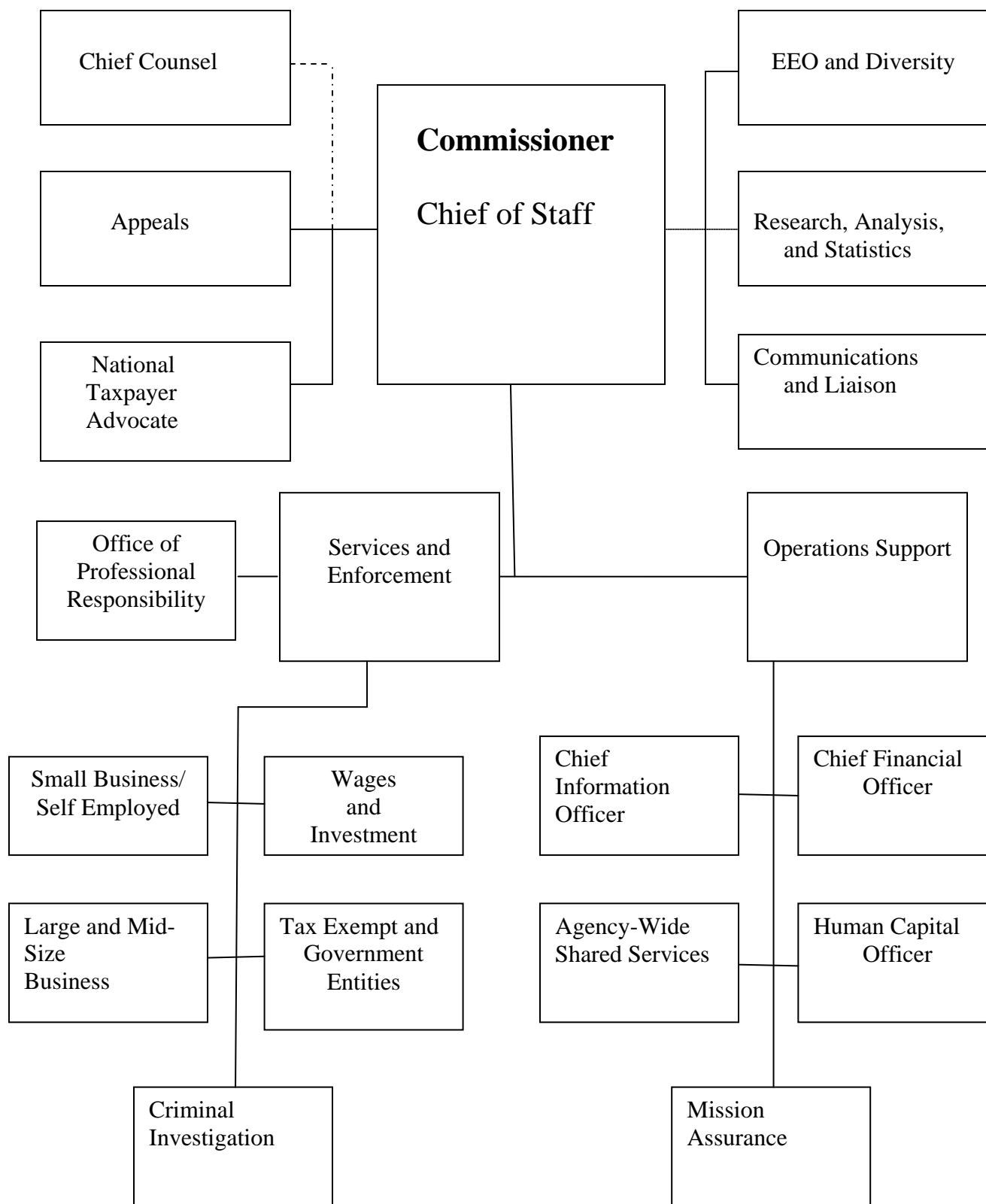
² Internal Revenue Manual 1.1.19.3 (09-10-2008), Criminal Investigation Area and Field Offices

³ <http://www.irs.gov/compliance/enforcement/article/0,,id=205909,00.html>

⁴ US Office of Personnel Management, Salary Table 2007-RUS (LEO) including special base rates at GS-3 through GS-10 and incorporating the 1.70% general schedule increase and a locality payment of 12.64% for the locality pay area of rest of U.S.

Table 1-1

Internal Revenue Service
Department of the Treasury



Tax auditors send out appointment letters to taxpayers and their representatives, to come to the local IRS office and bring documentation to substantiate specific income and deduction items reported on the tax return. These audits are done entirely in the IRS office, and generally deal with income and deduction issues somewhat more complex than wages and small investments, such as small sole proprietorship businesses, home offices and in-home daycares, “Mom and Pop” businesses, etc. These audits last anywhere from one day, to one or two months, depending once again on how quickly the taxpayer can respond to questions and concerns of the tax auditor.

Revenue agents deal with the much more complex audits of large sole proprietorships, partnerships and corporations. They are, without a doubt, the IRS’ tax law experts with regards to determining tax liability. The revenue agent also sends out appointment letters, but he or she conducts the audits at the place of business or at the office of the representative. Usually a long, detailed interview is conducted with the taxpayer and/or representative, as well as with key employees. The audit can involve numerous business records, and can last anywhere from one week to many months, depending on the audit issues at hand, the complexity of the business or records, and the cooperativeness of the taxpayer/representative.

In the audit process, the taxpayer has the burden of proof. In other words, if he or she takes an expense deduction or claims a tax credit on a tax return, in the process of an audit the auditor can request substantiation and verification from the taxpayer. If the taxpayer does not provide such substantiation or verification, then the auditor will simply disallow the deduction or credit. If the taxpayer received income that was not reported on the tax return, and the auditor believes it to be taxable income, then the auditor can require the taxpayer to produce verification of the nature of the income, to determine its taxability. If the taxpayer does not comply or cannot prove that the income was non-taxable, the auditor will add the income to the report and assess additional tax.

Because the determination of tax liability is a civil process, not a criminal investigation, the auditor can require the production of documents by the taxpayer. If the taxpayer refuses to comply, the auditor can serve the taxpayer with an IRS Administrative Summons to compel testimony and/or the production of documents¹. If the taxpayer refuses to comply with the summons, IRS may proceed with summons enforcement action in federal district court and force compliance via a court order. Unless the taxpayer makes the assertion that compliance would tend to incriminate him/her somehow, he/she is going to have to comply. And if he/she, takes a 5th amendment defense, he/she risks the initiation of a criminal investigation. After all, IRS is going to want to determine what possible criminal violations must have been missed in the course of the civil audit, especially if the taxpayer feels that he might incriminate himself by cooperating. This may not seem fair, since exercising one’s 5th amendment rights is not an admission of guilt. The act of exercising one’s constitutional right cannot be used in court to indicate that a person is guilty of a crime. Nevertheless, to IRS, exercising that right is a red flag, an indicator that a crime was possibly committed. A criminal

¹ 26 USC Section 7602

investigation has to be considered, especially when the taxpayer has all but stated that he committed a crime.

Auditors can also request documents from third parties via administrative summons, with all of the same remedies for non-compliance.

At the end of each of these reviews or audits, **an examination report is issued**. The taxpayer can agree to the report and pay the additional tax due (or in some cases await the IRS refund check! It doesn't happen often, but it does happen), or disagree and appeal. **There is an in-house appeals process which, believe it or not, often renders favorable results to the taxpayer.** The reason for this is that although the appeals officer must follow the same law by which the examiner/auditor is bound, the appeals officer may also consider the cost to the government of pursuing its position. The examiner/auditor is not allowed to make determinations based on cost to the government.

After the *tax due and owing* is determined, whether by the review/audit process, or simply as the result of filing a tax return, the collection process takes over. Those with job of collecting a tax that was not simply paid as a part of the filing process are called *revenue officers*. Like the revenue agent, the revenue officer can also request documents verbally, by correspondence, or via administrative summons. He/She will do so in order to determine the existence and location of assets, in order to make a determination of the taxpayer's ability to pay, as well as to take action against those assets in the event of a lack of cooperation by the taxpayer. The revenue officer may take action in the form of liens, levies, and the physical taking of assets and selling them to satisfy any tax liability.

In the case of either examination or collection, one must keep in mind that it is impossible for IRS to "get it all". Only a small number of tax returns can be audited. **Only about 84% of tax estimated to be due to the United States by taxpayers is actually collected¹.** So examination and collection employees must, to the best of their ability, use the tools at their disposal to effect the voluntary compliance by taxpayers who do not come into contact with the IRS in the more common ways: by having taxes withheld, sending in a check with their annual tax return, or receiving a refund of overpaid or over withheld taxes.

Now that you have a basic understanding of how the civil functions of IRS work, you can begin to compare that with IRS Criminal Investigation (CI), which is a whole different ballgame. CI has the duty of doing exactly what its name says - carrying out criminal investigations of alleged violations of Title 26 of the US Code, in order to foster voluntary compliance with US tax law. Employees of CI are not auditors or tax collectors, although many of them got their start with IRS as auditors or collectors. However, they are often confused with their counterparts in the civil divisions. If you are going to practice criminal tax law, you must be very careful never to make that mistake. In reality, even most civil IRS employees understand little about the function of **CI, and CI special agents are, generally speaking, far from being experts in tax law.**

¹ IR-2006-28, Feb. 14, 2006

CI is so different from the civil divisions of IRS, that it does not appear to be part of the same agency. Special agents do not audit, but they have the authority to obtain records either by informal request, summons or subpoena, or by seizure through a search warrant. Most have accounting backgrounds, and many hold CPA licenses or law degrees. They do not collect tax, but they do arrest and detain suspects, and assist with government efforts to convict and incarcerate convicted violators. They carry firearms, are trained in self-defense tactics, and may use force, if necessary, to defend themselves or others from acts of violence, or to detain or arrest suspects¹.

The typical special agent could actually care less how much your client owes to the IRS, or whether it is ever collected, except as a matter of proving the existence of a tax liability as an element of a criminal offense. His or her job is simply to make a determination as to whether an intentional violation of the law was committed, and then present sufficient evidence of that violation to see your client convicted of the crime.

CI's main objective, like the rest of IRS, is also to promote voluntary compliance with the tax laws. Voluntary compliance is a very important concept to CI, because although only a small number of American taxpayers have contact with IRS outside of filing their tax returns, an even smaller number of them ever have contact with CI. Only a very tiny number of taxpayers, only those suspected of the most egregious violations of tax law, come under the scrutiny of special agents.

CI investigates alleged violations of the criminal statutes of the Internal Revenue Code, which happens to be just a very small number of code Sections. However, in addition to this CI is also responsible for:

1. Investigating violations of the money laundering statutes in Title 18 of the United States Code (USC), also known as the criminal code.
2. Investigating violations of USC Title 31, The Bank Secrecy Act, having to do with the structuring of cash transactions in order to avoid reporting requirements.
3. Administering criminal forfeiture statutes related to money laundering crimes.
4. Assisting with all phases of prosecution, including arrest and incarceration.
5. Monitoring compliance with conditions of probation, and payment of taxes, after prosecution.
6. Providing protection to civil employees when called upon.

Summary

IRS has civil functions as well as a criminal investigation division. The primary civil functions are Small Business/Self-Employed (SB/SE), Wage & Investment (W&I), Large

¹ Internal Revenue Manual 9.1.2

and Mid-Size Business (LMSB), and Tax Exempt and Government Entities (TEGE). Other important civil offices include Office of Chief Counsel, Taxpayer Advocate Service, Appeals, and Communications and Liaison. Employees in the civil functions include tax examiners, tax auditors, revenue agents, and revenue officers. Their primary function is to examine tax liabilities and collect unpaid tax.

Those who perform criminal investigations for CI are special agents. They are law enforcement officers, with full authority to engage in normal law enforcement activities, such as investigating crimes, making arrests, carrying firearms, and engaging in any necessary use of force in order to further their law enforcement mission.

CI special agents make up only a small number of the total IRS employees. Very few members of the general public ever come into contact with CI. CI's mission is to promote voluntary compliance through enforcement of criminal tax statutes, and publicity of successful convictions for violations of these same statutes.

In addition to CI's investigations of alleged violations of the criminal statutes of the Internal Revenue Code, CI is also responsible for money laundering and Bank Secrecy Act investigations, administering forfeiture statutes, assisting with all phases of prosecution, monitoring compliance with conditions of probation and payment of taxes after prosecution, and providing protection to civil IRS employees when called upon.

Review Questions

1. The majority of IRS employees work for the Criminal Investigation division.
 - A. True
 - B. False
2. Besides the 50 United States, CI Special agents also have agents located in
 - A. Puerto Rico, the Virgin Islands, and Moscow.
 - B. France, Belgium, and South Africa
 - C. France, Puerto Rico, and Brazil
 - D. Puerto Rico, the Virgin Islands, Guam, and France.
3. The head of IRS-CI is
 - A. Chief, CI, appointed by the President of the United States.
 - B. Chief, CI, and is not a political appointee.
 - C. The Assistant Secretary to the Treasury, for Enforcement.
 - D. The Deputy Commissioner, IRS-CI.
4. CI is divided into the following geographical areas:

- A. North, South, East, and West.
 - B. Northeast, Northwest, Southeast, and Southwest.
 - C. North Atlantic, Mid States, Southeast, and Pacific.
 - D. Atlantic, Pacific, Midwest, Headquarters, and International.
5. The Special agent's immediate supervisor is the
- A. Group Manager
 - B. Assistant Special Agent-in-Charge
 - C. Special Agent-in-Charge
 - D. Supervisory Special Agent
6. CI special agents work under the same set of rules as the civil employees of IRS, i.e., revenue agents, revenue officers, and tax auditors.
- A. True
 - B. False
7. A CI special agent has the statutory authority to
- A. Obtain evidence via summons or subpoena.
 - B. Obtain evidence via a search warrant.
 - C. Execute arrest warrants.
 - D. All of the above.
8. A CI special agent has the statutory authority to
- A. Collect tax.
 - B. Audit tax returns.
 - C. Obtain evidence by informal request.
 - D. Negotiate payment agreements.
9. CI's main objective is
- A. To arrest and prosecute tax evaders.
 - B. To promote voluntary compliance with the tax laws.
 - C. To provide protection to civil employees.
 - D. To administer criminal forfeiture statutes.
10. Just what the heck does voluntary compliance mean, anyway?
- A. Federal Taxes are voluntary, and anyone can opt out of the tax system if they choose.
 - B. Filing tax returns is voluntary.
 - C. "Voluntary compliance" is Latin for "Pay up or go to jail!"

- D. Filing tax returns and paying all taxes due and owing are not voluntary. However, IRS would prefer that you just do it on your own, rather than making them go out and forcibly take the taxes owed from each and every American citizen! Hence, voluntary compliance!

CHAPTER TWO - INVESTIGATIVE AUTHORITY

The following is a description of all of the Federal code sections for which IRS-CI has exclusive, primary, or secondary investigative jurisdiction. I have given more detail with regards to the more common violations investigated by CI. The code sections cited are all part of Title 26 of the United States Code, unless otherwise specified. IRC, which stands for Internal Revenue Code, is the same as Title 26. Other than the Code, my source for this entire chapter is the Internal Revenue Manual Part 9.

Exclusive Investigative Authority

IRC Section 7201 Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

This is CI's signature code section, the most well known violation that it investigates. To truly understand what this crime entails, it is important to understand the difference between evasion and avoidance. Avoidance of taxes is not a criminal offense. Any attempt to avoid or minimize taxes by legal means is perfectly acceptable. When someone avoids tax he/she does not conceal or misrepresent. He/She takes action to avoid, and then makes all required disclosures of his/her actions. Evasion, however, involves deceit and concealment.

Elements of the Crime

The elements of the crime that must be proved in order to successfully prosecute are:

- A. An additional tax due and owing.
- B. An attempt in any manner to evade or defeat any tax, or the payment thereof.
- C. Willfulness

An additional tax due and owing

The government must prove that the taxpayer owed more tax than he reported. However, it isn't necessary to prove evasion of the full amount alleged in the indictment. It's enough to show that a material amount of tax was evaded, and it doesn't need to be measured in terms of gross and net income or by a percentage of tax shown to be due and payable.

The element of tax due and owing for the evasion or attempted evasion of *the payment of* tax is a little different than for evasion of tax. When the government charges attempted evasion to pay, it has to show that a tax is due and owing at the time the return was filed, or should have been filed. Unlike evasion, this amount doesn't need to be in addition to the tax shown on the return, but can be the amount of tax shown on the original return which was never paid.

An attempt to evade or defeat any tax

The statute doesn't specifically define the term "attempt". However, the courts have determined that the term "attempt" implies the commission of some type of affirmative or overt act¹. The actual filing of a false tax return is not required for the commission of the offense, although it could be the "attempt" to evade. A false statement for the purpose of concealing unreported income has also been determined to be an attempt to evade tax.

A willful omission or failure to do something required by law does not necessarily constitute an attempt to evade or defeat a tax. However, a willful omission or failure, like intentionally failing to file a tax return, together with affirmative acts or conduct, could constitute an attempt to evade. Examples of affirmative or overt acts that could be associated with attempted evasion of the payment of tax include:

- concealing assets
- attributing income to nominees
- misappropriation or diversion of corporate assets
- filing returns late
- failing to withhold taxes
- withholding taxes, but not paying over to IRS

Willfulness

Evasion or an attempt to evade or defeat any tax must be shown to be willful, in order to be successfully prosecuted. Willfulness is voluntary, intentional violation of a known legal duty². Simply understating income, and/or filing an incorrect income tax return, doesn't by itself constitute willful attempted tax evasion. Unless the taxpayer makes an admission or confesses, willfulness is difficult to prove. Generally speaking, willfulness has to be inferred from things the taxpayer said or did, within or surrounding, the acts of evasion. Willfulness can be inferred from any conduct, the likely effect of which would be to mislead or conceal.

This definition of willfulness applies to all USC Title 26 violations where willfulness is an element of the crime, unless specifically stated otherwise.

Statute of Limitations

It should be noted that IRC Section 7201, along with most other Title 26 criminal violation statutes, has a statute of limitations of six years, rather than the five years which

¹ Spies v. United States, 317 U.S. 492

² IRS Internal Revenue Manual 9.1.3.3.2.2.3

is standard for most federal crimes¹. This is probably because tax crimes are often not discovered until two or three years after the fact. Thus the extended statute allows the government the time needed to complete what may be a complex investigation, before seeking an indictment. For Section 7201, the statute begins to run on the date that the subject filed a fraudulent return, or its due date, whichever is later. This statute date can be extended even further if the government can establish an ongoing conspiracy in the evasion, which extends past the filing date, and/or additional affirmative acts of evasion related to the same tax year, which occur after the filing date.

IRC Section 7202 Willful Failure to Collect or Pay Over Tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

This code section is used only very rarely, to prosecute those who fail to truthfully account for and pay over withholding, social security, and excise taxes.

Elements of the Crime

The elements of the crime that must be proved in order to successfully prosecute are:

- A. either failure to collect any tax or failure to truthfully account for and pay over any tax, or both
- B. willfulness

Failures to truthfully account for and to pay over any tax are **both** required, and a failure to do either leaves the duty in its entirety incomplete. Therefore, failure to do either one of these, not necessarily both, can result in prosecution

Willfulness under IRC Section 7202 is the same as for all Title 26 offenses, i.e., voluntary, intentional violation of known legal duty. An example of willfulness in the violation of this code section might be a taxpayer who files his employment tax returns but then pockets the amount of tax shown to be due rather than paying it over.

Statute of Limitations

The six-year statute of limitations for this violation begins on the due date for collecting or paying over the tax in question.

¹ 26 USC §6531

IRC Section 7203 Willful Failure to File Return, Supply Information, or Pay Tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under Section 6654 or Section 6655 with respect to such failure. In the case of a willful violation of any provision of Section 6050I, the first sentence of this section, shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

This code section is used to prosecute misdemeanor failures to file income tax returns. It has been historically used in “illegal tax protester” cases, although IRS dislikes the use of that term nowadays for reasons of political correctness. CI now only uses this code section to prosecute as a last resort, because of the misdemeanor status. Persons found guilty of violating Section 7203 rarely get a jail sentence. Special agents often try very hard to find whether the subject has committed an affirmative act of evasion, so that the investigation may be “upgraded” to a “Spies” evasion case under Code Section 7201¹.

Although they are all part of the same statute, any one of the following violations is considered a separate offense:

- A. willful failure to make any type of required return
- B. willful failure to pay any estimated tax or tax
- C. willful failure to keep records
- D. willful failure to supply information

Elements of the Crime

The following are the elements of the offense described in Section 7203:

- A. a legal duty to make a return, pay a tax due and owing, keep records, or supply information, for the year or period involved
- B. failure to fulfill the legal duty at the time required by law or regulation
- C. willfulness

The first two elements are somewhat self-explanatory. Most US individual have one or more of these duties with regard to IRS and tax obligations, and a failure to fulfill one of those legally required duties by its legally defined due date may constitute a violation of

¹ Spies v. United States, 317 U.S. 492

this statute, **if it was also willful**. Willfulness, as it applies to this code section, requires a little more discussion.

Willfulness in IRC Section 7203

As previously stated, willfulness is the intentional violation of known legal duty. The government must establish willfulness in the failure to file a return. However, it is somewhat different from an evasion case; the government doesn't need to prove a tax evasion motive. Willfulness in this case means deliberate and intentional, as opposed to accidental, inadvertent, or negligent¹.

Willful Failure to Pay Tax

An additional tax due is not an essential element of the offense, but willfulness is difficult to prove without demonstrating a substantial tax liability. When charging willful failure to pay tax, repeated failure to pay taxes, together with proof of other large expenditures when taxes are owed, may be evidence of willfulness.

Willful Failure to Keep Records

This is a very rare application of this particular code section. In a failure to keep records case, an intent to conceal is an important part of proving willfulness. Once again, a material tax deficiency due to the failure to keep records is also an indication of willfulness.

Willful Failure to Supply Information

This is also a rare application of this particular code section. An example of willfulness in this case would be a deliberate failure to furnish a schedule of partnership assets and liabilities as required on a partnership return, which would show an increase in net worth due to the receipt of taxable income.

Statute of Limitations

The six-year statute of limitations applies for only two of the violations specified in this code section, the failure to file and failure to pay violations. A three-year statute of limitations applies for the failure to keep records or to supply information violations. In each of these cases, that statute begins on the due date for filing the return related to the specific violation, or the due date for payment of the tax in question. Once again, the statute can be extended by additional affirmative acts, such as a conspiracy to conceal the predicate crime.

IRC Section 7206 Fraud and False Statements

IRC Section 7206 states its entirety:

Any person who—

¹ IRM 9.1.3.3.4.1.3

- (1) **Declaration Under Penalties of Perjury.** Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
- (2) **Aid or Assistance.** Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or
- (3) **Fraudulent Bonds, Permits, and Entries.** Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or
- (4) **Removal or Concealment With Intent to Defraud.** Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by Section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or
- (5) **Compromises and Closing Agreements.** In connection with any compromise under Section 7122, or offer of such compromise, or in connection with any closing agreement under Section 7121, or offer to enter into any such agreement, willfully—
 - a. concealment of property. Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or
 - b. withholding, falsifying, and destroying records. Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation) or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Elements of the Crime

This code section actually deals with five separate violations, which should be treated separately when describing the elements of each. As Sections 7206(3) and (4) are rarely, if ever used, they will not be explained in detail here.

False or Fraudulent Return, Statement, or Other Document Made Under Penalty of Perjury (IRC Section 7206(1))

This code section is often used in place of the Section 7201 statute when IRS-CI feels it is possible to prove the falsity of a return but cannot establish the evasion of an ascertainable amount of tax. This violation may also be charged when the fraud results in a small amount of tax evaded.

The elements of the crime are:

- A. making and subscribing a return, statement or other document under penalty of perjury
- B. the document is false as to a material matter
- C. knowledge that it is not true and correct as to every material matter, and
- D. willfulness

Aid or Assistance in Preparation or Presentation of False or Fraudulent Return, Affidavit, Claim or Other IRC Section 7206(2)

This is the code section usually used to prosecute tax professionals for fraudulent return prepared for clients. The elements are:

- A. the defendant aided or assisted in, procured, counseled, or advised the preparation or presentation of a document in connection with matters arising under the internal revenue laws
- B. the document was false as to a material matter, and
- C. willfulness

Compromises and Closing Agreements IRC Section 7206(5)

This section is used to prosecute tax professionals or their clients, who submit fraudulent tax collection documents to IRS, such as payment installment agreements, offers-in-compromise, or the supporting documents that go along with them, such as financial statements.

The elements are:

- A. the defendant concealed property or aided or assisted in the concealment of property related to a compromise or closing agreement, or withheld, falsified, or destroyed records related to such property;
- B. the aforementioned property or records were related to a false or fraudulent compromise or closing agreement filed with IRS;
- C. the compromise or closing agreement was signed under penalties of perjury; and the compromise or closing agreement was signed under penalties of perjury; and
- D. willfulness

Statute of Limitations

The six-year statute of limitations applies only to violations of Sections 7206(1) and (2), the filing of a false return, and aiding or assisting in the preparation of a false return. The statute is initiated on the due date of the return in question, or the actual filing date, whichever is later.

A three-year statute of limitations applies to Sections 7206(3), (4), and (5). For Sections 7206(3) and (5), the statute is initiated when the document in questions is actual filed with IRS (See 26 USC Section 6531). For Section 7206(4), the statute starts ticking on the date of concealment or removal. As with the previous code Sections, the statute of

limitations for Section 7206 can be extended by additional affirmative acts, such as a conspiracy to conceal the predicate crime.

IRC Section 7212 Attempts to Interfere with Administration of Internal Revenue Laws

IRC Section 7212 states in its entirety:

- (a) **Corrupt or Forcible Interference.** Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both. The term threats of force, as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.
- (b) **Forcible Rescue of Seized Property.** Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than \$500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.

Note:

The maximum permissible fines for the felony offenses set forth in IRC Section 7212, is at least \$250,000 for individuals and \$500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

Elements of the Crime

Corrupt or Forcible Interference - IRC Section 7212(a)

IRC Section 7212(a) establishes two general categories of prohibited conduct. The first category consists of the following elements of Corrupt or Forcible Interference:

- A. Use of force or threats of force;
- B. To intimidate, impede or obstruct;
- C. Officer/employee of U.S. acting in official capacity under Title 26

These cases typically involve attempts to disrupt, intimidate or impede IRS employees in the performance of their investigative, examination or collection activities.

The second category consists of the following elements of corrupt endeavors to impede:

- A. A corrupt effort, endeavor or attempt;
- B. To impede, obstruct or interfere with;
- C. Due administration of Title 26

Definition of "Corrupt"

An act is corrupt if it is performed with the intention to secure an unlawful benefit for oneself or for someone else. Case examples include actions intended to harass an IRS employee or the IRS in general (filing a frivolous common law lien against an agent) and causing administrative action by the IRS with the intent to harass a third party (filing a Form 1099 falsely reporting payments to a third party with the intent to cause the IRS to initiate an investigation of the third party).

Forcible Rescue of Seized Property - IRC Section 7212(b)

The essential elements of this offense are:

- A. property seized under Title 26
- B. defendant has knowledge that property has been so seized, and
- C. there is a forcible rescue or attempt to forcibly rescue

"Forcible" does not necessarily mean actual violence or bodily harm. It includes threatening language, or conduct calculated and intended to intimidate government employees, and make them desist from the performance of their official duties. The term, "threats of force" as used here, means threats of bodily harm to the officer or employee of the United States or to a member of his family. A forcible rescue, under IRC Section 7212(b), includes the use of force against property, such as the breaking of a bank window, the removal of the Service's seal on a safe deposit box, and the removal of the box and its contents from the bank.

Cases interpreting forcible rescue under both IRC Section 7212(b) and 18 USC Section 2233 (discussed later in this chapter) permit prosecution for rescuing or dispossessing, or attempting to rescue or dispossess, property of which the government has taken legal possession against a stranger as well as a former owner. To charge forcible rescue under 18 USC Section 2233 or IRC Section 7212(b), the taking by the government must have been made with at least some semblance of authority, i.e., the seizure must be valid on its face. It should be shown that the person retaking the property had knowledge of the seizure or of the fact that the property is in the possession of the government. A seizure valid on its face will generally support a rescue conviction even if the seizure could be invalidated by court proceedings. It is not a defense that the person retaking the property claims to be the real owner and that the property was seized by mistake. A person's remedy must be legal, not taking the law into his own hands.

Note:

18 USC Section 2233 is also a forcible rescue statute that the IRS has joint jurisdiction with the Federal Bureau of Investigation (FBI). Determination of whether an alleged

forcible rescue is to be investigated by Criminal Investigation or the FBI depends on whether the property was taken before or after it was adjudicated government property. Property taken before adjudication falls under the jurisdiction of IRS-CI. The elements of 18 USC Section 2233 are provided in the section of this chapter dealing with Title 18 statutes.

Statute of Limitations

The six-year statute of limitations applies for Section 7212(a), Corrupt or Forcible Interference. The three-year statute of limitations applies to Section 7212(b) (26 USC Section 6531).

IRC 6050I Structuring Transactions to Evade Cash Reporting

Internal Revenue Code section 6050I requires trades and businesses to file Form 8300 when in receipt of \$10,000 in cash from one transaction or two or more related transactions. Internal Revenue Code Section 6050I(f) prohibits structuring transactions to evade the reporting requirements. It states:

- (1) **In general.** . . No person shall for the purpose of evading the return requirements of this section —
 - (A) cause or attempt to cause a trade or business to fail to file a return required under this section ,
 - (B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact, or
 - (C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or businesses.
- (2) **Penalties.** A person violating this subsection shall be subject to the same civil and criminal sanctions applicable to a person who fails to file or completes a false or incorrect return.

Statute of Limitations

The six-year statute of limitations applies for Sections 6050I(f)(1)(B) or (C) of this code section, causing or attempting to cause the filing of a false Form 8300, or structuring or assisting the structuring of cash transactions. The three-year statute of limitations applies to Section 6050I(f)(1)(A).

Other Title 26 Code Sections

Other Internal Revenue Code Sections for which IRS-CI has exclusive investigative authority, but which are used very infrequently, include:

IRC Section 7204 Fraudulent Statement or Failure to Make Statement to Employees

IRC Section 7205 Fraudulent Withholding Exemption Certificate or Failure to Supply Information
IRC Section 7207 Fraudulent Returns, Statements, or Other Documents
IRC Section 7208 Offenses Relating to Stamps
IRC Section 7209 Unauthorized Use or Sale of Stamps
IRC Section 7210 Failure to Obey Summons
IRC Section 7211 False Statements to Purchasers or Lessees Relating to Tax
IRC Section 7215 Offenses with Respect to Collected Taxes

Joint Investigative Authority – Title 18

The following code Sections are used by IRS-CI in many types of investigations; however, they can also be used by other federal law enforcement agencies to investigate crimes related to their areas of stewardship.

Section 2 Principals

- (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

One who aids and abets could possibly be convicted even if the person who committed the principal offense was not indicted, tried or convicted. Someone who causes a criminal act can be convicted even if the performer of the act is acquitted. While conviction of the principal is not a prerequisite to the conviction of the one who aids and abets, the government must nevertheless establish beyond a reasonable doubt that the alleged offense was committed by someone and that the person charged for aiding and abetting assisted in the commission of the crime.

To aid and abet, a defendant must associate himself with a venture, whether or not there is a conspiracy, and try to make it succeed. Thus, if the crime of attempted tax evasion by the main defendant was based on alleged concealment of his interest in and income from gambling clubs, his co-defendants could be held guilty because they consciously were parties to the concealment by pretending to be proprietors even if they did not actually share in the making of false returns. A defendant need not be physically present to be guilty as one who aids and abets in embezzlement. It is sufficient that he induced or procured another to embezzle.

Section 3 Accessory after the Fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding Section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

Note:

This statute can only be used by CI when it relates to some other tax or money laundering violation for which CI has jurisdiction.

A principal becomes an accessory after the fact if, with knowledge of the commission of a crime, he/she assists in preventing or hindering the apprehension, trial, or punishment of the perpetrator.

Section 4 Misprision of Felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

Note:

This statute can only be used by CI when it relates to some other tax or money laundering violation for which CI has jurisdiction.

A person is guilty of misprision of felony if, he/she has knowledge of the actual commission of a felony, conceals it, and does not make this known to a person in authority as soon as possible.

Section 287 False, Fictitious or Fraudulent Claims

18 USC Section 287 states in its entirety:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Elements of the Crime

The elements of a criminal violation under 18 USC Section 287 are:

- A. making or presenting a claim upon or against the United States
- B. the claim was false, fictitious, or fraudulent
- C. knowledge that the claim is false, fictitious, or fraudulent when presented

Making or Presenting a Claim Upon or Against the United States

This section can be used to prosecute a number of different false claims crimes. IRS-CI generally uses it in instances where a false claim for a tax refund has been filed. Most common is in Questionable Refund Project (QRP) cases or Return Preparer Project (RPP) cases. QRP cases involve a single person filing multiple refund tax returns using multiple taxpayer identities. RPP cases involve a paid tax return preparer who is preparing questionable refund returns for numerous clients, often using schemes like inflated tax credits or deductions.

The Claim was False, Fictitious, or Fraudulent

These terms don't have any legal significance as used in this statute; they should simply be applied using their ordinary definitions.

Fraud in this code section includes any conduct whose intent is to obstruct or impair the efficiency of the United States and to destroy the value of its operations. Actual financial or other loss to the government is not an essential element of the offense. Whether the claim is false, fictitious, or fraudulent will be determined based on all of the facts of the case, not just on the tax return filed. It isn't absolutely necessary that the actual tax return be false or contain fraudulent entries. An income tax return, correct on its face, would still constitute a false claim if the person filing the return knew that the refund shown to be due had already been paid resulting from the filing of a prior return, or even that another return for the same year had already been filed. In one case that I investigated, the preparer would file a return with a client's information, but with the preparer's post office box for a refund mailing address, and then hold the client's return for a few days before returning it to the client for filing. This insured that the false refund would be mailed, to the preparer, before the legitimate return was actually processed. The preparer would then forge the client's endorsement and cash the check. She and her husband stole over \$100,000 in tax refunds before they were caught.

Knowledge That the Claim is False, Fictitious, or Fraudulent When Presented

It is only necessary to prove that the defendant made a claim for refund taxes against the government and that he/she knew that he/she was not entitled to receive it.

Statute of Limitations

The statute of limitations for Section 287 is five years and begins at the filing of the false claim, or at any subsequent affirmative act to conceal the fraud.

Section 286 Conspiracy to Defraud the Government with Respect to Claims

18 USC Section 286 states in its entirety:

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious, or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

Elements of the Offense

- A. An agreement, combination, or conspiracy to defraud the United States;
- B. By obtaining or aiding to obtain the payment of any false, fictitious or fraudulent claim.

This code section is used by IRS-CI exclusively to prosecute individuals violating Section 287, False, Fictitious, and Fraudulent Claims. All other conspiracy allegations are prosecuted using Title 18 USC Section 371, Conspiracy. The government is not required to establish an overt act undertaken in furtherance of the conspiracy in order to prove a violation of Section 286 because, unlike Section 371, an overt act is not an element of a Section 286 conspiracy.

An agreement, combination, or conspiracy to defraud the United States

Obviously, in order to have a conspiracy, there must be more than one individual involved in the crime, and the government must show that they conspired or colluded to commit the crime.

By obtaining or aiding to obtain the payment of any false, fictitious, or fraudulent claim.

The government also must demonstrate that the conspirators agreed to defraud the government by obtaining the payment of false claims against the government. It is not actually required that the co-conspirator actually obtain the payment, as long as the existence of the agreement can be proved.

Statute of Limitations

The statute of limitations for Section 286 is five years and begins at the final affirmative act taken to further the conspiracy.

Section 371 Conspiracy to Commit Offense or to Defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Types of Conspiracy

In general, a conspiracy is a collaboration of two or more individuals, who act together in order to commit a criminal act, or some act not in itself criminal, but accomplished by illegal means.

The conspiracy is a separate crime from the predicate crime and an individual can be convicted of both the completed crime and the conspiracy, even though the completed crime was alleged as the overt act necessary to convict for conspiracy. An individual can also be convicted of the predicate crime and not the conspiracy, or even the conspiracy, but not the predicate crime itself.

A tax conspiracy is one in which the particular Title 26 criminal tax statute which the conspiracy attempted to violate must be referred to in the indictment, (unless it is a *Klein* conspiracy, discussed below).

Although there can be a conspiracy to violate almost any statute or to defraud any agency of the government, two types of conspiracy investigations are of special concern to IRS-CI: tax conspiracies, as discussed in the preceding paragraph and *Klein* conspiracies.

A *Klein* conspiracy is a conspiracy to defraud the government by impeding and impairing the lawful function of the Internal Revenue Service. Evidence must demonstrate deceit, trickery, craftiness, or dishonesty by the defendant, done in furtherance of an agreement to interfere with or obstruct the IRS in its lawful function of tax administration. The purpose of a *Klein* conspiracy is to knowingly deceive the IRS. However, tax evasion does not have to be proved to be the motive for the conspiracy.

Elements of the Crime

The elements of the offense are:

- A. an agreement by two or more persons
- B. to commit an offense against the United States; or to defraud the United States or one of its agencies
- C. an overt act to effect the objective of the agreement
- D. with the requisite intent to defraud or commit the substantive offense

Agreement by Two or More Persons

A person can be considered a co-conspirator either by joining an existing conspiracy, or by knowing of its existence and committing an overt act in its furtherance. After joining the conspiracy, a co-conspirator becomes liable for all acts and statements of the other participants committed in the conspiracy, whether they were committed before or after he joined the conspiracy.

There has to be intentional participation in a transaction with the view toward furthering the purpose. The mere knowledge or approval of an act is not enough to constitute a party to a conspiracy.

Conspirators usually do not put their agreements into writing, and they don't make their plans public! Direct proof of a conspiracy is a rarity. Proof of conspiracy is almost always circumstantial, drawn from the conduct of the co-conspirators and the surrounding circumstances. Evidence must be presented that shows that the minds of the parties met in an understanding way so as to bring about an agreement to do the act or acts charged, although there is unlikely to be any formal agreement.

Overt Act

An overt act is any act or statement designed to advance, aid, or assist in accomplishing the object of the conspiracy. An overt act does not need to be a violation of law in and of itself.

The crime is not complete until an overt act is performed by at least one of the conspirators to bring about the purpose of the conspiracy. An individual may avoid prosecution if he abandons the conspiracy before the overt act is completed.

Statute of Limitations

The statute of limitations for Section 286 is five years and begins at the final affirmative act taken to further the conspiracy.

Section 1001 Statements or Entries Generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matters within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

- (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.”

This statute is only used by IRS-CI when it relates to some other tax or money laundering violation for which IRS-CI has jurisdiction.

This code section covers false statements which might impede the exercise of federal authority. Monetary loss to the government is not a requirement. Any impediment to the administration of its governmental functions is sufficient. The crime can still be prosecuted even if the intended fraud is unsuccessful.

It is possible for a defendant to be charged with a violation under this section and also to be charged with an attempt to defeat or evade the payment of tax¹ in connection with the same tax return.

Prosecution may lie under this statute, as well as under 18 USC Section 1503 (Obstruction of Justice), against persons summoned to produce records in their possession, who falsely state that the records have been stolen from them, and conspire together to conceal them.

Elements of the Crime

The elements of a criminal violation under 18 USC Section 1001 are:

- A. a matter within the jurisdiction of a department or agency of the United States
- B. falsification or concealment by trick, scheme or device, of a material fact; or the making of false, fictitious or fraudulent statements or representations; or the making or using of any false writing or document
- C. the false statement or representation, or false document related to a material matter
- D. knowledge of the falsity by the party charged
- E. willfulness

Jurisdiction

The term "jurisdiction" means a matter as to which a department or agency has the power to act, i.e., within the agency's investigative authority and the term "department" includes the U.S. Treasury Department².

Falsification and Materiality

It is not necessary that the statement be required to be made by some regulation or law. For example, a taxpayer could commit a violation under this section by voluntarily furnishing a false and fraudulent net worth statement during an official investigation of his/her income tax liability.

¹ IRC Section 7201

² 5 USC Section 1

The weight of authority requires proof of materiality in any prosecution under this section. Courts have determined materiality is required in all three prohibited activities. A commonly used test for determining whether a matter is material is whether the falsity or concealment had a natural tendency to influence, or was capable of influencing, the agency or department.

The violation may involve formal or informal records, forms, and instruments, and even oral statements. It is not necessary that the statements be under oath, and the perjury corroboration rule does not apply.

Knowledge and Willfulness

As used in this section, the term "willful" simply means the defendant did the forbidden act deliberately and with knowledge.

Statute of Limitations

The statute of limitations for Section 1001 is five years and begins at the filing of the false statement, or at any subsequent affirmative act to conceal the fraud.

Section 2233 Rescue of Seized Property

Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained, or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures, shall be fined under this title or imprisoned not more than two years, or both.

Elements of the Crime

The essential elements of the offense under 18 USC Section 2233 are:

- A. Seizure of the property by the United States;
- B. knowledge by the defendant that the property has been seized and that removal is unlawful; and
- C. that there is a forcible and willful rescue or dispossession or an attempt to forcibly rescue or dispossess property from the dominion and control of the government.

Prosecution recommendations may be made under this code section if:

- A. There has been a seizure, levy, or other taking which is sufficient to put the "retaker" on notice that the property is under process of seizure for taxes.
- B. There is a retaking by physical force, stealth, or in any other manner which indicates a willful defiance of the legal process.

Statute of Limitations

The statute of limitations for Section 2233 is five years and begins at the act of rescue.

Other Title 18 Code Sections

IRS-CI also has primary or joint investigative authority to investigate violations of other criminal statutes found in Title 18, The US Criminal Code, as well as Title 31, The Bank Secrecy Act. These are generally used by IRS-CI to investigate and prosecute money laundering crimes and currency structuring crimes (related to money laundering).

Finally, CI has authority for criminal and civil forfeiture, which are also used in money laundering investigations, to take away assets used in the furtherance of crime, as well as the fruits of such crimes. As this book deals exclusively with representation in criminal tax matters, little discussion of these statutes is offered here. However, a list of the statutes follows. They include:

Section 1956 Laundering of Monetary Instruments

Section 1957 Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

Section 1960 Prohibition of Unlicensed Money Transmitting Businesses

Section 1962 Prohibited Activities (of Racketeer Influenced and Corrupt Organizations)

Section 2071 Concealment, Removal or Mutilation

Section 2231 Assault or Resistance

Section 2232 Destruction or Removal of Property to Prevent Seizure

Section 2339A Providing Material Support to Terrorists

Section 2339B Providing Material Support or Resources to Designated Foreign Terrorist Organizations

Section 2339C Prohibitions Against the Financing of Terrorism

Title 31 Code Sections

Section 5322(a) and (b) Criminal Penalties

Section 5324 Structuring Transactions to Evade Reporting Requirement Prohibited

Section 5331 Reports Relating To Coins and Currency Received In Nonfinancial Trade or Business

Section 5332 Bulk Cash Smuggling Into or Out of the United States

Summary

IRS-CI has exclusive investigative authority for the criminal statutes of Title 26 of the United States Code (USC), also known as the Internal Revenue Code. The statutes most often used to prosecute federal tax crimes are:

IRC Section 7201 Attempt to Evade or Defeat Tax
IRC Section 7202 Willful Failure to Collect or Pay Over Tax
IRC Section 7203 Willful Failure to File Return, Supply Information, or Pay Tax
IRC Section 7206 Fraud and False Statements
IRC Section 7212 Attempts to Interfere with Administration of Internal Revenue Laws
IRC Section 6050I Structuring Transactions to Evade Cash Reporting

IRS-CI also has joint investigative authority for many Title 18 statutes, also known as the US Criminal Code. CI uses these code Sections to prosecute certain tax crimes and related conspiracy. However, these same code Sections are also used by other agencies to investigate crimes related to their areas of stewardship. The Title 18 statutes most often used to prosecute tax crimes include:

Section 2 Principals
Section 3 Accessory after the Fact
Section 4 Misprision of Felony
Section 287 False, Fictitious or Fraudulent Claims
Section 286 Conspiracy to Defraud the Government with Respect to Claims
Section 371 Conspiracy to Commit Offense or to Defraud the United States
Section 1001 Statements or Entries Generally
Section 2233 Rescue of Seized Property

Review Questions

1. IRS-CI's signature code section is
 - A. Title 26 USC 7201, Attempt to Evade or Defeat Tax
 - B. Title 18 USC 7201, Attempt to Evade or Defeat Tax
 - C. Title 1 USC 2601, Tax Evasion
 - D. Title 26 USC 7203, Willful Failure to Pay Taxes
2. Tax evasion and tax avoidance mean essentially the same thing.
 - A. True
 - B. False
3. The elements of a violation of section 7201 include:
 - A. An additional tax due and owing.
 - B. An attempt in any manner to evade or defeat any tax, or the payment thereof.
 - C. Willfulness
 - D. A. B. and C
4. Willfulness

- A. Is a voluntary, intentional violation of a known legal duty.
- B. Is successfully violating a law, not just making the attempt.
- C. Is not difficult to prove.
- D. Cannot be inferred from conduct, the effect of which is to mislead.

5. The statute of limitations for most Title 26 criminal statutes is

- A. 5 years
- B. 6 years
- C. 7 years
- D. 3 years

6. In most cases, someone who violates Title 26 USC Section 7203

- A. Is guilty of a felony.
- B. Is guilty of an infraction.
- C. Is guilty of a misdemeanor.
- D. Is in danger of facing substantial jail time.

7. A substantial tax due and owing is required to convict someone of a violation of Title 26 USC Section 7206(1).

- A. True
- B. False

8. IRS-CI has authority to investigate violations of Title 18 USC.

- A. True
- B. False

9. Only Title 26 criminal code sections are used to prosecute tax crimes.

- A. True
- B. False

10. Which of the following statements is true?

- A. Title 18 USC Section 371 is the only code section used to prosecute conspiracy related to tax crimes.
- B. Title 18 USC Section 286 is the only code section used to prosecute conspiracy related to tax crimes.
- C. Title 26 USC Section 287 is the only code section used to prosecute conspiracy related to tax crimes.
- D. There are two different code sections in Title 18 USC used to prosecute conspiracy related to tax crimes.

CHAPTER THREE - THE INVESTIGATIVE PROCESS

How a Criminal Investigation is Initiated

So how exactly does someone draw the attention of IRS-CI and end up as the subject of a criminal tax investigation? CI obtains or receives information from various sources, both within IRS and without, or in other words, internal and external.

Internal Sources

The Referral

One of the most common ways that a person comes under CI's scrutiny occurs when he/she undergoes a tax audit by IRS. In the course of an audit, the auditor may encounter "badges of fraud", or in other words, records (or a lack of records), altered records, actions or statements by the taxpayer, etc., that would tend to indicate an intent to evade taxes or otherwise defraud the United States. Generally, the auditor will wait until he/she has encountered multiple badges, or fraud indicators, before making a referral to CI; however, a referral may be made based upon a single badge if it is a uniquely significant badge, or is egregious.

When the auditor decides to make a referral, at that point, all communication is severed with the taxpayer. No further determinations will be made, no further assessments of tax will be made, and no attempts will be made to collect any deficiency. The reason for this has to do with one's 5th amendment right not to incriminate oneself. When an auditor or a collector is making inquiries regarding a tax liability, it is a civil matter, and no 5th amendment right attaches. However, at the point where he/she decides to refer the case to CI, the 5th amendment right attaches, and any request for information, or questions put to the taxpayer must now be seen as an attempt to obtain evidence for a criminal prosecution.

The referral is made to CI, and is assigned to a special agent to evaluate, and to determine whether the potential exists for a successful investigation and prosecution. If CI determines, for whatever reason, that the taxpayer ought not to be criminally investigated, the case is returned to the auditor, and the auditor continues on with the examination as if no referral was made. The taxpayer is generally not advised that the referral was made to CI.

If CI does accept the case, the auditor agent turns over all case files to CI and ceases all further audit activities (except when a revenue agent is assigned as a cooperating agent in a joint investigation). If the investigation is being conducted administratively, that is, entirely within, and under the authority of, the IRS, then generally within a short period of time the taxpayer is contacted by CI, advised of the investigation, and also advised of his/her constitutional rights. At this time CI will also attempt to interview the taxpayer, now referred to as the "subject". If the investigation is being conducted under the direction of a grand jury, there may be no contact with the subject at all, until his/her arrest.

The process of making a referral by a revenue officer is substantially the same as by a revenue agent, tax auditor, or tax examiner, except that revenue officers, tax auditors or tax examiners never act as cooperating agents in joint investigations. Only revenue agents may perform this function. When the case is accepted by CI, the revenue officer's involvement is immediately terminated, until after the taxpayer is prosecuted, serves a sentence, and then is placed on federal probation, at which time a revenue officer is re-assigned and begins collection actions.

Independent Case Development

Special agents are also often involved in their own case development activities, and develop information which results in criminal investigations. As the agent obtains information on his own, "Information Item" reports are filed, and evaluated in exactly the same way as referrals from auditors and revenue officers.

CI also has ongoing *general investigations*, or *projects*. These are information gathering programs, often centered on a certain industry or activity in the community where numerous violations have been identified in the past, or where there is a strong potential for violations. Information is obtained and reviewed to identify future subjects of investigation.

CI also develops information from newspaper or magazine stories. Special agents participate in multi-agency task forces, and often develop cases based on investigations in which other agencies are already involved. A good example of this is a task force that I spent several years working on, the Health Care Fraud Task Force. This group included numerous law enforcement agencies as well as insurance company investigators, and was a great source of cases dealing with insurance fraud and fraudulent health care professionals.

External Sources

CI also receives a nearly constant stream of *information items* from sources outside of IRS. These outside sources can be divided into two groups: Informants, or other government or law enforcement sources.

Informants

Informants give information to IRS in person by walking into a local IRS-CI office, by telephone, or by correspondence. The information is always treated as confidential, but oftentimes the informants refuse to be identified and want to remain anonymous, and CI will honor that desire. CI often receives information from telephone callers who refuse to identify themselves, or via unsigned correspondence with no return address. Of course, the source of the information is always part of the evaluation of that information, and unknown sources do not carry the same weight as those who freely identify themselves.

Most CI informants are unpaid, but some do receive compensation for their information if it proves to be of value.

Informants can be just about anybody, and most have a substantial motive for turning someone in to the IRS. Many times that motive is revenge; the informant has an axe to grind. Ex-spouses or estranged business partners are often informants. Informants can also be disgruntled employees, angry associates, competitors, parties involved in lawsuits or divorces, and parties involved in child custody battles. Just about anybody that is angry at someone else could be a potential informant. CI understands this, and that is why although they will take information from anyone, the information goes through a rigorous evaluation process before it is accepted for criminal investigation. The vast majority of these types of information items never pass muster.

Other Government or Law Enforcement Sources

Information received from other government or law enforcement agencies is given much more credence, and generally goes to the head of the line of information items to be evaluated. Oftentimes other agencies have experience working with CI, and they know exactly what CI is looking for in a case, so they only refer those cases that have a good chance of being accepted.

Developing the Information Item

When a referral or information item has been evaluated, and determined to be worthy of further review, a *primary investigation* is initiated. I should explain here that IRS classifies its tax investigations in three different ways: general, primary, and subject investigations. As I have already explained, a general investigation is an information gathering program, with no specifically identified individual under investigation. Without initiating any of the three types of investigations, an agent may gather information in the following manners¹:

- Clip news articles
- Access IRS databases, including Integrated Data Retrieval System (IDRS)
- Maintain liaison with other law enforcement agencies
- Interview informants
- Identify individuals through vehicle license checks
- Visually inspect a home, office, real estate, or personal property in order to identify an individual
- Record the result of any of the preceding investigative activities

After initiating a general investigation, a special agent may also be allowed to disclose the name of an individual associated with a particular group for identification purposes, to the extent necessary to secure information that is relevant and necessary to the investigation. Investigative inquiries are still very limited. However, additional techniques include²:

¹ Internal Revenue Manual 9.4.1.3

² Internal Revenue Manual 9.4.1.4.5.1 and 9.4.1.4.5.2

- Searches within existing IRS records and databases
- Inquiries of Federal, State, and local governmental agencies, including state and local taxing authorities
- Contact with the original informant and other informants who are believed to possess pertinent information
- Contact with foreign (tax treaty and other nations) government bodies, coordinated through IRS-CI headquarters (HQ)
- Surveillance
- Consensual monitoring
- Undercover operations
- Contacts with sources outside the government, as long as there is no disclosure of a specific individual or entity
- Form letters, pattern letters, or letters to third parties to persons outside the IRS for information on individuals and entities, as long as no individual or entity name is disclosed.
- Verify suspicious refund addresses through the use of drive-bys or visual inspection of a potential subject's home, office, place of employment, post office box, etc.
- Determine the validity of the earnings and withholdings reported on the potentially fraudulent returns by contacting the employer
- Contact the US Postal Service to intercept fraudulent refund checks

As information is developed regarding a specific individual, that information will be segregated out into its own primary or subject investigation.

The Primary Investigation

A primary investigation is also initiated upon acceptance of a referral from a revenue agent or revenue officer, for further evaluation. It has a specifically identified subject or subjects. Additional investigative tools at this level will include¹:

- Assisting other agencies in the execution of a search warrant
- Assisting other agencies in subject and third party interviews conducted during the execution of the search warrant
- Mail covers
- Discussion with the referring IRS employee in the case of a referral
- Contact with the taxpayers by mail to verify their filing record
- Access to the original tax return
- Limited third party inquiries are allowed to determine the true identity of a filer of false or fraudulent claims

¹ Internal Revenue Manual 9.4.1.5.6

The objective here is to learn as much as possible about the veracity of the allegations without disclosing to either the potential subject or any other third parties that IRS may be interested in investigating this individual. This is for protection of the individual's privacy, not for some devious ulterior IRS motive.

The Subject Investigation

At the conclusion of the primary evaluation period (for a referral, 30 days; for an information item, as much as 180 days) the primary is either accepted or declined. If it is accepted, a subject investigation is immediately initiated, and the restrictions on methods of investigation are lifted. Additional techniques may be used including¹:

- Execution of search warrant, and acting as the affiant on said warrants
- Interviewing the subject, as well as any third party deemed by the investigating agent to have relevant information
- The use of extensive undercover operations
- The use of a wide range of consensual monitoring techniques
- Although non-consensual monitoring techniques are occasionally used by IRS-CI, such as telephone wiretaps, they may not be, and are not currently used in Title 26 tax investigations
- Use of pen registers and trap & trace technology
- Requesting documents or other evidence from third parties
- Issuance of a summons or subpoena to third parties (including solely owned corporations of the subject under investigation) to obtain evidence pertinent to the investigation
- Any other investigative technique not specifically precluded by law

Summary

IRS criminal investigations are initiated as a result of the receipt of information from outside sources, or from the development of information from internal sources. Internal sources include referrals from civil employees of IRS, or independent case development by special agents. Outside sources include informants and other government employees or law enforcement officers.

CI often develops information through General Investigations. These are information gathering projects, where no individual has specifically been identified as a subject of investigation.

Once an individual is specifically identified as a potential subject of investigation, a Primary Investigation is initiated. This allows the information and evidence to be

¹ Internal Revenue Manual 9.4.1.6.4 and 9.4.4 through 9.4.9

developed further, without actually allowing the subject, or any third party, to know that he or she is under investigation. Once a primary investigation is accepted, a subject investigation is immediately initiated.

Review Questions

1. The referral is considered to be an internal source of information for investigations.
 - A. True.
 - B. False.
2. One of the most common ways that a person comes under CI's scrutiny occurs when he/she undergoes
 - A. An audit
 - B. An investigation
 - C. A collection activity
 - D. An offer – in – compromise
3. If CI does accept the case, the revenue agent then
 - A. Continues all audit activities as usual.
 - B. Ceases all further audit activities.
 - C. Refers the case for immediate collection action.
 - D. Asks his/her supervisor for further guidance.
4. If the investigation is being conducted administratively, then generally, within a short period of time
 - A. The taxpayer will be arrested.
 - B. The taxpayer will be searched.
 - C. The taxpayer will be contacted, and advised of his/her constitutional rights.
 - D. A grand jury investigation will be initiated.
5. If the investigation is being conducted under the direction of a grand jury, there may be no contact with the taxpayer at all, until his/her arrest.
 - A. True.
 - B. False
6. In independent case development, the report that the special agent files is called a
 - A. Special agent's Report.
 - B. Referral.

- C. General Investigation.
- D. Information item.

7. A general investigation, is an information gathering program, often centered on

- A. Specific individuals.
- B. Specific violations.
- C. Certain information.
- D. A certain industry or activity in the community.

8. Which the following is an example of a source of information coming from outside of the IRS?

- A. Informant.
- B. A co-worker.
- C. Other IRS employees.
- D. Another special agent.

9. The information received from an informant is always treated as _____, but often the informants also want to remain _____.

- A. Skeptical, unidentified.
- B. Anonymous, confidential.
- C. Suspect, believable.
- D. Confidential, anonymous.

10. All believable informants have no other motive for turning someone into the IRS, other than to see justice done.

- A. True.
- B. False.

11. When a referral or information item has been evaluated, and determined to be worthy of further review, the next step is to initiate a

- A. Subject investigation.
- B. General investigation.
- C. Primary investigation.
- D. Information gathering project.

12. Without initiating any of the three types of investigations, a special agent may

- A. Make arrests.
- B. Execute a search warrant.
- C. Access IRS databases.
- D. Interview the taxpayer.

13. After initiating a general investigation, a special agent may also

- A. Make arrests.
- B. Conduct undercover operations.
- C. Issue subpoenas.
- D. Assist other agencies with search warrants.

14. After initiating a primary investigation, a special agent may also

- A. Request a mail cover.
- B. Be the affiant on a search warrant affidavit.
- C. Request documents or other evidence from third parties.
- D. Issue a summons.

15. Only after initiating a subject investigation, may a special agent

- A. Request pen registers, and trap and trace devices
- B. Have access to the original tax return.
- C. Conduct consensual monitoring.
- D. Make contact with foreign government bodies.

CHAPTER FOUR - THE INVESTIGATIVE PROCESS

Administrative vs. Grand Jury Investigations

Once a determination has been made to initiate a subject investigation, the special agent needs to make the decision as to whether he will investigate administratively, or via the grand jury. CI has the authority to conduct investigations outside of the grand jury, which is different from many federal law enforcement agencies. CI as an organization prefers to conduct its investigations administratively mainly for two reasons:

- 1-Administrative investigations are free of the time and secrecy restraints of the grand jury, and as well as from the immediate oversight of the United States Attorney.
- 2-The information obtained via the investigative process may be turned over to the civil employees at the conclusion of prosecution, to be used in collecting the taxes due.

However, the administrative investigation also has some limitations that the special agent may view as impediments to his investigation:

- 1-The agent has no access to grand jury subpoenas, and must use the administrative summons to obtain evidence not easily accessible by simple request. The weaknesses of the summons will be discussed later.
- 2-In an administrative tax investigation, it is an IRS policy that the subject be advised of the investigation soon after initiating the subject investigation.
- 3-The agent is required to advise the subject of his constitutional rights at their first meeting. This is done with a CI version of the Miranda warning.

For these reasons the agent may prefer to request a grand jury investigation rather than an administrative one. Advantages of the grand jury investigation are:

- 1-The grand jury subpoena is a much more powerful document than an administrative summons. Although both must be obeyed, consequences for ignoring a subpoena can be much faster and more severe.
- 2-There generally is no requirement to advise the subject of the investigation until a time that the agent chooses, based on the expediency of his investigation.
- 3-The subject does not need to be advised of his constitutional rights until he is taken into custody.

The downsides to the grand jury investigation are:

- 1-It takes a long time to get it through the ridiculously impeding IRS approval process, whereas an administrative investigation can be approved very quickly. Grand jury approval through IRS-CI requires a long, detailed report, which can be longer than some agencies' prosecution reports. All evidence obtained through the information items and primary investigation must be detailed and

displayed. The agent must show justification for a grand jury investigation rather than an administrative one. It then must be reviewed by the special agent-in-charge, Criminal Tax Counsel, and Department of Justice, before being approved and assigned to an AUSA. The process can take 8 to 9 months! It can be shortened considerably, if other federal agencies are already investigating the subject and the AUSA makes a written request for IRS to join the ongoing grand jury investigation. Even this can take 3 to 4 months for approval.

- 2-All evidence obtained via grand jury subpoena is subject to grand jury secrecy, and may not be used by IRS civilly. Therefore, even if a revenue agent is assigned to assist CI, any information obtained is secret, and must be obtained all over again via administrative summons after prosecution is concluded, if IRS needs it to collect the tax due.

Administrative Criminal Tax Investigation

An administrative investigation is a somewhat long process, lasting 6 to 18 months, or sometimes longer, depending on the complexity of the investigation. The general flow of the investigation and post-investigation is as follows:

INVESTIGATIVE STEPS

- 1-Interview of the subject and advice of rights
- 2-Investigation of allegations:
 - A-Examination of public records
 - B-Obtaining evidence from third parties
 - C-Use of Special Investigative Techniques
- 3-Analysis of evidence obtained
- 4-Write the Special Agent Report (SAR) and Revenue Agent Report (RAR)

POST-INVESTIGATIVE STEPS

- 5-Submission of SAR for internal reviews
- 6-Final Conference with Criminal Tax Counsel,
Subject of the Investigation, and Defense Counsel
- 7-Submission of SAR for Department of Justice (DOJ)
review
- 8-Assignment to the AUSA
- 9-Submission to Grand Jury for Indictment
- 10-Arrest, Initial Appearance, Arraignment, and Trial
or Plea
- 11-Pre-sentencing investigation
- 12-Sentencing and Incarceration
- 13-Post-sentence referral to civil IRS

Keep in mind that the 6-18 month time period spoken of refers to only steps 1 through 3, and possibly 4, above. The time from steps 5 through 8 can take up to another year! And of course, for steps 9 through 13, it is impossible to estimate a specific time. After indictment, the case tends to take on a life of its own, and can take weeks, or months or even years to be resolved, depending on numerous variables.

The investigation in steps 1 through 3 can be much shorter than 6 to 18 months, if the violation is less complex, or if the subject cooperates and enters into a pre-indictment plea. These are somewhat rare. It is also shortened if once into the investigation, the special agent determines that an error was made in evaluating the primary investigation evidence, or fatal flaws are discovered in the case. At this point the case will be immediately discontinued. This is actually quite common, since IRS is unwilling to proceed to indictment with a case that does not have what appears to be insurmountable evidence with which to prove the indictment.

Grand Jury Tax Investigation

The grand jury investigation is very similar in terms of the process and the flow of investigative steps. The biggest difference is the speed at which things happen, and of course the secrecy of the investigation. Here is how a grand jury tax investigation would differ from an administrative investigation.

Approval Process

Getting approval for initiating a grand jury can be almost as time consuming as getting a case approved for prosecution by DOJ. A long, detailed report is written, incorporating all the evidence obtained up to the point of the grand jury request. As IRS does not like to initiate grand jury tax investigations, the special agent must demonstrate justification for doing so, which he/she must articulate in a convincing narrative.

The request is first reviewed and approved by the SSA, then the SAC, then CT Counsel, and then is returned to the SAC who forwards it to Department of Justice-Tax Division. The report can sit at DOJ for months, before being approved or rejected. Once approved, an AUSA is assigned, and the case is initially presented to the grand jury and subpoenas can be requested and issued.

At this point, the process varies depending on the judicial district and the AUSA's personal philosophy.

Some AUSAs (in some districts) will have the special agent testify before the grand jury on a regular basis in order to present the government's case "so far", and then request subpoenas. The evidence must be returned by the subpoena recipient to the AUSA and presented to the grand jury, in session, before the special agent can have access to it. Most AUSAs do not follow this practice however, and allow the agent access to the evidence immediately upon receipt. Many would just prefer that the evidence be

delivered directly to the special agent, and have the agent keep the AUSA advised of all activities and events with regards to the investigation.

The Initial Interview

Although the initial subject interview is also very important in a grand jury investigation, it often is not done at or near the beginning of the investigation. The agent has a great deal more flexibility regarding when to notify the subject of the investigation, and may never read him his rights until he is arrested. The purpose of this is to maintain the secrecy of the investigation, as well as to allow the agent to obtain as much information regarding the alleged crime as possible, before confronting the subject. This gives the agent a much greater advantage in the interview, should the subject choose to speak to him.

On the other hand, it is very important to avoid performing some investigative task that would allow the subject to learn of the investigation before the appropriate time. Speaking to the wrong person, issuing a subpoena to someone who disregards the secrecy of the grand jury, can lead to the subject's discovery of the investigation, and the loss of the element of secrecy.

Examination of public records and obtaining third party records are both done in grand jury investigations pretty much the same way they are done in administrative investigations, with one major exception: the use of the grand jury subpoena.

The administrative summons is a good tool for getting financial records and other evidence from reluctant witnesses. However, it is only a "geologist's hammer" as opposed to the "sledge hammer" of the subpoena. With the subpoena there is no long, drawn out process to force compliance. There is a short time period given to comply, and then the recalcitrant is hauled before a federal judge to explain his noncompliance. He could face possible jail time for contempt. And there is no requirement to notify the subject of the issuance of the subpoena. Ever. Special agents love this, and it is the main reason that they would prefer to work under the grand jury umbrella.

The rest of the grand jury investigative process is pretty much the same as under administrative authority. The first reviewer is of course the SSA, followed by the CCR, CT Counsel, via the SAC's office, and then on to DOJ Tax. The pre-referral conference is not generally offered to the subject and his attorney at the conclusion of the grand jury investigation.

Summary

IRS-CI investigates tax crimes either administratively, or via the grand jury. Administrative investigations are conducted entirely on CI's congressionally granted authority, without the use of grand jury subpoenas or under the direction of an Assistant United States Attorney. IRS prefers that tax crimes be investigated administratively,

because it allows IRS total control over the conduct and direction of the investigation. Also, all evidence obtained administratively may be used later on in civil examination and collection proceedings.

A grand jury tax investigation must be approved by the Department of Justice Tax Division, which can sometimes take a very long time. It can be initiated by CI, or the US Attorney can request CI's involvement in an investigation. Most special agents would prefer to investigate via the grand jury, because of the power of the grand jury subpoena, and also because of the mandatory secrecy of the investigation.

Review Questions

1. Once a determination has been made to initiate a subject investigation, one of the first decisions that a special agent must make is
 - A. What violation to charge.
 - B. Who the main subject is.
 - C. Whether to investigate administratively, or via the grand jury.
 - D. Who the best witnesses will be.
2. IRS CI has the authority to conduct investigations outside of the grand jury, just like all other federal law enforcement agencies.
 - A. True.
 - B. False.
3. CI as an organization prefers to conduct its investigations, administratively, because
 - A. Administrative investigations are under the immediate oversight of the assistant United States Attorney.
 - B. The summons is a more enforceable document than a subpoena.
 - C. Information obtained via the investigative process may be used by civil employees also.
 - D. The subject does not need to be advised of the investigation right away.
4. Which of the following statements is true?
 - A. The IRS grand jury approval process is very quick.
 - B. Grand jury approval through IRS CI requires a long, detailed report, which can be longer than some agencies' prosecution reports.
 - C. All evidence obtained via administrative summons is subject to grand jury secrecy.
 - D. Any evidence obtained via a grand jury subpoena, may be used after prosecution is concluded if IRS needs it to collect the tax due.

5. One of the first investigative steps in an administrative criminal tax investigation is
- A. Write the Special Agent Report.
 - B. Execute a search warrant.
 - C. Write the Revenue Agent Report.
 - D. Interview the subject and advise him/her, of his/her constitutional rights.
6. Put the following post-investigative steps in order
- 1 –Assignment of case to a USA.
 - 2 –Arrest, Initial Appearance, Arraignment, and Trial or Plea.
 - 3 – Submission of SAR for internal reviews.
 - 4- Pre-sentencing investigation.
 - 5 – Final Conference with Criminal Tax Counsel, Subject of Investigation, and Defense Counsel.
 - 6 –Post–sentence, referral to civil IRS.
 - 7 – Submission of SAR for Department of Justice (DOJ) review.
 - 8 – Sentencing and Incarceration.
 - 9 –Submission to Grand Jury for Indictment.
- A. 3, 5, 7, 1, 9, 2, 4, 8, 6.
 - B. 1, 2, 3, 4, 5, 6, 7, 8, 9.
 - C. 9, 1, 8, 2, 7, 3, 6, 4, 5.
 - D. 7, 3, 2, 6, 8, 4, 1, 5, 9.
7. The investigative steps of an administrative investigation can last
- A. 9 to 24 months.
 - B. 1 to 3 months.
 - C. 6 to 18 months, or sometimes longer.
 - D. 9 to 10 years
8. The post- investigative steps of an administrative investigation
- A. Can last an additional 6 to 18 months.
 - B. Generally are addressed very quickly.
 - C. Can take on a life of their own and can take weeks or months or even years to be resolved, depending on numerous variables.
 - D. Will not take more than an additional three years.
9. One of the biggest differences between grand jury investigations and administrative investigations is the speed at which things happen. Which of the following statements regarding this is true?
- A. Getting approval for initiating a grand jury investigation takes much longer than getting approval for initiating an administrative investigation.
 - B. Getting approval for initiating an administrative investigation takes much longer than getting approval for initiating a grand jury investigation.

- C. The grand jury request is a very short summary of evidence obtained in the primary investigation.
 - D. A grand jury request can be approved by the supervisory special agent within a couple of days.
10. The initial subject interview is not always a very important part of a grand jury investigation, and may not be conducted at all.
- A. True.
 - B. False.

CHAPTER FIVE - THE INVESTIGATIVE PROCESS

The Subject Investigation

Let's look at the subject investigation process now, step by step.

The Initial Interview

Upon approval of the subject investigation (administrative) the special agent must advise the subject of the investigation within 30 days. This will be the most important interview that he or she conducts. Special agents like to say, "You only get one bite at the apple", and the first interview is usually it! They will prepare for this interview meticulously, using every single piece of evidence accumulated up to this time.

A common plan is to try to catch the subject at his most vulnerable moment, generally when he/she is alone, away from any possible co-conspirators, accountants, or attorneys. The special agent will always take someone with him/her to conduct the interview. Sometimes he/she will take the cooperating revenue agent, or he/she may take another special agent. It all depends on the circumstances of the case and the agent's personal preference. It is all up to the special agent, as he controls the direction of the investigation.

The agents will approach the subject in a non-threatening manner, trying to be as friendly as possible under the circumstances. That is a difficult task, when the first thing that they must do is explain to the subject that he/she is the subject of a criminal investigation, and explain to him/her about his/her constitutional rights in much the same way as he/she may have heard TV cops explain rights to arrestees on TV shows. The wording is changed a bit to soften the impact, but all the same rights are explained (See IRS Document 5661, below).

If the subject states that he doesn't want to talk to the agent, and/or he wants to consult an attorney, that's the end of the conversation right there! **THIS IS HOW YOU, AS AN ATTORNEY, WANT THIS INTERVIEW TO END!** The agents will leave the special agent's business card with instructions to contact the special agent with any questions or information (not the revenue agent. Any inquiries to the revenue agent will be, without exception, re-directed to the special agent). The special agent may also give a general explanation as to how the impending investigation will ensue. This is done both to educate and to encourage the subject to be cooperative. But the agents are not allowed to ask any more questions. If the subject asks any questions at this point, he will most likely be told by the agent that he/she really can't discuss it with him/her any further without the presence of the subject's attorney.

As I said, this is how you want the interview to end. Under no circumstances should the subject ever speak to a special agent after having been read his/her rights, without first consulting his/her attorney. The problem for him/her is that, in most cases, no one has ever told him/her this! You can only hope that he/she is moderately intelligent, and that he/she has watched a lot of police shows on TV!

IRS Document 5661

Non-Custody Statement of Rights

(At the outset of your first official meeting with the subject of an investigation, identify yourself as a special agent of the IRS and produce authorized credentials. THEN STATE:)

" As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses. " In connection with my investigation of your tax liability (or other matter), I would like to ask you some questions. However, first I advise you that under the 5th Amendment to the Constitution of the U.S., I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of any attorney before responding.

" Do you understand these rights? "

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Why is the initial subject interview so important? After all, even the dumbest tax evader isn't going to just come right out and admit to a crime, right? That's probably right, but it really isn't the point.

Keep in mind that IRS-CI is very aware that this will likely be the only time that a special agent has a clear shot at the subject. A great deal of preparation goes into this interview, starting back in Criminal Investigator Training (CIT) and Special Agent Basic Training (SABT) at the Federal Law Enforcement Training Center (FLETC) in Brunswick, Georgia. A large amount of early training is focused on interviewing skills. By the time an agent finishes his/her training, he/she is quite skilled at developing rapport with the interviewee, making the interviewee want to answer questions and tell his life story, and actually making the interviewee feel self-conscious and uncomfortable unless he answers the investigator's questions! After a few years on the job, and a lot of interviews, the agent has become an expert at extracting information from witnesses as well as subjects of investigation.

The agent has already acquired a good deal of information regarding the subject's activities and finances. One of the first things that the agent will do is to ask questions to which he/she already knows the answers. This is to test the subject's veracity, to see whether he/she will lie, or simply decline to answer a question that might tend to shed light on his/her activities.

The agent is an expert at "beating around the bush", and then just diving right into the heart of the matter! He/She will ask questions that sort of dance around the periphery of

the issue at hand. He/She will make the subject feel comfortable with answering questions that may be truthful, but don't really address the heart of the issue. He/She will obtain enough information this way to get a good idea of the truth of the matter, and then jump in with a question that although polite, will demand a direct response, or even an admission of some type. The subject may answer the question without even thinking about it until too late, and then the cat is out of the bag. He/She may stumble and equivocate, at which point the agent will point out all of his/her previous answers and then ask why this most recent one seems to contradict his/her previous statements. About now the subject will start to get nervous, and the agent will pull back, change the subject, and begin another line of seemingly innocuous questions, let the subject get comfortable again, only to repeat the technique a few minutes later. The questions will get more and more pointed and adversarial, until the subject, often after a couple hours of questioning, realizes he/she is in over his/her head, and stops the interview, invoking the right to counsel. The interview stops, but much too late.

The subject may be very sophisticated, and possibly arrogant. He/She may answer questions truthfully, or he/she may lie. That isn't important. What is important to the special agent is that the subject talks! If the subject tells the truth, it makes the agent's case much easier. If the subject lies, the agent probably already knows it, and will document it, making it much easier to trip the subject up later on. If the subject lies and the agent **doesn't** know it, he'll find out eventually. Then the statements are still memorialized, witnessed by two IRS employees, and may even be referred to as indicators of intent to defraud on the part of the subject.

Examination of Public Records

As part of the preparation for an initial interview, there are sources of public information that an agent may consult. There is the county recorder/assessor, where he/she may obtain information regarding real and personal property holdings, civil legal actions and judgments. He can go to the secretary of state to get business information such as corporate filings and fictitious name registrations. There are also state licensing bureaus for medical, accounting, law and other professional licenses. An agent can consult any public information source before or after advising the subject of the investigation.

Obtaining third party evidence

Evidence obtained directly, and voluntarily, from the subject can certainly be used by the government to obtain a conviction. But that type of evidence is rare and difficult to come by. The vast majority of evidence will be obtained from third party sources. The agent is going to talk to employees, employers, clients, associates, financial institutions, family members, neighbors, and anybody else who has knowledge of the subject's financial and tax affairs. She will take statements, and she will request documentary evidence. In most cases she will issue administrative summonses to obtain documents, and in some cases to obtain testimony. In certain instances a summons can also be served on the subject himself, for example, if the subject is the custodian of records for a corporation whose records are pertinent to the investigation. Even if the subject is the sole shareholder of

the corporation, the records are the property of the corporation, not the subject, and in most cases she has no 5th amendment right to withhold those records¹.

The summons that a special agent issues is the same summons used by revenue agents in civil matters, and very similar to that used by revenue officers. The only difference is that civil employees need supervisory approval to issue a summons, to include a supervisor's signature on the summons itself. A special agent has the authority to issue a summons without supervisory approval, and therefore can write one out and issue it on the spot. Although the administrative summons does not carry the same power as a grand jury or trial subpoena, it can be enforced by a federal judge, which would then give it the same power.

There is a certain class of potential summons recipients referred to in the Internal Revenue Code as *Third-Party Recordkeepers*². These are not just any third party who has knowledge of the subject's financial dealings, but are a third parties who actually maintain records of the subject's financial transactions with others. These consist of financial institutions such as banks, credit unions, brokerages, credit card issuers, credit reporting agencies, or other similar financial services providers. It also includes investment companies and brokers, barter exchanges, enrolled agents, accountants, bookkeepers, and attorneys. When a summons is issued to one of this class of recipients, the subject of the investigation must be notified of the summons. He must be notified within three days of service. The notification can be made in person, by certified mail (sent by the 3rd day after service), or left at the last known address.

As previously stated, the administrative summons can be enforced by court order if the recipient chooses not to comply. Enforcement is sought by IRS Criminal Tax Counsel in Federal Court. It can be a long, drawn out process, taking in some cases a year or more. It is something that special agents avoid doing, if at all possible, because one minor error can void the request for enforcement, and then the agent has to start all over again. That's why they are very careful to follow the law and all IRS policy when issuing summonses. If IRS is forced to enforce the summons, they will do it; and even though agents don't like to do it, they are generally very successful at getting the summons enforced by a federal judge. One additional important point is that if enforcement proceedings are initiated, the statute of limitations related to the tax years under investigation is tolled until the recipient is compelled by the courts to comply³.

Summary

Upon approval of an administrative subject investigation, the initial interview of the subject will generally be conducted within 30 days. Interviewing is one of the most important investigative tools that a special agent will use. The initial subject interview

¹ Braswell v. United States, 487 U.S. 99

² 26 USC Section 7609

³ 26 USC Section 7609(e)

will be, by far, the most important interview that the special agent will conduct. It is important that the agent get the subject to talk to him; whether the subject lies or tells the truth is of less importance.

All subject investigations will include a search of public records, for real estate, judgments, criminal proceedings, etc. Public records searches may take place before or after the initiation of a subject investigation.

All subject administrative investigations will involve obtaining third party records, either by simple request, or by the use of an administrative summons. If the summons is served on a statutorily defined third party recordkeeper, the subject must be notified within three days of the service. If the subject has a solely owned corporation, he may be issued a summons as the recordkeeper for the corporation. She has no 5th amendment right to withhold those records. In the case of a grand jury investigation, a grand jury subpoena may be used, with no notification requirements whatsoever.

In seeking third party evidence, no third party is off limits, other than those covered by some type of legal privilege. The special agent will contact every person who he/she feels may have information pertinent to his/her investigation, including family, friends, casual acquaintances, business partners and associates, employers, employees, subcontractors, in short, everybody he/she can think of.

Review Questions

1. In an administrative investigation, upon approval of a subject investigation, the subject must be advised of the investigation
 - A. Within 60 days.
 - B. Within 30 days.
 - C. Within 6 months.
 - D. Within 14 days.
2. The subject interview is generally the most important interview that a special agent will conduct during the course of an administrative criminal investigation.
 - A. True.
 - B. False.
3. If the subject states that he doesn't want to talk to the special agent, the agent may still give the subject a general explanation as to how the impending investigation will ensue, without asking any more questions.
 - A. This is done to try to get the subject to change his mind and answers some more questions.

- B. This is done both to educate and to encourage the subject to be cooperative.
- C. This is another way to get answers without really asking any questions.
- D. Special agents should not do this because it violates the subject's 5th amendment rights.

4. The initial subject interview is really important because

- A. The subject may make a confession or admission.
- B. The subject may lie, and his/her deception will then be memorialized by the agent.
- C. In most cases, this will be the only time that an agent will be able to question the subject before he seeks the advice of an attorney.
- D. All of the above.

5. Documentary evidence

- A. May not be requested voluntarily from the subject of the investigation.
- B. May be obtained through the use of an IRS administrative subpoena.
- C. May be obtained through the use of an IRS administrative summons.
- D. May not be obtained from the subject's family members.

6. Even if the subject is the sole shareholder of a corporation, the corporate records are the property of the corporation, not the subject, and he has no 5th amendment right to withhold those records.

- A. True.
- B. False.

7. Which of the following statements regarding an IRS Administrative Summons is false?

- A. IRS Summonses are used in both civil and criminal tax matters.
- B. A special agent has the authority to issue a summons without supervisory approval.
- C. A summons issued to a "third party recordkeeper" carries the requirement of notification of the subject of the investigation within three days of service.
- D. An IRS administrative summons carries the same power as a grand jury or trial subpoena.

8. Which of the following is not classified as a "Third-Party Recordkeeper" in the Internal Revenue Code?

- A. A bank.
- B. An insurance company.
- C. A credit card issuer.

D. An attorney.

9. A special agent can consult any public information source before or after advising the subject of the investigation.

A. True.

B. False.

10. The vast majority of evidence obtained in a criminal tax case will come from

A. The subject of the investigation.

B. Third party sources.

C. Search warrants.

D. Undercover Operations

CHAPTER SIX – SPECIAL INVESTIGATIVE TECHNIQUES

There are special circumstances in which a subject interview or third party contacts may not be conducted at or near the initiation of the administrative investigation. For example, if the agent determines that an undercover operation, or some other *Special Investigative Technique* (SIT), is the best way to initially obtain information, then no interview will be conducted, or summons issued, until after the completion of the SIT activity. Other activities which may also be initiated at the outset of the investigation include *surveillance, mail cover, pen register, trap and trace, search warrant execution, and consensual monitoring* (this is usually done in conjunction with an undercover operation, but in some circumstances may not be). Usually, when any of these activities have been initiated, it is important that the subject not be aware of the investigation. Therefore, interviews and the issuance of summonses will be delayed.

As previously stated, an administrative investigation is a somewhat long process, lasting 6 to 18 months, depending on the complexity of the investigation. If one of the aforementioned special investigative techniques is used, it can lengthen the investigation time. One of my last investigations, of a tax representative, took over four years, largely because of an 18 month undercover operation, followed by the execution of a search warrant. The investigation also included mail covers, pen register, trap and trace, consensual monitoring, and several legal issues and complications. From the date of initiation of a subject investigation to the day the subject was sentenced, nearly 6 years had elapsed.

Undercover Operations

This technique can actually be used in general, primary, and subject investigations. It is often used in the investigation of false tax return preparation by a professional tax return preparer, such as an accountant.

IRS has an ongoing *Return Preparer Project*, which receives and evaluates complaints regarding specific tax return preparers. Every year during tax season, a list of preparers with the most complaints or allegations is compiled, and undercover special agents are sent out to “shop” them. In other words, the undercover agent will approach the preparer as a potential client, with a fictitious name and social security number, and bogus income and/or deduction information, and ask the preparer to help him to reduce his tax liability or maximize his refund. If the preparer takes the bait and prepares a return he knows to be false, a primary or subject investigation will likely be initiated.

Sometimes substantial evidence may have already been developed with regard to the specific preparer or accountant, and a primary or subject investigation will be initiated before starting the undercover. Undercover operations are also utilized to investigate offshore tax scheme promoters, and numerous others types of investigations (They are

used extensively in IRS-CI money laundering investigations as well, but that really is not the focus of this book).

An IRS agent trained as an undercover agent (UCA) may be used, or a confidential informant who already has a connection to the subject, and who can be trusted, may also be used. Meetings with the subject are generally recorded using some type of concealed recording device(s). This is referred to as consensual monitoring, because the person wearing the wire gives his consent to the monitor. No court order is needed for this type of monitoring. Also, phone calls to or from the subject can be monitored and recorded by the UCA or informant.

Consensual Monitoring

Consensual monitoring, as explained above, is generally used in conjunction with an undercover operation, but may be used in other situations as well. For instance, during the course of an investigation of a physician, he contacted a former employee who was the original informant on the case. The good doctor had not had contact with this employee for some time. It was determined that he might be aware of the IRS investigation, and might ask the informant to lie to IRS. I obtained approval for consensual monitoring of the planned meeting, and tech agents put a hidden recording device on the informant's body. It turns out that the good doctor was aware of the investigation, and asked the informant, a former employee whom he had treated quite badly, to lie to the IRS about his financial dealings. The tape was later used at trial to demonstrate the doctor's intent to deceive, and was instrumental in his conviction for several counts of tax evasion and numerous counts of mail fraud.

Surveillance

Surveillance comes from the French word *surveiller*, which means to watch over. It is simply the practice of watching the subject. It can be done in a stationary position, watching a residence or business, or by following the subject on foot or by vehicle. On occasion, if dictated by the circumstances, the surveillance can be conducted from city to city, and by mass transit.

When using this technique, the investigator is looking for information regarding relationships and activities. He wants to know with whom the subject associates, when and where he conducts his financial transactions, and where important records may be located.

Mail Cover

A mail cover is an arrangement with the US Postal Inspector, whereby a law enforcement officer can receive “cover” information regarding mail received at a specific address. This information can be for a specific addressee, or can be for all mail received at the address. “Cover” information, is just what it sounds like: information included on the cover of individual pieces of mail. The information includes: addressee’ name, sender’s name, sender’s address, and class of mail. The information sent to the investigator may not be photocopied, and is generally only used to develop leads, as the Postal Inspector is very sensitive about this information being used in open court. The mail is never opened, and no knowledge is received regarding the contents of the envelope or package.

Pen Register

Pen Registers are sometimes confused with wiretaps. A pen register does not involve listening to or recording a telephone conversation. It is simply a record of telephone numbers called from a specific telephone number. Additional information may be obtained regarding the owner of the number called. This technique may only be used upon receipt of a court order.

Trap and Trace

This is just the opposite of a pen register, and also requires a court order in advance. All incoming calls to a specific telephone number are “trapped and traced”, and the originating numbers are recorded.

Trash Run

The technique that no agent likes to do, but nearly every agent does. The local garbage collector is contacted, the pick-up dates are determined, and the agent goes and collects trash set out at the curb before the trash collector gets around to it. This is best conducted at night when hopefully the subject has put the trash out the night before. I know of instances where the investigator has a good relationship with the local trash collector, and actually rides with the collector, picks up the trash and deposits it in the back of the truck without running the compactor, runs around the corner to where his government vehicle is waiting out of sight, and transfers the trash to the trunk of his vehicle. The trash is then examined (with rubber gloves!) looking for the financial clues hoped for.

Search Warrant

All of the aforementioned investigative techniques, as well as well as other techniques of obtaining information, may be used to develop probable cause sufficient for the approval, by a federal judge, of the execution of a search warrant. What is necessary to obtain a financial records search warrant is a reasonable belief that a crime has been committed, and evidence of probable cause that records or other evidence of the crime will be found at the location desired to be searched. Obviously, once an army of IRS-CI special agents descends on a residence or a business looking for records of tax evasion, the element of surprise has been lost, and at this time the subject will be advised of the investigation and of his constitutional rights. Almost certainly there will be an attempt to interview the subject at the same time other agents are searching the premises for evidence.

Summary

Special Investigative Techniques are often used to acquire evidence that cannot be acquired by other less intrusive means. Most often, Special Investigative Techniques are used at the beginning of an investigation, before contacting the subject.

Special Investigative Techniques include search warrants, undercover operations, surveillance, mail cover, pen register, trap and trace, and consensual monitoring (this is usually done in conjunction with an undercover operation, but in some circumstances may not be).

Review Questions

1. Special Investigative Techniques

- A. May often result in the initiation of a new subject investigation.
- B. May be used before conducting any interviews.
- C. May be used before issuing summonses.
- D. All of the above.

2. SIT activities include a(n)

- A. Pen Register.
- B. Subpoena Issuance.
- C. SAR.
- D. Indictment.

3. The IRS Return Preparer Project is

- A. An ongoing program in which IRS-CI educates the tax return preparer community on correct preparation procedures.

- B. A program in which IRS educates its own employees on the most current tax preparation rules.
- C. An ongoing program, in which IRS receives and evaluates complaints and/or allegations regarding specific tax return preparers in the community.
- D. A way of measuring the number of income tax returns that are being prepared professionally in the community.

4. Which of the following statements about undercover operations is false?

- A. Either an IRS agent trained as an undercover agent, or a confidential informant who already has a connection to the subject, may be used to conduct undercover operations.
- B. Undercover meetings with the subject of the investigation are generally recorded using hidden recording devices of some type.
- C. A recording made with a concealed device, by an undercover agent in a meeting with the subject of an investigation is referred to as nonconsensual monitoring, because the subject did not give his/her consent to the recording.
- D. No court order is needed for consensual monitoring.

5. When conducting surveillance, the special agent is looking for

- A. Documentary evidence.
- B. Information regarding relationships and activities.
- C. Third-party records.
- D. Information regarding related investigations.

6. A mail cover is

- A. A joint investigation with the US Postal Service.
- B. A collection of publicly accessible information regarding private mail.
- C. An arrangement with the US Postal Inspector to surveil a post office mailbox.
- D. An arrangement with the US Postal Inspector, whereby a law enforcement officer can receive sender and addressee information with regards to mail received at a specific address.

7. A pen register is

- A. Just another name for a wiretap.
- B. An audio recording of all incoming telephone calls to a specific number.
- C. A record of telephone numbers called from a specific telephone number.
- D. A record of all the originating numbers of incoming telephone calls to a specific number.

8. Trap and Trace is

- A. Just another name for a wiretap.
- B. An audio recording of all incoming telephone calls to a specific number.
- C. A record of telephone numbers called from a specific telephone number.
- D. A record of all the originating numbers of incoming telephone calls to a specific number.

9. The one special investigative that no special agent enjoys doing, but nearly every agent does, is

- A. The trash run.
- B. Moving surveillance.
- C. The wiretap.
- D. The trap and trace.

10. Which of the following is necessary in order to obtain a financial records search warrant?

- A. Reasonable belief that a crime has been committed.
- B. Probable cause that evidence of the crime will be found at the location to be searched.
- C. Evidence of ongoing criminal activity for an extended period of time.
- D. All of the above.
- E. Both A and B.

CHAPTER SEVEN – CONCLUSION OF THE INVESTIGATION

Analysis of Evidence Obtained

Before, during, and after the use of the investigative techniques described in Chapters Three through Six, the evidence will be analyzed as it is obtained. The special agent conducting the investigation, also referred to as the case agent, is putting a puzzle together that hopefully will show a complete and accurate picture of the crime that has been committed. Or, in some cases, it will show that a crime was not committed. Or it may simply be missing large or vital pieces to the puzzle, without which it is impossible to clearly see the picture the puzzle represents; in other words, the case cannot be proven. This process may be completed simultaneously with the obtaining of the evidence, or may go on for some time after all of the pertinent evidence has been acquired. At some point in time, a conclusion will be reached as to whether the case may be submitted for prosecution.

The Final Report

When the agent decides whether or not to seek a prosecution, a report must be submitted¹. The report can be part of either the investigative process or post-investigative process, depending on the agent. Many agents start writing their Special Agent Report (SAR) as soon as they start the investigation. As the investigation progresses and information is obtained, another section is filled in. Most agents, however, do not start the SAR until the investigative process is at, or close to, its end.

A conclusion not to prosecute is reflected in a discontinuation, or a Discontinued Report (DR). It is relatively short, and refers to the reasons the case was discontinued. The discontinuation may be because of: 1)lack of or insufficient evidence, 2)lack of or *de minimus* tax consequences, 3)poor health or death of the subject, 4)lack of jury appeal, 5)lack of resources to complete the investigation, or 6)other unspecified reasons. When the report has been accepted, if the subject is aware of the investigation, a letter is usually sent to the subject and/or his attorney advising him/them that the investigation has been discontinued. The letter will not include the DR, which is an internal memo and is not disclosed to anyone outside of IRS-CI.

However, if it is determined that the case is viable, and a successful prosecution is likely, the work has just begun. The special agent must now write the Special Agent Report (SAR), IRS-CI's famous (in federal law enforcement circles) prosecution report. As a part of your defense strategy, you should make all efforts to obtain a copy of this report. Depending on the judicial district, this may be provided as a part of the discovery process. In some districts the judge may order it turned over to the defense. And in

¹ Internal Revenue Manual 9.5.8

others, you're just not going to get it. It is IRS's position that the SAR is an internal memorandum, and therefore not subject to discovery. However, in some districts where judges have determined that it ought to be turned over, IRS really hasn't put up much of a fight to keep it back. And you can always just ask the special agent or Assistant United States Attorney (AUSA) if you can have a copy! You may get lucky and get an AUSA that doesn't care whether you see it or not! Truthfully, however, in most cases, you're just not going to get it!

Why do I refer to the SAR as "famous"? You may not have ever heard of it before, or maybe you heard of it only in passing. It is, in a nutshell, the prosecution's case, front to back, beginning to end. It is famous, because in comparison with prosecution reports submitted by other agencies it is the most complete prosecution report prepared by any law enforcement agency, bar none. Most law enforcement agencies present a prosecution report that is at best a summary of the allegations, and an index to the evidence, together with boxes filled with the actual evidence. The IRS-CI SAR is a very detailed report of the charges, the specific steps that the subject allegedly took in the commission of the violation, a detailed report of the investigative steps taken, all indexed precisely to each piece of evidence. It is followed by detailed calculations of the unreported income due to fraud, additional tax due to fraud, and often many other schedules in support of the charges. These financial schedules are known as "Appendices". It comes with a detailed index of the evidence which includes a description of the evidence the source of the evidence, the name, address and telephone number of the witness, and it assigns the witness a number as well a number for each piece of evidence. All of the evidence is presented in the precise order that CI believes it ought to be presented at trial. It is said that a good attorney could read through the SAR once, and then walk into a court room with the evidence and try the case. Believe me, my description would be backed up by any AUSA who has tried a criminal tax case.

The SARs used to be quite long, as long as 100 to 200 pages, depending on the complexity of the case. It could take as long as three months for the special agent to write. In the last couple of years, efforts have been made to streamline it, to cut out some of the information that the agents and the AUSAs have found to be extraneous. Now the report runs about 30 to 50 pages.

The SAR includes a Revenue Agent's Report (RAR) which includes the revenue agent's determination of tax due and owing. It is similar to what the revenue agent would have issued as an audit report had the criminal investigation not ensued, except that it is pared down to include only those deficiencies determined to be due to criminal activity.

Review

Now here is one of the main reasons that IRS doesn't lose many criminal prosecutions. After the special agent has concluded his very precise and meticulous investigation, and has written a very detailed report of that investigation, it now must be reviewed at several

levels. The case may be returned for correction, revision, or additions at any level, or in some cases it can be rejected outright.

The first review is of course the special agent's immediate supervisor, the supervisory special agent (SSA). The SSA is usually a veteran special agent, who has written and read many SARs. He applies his experience to the review of the SAR before him. As he has probably been involved in the agent's case from the beginning, the SAR should hold no surprises. He may make a few changes, possibly in style and language, and may find mistakes in the way evidence is presented or indexed, but generally very few changes get made at this point. However, the SSA has the authority to kill the case outright.

The next stop is the Centralized Case Reviewer (CCR). The CCR is also generally a senior agent with a lot of SAR writing experience. All the CCR does is review the SARs of other agents. He can return a case to the agent for revisions and corrections, or may recommend that a case be rejected; however, he does not have the authority himself to kill the case. He reviews on three different levels. First he reviews the writing: spelling, grammar, style, things that should not be a problem at this point in the process; things that should have been caught, if not by the agent writing the report, then by his SSA. Secondly, the CCR reviews the content: whether the writing itself makes sense, whether the conclusions drawn are based on the facts, and whether the allegations and assertions referenced in the report are properly indexed to the corresponding evidence. And finally the CCR makes sure that all elements of the violations alleged, that are required to be present, are present and are supported by the evidence. This review is somewhat cursory and superficial, as the next level of review addresses these items much more in depth.

After passing this level of review, the SAR and all evidence goes to Criminal Tax Counsel (CT Counsel). CT Counsel Attorneys are not actually part of CI, but work for IRS Counsel, and are assigned to CI to review only criminal issues. Hopefully, they have been aware of the investigation in question before the actual review of the SAR, but they may not have been. CT Counsel would likely have been asked to review special investigative techniques proposed, or to give opinions on legal issues identified during the course of the investigation. Now they must review the legal ramifications of every aspect of the case, including any defense or other mitigating factors that the subject might utilize. CT Counsel does not have the authority to kill a case, however if they recommend rejection, the case is probably dead. If however, the case passes legal muster, CT Counsel refers it to Department of Justice (DOJ), Tax Division, for one last review. It passes back through the SSA's and SAC's offices on its way to DOJ for a cursory review and a signature.

At DOJ, the SAR and accompanying evidence is assigned to a trial attorney for review. The trial attorney reviews the case all over again, focusing mainly on the same legal issues that the CT Counsel attorney looked at, and seeing if any pertinent issues have been missed. The trial attorney presents the case to a review committee, and argues either for acceptance or declination. The committee then accepts the case for prosecution, or declines to prosecute.

IRS-CI is formally notified by letter of DOJ's acceptance, and the case is sent to the Office of the United States Attorney for assignment to an AUSA. The US Attorney does not have the authority to reject the case if DOJ has directed him to prosecute. However, the US Attorney may decline to prosecute based on lack of resources and ask that DOJ prosecute the case, at which time a DOJ Trial Attorney would be assigned to prosecute the case.

Summary

Before, during, and after the use of the investigative techniques described above, the evidence will be analyzed as it is obtained. At the conclusion of the investigation come the final analyses of all evidence obtained, at which time the agent's final determination as to the viability of the case is made.

The special agent then completes the Special Agent Report (SAR), into which he incorporates the Revenue Agent Report (RAR). The SAR may be initiated early in the investigation, or may not be started until the investigation is completed, depending on the agent's personal preference. The SAR is CI's prosecution report, to be used by the US Attorney to plan for trial and prosecute a criminal case.

If CI chooses at this point not to submit the case for prosecution, a Discontinued Report (DR) is submitted by the special agent, explaining why the case has been discontinued. The DR can be submitted at any time during the subject investigation. Reasons for discontinuing a case may include 1)lack of or insufficient evidence, 2)lack of or de minimus tax consequences, 3)poor health or death of the subject, 4)lack of jury appeal, 5)lack of resources to complete the investigation, or 6)other unspecified reasons.

Upon completion the SAR is then submitted to several levels of review before being submitted for prosecution. The levels of review include the agent's immediate supervisor, the Centralized Case Reviewer, Criminal Tax Counsel, The special agent-in-charge (SAC), and then finally it is sent to Department of Justice Tax Division for a final review and decision on whether to recommend for prosecution.

Finally the case is sent to the local US Attorney's office and assigned to an Assistant US Attorney. If the case is a grand jury investigation, the case is assigned to the AUSA who was overseeing the investigation in the first place. The US Attorney may also decline to prosecute at this point, but then the case would simply be assigned to a DOJ Trial Attorney for prosecution.

Review Questions

1. Evidence obtained during a criminal tax investigation is analyzed
 - A. As it is obtained.
 - B. At the conclusion of the investigation.

- C. Neither A nor B.
- D. Both A and B

2. The report that the special agent writes to recommend prosecution is called

- A. The Final Report (FR)
- B. The Prosecution Report (PR)
- C. The Special Agent Report (SAR)
- D. The Recommendation to Indict (RI)

3. A conclusion not to prosecute is reflected in a

- A. Lack of Evidence Report (LER)
- B. Discontinued Report (DR)
- C. Revenue Agent's Report (RAR)
- D. Revenue Officer's Report (ROR)

4. One of the reasons that IRS-CI doesn't lose many criminal tax prosecutions is because

- A. The prosecution report is so well written.
- B. Defense attorneys are terrified and intimidated by IRS-CI.
- C. Special agents are all very eloquent expert witnesses.
- D. There is a meticulous multi-level review process that weeds out all of the identified weaknesses long before submission of the case for indictment.

5. Which of the following reviewers does not have the authority to stop the prosecution of a case recommended by a Special agent?

- A. Supervisory special agent.
- B. Special agent-in-charge.
- C. Department of Justice Review Committee
- D. IRS Criminal Tax Counsel.

6. If the Assistant United States Attorney declines to prosecute a criminal tax case, then the case is dead and will not be prosecuted.

- A. True.
- B. False.

7. Put the following steps of review for a criminal tax case in the correct order:

- 1-Supervisory special agent
- 2-Department of Justice
- 3-Centralized Case Reviewer
- 4-Special agent-in-charge (SAC)
- 5-Criminal Tax Counsel

- A. 1, 2, 3, 4, 5
- B. 5, 4, 3, 2, 1
- C. 1, 3, 5, 4, 2
- D. 5, 1, 4, 2, 3

8. Which of the following items is not included in the SAR?

- A. A listing of all IRS employees who assisted with the investigation.
- B. A detailed index of the evidence to be presented at trial.
- C. Appendices showing the key financial calculations related to the alleged additional tax due to fraud.
- D. The name, address, and telephone number of every potential prosecution witness.

9. The SAR used to be a 100-200 page document, but has recently been lengthened to nearly 250 pages.

- A. True.
- B. False.

10. The Centralized Case Reviewer does not have authority to stop a case from being prosecuted.

- A. True.
- B. False.

CHAPTER EIGHT - THE POST-INVESTIGATIVE PROCESS

Pre-Referral Conference

There is one interim step between CT Counsel's review of the SAR and the referral to DOJ that I have not yet mentioned. Before sending the case to DOJ, CT Counsel generally contacts either the subject or the subject's attorney if he is represented, and offers a pre-referral conference¹. Only the CT Counsel attorney, the subject, and the subject's attorney will be present at the conference; the special agent is not invited to attend. At the conference, the case is presented to the subject and his attorney, and they are given a final opportunity to offer any exculpatory or mitigating evidence, present a defense, or give any other reason to persuade CT Counsel not to forward the case to DOJ. I have never heard of a case where CT Counsel decided not to forward a case after a pre-referral conference. It is a somewhat insignificant step on the path to prosecution, however one that I feel that I needed to mention.

Prosecution

The prosecution process for federal tax crimes is pretty much the same as that for any other type of criminal prosecution. The case is presented to the grand jury by the AUSA and the case agent. This is done according to the individual style of the AUSA. Sometimes the case agent is simply asked to tell the story of the crime and its investigation. Other AUSAs ask very specific questions, and try to limit the agent's responses. And of course, after the initial presentation of the case, the jurors themselves are allowed to ask any questions of the agent. The agent is then excused, and the AUSA asks the grand jury to deliver a true bill.

The saying goes that a competent AUSA can get a ham sandwich indicted. The implication is that a grand jury is a rubber stamp for the prosecution. Having testified many times before a grand jury, I would beg to differ. Most grand juries are very interested and involved in the process, and generally ask a lot of questions. But they do only hear one side of the story, the prosecution's side; and that is the way it is meant to be. After all, the grand jury does not decide guilt or innocence; they only decide whether the prosecution's evidence is sufficiently strong to support prosecution. So yes, failure to secure a true bill is not a common occurrence. And a "no true bill" for a tax evasion case is truly rare. In 16 years of bringing cases to the grand jury, I have only known personally of one failure to obtain a true bill.

After indictment, the subject will be arrested fairly quickly. Defense attorneys would prefer that their clients have the opportunity to turn themselves in and often request that of the agents. However, tax evasion defendants are rarely afforded the luxury of turning themselves in. As I have already pointed out, IRS prosecutes relatively few people, and

¹ Internal Revenue Manual 9.5.12.3

wants the maximum “bang for their buck”. It is IRS’ policy to arrest all indicted defendants, unless there are mitigating circumstances, such as health problems. IRS is trying to send a message, and having your hands cuffed behind your back, being transported to the US Marshall’s office for mug shots and fingerprinting, and then being taken to the magistrate for your initial appearance, sends that message: Tax evasion is a felony!

After indictment is when many defendants finally get around to hiring an attorney! It’s sort of too late at this point, at least for most of them. Nevertheless, this is when a lot of the defense’s work gets done. Discovery will occur soon after the initial appearance; the exact time frame depends entirely on the judicial district in which prosecution takes place. And although pleas can be worked out anytime up to the delivery of a verdict by the jury, this period of time right after the initial appearance is often the best time to start talking about a plea. The AUSA is almost always willing to listen to plea requests, and will most likely offer his own plea deal, but only after being approached by defense counsel. A lot of factors will be taken into consideration at this point, including the defense attorney’s relationship with the AUSA as well as the special agent. The AUSA has the authority to enter into an agreement without IRS’ consent; however, he will give a lot of weight to the desires of the IRS as well as to the case agent specifically. If you have been a thorn in the side of the agent from the beginning, well, it may now be payback time!

There is one other factor that you need to consider when timing a plea deal. The agent has been with this case for two or more years now. Although he has a lot invested in the investigation, and is quite confident in his and the AUSAs ability to successfully prosecute it, he would just as soon see it resolved as quickly as possible. He is not averse to a plea. He is going to have to get ready for trial, and the prosecution team consists of him, the AUSA, the AUSA’s secretary, and possibly a tax fraud investigative aid (TFIA) assigned to the agent for trial. The bulk of the work of trial preparation will fall on the shoulders of the agent and TFIA. If your client waits to plead guilty until after weeks of trial preparation, the agent is not going to be in any mood to recommend leniency. He is going to want blood!

Tax trials can be long and sometimes complex. The AUSA will be trying to make it as simple and straight forward as he can, so that the jury is able to understand it. You don’t want any surprises. You will want your own investigator to go over the evidence well in advance of the trial. If you are able to hire a former special agent, or someone else with IRS experience, that will be very helpful to your defense.

Summary

At the end of an administrative tax investigation, before sending the SAR to DOJ, CT Counsel offers a pre-referral conference to the subject and his attorney. This is a final chance for the subject to present exonerating or mitigating evidence to the government,

before the case is submitted to DOJ for approval. This is a somewhat insignificant step, as it rarely stops the case from going forward to DOJ for review and indictment.

The actual prosecution of alleged federal tax crimes really doesn't differ much from any other type of federal prosecution. The AUSA, with the assistance of the special agent, seeks an indictment from the grand jury. This almost always results in a true bill. After the indictment, the subject will be arrested fairly quickly, unless extenuating circumstances require that he be allowed to turn himself in.

Many defendants don't hire a defense attorney until after they are indicted. This makes the defense attorney's job more difficult, especially if his client plans to go to trial and fight. This is a good time to start thinking about a plea deal, as this is the time that the special agent and the AUSA will be most receptive. The longer you wait to make a plea offer, the less likely the government will be to consider it.

Review Questions

1. The interim step between CT Counsel's Review of the SAR and its referral to DOJ is called
 - A. Indictment
 - B. Centralized Case Review
 - C. Pre-Referral Conference
 - D. AUSA Evaluation
2. Which of the following people will often be present at a pre-referral conference?
 - A. Special agent.
 - B. Subject of the investigation.
 - C. Supervisory special agent
 - D. US Attorney
3. Which of the following is not common in presenting the government's case to a federal grand jury?
 - A. The special agent is simply asked to tell the story of the alleged crime and its investigation.
 - B. The grand jurors are allowed to ask the special agent any questions they would like, with few exceptions.
 - C. The special agent is asked very specific questions by the AUSA and defense counsel.
 - D. The subject of the investigation and defense witnesses testify before the grand jury.
4. When presenting a case to a grand jury, the jurors themselves are not allowed to ask

questions of the agent.

- A. True.
- B. False.

5. Failure to secure a true bill in a tax evasion case is a truly rare occurrence.

- A. True.
- B. False.

6. After indictment, the subjects of a tax evasion indictment

- A. Always have the choice of being arrested or turning themselves in.
- B. Are rarely arrested, because of the victimless nature of the alleged violation.
- C. Are rarely afforded the luxury of turning themselves in.
- D. Will be arrested, but only after a 7-day grace period in which they may turn themselves in.

7. Subjects often wait until after indictment before they

- A. Hire an accountant.
- B. Hire an attorney.
- C. Flee the jurisdiction.
- D. Inform their accountants of the investigation.

8. In the author's opinion, the best time to start discussing a plea is

- A. As soon as the subject is made aware of the investigation.
- B. Right before the date that trial is scheduled to commence.
- C. After jury selection.
- D. Soon after the initial appearance.

9. The AUSA has no authority to enter into a plea agreement without IRS' consent.

- A. True.
- B. False.

10. The prosecution team will likely consist of all of the following, except for

- A. The special agent's secretary.
- B. The special agent.
- C. The TFIA.
- D. The AUSA's secretary.

CHAPTER NINE – REPRESENTATION – Part I

Representation Prior to a Criminal Investigation

Although many attorneys practice tax law, it is much more common for someone not under investigation to have an accountant rather than a tax attorney on retainer. Even less common is someone having an attorney on retainer specifically for advice on criminal tax law! People just don't often go to their attorney and ask for advice on committing fraud! In all my years in IRS, I have only known of two instances in which a taxpayer showed up at a civil tax audit with a criminal tax attorney in tow. And why do you think they did that? One of them, five years earlier, spent 18 months in a federal prison for tax evasion. And he had good reason to bring his attorney, because he had apparently not learned his lesson during the 18 months of incarceration! The other simply knew that when IRS asked to look at his books and records, he was going to be in trouble! His biggest mistake was immediately invoking his 5th amendment rights at the beginning of the civil audit. The case was referred to CI, and the subject was investigated, tried, convicted, and incarcerated.

The biggest problem for someone who does not have the regular advice of a tax attorney is that she likely will never receive the most important advice that anyone who comes under investigation should have. That is, that she should **NEVER** talk to an IRS special agent out of the presence of a criminal defense attorney. But the fact of the matter is most taxpayers never receive this advice.

The best thing that an accountant, or a tax attorney can do for his clients, is to educate them ahead of time. Obviously, most of your clients are honest, and simply want to avoid paying any taxes that they don't absolutely have to pay. Most accountants never have a client who comes under the scrutiny of IRS-CI. Nevertheless, it is wise counsel to advise all of your tax clients that they should not speak with IRS employees until they have spoken with you first. This is especially true if two agents show up at their home or office unannounced.

Although as we have said, most of your clients will be quite honest, we all know that there are those clients who seem to be magnets for trouble. Generally speaking, if you have a client who is constantly under the scrutiny of local, state, or federal agencies, or seems to be the target of an inordinate number of lawsuits, there is probably a reason for it. And it isn't because the world is out to get him! That is why it is important for you to know your client, whether you are an accountant or an attorney. Know his business, his industry, his character, as well as problems or practices in his industry that could be misconstrued as fraudulent. I don't know how many times I walked into an accountant's office with a summons or subpoena, only to be met with an incredulous response. There

were times when the accountant was not even aware of the ongoing investigation, even though he was contacted long after her client was read his rights!

I once investigated a business man in Orlando, Florida, who's CPA was located in Sarasota, Florida, over 200 miles away. I showed up at the accountant's office, a week after informing his client of the investigation (I also conducted a 3-hour long interview with the taxpayer, who had never been advised by his accountant not to talk to someone like me!). The accountant had no idea that his client was under investigation. The accountant also had never seen his client's place of business, and had never looked at his client's books and records! His client simply sent him his bank statements every month, with a notation by each item to tell the accountant what it was! This was actually used to prepare monthly and annual financial statements, as well as the corporate tax returns!

The CPA stated that he had known the client from college, and one day, he just showed up at the CPA's door, and hired him. The CPA had not had contact with the client in years! Rather than getting to know the client better, or maybe thinking about why a local businessman from Orlando would want to come all the way to Sarasota for an accountant, he was just happy to get a new paying client, and went on about his business. There was a short period of time that I thought that the CPA might have been a co-conspirator in his client's tax evasion. But after interviewing him I came to the conclusion that he was just stupid, and as far as I know, there is no criminal statute prohibiting professional stupidity!

The fact is, hiring an accountant 200 miles away from your business is actually considered to be an indicator of possible fraud to a special agent or revenue agent. It is quite common for people who intend to commit fraud, to hire an accountant whose location is far from their business activities, so that they come under less scrutiny. Let me repeat, it is very important that you know your client and his business, so that neither of you get caught by surprise.

Now, as long as we are talking about clients of questionable character, is it alright to do accounting or legal work for someone who you know to be a ``problem child``? If attorneys never represented people who do stupid or dishonest things, there would probably be a lot more incarcerated people than there are now! The fact is, that is the attorney's job. An attorney representing a criminal is perfectly normal, as long as the attorney is not participating in the criminal activities. After all, it is not unheard of for a defense attorney to find himself indicted along with his client.

It is however a very different thing for an accountant to associate with clients of questionable character. The dirt bag's dirt will rub off on to the accountant. The accountant may very well be dragged down into the mud along with his client, have her own reputation sullied, and she even stands a good chance of facing criminal charges. It should be understood that one of the first questions a special agent asks when tax evasion is discovered is not, "Was her attorney involved? It is, "Was her accountant involved?"

Whether you are an accountant or an attorney, I think that the best policy is to keep your clients in line. How do you do that? By educating them, and by being aware of their

business and financial activities. Let them know when you think they are doing something that could be construed as an indicator of fraud. Do what you can to put a stop to it. Attorneys, if you are not interested in representing this client in a criminal matter, consider dropping him if he doesn't stay in line. Accountants, you should **always** consider dropping a client if he is doing anything illegal or unethical. I am not saying that you **should** drop him in every case. But it ought to be something that you consider. Remember that for accountants, your client's integrity, or lack thereof, can often rub off on you.

What are some of the activities that you should watch out for in your clients? Here are just a few that every tax practitioner should be aware of:

1. Illegal Tax Protest Activities (Here are a couple of great websites to educate yourself and your clients - <http://evans-legal.com/dan/tpfaq.html>, and <http://tpgurus.wikidot.com/>)
2. Use of Offshore Banking and Trusts
3. Tax Schemes which are currently under scrutiny, such as the abusive misuse of Nevada Corporations
4. Un-reported Bartering
5. Mingling of Personal and Business Funds
6. Structuring of Cash Transactions

Each of these items will be discussed further in Chapter 11.

Two final notes for accountants. First, as I have stated that you should consider dropping a client who is doing anything illegal or unethical, you should also think twice about accepting a new client who comes to you specifically because he is under investigation and would like your help. What happened to the accountant that he had while he was getting into trouble? It could be that the former accountant dropped him when he came under investigation. Whatever the reason, taking a client under investigation is going to involve 2-3 years, or more, of all kinds of complications in your accounting practice and in your life. I am not saying that you shouldn't. I am just saying that you should go into the engagement with eyes wide open. At the first sign that he is withholding information from you, or continuing in the behavior that called CI's attention to him in the first place, for your own benefit, cut him loose.

Secondly, if a new tax services client asks you to do things like, 1) leave things off his tax return, 2) add unsubstantiated expense deductions, 3) assist him to conceal assets from IRS collection, or 4) set up offshore bank accounts or Nevada Corporations with bearer stock certificates, remember, he could be an IRS undercover agent shopping you!

Representation During the Course of the Investigation

Being contacted by a new client who has just been advised of a criminal investigation is the most common situation for criminal tax attorneys. Tax offenders often have

accountants doing work for them for years before getting into trouble, but they don't hire attorneys until after the trouble starts.

On a somewhat crude note, get your retainer up front! There often is nothing left at the end of the process. Make sure all payments come to you from legitimate sources. Document them. This is where F. Lee Bailey got into trouble, and he ended up in jail and disbarred. Don't take large amounts of cash. If you do take cash, make sure you file the Form 8300. Document, document, document! Some attorneys feel that they violate attorney client privilege when they file the 8300. The courts do not agree, and have consistently come down on the side of the government¹.

The Special Agent

When you have been contacted by a client under investigation, and have decided to accept the case, one of your very first steps should be to file a Form 2848 power of attorney with the IRS-CI special agent, and then contact him. Set-up an appointment to come to his office and meet with him, and then find out as much about the investigation as you can.

Don't file your own custom power of attorney, or some standard form that you use in any other situation. Use the IRS Form 2848, and fill it out exactly as the instructions dictate. Why? Is it really that important? Yes it is. Depending on the particular CI field office, they may be sticklers for "dotted i's" and "crossed t's". They may only accept originals and not faxed forms. Maybe they're right, and maybe they're wrong. Who cares! That's not the point. Your big battle may come in the court room later on and that's what you want to focus on. Don't start picking fights over stupid little things. Just do it the way they want it done, the first time.

This brings me to my main point about your relationship with the special agent. You need to be courteous. You need as much information as you can get about what he is investigating, and why. You need him to be your friend, to like you. So that when you get into one of the situations, and you will, where the agent is in control, and he can be nice or he can be a jerk, he will already be in your corner, and give your client the extra consideration needed. It is possible to become friendly with the agent. All you need to do is not be a jerk outside the court room.

You can develop a good relationship with CI special agents. Don't get me wrong. Deep down they really don't like most of you. Special agents have learned early in their careers not to trust you. They don't like attorneys. They don't even like most government attorneys, not really. The special agent is all about finding the truth, putting the criminal in jail. He has watched too many times while you try to make him look like the bad guy in the court room, or confuse the jury about the issues when you can't help your client in any other way. He has even recognized when the government attorney exaggerates the facts in order to get the bad guy convicted, which to the agent is just as

¹ Lefcourt v. United States, 125 F3d 79

bad. In his mind, the end does not justify the means. Nevertheless, like a dog, the special agent responds to kindness and respect. Be cooperative to the extent that you are able. Always be courteous. And always remember, the special agent has a large degree of control over the outcome of this case. He determines what to investigate, what considerations to give your client. He writes the prosecution report or the discontinued case report. Everything about the investigation was controlled and completed by the special agent. All the AUSA does is try to get a plea, or try the case at court, and even in this he depends 100% on the special agent. You do not want the special agent to hate you. It just makes your job that much harder.

Although you ought to be cooperative as possible, do not let your client anywhere near the special agent! Even if he has already spoken to the agent before he contacted you, don't let him do it again, not even to deliver a document. Every time you put him in the special agent's presence, you put his freedom in danger. Until there is a plea agreement in place, a letter of immunity from the US Attorney, or a letter from IRS stating that the investigation has been discontinued, your client should never speak to the special agent again, not even in your presence. One slip of the tongue, a quick response before you get the chance to advise him not to answer the question, and your defense could be perforated.

Now, for the accountants: Get an attorney involved immediately! Have I said that somewhere before? I think I have! I think I'll say it again! You are accounting and tax professionals. You are not criminal defense litigators. Your role now must shift to litigation support. You may not even be able to do that, if there is a possibility that you might be called as a witness because your work product is a material part of the investigation. If you attempt to represent a client before IRS-CI (And make no mistake, CI will let you represent. Nothing makes a tax evasion investigation easier than an accountant being the only representative the criminal investigation subject has!) **you will lose and your client will go to jail!** 'Nuff said?

Attorneys, learn everything about your client's income, expenses, activities, and anything else that could come under scrutiny. Hire a private investigator to conduct a shadow investigation. There are a lot of retired special agents out there doing litigation support work now. If you can get one of them, it would be the best thing you could do. You need to know everything about your client that IRS-CI knows, and a retired special agent knows what they are looking for, and where they are most likely looking.

Hire an accountant to take the information that your PI acquires, and compare it to the tax returns under investigation, or have him prepare pro forma tax returns to compare with those already filed. Have him work closely with you, kind of like the revenue agent cooperating with the special agent. It could be a good thing to hire your client's accountant, since he already has some knowledge of your client's financial activities; as long as you're sure that he doesn't have anything to do with the reason your client is under investigation in the first place!

I probably won't have much influence over your personal philosophy on how to best represent a client in a criminal matter. But I do not believe that it is in your client's best interest for you not to know whether or not he is guilty. In a tax evasion case, or any white collar criminal investigation for that matter, you need to know what your client is up against. You need to know everything about his financial dealings, usually more even than he is willing to tell you. Don't stick your head in the sand. If you do, you will most likely get an unpleasant surprise, possible in the middle of trial. If you get surprised, you lose!

Make a decision early on about whether you intend to defend your client at trial, or advise him to seek a plea agreement. The earlier you make that decision, the better. Remember, you can always change your mind, all the way up to sentencing. But, if your client is guilty of the crime, and the government's case appears strong, or if he just wants to plead and get the whole thing behind him, remember: the earlier the better. Consider a pre-indictment plea, if circumstances permit. The longer you drag a plea out, the less inclined the government is to make any favorable concession to your client.

Summary

Representation by a criminal defense attorney prior to the initiation of a criminal tax investigation is very rare for a taxpayer. If he has any type of representation, it will likely be an accountant, or possibly a civil tax attorney.

Since most people are unrepresented before the initiation of a criminal investigation, most will never get the most important piece of advice, which is, **NEVER** talk to an IRS special agent out of the presence of a criminal defense attorney. Attorneys and accountants should do their best to educate their clients about this ahead of time, to the best of their ability.

Accountants and attorneys should know their clients, as well as their clients' business, industry, character, and problems or practices within the industry that may be misconstrued as fraudulent.

Although attorneys represent criminals and people of questionable reputation, it is not the same thing when an accountant does it. It is normal for an attorney to have clients who are criminals. It doesn't mean that the attorney is a criminal. But it is different for accountants. The dirt bag's dirt will rub off onto the accountant. Because an accountant does financial work for the white collar criminal, or the businessman of disreputable character, the accountant's character will likely be called into question along with his client's. CI looks into the preparer of the tax return in the course of the investigation into the subject. An accountant should take this into consideration when accepting a client, along with the client's willingness and ability to pay the bill.

The best policy for accountants or attorneys is to keep their clients in line. Educate them, and be aware of their business and financial activities. Let them know if you think that

they may be doing something that could get them into trouble. Accountants should always consider dropping a client if you know that he is doing something wrong. Accountants should also think twice about accepting new clients who come to them for help specifically because they are under investigation by IRS-CI. If you do accept them as clients, make sure that they are also represented by a criminal defense attorney.

Remember that if a new client comes to you asking you to do things which may be illegal, he could be an undercover IRS-CI special agent. IRS-CI regularly “shops” accountants to confirm allegations regarding a tax return preparer’s willingness to break the law for his clients.

Some of the activities that often get people in trouble with IRS-CI include 1)Illegal tax protest activities, 2)Use of offshore banking and Trusts, 3) Misuse of Nevada corporations, 4)Un-reported bartering, 5)Mingling of personal and business funds, and 6) structuring of cash transactions. These activities are discussed in detail in Chapter 11.

Generally speaking, criminal tax attorneys are only contacted by potential clients after they have been advised of the investigation, but the same client may have had an accountant long before he ever got into trouble.

File a Form 2848 Power of Attorney with the IRS, and then contact the special agent conducting the investigation. It is possible to have a friendly, courteous, and professional relationship with the agent, even though technically, you are adversaries. A cordial relationship may go a long way to help your client at some point down the road. The special agent, to a large degree, controls the outcome of the investigation.

Do not ever let your client speak to a special agent, even in your presence, until there is a plea agreement in place, you have received a letter of immunity, or you have received a letter from the IRS advising your client that the investigation has been discontinued.

Accountants should always get a criminal defense attorney involved when a client comes under investigation. IRS-CI will be more than happy to allow an accountant to represent his client during the course of the investigation. But the outcome will undoubtedly be a conviction and jail time for the client!

Attorneys should learn everything about their client’s income, expenses, activities, etc. He can hire a private investigator to conduct a shadow investigation, or even a retired IRS special agent. Hire an accountant to take the information obtained by your investigator, and make a comparison to the tax returns under investigation. This could be the accountant your client already has, as long as he is not suspected of colluding with your client in some illegal activity.

Make a decision as early as possible as to whether you will represent your client at trial, or seek a plea deal; the earlier, the better. If you are involved in the case during the investigation, consider a pre-indictment plea.

Review Questions

1. It is more common for a person not under criminal investigation to have an accountant rather than an attorney.
 - A. True
 - B. False
2. The biggest problem for someone who does not have the regular advice of a tax attorney is that
 - A. He will never receive all of the really useful tax advice that a tax attorney can give.
 - B. He will likely never come under investigation.
 - C. He will most likely come under investigation for tax evasion.
 - D. He likely will never receive the advice that he should **NEVER** talk to an IRS special agent out of the presence of a criminal defense attorney.
3. The best thing that an accountant or tax attorney can do for his clients prior to a criminal investigation is
 - A. Educate them about how to respond when contacted by IRS, especially CI.
 - B. Advise them not to cooperate with IRS-CI in its investigation.
 - C. Offer to prepare their tax returns.
 - D. Offer to represent them in collection matters.
4. Knowing as much as possible about your tax client's business, character, industry etc., will generally be beneficial to both you and your client.
 - A. True
 - B. False
5. For an accountant, representing or being associated with someone of questionable character or business practices is
 - A. Perfectly legitimate.
 - B. Different than an attorney representing the same person.
 - C. A really bad idea.
 - D. All of the above.
6. Accountants
 - A. Should always consider dropping a client if he is doing anything illegal or unethical.
 - B. Must always consider dropping a client if he is doing anything illegal or unethical.

- C. Are required to drop a client if he is doing anything illegal or unethical.
 - D. Should never a drop a client just because he is doing something illegal or unethical.
7. The use of offshore banking and trusts is illegal under federal laws governing tax evasion.
- A. True
 - B. False
8. All of the following are questionable activities often associated with fraud, which you as a tax representative should be aware of with regards to your clients, except for
- A. Tax Protest Activities.
 - B. The use of Nevada Corporations.
 - C. The use of credit union accounts.
 - D. Structuring of cash transactions.
9. Who should think twice about accepting a new client who seeks his service specifically because he is under investigation?
- A. An attorney.
 - B. Either an attorney or an accountant.
 - C. An accountant.
 - D. Neither an attorney or an accountant.
10. If a new tax services client asks you to do things that seem to be unethical or possibly illegal, he may possibly be
- A. An unethical client.
 - B. An undercover IRS agent.
 - C. An unsophisticated taxpayer.
 - D. Any of the above.
11. Which of the following situations is most common for criminal tax attorneys?
- A. Being advised by a long term client that he is the subject of a criminal tax investigation.
 - B. Being advised by IRS-CI that a long term client is the subject of a criminal tax investigation.
 - C. Being contacted by a prospective new client who has just been advised that he is the subject of a criminal tax investigation.
 - D. Being advised by IRS-CI that a new prospective client is the subject of a criminal tax investigation.

12. If you receive a cash payment of more than \$10,000, from your client,
- A. Document the cash receipt, but do not file the Form 8300, as doing so would violate the attorney client privilege.
 - B. Give the cash back to your client, and demand a more traditional form of payment, ie., check, money order, cashier's check, credit card, etc.
 - C. Document the cash receipt, and file the Form 8300, as the courts have held that doing so does not violate the attorney client privilege.
 - D. Document the cash receipt, but do not file the Form 8300, since the attorney client privilege is still being actively litigated, and IRS is not currently enforcing the issue with attorneys.
13. Any custom created power of attorney form is acceptable to IRS for representing clients in criminal tax matters.
- A. True
 - B. False
14. A defense attorney developing a good working relationship with the IRS-CI special agent will most likely put his client at greater risk of conviction and incarceration.
- A. True
 - B. False
15. You should never let your client near an IRS-CI special agent
- A. Even if he has already spoken to the agent before contacting you.
 - B. Even to deliver a document.
 - C. Until there is a plea agreement in place, a letter of immunity from the US Attorney, or a letter from IRS stating that the investigation has been discontinued.
 - D. Even in your presence.
 - E. All of the above.
16. In which of the following cases is it acceptable for an accountant to represent a client before the IRS in a criminal tax matter instead of an attorney?
- A. If the client does not want to hire an attorney.
 - B. If the accountant has nothing to do with the matters under investigation.
 - C. If the tax matter under investigation involves employment taxes.
 - D. Never!

CHAPTER TEN – REPRESENTATION – Part II

Representation After Indictment

If you are hired post-indictment, boy do you have your work cut out for you, especially if your client intends to put up a fight! You have to do all the things we have already talked about, and the pressure is on to get it done now! Hire the private investigator, hire the accountant. It's going to get expensive and time consuming. You need to have sufficient staff and/or no other pressing commitments.

If you are considering a plea, you'll obviously be seeking as favorable a plea agreement as possible. It is important to know 1) what the government is looking for, and 2) what the government will settle for.

What the government is looking for:

First of all, the government wants the tax paid. They want an agreement from your client to pay what they assert is owed, plus any interest and penalties. Unless you can convince them that the tax computation is wrong, you are going to be stuck with the tax figure that they allege went unpaid. Only the tax due and owing is used in the sentencing guideline calculation, but the interest and penalties will still have to be paid. If multiple tax years are charged, but a plea is accepted for one year and the rest are dismissed, the total tax for all of the years is still used in the sentencing guideline calculation.

Secondly, the government will almost always be looking for some incarceration time. The special agent has spent a lot of time working on this case, and the AUSA has also put in a great deal of effort. The main purpose of criminal tax prosecutions is tax compliance; they want to send a message. Except in rare circumstances, the government is looking to get its pound of flesh.

Once again, the government is trying to send a message to all would-be tax law violators: Don't! They need to get this message out to the public. Therefore, don't expect them to make a deal that will make the whole case go away quietly. The first thing that a special agent does after every indictment, arrest, appearance in court, trial, plea, sentencing, etc., is find a way to get the information to the IRS public information officer, and then out to the press.

The government wants a clear admission of guilt, or adjudication by a jury. No wishy-washy, namby-pamby guilty pleas will be accepted. The government wants your client to stand up in open court and clearly allocute his deeds and his guilt.

What the government will settle for

First, the tax. The prosecution is not going to budge on the tax, unless you can present convincing evidence that the special agent's/revenue agent's tax computation is wrong. This is the figure that will be included in the plea agreement, and the entire alleged tax loss will be included in the sentencing guideline no matter what charges are dismissed per the plea agreement.

There is generally some leeway to argue one's case before the civil IRS after the criminal matter has been resolved, and reduce the amount of tax one must eventually pay. However, one's civil appeal rights are severely limited after one has agreed to a plea with an amount of tax due and owing specified.

Secondly, although IRS-CI wants to see incarceration in as many cases as possible, the judges seem to be on your side, as long as the tax loss is not a ridiculously large amount. In situations where the tax loss is under \$100,000, probation and/or home confinement is very common. Over \$100,000, and the judges begin to be a bit more sympathetic with the government. As with any other type of crime, repeat offenders will tend to get tougher sentences. However, in most cases, tax evasion is not repeated. It is generally committed by white collar types, who learn their lesson after their first criminal prosecution.

What this all boils down to, is that if your client pleads to one count of a multiple year evasion indictment, usually the main indictment, there is a good chance that the government will drop the other evasion counts; once again, the earlier the plea, the more favorable to your client. The government will not budge on the tax computation (at least before sentencing), but if your client can document good reason for it, he may be able to get the tax, interest, and penalties actually paid, reduced later in his dealings with IRS revenue officers.

Representation at Trial

Once again, if you have only been hired after indictment and arrest, you ***really*** have your work cut out for you. But regardless how early you have been brought into the case there are a few very important things to know and to prepare for in advance of the trial.

In most criminal tax violations, there are three elements to the crime, three things that must be proven in order to convict. You only have to disprove one of those elements in order to obtain an acquittal. Obviously, you would like to disprove as many of the elements as possible, however, one of them is sufficient. So which one should you focus on?

Let's use for this example, the elements of Title 26 USC Section 7201, Tax Evasion. They are:

- 1-There is a tax due and owing,
- 2-The tax, or payment thereof was evaded, or an attempt was made at evasion.
- 3-There was an intent to evade, or in other words, there was willfulness.

Let's talk about the tax due and owing first. This is going to be the hardest part of the government's case for you to attack. Keep in mind that to arrive at the tax due and owing, there hasn't been any guesswork, or at least if there was in the beginning, it has been eliminated by the time it is submitted at trial.

Remember that there is a difference between the methods used by civil IRS employees and criminal investigators to compute tax due. When a revenue agent or tax auditor makes a civil tax determination, he can say, "This is what I think you owe", and then make an assessment based on his opinion. It is an educated and informed opinion, but he can basically throw everything, including the kitchen sink, into his assessment. It of course must be reasonable and sustainable with fact, and if you don't agree, you can appeal. But for all intents and purposes, you have the burden of proof if you feel the assessment is wrong.

In a criminal case, the burden of proof rests with the government. In the beginning there is a strong likelihood that a revenue agent has been involved, and submitted the initial tax computation. Remember from a previous chapter that the revenue agent is the IRS tax expert, so often times the original information has come from him. But at the point where the case goes from civil to criminal, things begin to change.

The special agent can't support a charge based on anyone's opinion, regardless of how educated that opinion may be. He can't even base a charge on a strong indication. His tax assertions must be based on evidence carrying the criminal level of proof: beyond a reasonable doubt. If there is any reasonable possibility that the revenue agent's or special agent's assertion could be wrong or flawed, he must compute the tax in favor of the defendant. This is strict IRS and DOJ policy¹.

After the revenue agent and special agent have finished their work, the tax figures are reviewed by a supervisory special agent, the Centralized Case Reviewer, a Criminal Tax Counsel attorney, and a Department of Justice Trial Attorney, before arriving in the hands of the Assistant United States Attorney who will eventually prosecute the case. What this means for you and your client is that the tax figure to be used at trial is pretty solid. Anything that can be computed in the defendant's favor probably already has been. Every benefit of the doubt is given to the defendant. Deductions that the revenue agent may not have allowed in his computation, the special agent will have to allow. If there is

¹ Internal Revenue Manual 9.5.13.2.1

any gray area, any controversy, any question, any concern, any doubt, it has already been resolved in favor of the defendant.

What is left is what the government can absolutely prove was taxable income, or a personal non-deductible expense. It has been computed either by the special agent or the cooperating revenue agent. It has been reviewed at five different levels before arriving in the hands of the AUSA. This is a pretty tough element to attack. To be thorough, you will want your litigation support accountant to take a look at it. But keep in mind that this is probably the strongest part of the government's case, and you are likely wasting your time. Unless you have some overwhelming evidence of a specific computational error, or of the taxability of some item of income, it is unlikely that you will win this point. It is a much better use of your time to attack the grayer areas of the evasion case. Those areas will be the 2nd and 3rd elements of the violation.

The second element is the act or acts, or attempted act or acts, of evasion. It isn't enough that a person simply failed to file a tax return, or failed to pay the tax due. These acts, in and of themselves, may or may not be prosecutable crimes. But for an evasion conviction, the government must prove that the defendant took specific steps to evade, hide, conceal, deceive, or defraud the government in any way. It also may not be enough that the defendant filed a false tax return. The government must demonstrate that the defendant knew that the tax return was materially false, and that it wasn't an accident or an error.

How can the government prove what the defendant knew? The best way is with his, the defendant's, own words, in the form of undercover recordings, correspondence, or other documents. Naturally not only is it the best way, but it is also the most difficult way, and this type of evidence can be rare.

The next best way would be to document testimony from third parties, preferably reputable ones. Often the government is successful at drawing inferences from specific acts that are documented, such as concealing money in offshore bank accounts, or directing third parties to pay the defendant in cash. The more of these types of acts that can be documented, the stronger the government's case. And you may be certain that if the government is planning on prosecuting your client, they believe they can prove multiple acts. In 16 years as a special agent, I have never seen a case accepted for prosecution where the government was only able to prove one specific act of evasion.

How can you attack this element? Although this is not as tough a nut to crack as the actual tax computation, it can still be a difficult one. You must show that the defendant did not perform an act that the government said she did. If the act is the filing of a tax return, your defense might be something like:

- It was a rough draft and was filed by accident.
- The defendant was not aware of the additional income; it was an oversight.
- The defendant's spouse prepared and/or filed the return and the defendant signed without examining the return.

- The defendant did not file the return; his preparer did, without his permission.

If the act is concealment of income, your potential arguments might be:

- Someone else received the income and deposited it into an unauthorized account. The defendant didn't even know he received it.
- The defendant never received any such income. The government erroneously believes that the offshore account belongs to the defendant.
- The income deposited into an offshore account was not taxable to begin with.

Finally, the third element of the crime of evasion is willfulness, or intent to evade. This should be where you expend your greatest effort, if you want to get your client acquitted. This is the ultimate gray area. How can the government prove what is going on inside your client's head. It can't; it can only attempt to demonstrate it by using your client's words and deeds to infer what his intent was. The prosecution must obtain and display evidence overwhelming enough to convince a jury that your client intended to defraud. The government will present evidence such as:

- Documentation that your client personally received income that was not reported.
- Grades from school, or testimony regarding your client's business acumen, thereby demonstrating that he is a smart guy, and knows what taxable income is.
- Testimony from co-workers, employees, employers, friends, associates, competitors, etc., regarding comments made by the defendants about his tax liability. Depending on the source, this can be especially damaging.
- Records from offshore bank accounts, storage units, or any other place used to conceal assets.
- Documentation of business practices that can be shown to have no other purpose other than to conceal or deceive.

How do you defend against this element? By showing that there was another legitimate reason for doing what he did, not tax evasion. For example, he wasn't hiding assets from the IRS; he was hiding them from creditors, an ex-wife, or from a lawsuit. You can show that whatever he did is a normal action for his particular industry, for reasons other than tax evasion. A method occasionally used would be to show that he relied on the advice of a tax professional such as an accountant or an attorney. This one is tough, because your relied-upon professional may become the fall guy, and could come under scrutiny by the IRS, in the event your client is found not guilty. Possibly your client didn't

receive a form 1099, so he believed that the income was not taxable. Whatever the method, you must show that there was a legitimate reason for the act, not necessarily evasion.

Representation Post-Conviction

If your client is ultimately convicted of the tax crime, you may think that your representation has come to an end. But there is still work to do. Probation will now begin its pre-sentencing investigation. It would serve your client well to be as cooperative as possible with them. There may still be some “wiggle room” as it pertains to obtaining a reduced sentence. You need to make sure that all required information is reported to the probation officer, for the benefit of your client.

For example, were there multiple parties in the tax fraud, some of whom have not yet been indicted or tried? If he hasn’t already, now is the time to start offering the government information, evidence, and an agreement to testify. Sentencing can be deferred until after the conditions of cooperation have been met, after grand jury or trial testimony has been given.

If there are no serious, credible objections to the tax computation, pay the tax, interest, and penalties, as soon as possible. If the IRS has frozen your client’s tax accounts, which is likely, they can get you information regarding posting a cash bond in the amount of the taxes, interest, and penalties. Document this, and provide evidence of payment to the prosecuting attorney, as well as to the probation officer. If you have to repatriate funds from offshore to do this, then do it, document the repatriation, and provide the documentation to the prosecuting attorney and the probation officer.

It has been my experience that the old adage “Birds of a feather flock together” is quite true. I think tax evaders, or people of that particular mind set, must be attracted to each other, for whatever reason. It’s just anecdotal, nevertheless, I can’t begin to count the times where the subject of one of my investigations, had business or social dealings with the subject of a completely unrelated investigation. If your client has information regarding another tax crime violator, or possibly other federal crimes that another agency may be interested in investigating, the US Attorney will likely be willing to listen. It could result in a substantial sentence reduction.

IRS is very interested in positive publicity, at least positive for the IRS. Large, loud, public apologies, admissions of guilt, error, or regret can all go a long way to getting a sentence reduced. In one case, a convicted medical professional took out a full page advertisement in the local newspaper, admitting his guilt and his misguided belief that he was exempt from filing tax returns, and making a promise to file his returns, pay all his taxes, and never to violate the law again. That got a lot of attention from the US Attorney’s office, the judge, and the resulting sentence was negligible.

Above all, remember that unless you are planning to appeal, now is definitely the time to become humble and cooperative. Being loudmouth, obnoxious, combative, and

uncooperative will do no favors for your client. When I was a new IRS employee many years ago, a revenue agent in a small IRS office, I worked with and socialized with the two special agents in our office. We became good friends, and one of the agents and I began to trade minor practical jokes with each other. On one occasion, when I had gotten the agent with a particularly good practical joke, he put a mock serious look on his face and stated, “Mr. Martinez, I believe you have just violated the POSA Statute!” Totally confused, I asked just what the POSA Statute was, to which he replied, “Pissed Off Special Agent!”

Never violate the “POSA Statute”, especially at this point when your client is to a large degree at the mercy of the court, the Assistant US Attorney (or DOJ Trial Attorney as the case may be), and yes, even the special agent. The federal judge listens to the recommendations of the probation officer and the US Attorney. The probation officer listens to the recommendations of the US Attorney and the special agent. The US Attorney also listens to the special agent, and Post-Trial, he will likely give a lot of weight to the agent’s recommendations. Like it or not, *ya gotta* play nice with the special agent. On the same note, never violate the POUSA (Pissed Off United States Attorney) Statute. And I probably don’t need to say this, but never, ever, ever, violate the POFJ (Pissed Off Federal Judge) Statute!

In a drug and money laundering trial that I assisted with several years ago, the defendant decided to change his plea to guilty in the middle of the trial. He chose to do this thinking that it would result in a reduced sentence, even though he had not cooperated in any way before the trial or after his guilty plea, other than pleading guilty. Upon receiving a stiff prison sentence of 27 years, the defendant leapt to his feet in the court room and began screaming obscenities at the judge. After he was subdued by federal marshals, the judge added two more years to his sentence, and asked if he would like to try for more! Later, based upon the judge’s strong recommendation, the defendant (who was not a citizen of the United States, spoke limited English, and had lived most of his 30 years in a tropical climate, in a Spanish-speaking US territory) was transferred to a federal penitentiary in the northern Midwest, where winters are long and cold, and the inmate population for the most part spoke only English. When he gets out, he will immediately be deported to the country of his birth, which by coincidence, is actually an English speaking country (His entire family moved to Puerto Rico when he was only a small child, so he did not grow up speaking English. He no longer has any friends and family there, as his family members are all now in Puerto Rico and are United States citizens!); kind of ironic when you think about it. The point is, always be respectful towards federal judges. Once again, ‘nuff said.

Summary

If an attorney is hired to represent a criminal tax defendant post-indictment, he will have a lot of work to do. If his client intends to fight the charges, it would be wise to hire a private investigator as well as an accountant right away, to assist in preparation.

In terms of seeking a plea agreement, there is a difference between what the government is looking for, and what the government will actually accept. First of all, the government wants the tax to be paid, and will not accept anything less, unless you can prove the amount to be incorrect. Your client may also be able to argue the amount with the civil IRS after the resolution of the criminal matter, but this is not often successful.

The government is also looking for incarceration time, however the courts often disagree. If the tax loss is not large, probation and/or home confinement is common. The government is aware of the courts' bias, and can often be prevailed upon to reduce the incarceration time sought.

At trial there are normally about three elements that the government must prove in order to prevail. You on the other hand only need to disprove only one of those elements in order to prevail. Invariably, the government's weakest element will be that of willfulness, and therefore is the area on which you ought to focus most of your efforts.

Even after a conviction, there is hope for a reduced sentence. However, the time has now come for your client to eat a little humble pie and to be as cooperative as possible. Now is the time to offer testimony or evidence against others involved in his crime, or in some other unrelated crime in which the government may have interest. Pay the tax due and owing, as well as the interest and penalties and provide documentation of the payment to the prosecuting attorney as well as the probation officer. You can always contest the amount later in a civil proceeding, and receive a refund if you prevail there, It may also be in your client's best interest to make a public admission of guilt along with a sincere apology. Being combative at this point in the process will not do any favors for your client.

Review Questions

1. It is easier to start representing a defendant post indictment, than if he had hired the lawyer as soon as he learned of the investigation.
 - A. True
 - B. False

2. Putting on a defense of criminal tax allegations is
 - A. Time consuming.
 - B. Really easy.
 - C. Inexpensive.
 - D. Something that can easily be done with a bare bones legal staff.

3. With regards to a plea agreement, the government wants to see
 - A. The whole case go away quietly.
 - B. An agreement that makes everybody happy.
 - C. An admission of guilt, but does not necessarily need to hear an allocution.
 - D. Mandatory incarceration, except in cases involving a relatively small amount of tax deficiency.

4. With regards to a plea agreement, the government will not budge with regards to
 - A. Incarceration
 - B. The tax deficiency
 - C. Multiple counts of evasion in the indictment.
 - D. Use Immunity.

5. In the case of sentences including incarceration, federal judges currently seem to
 - A. Generally favor the prosecution.
 - B. Strictly follow federal sentencing guidelines.
 - C. Generally favor the defendant.
 - D. Be very consistent throughout all judicial districts.
6. Invariably, the weakest part of the government's evasion case will be the tax due and owing.
 - A. True.
 - B. False

7. If there is any gray area with regards to the computation of the tax deficiency, it most likely has already been resolved in favor of the defendant prior to trial.
 - A. True
 - B. False

8. An effective way to defend against the second element of an evasion case, the alleged act of, or attempt at, evasion is
 - A. To show that the act, or acts, resulted in de minimus tax savings.
 - B. To try to demonstrate that the government misidentified the person who actually performed the act or acts in question.
 - C. To demonstrate that the defendant is a sovereign citizen not subject to the income tax laws of the United States.

- D. To demonstrate that the act, or acts, in question were performed in furtherance of some alternative non-tax related purpose.
-
- 9. The following items are all examples of intent to evade income taxes, except for
 - A. Documentation of business practices that can be shown to have no other purpose other than to conceal or deceive.
 - B. The existence of bank accounts in the names of minor children.
 - C. An admission of guilt, made to an associate.
 - D. Documentation of a large amount of income received personally by the defendant, which was never reported.
-
- 10. Being combative and confrontational, all the way to the sentencing, is a great way to demonstrate innocence and obtain a lesser sentence.
 - A. True.
 - B. False.

CHAPTER ELEVEN – ESSENTIALS

Attorneys and accountants don't often discuss criminal tax issues with clients prior to a client coming under criminal investigation. Whether you are an accountant or an attorney, there are several good things to know that will help you represent your client better, before he ever gets to the point of coming under investigation. Some of these we have discussed in previous chapters, but I repeat them here because they are important and bear repeating.

Representation by a Non-Attorney or Civil Litigator

If your client informs you that he thinks he may be under investigation, and you are not a criminal defense attorney, do not try to represent him before IRS-CI! If you do, your client will lose, and he will go to jail! And on top of everything else, he may try to sue you for not advising him to get a criminal attorney instead! Advise your client to hire a criminal defense attorney. If you are an accountant, you can also have a power of attorney for your client, along with the attorney. But your role now must become one of litigation support.

Do Not Speak to IRS-CI Special Agents

Advise all of your tax clients (even those that you believe are the epitome of honesty) that they should never talk to an IRS-CI special agent who advises them that they are under criminal investigation, until after they have consulted a criminal defense attorney.

Know Your Client

Know your client. Know his character, his business, his industry. Be aware of any innocent behavior that could be perceived as fraudulent activity. You may be able to repair any real or perceived problems before an investigation starts.

Questionable Clients

Know the risks of associating with, doing accounting or tax work for, or representing someone with questionable character or reputation. If you choose to associate with clients with questionable reputations, you must realize that their reputation may be extended to you, simply because of that association. Remember that simply representing a dirt bag is normal; attorneys do it every day. If you get involved in, or facilitate questionable transactions, in any way, you are no longer just an attorney representing a client. You may have sacrificed your attorney-client confidentiality. Your records can be summoned or subpoenaed, and you can be indicted along with your client. There's this nasty little thing called conspiracy.

Accountants associated with a dirt bag will get dragged down into the mud with him, have their reputations sullied, and even stand a good chance of facing criminal charges.

Source of Fees

Know the source of the fees that you receive. Be careful of taking the proceeds of illegal activities. Remember F. Lee Bailey. He took a fee from a drug dealer, and then refused to disclose the source. Then, after the source was disclosed, he refused to give up the fee as part of the forfeiture of drug proceeds. Not only was he jailed for contempt, but he eventually lost the proceeds to forfeiture, and he was disbarred for disreputable conduct. O how hard the mighty fall!

Keep Your Clients in Line

Be aware of pitfalls into which your clients may take a tumble. Here are a few of the perennial schemes that seem to catch greedy taxpayers on a regular basis:

Intentional Failure to File. This comes in two flavors, (1) simply not filing tax returns, and (2) the Spies (pronounced spees) Evasion¹. Simple failure to file an income tax return by intent is a misdemeanor, punishable by not more than 1 year incarceration and a fine. In most cases, the sentence is much less than one year and often is only probation or possibly home confinement. Simply failing to file a tax return for one year will most likely result in the assertion of failure to file and failure to pay penalties, along with interest accrued. However failure to file for multiple years, will often be interpreted by IRS-CI as a pattern of intent, and will result in prosecution.

IRS-CI will also be more likely to pursue investigation and prosecution if the subject has taken an additional step known as an affirmative act of evasion. In other words, besides simply not filing, the subject actively conceals the receipt of taxable income, or conceals assets, or something as simple as falsifying a Form W-4 so as to avoid the withholding of payroll taxes. This elevates the crime from failure to file, to evasion; from misdemeanor to felony. This is known as a Spies Evasion.

Illegal Tax Protest. This is a more potent form of failure to file. It has many manifestations, but the basic argument is that there is no constitutional authority for the federal income tax. Its proponents do not simply choose not to file, but object to the very idea of filing federal income tax returns. They take steps such as filing blank tax returns (this is actually evasion since a false income tax return is filed), moving assets and income offshore to banks in tax haven countries, and filing documents in their respective countries revoking their “social security numbers and citizenship”. You can dissuade your clients from falling into the tax protester trap by using these websites: <http://evans-legal.com/dan/tpfaq.html> and <http://tpgurus.wikidot.com/>. The first website, created by Philadelphia Attorney Daniel Evans, has every conceivable tax protest argument, with an excellent explanation why each one is ridiculous and will not hold water. The second, also created by Mr. Evans, has a “dossier” on a number of famous illegal protesters, and the results of their activities.

¹

Offshore Banking and Trusts. This type of scheme is very popular currently, because as with other schemes, it propounds the belief that one can move assets and income offshore, and that they will then be off the radar of the IRS. Well, sometimes they are, and sometimes they aren't! The fact of the matter is, that if the income ever had a US source, or the asset was ever in the US, it can be traced, and often is. Are assets moved offshore safe from IRS collection? Possibly. But if you live in the US, you must maintain some assets here, and if IRS can't get the ones offshore, they can seize, or levy, or lien the ones that are here! Or they can use all kinds of tactics to make your life a living hell until you move your assets back to the US and pay your taxes. And as for criminal investigation, CI doesn't need to get your assets back into the US. They just need to show that you had US income, and then moved it out of the country to (1) evade the payment of taxes assessed, or (2) conceal it so that you could falsely underreport income on your tax return. You can still be prosecuted successfully without ever trying to collect the tax.

Nevada Corporations. This is becoming quite the cottage industry, with the assistance of the Nevada state government. It isn't often that a legislative body becomes a co-conspirator in a federal felony, but the Nevada legislature has done it somewhat successfully. They have created the "Nevada Corporation", with bearer stock certificates. Whoever holds the stock certificates is the owner of the corporation, with no names recorded anywhere. The Nevada registered agent can honestly say, when asked, that he has no idea who the current stockholders are. He is often the only listed corporate officer. The taxpayer pays someone, usually a Nevada attorney to set up the corporation, and open a bank account. He receives the "no name" stock certificates. He then starts transferring money into the new corporation, and claims a business expense in the amount of these transfers, which he then deducts against any taxable income. This is generally accompanied by an offshore corporation, to which the Nevada corporation transfers the money received from the taxpayer. The Nevada corporation claims money received from the taxpayer as business income, and then deducts an equal amount as a business expense to represent the money transferred offshore. As the offshore company is not a US company, its income is not taxable in the US, and so the money has successfully been moved out of the reach of the IRS. Or so it would seem.

If CI can discover the existence of the Nevada Corporation, it's relatively easy to follow the audit trail from the taxpayer, to Nevada, and then offshore. It's also relatively easy to show that the Nevada corporation is a sham, and that no legitimate business expense was incurred by the taxpayer when money was transferred. The scheme works as long as IRS doesn't discover the existence of the Nevada corporation. But once it is discovered, an evasion case is not hard to prove.

Unreported bartering. Bartering does not exist anymore as a tax avoidance scheme to the extent that it existed in the 1970s and 80s, but it is still out there. The premise is that if professionals and business people exchange goods and services rather than paying money for them, no taxable event has occurred. Each party to the transaction has received income, and expended a product or service equal to that income, and therefore it is a "wash", with no tax consequences. Let me explain why this premise is fallacious.

Let's say that I, as an accountant, prepare your tax return for \$500. I have \$500 of taxable receipts. What was my deductible expense? In a service industry like accounting and tax preparation, there really isn't a "cost of goods sold" per se. If I have an employee prepare the return, and the employee is paid \$20/hour, for 5 hours work, then my cost would be \$100. Add to that incidentals like paper, ink, my review time, and we'll say that there is a total cost of \$300, for a net taxable profit of \$200.

Now you as an attorney, perform legal services for me, for which you bill me \$500. Your product cost is similarly estimated to be \$300, and you have a net taxable profit of \$200.

In each case, our cost to produce is less than \$500, allowing us to earn a profit, our reason for being in business. That profit is taxed to each of us, even though we have performed similarly valued services for each other. The misguided barterer's view is that because my accounting work is valued at \$500, and your legal work is valued at \$500, that is the deduction we are allowed against the income received when we barter services. Not true. We get the same deduction that we would get in a traditional arms length transaction - \$300. Hence, there is a taxable event.

Granted this is not as serious a problem as it once was, but it is still out there. I had this issue in the last criminal case that I had prosecuted. Your client can get into trouble with this one, at least civilly if not criminally, and should be warned about it.

Mingling of business and personal funds. Although this is not inherently illegal, it is dumb, and a sign of poor business management and money management skills. But the main reason your client should not do this is because it is seen by civil IRS auditors as a "badge" of fraud. Often, small business owners who may be skimming income from their business will deposit business receipts into their personal bank accounts or pay personal expenses from the business accounts. In a criminal investigation, both of these activities are frequently used to demonstrate intent to underreport taxable income and thereby evade income taxes. Even if it is shown later that all of the appropriate taxes were paid, why put yourself through the pain and heartache of a criminal investigation to get to that point. Do it right the first time, and don't draw attention to yourself.

Structuring. Structuring cash transactions in order to avoid reporting requirements, is not only a felony, it is also an indicator of the intent to defraud, and it is a red flag that in most cases is immediately reported to IRS-CI. In other words, structuring is really dumb! Teach your client this principle and advise him in the strongest terms not to do it!

Title 26, the Internal Revenue Code, and Title 31, the Bank Secrecy Act, both have code provisions dealing with structuring. What it boils down to is this: financial institutions and other businesses are required to file reports with the IRS of any cash transaction of \$10,000 or more. If the financial institution or business fails to file this report when required, the employee or officer responsible faces potential prosecution for a felony. If anyone, the business owner, bank or business employee, or the transactor herself, takes steps to defeat the filing of this report, they can be prosecuted. One method that

transactors often use to defeat the filing of these forms is to structure large transactions into multiple smaller transactions of less than \$10,000.

For example, an auto dealer sells a sports car to a known drug dealer for \$100,000 cash. He is required to file Form 8300, **Report of a Cash Transaction of \$10,000 or More**, with the IRS reporting the receipt of the cash from Mr. Drug Dealer, along with the customer's current address, social security number, denominations of the cash, etc. The auto dealer advises the drug dealer to make him several payments of \$9,000, over the period of several weeks, until the total has been paid. That way he is not required to file the report. In this case, both the car seller and purchaser are guilty of the crime of structuring. Or the auto dealer may accept all of the money, put it in his office safe and not file the 8300, then structure his bank deposits so as to avoid the filing of the bank report, Form 4789 **Currency Transaction Report (CTR)**. He does this, because if the bank files its Form 4789, IRS may wonder why the auto dealer did not file the Form 8300.

Now what we have been talking about is money laundering. What does all this have to do with tax evasion investigations? Structuring cash deposits into the bank is also a common tactic used in tax evasion schemes. People who are trying to evade the payment of income taxes often engage in cash transactions, or may even direct customers to pay them in cash, since cash is easier to hide. In this case, structuring cash deposits is not only illegal, it demonstrates the intent to evade, an element of tax evasion. The person engaged in this activity can be charged with both evasion and structuring.

Now you may think, if the person structures his bank deposits and no CTR is filed, how will the IRS find out? Most business people are aware of the CTR requirements. What many people are not aware of is that most bank employees are trained to recognize structuring, and banks are also required to file another report, a Suspicious Activity Report (SAR) when they suspect structuring. The structurer will never even know that this report has been filed until IRS-CI comes knocking at his door.

Every IRS-CI field office has a SAR Review Team, an information gathering project which employs several special agents who spend a great deal of their time reviewing SARs, and identifying the ones that need follow up. If your client structures cash transactions, chances are his activities will at the very least be scrutinized by a review team.

Accountants, Part I, New Clients. Think twice about accepting a new client who comes to you because he is currently under investigation. A lot of reputable accountants refuse to accept clients under these circumstances. Many more drop clients who come under investigation, simply because they are concerned about the damage to their reputation. I certainly am not counseling anyone to do this! People under investigation definitely need representation and accounting help. But remember that an attorney representing someone suspected of criminal activity, and an accountant working for the same suspect, are two horses of a different color! An attorney does not come under scrutiny because he represents a suspected criminal. That is his job! An accountant does not always have

that luxury. Anything you submit to IRS in your client's behalf now may become suspect. You may be scrutinized along with your client. Once again, I am not counseling accountants not to do work for tax evasion suspects. I just want you to fully understand that IRS does not look at you in the same way that it looks at a criminal defense attorney. You need to keep that in mind when you accept this type of work. If you are interested in this type of work, consider doing litigation support services, working directly for the defense counsel and not for the client under investigation.

Accountants, Part II, Shopping. I have advised you how to help your clients stay out of trouble. But don't forget the many ways that you can get yourself into trouble. You can bring an investigation onto yourself by assisting your client to do any of the things that I have already mentioned. But, there is yet another consideration for you to ponder. If a new client comes to you for tax services and asks you to (1)leave things off of the tax return, (2) add expense deductions that are obviously overstated or non-existent, (3)assist him to conceal assets from collection, or (4)set-up offshore accounts or Nevada corporations, keep in mind that, he could be an IRS-CI undercover agent. CI "shops" accountants that have a reputation for "crossing the line". Even if the new client simply shows up with tax problems and looks to you for a solution, if you suggest something illegal or unethical, you could be walking into a trap.

If an accountant has a habit of crossing the line once in a while, he ought not to think that he can stay under the CI radar forever. Unethical accountants always anger someone; usually competitors who are familiar with the unethical practices being used. Whether it is because he is taking away their business or offending their sense of right and wrong or fair play, someone will mention him to CI sooner or later. Often, it is a revenue officer or revenue agent who sees or hears of specific unethical practices being used over and over again.

Review Questions

1. What is the first thing that a civil tax attorney ought to do upon learning that his client is under investigation by IRS-CI?
 - A. Refer him to an accountant.
 - B. File a Form 2848 Power of Attorney with IRS-CI.
 - C. Refer him to a criminal tax litigator.
 - D. Tell him to go ahead and talk to the Special agent investigating him.
2. It's alright for your client to speak to an IRS-CI Special agent
 - A. Only after receiving a grant of immunity from the United States Attorney.
 - B. After the agent explains to your client about his civil rights.
 - C. If his attorney is present.
 - D. Never!
3. It is better to know as much as possible about your client's business and industry, than

to be completely ignorant of his financial activities.

- A. True.
- B. False.

4. Which of the following statements is true?

- A. No reputable attorney should ever represent someone of questionable character or reputation.
- B. No reputable accountant should ever represent someone of questionable character or reputation.
- C. An accountant representing an individual of questionable character is seen differently by IRS than an attorney representing the same person.
- D. An accountant representing an individual of questionable character is no different than an attorney representing the same person.

5. The source of the fees that an attorney receives

- A. Is considered by the federal courts to be subject to attorney client privilege.
- B. Is irrelevant.
- C. Must be reported to the IRS.
- D. Becomes relevant if the attorney knows that it is from illegal activities.

6. Intentional Failure to File Income Tax Returns includes all of the following except

- A. Simple Tax Evasion
- B. Misdemeanor Failure to File
- C. Spies Evasion
- D. Illegal Tax Protest

7. Which of the following is a common illegal tax protest tactic?

- A. Frequent violent demonstrations in front of federal buildings.
- B. Bombing IRS offices.
- C. Revoking ones social security number and citizenship.
- D. Underreporting income on an income tax return.

8. Once someone moves assets into an offshore location, they are forever off the IRS radar.

- A. True.
- B. False.

9. "Nevada corporations"

- A. Are no different than corporations incorporated in any other state.
- B. Are part of a well-known completely legitimate tax avoidance strategy.
- C. Neither of the above.
- D. Both A and B.

10. The premise behind bartering is that

- A. A taxable event occurs only when professionals or other business people exchange goods and services.
- B. A taxable event occurs only when non-professionals or other people exchange goods and services.
- C. No taxable event occurs when professionals or other business people exchange goods and services rather than paying money for them.
- D. No taxable event occurs when professionals or other business people pay money for goods and services.

11. Mingling of business and personal funds is

- A. Illegal.
- B. A wise business practice.
- C. A sign of business acumen.
- D. Seen by IRS as a possible “badge” of fraud.

12. Structuring of cash transactions

- A. Is rarely reported to the IRS.
- B. Is always a generally accepted business practice.
- C. Is in most cases immediately reported to the IRS.
- D. Is only common in cases of money laundering.

13. A reputable accountant ought to think twice about accepting a new client who comes to him when he needs help with a criminal investigation, because

- A. This type of client generally has problems paying his bills.
- B. It is much more difficult than the non-criminal work he is used to doing.
- C. The accountant’s reputation could suffer damage, and he could draw attention by the IRS onto himself.
- D. Doing so is a “badge” of tax fraud.

14. When IRS-CI goes “shopping”

- A. They are looking for unethical defense attorneys.
- B. Undercover special agents go to tax return preparers to find out if they are overcharging clients.

- C. Undercover special agents try to entice accountants into committing a crime that they would not normally commit.
- D. Undercover special agents offer tax return preparers with questionable reputations the opportunity to prepare fraudulent tax returns for the agents.

FINAL COMMENTS

I hope that the information that I have provided here will help attorneys and accountants better represent their clients who have stumbled into the criminal investigation realm of the IRS. I have tried to show how the investigation of possible criminal violations of the Internal Revenue Code is a much different ball game than the usual audit or collection issues. Once again, your understanding of these differences will, to a large degree, determine whether your client does jail time, or gets a slap on the wrist.

After reading the book you may wonder at its lack of legalese, sophistication, technical language. None of these things was my intent. If you want an exhaustive manual of the criminal investigation function of the IRS, that tells you everything you want to know about its inner working, there is a \$700 2-volume set available (not mine) written by a former IRS attorney. It will give you everything except:

- 1- A step-by-step practical guide to representing a client through an IRS-CI investigation and prosecution.
- 2- An inside look at IRS-CI through the mind of a special agent.
- 3- An understanding of how things actually work at IRS-CI, as opposed to how the Internal Revenue Manual says they are supposed to work (if you are interested, the entire Internal Revenue Manual is online, including Part 9 – Criminal Investigation).

In this sense, I hope this book has been of value to you. If you have any further questions or comments, or feel the need to offer a correction, you can reach the author at me@carymartinez.net.

Thank you,

Cary M. Martinez

November 12, 2010

ANSWERS TO REVIEW QUESTIONS

Chapter 1

- 1.B
- 2.D
- 3.B
- 4.C
- 5.D
- 6.B
- 7.D
- 8.C
- 9.B
- 10.D

Chapter 2

- 1.A
- 2.B
- 3.D
- 4.A
- 5.B
- 6.C
- 7.B
- 8.A
- 9.B
- 10.D

Chapter 3

- 1.A
- 2.A
- 3.B
- 4.C
- 5.A
- 6.D
- 7.D
- 8.A
- 9.D
- 10.B
- 11.C
- 12.C
- 13.B
- 14.A
- 15.A

Chapter 4

1.C
2.B
3.C
4.B
5.D
6.A
7.C
8.C
9.A
10.A

Chapter 5

1.B
2.A
3.B
4.D
5.C
6.A
7.D
8.B
9.A
10.B

Chapter 6

1.D
2.A
3.C
4.C
5.B
6.D
7.C
8.D
9.A
10.E

Chapter 7

1.A
2.C
3.B
4.D
5.D
6.B
7.C
8.A
9.B
10.A

Chapter 8

1.C
2.B
3.D
4.B
5.A
6.C
7.B
8.D
9.B
10.A

Chapter 9

1.A
2.D
3.A
4.A
5.D
6.A
7.B
8.C
9.C
10.D
11.C
12.C
13.B
14.B
15.E
16.D

Chapter 10

1.B
2.A
3.D
4.B
5.C
6.B
7.A
8.D
9.B
10.B

Chapter 11

1.C
2.A
3.A
4.C
5.D
6.A
7.C
8.B
9.C
10.C
11.D
12.C
13.C
14.D