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Drake University College of Law CLE Program

How to Represent Clients Before the IRS
Criminal Proceedings (when things get interesting)
Civil Appeals (when we just can't agree)

PRACTICAL ANSWERS FOR TAX LAWYERS IN THE TRENCHES

HANDLING TAX CONTROVERSIES

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I. *INTRODUCTION*

A. The Differing Roles of Counsel in Tax Practice and Related Ethical Issues

Attorneys involved in tax practice of any kind encounter differing ethical restrictions as their roles evolve with a particular client. There are at least three distinct areas in the tax representation of clients and as our role changes our options and responsibilities change. In brief the first area (and generally the most flexible) is the planning stages. When representing a single client and providing prospective business advice (such as how to spin off a subsidiary, how to sell a portion of a business, how to combine businesses) taxes clearly play a role in the planning and often "intent" is nearly as important as the structuring and thus documenting (papering if you will) the intent and purpose of transactions is good lawyering assuming only that such documenting and structuring is consistent with the reality of the situation. That said, there are areas where planning to get around legal restrictions on desired business conduct can get close to (or cross over) the line and lead to investigations of the attorneys. Examples include shell entities designed to protect funds from taxation (off shore entities) or perhaps from IRS collections. Also, as will be discussed later, under the surface of these planning situations can be issues related to multiple representation of parties with potentially conflicting interests.

The normal planning flexibility however diminishes significantly as we move to the next stage such as preparing tax returns reflecting past transactions. Here our ethical (and legal) restraints limit the presentation and treatment of items to the reality of what has occurred and too common problems present themselves where efforts to "improve" the situation with backdated documents or minutes of meetings that did not occur becomes a temptation. While not common, there have been situations where the attorney has been drawn into a criminal inquiry when the lawyer's role appears to have been to facilitate "false" documents or transactions. That is not to say that a document presently dated purporting to reflect earlier events are necessarily wrong or improper where based on objective evidence of validity but should be truthful on their face as well (such as using present dates where related to prior transactions).

The emphasis of this outline however relates to events subsequent to return preparation where again the rules and limitations on counsel change again. A number of events can occur after the preparation and filing of the tax returns that require the attorney's attention. In nearly all of the situations, the attorneys' role will be as that of an advocate rather than as an advisor or a

"recorder" of events and accordingly the ethical issues may be somewhat more straightforward. The following situations commonly confront an attorney in tax practice:

(1) Discovery of Prior Return Errors. Where an attorney discovers that an error has been made in a prior year's return, the attorney clearly has an ethical duty to advise that client of that error. Circular 230, § 10.21 mirrors that requirement by requiring the attorney to "advise the client promptly of the fact of such non-compliance, error or omission." Treasury Regulations provide that a taxpayer should then file an amended return but it does not discuss the preparer's responsibility in that regard. Treas. Reg. §§1.451-1(a); 1.451-1(a)(3)(i).

Given that the IRS has, in recent years, proven they will prosecute individuals who make "voluntary disclosures" as would be the case in an amended return, the attorney is not required to require his or her client to file the amended return but clearly it may impact in the future the correctness of subsequent returns and representations of counsel in the event of an audit. The ABA's opinion number 314 states that "in all cases, with regard both to the preparation of returns and negotiating the administrative settlements, the lawyer is under a duty not to mislead the IRS deliberately and affirmatively, either by a misstatement or by silence or by permitting his client to mislead."

(2) Representations in the Audit. Where the attorney has been the tax preparer, the attorney initially must be aware of the fact that to the extent this may become an adversarial proceeding the attorney's role as an advocate must be tempered because the attorney may also be a witness relative to the facts that may be in dispute. Beyond that the attorney must be aware of the ethical responsibility not to mislead through either affirmative acts or silence to a Revenue Agents or, at the appeals level, the appeals officer. In addition, the attorney has obligations under not only the attorney-client privilege but also the ethical compulsions in maintaining client secrets inviolate. What this means is that the attorney may not disclose tax information to Internal Revenue Agents (civil or criminal) without either the client's specific approval (preferable in writing) or a Court order. The issuance of a summons by the Internal Revenue Agent does not solve this problem. Compliance with a summons without a court order or client approval would be violative of, at least, Section 423A.2 of the Iowa Code and Cannon 4 of the Iowa Code of Professional Responsibility. ABA Committee on Professional Ethics and Grievances, Formal Op. 94-385 (July 5, 1994) holds that if a client does not consent to voluntary compliance an attorney must resist a government subpoena for his or her records by all lawful means until such time as a judicial order issues compelling compliance.

Circular 230 provides that a practitioner is required to exercise due diligence in determining (i) the preparation and filing of documents with the IRS; and (ii) the correctness of oral and written representations made by the practitioner to the Treasury Department. Circular 230, §10.22. Circular 230 also provides that if a practitioner knows a client has made an error in or omission from a return or other document that the internal revenue laws require the client to execute, the attorney must advise the client of such error or omission. Circular 230, §10.21.

Rule 32:1.16 provides that a lawyer shall not represent a client (or continue to represent a client) where (a) it will result in a violation of the law or Iowa Rules of Professional Conduct; (b) the course of action involving the lawyer's services reasonably could be criminal or fraudulent; (c) the lawyer's services have been used to perpetrate a crime or fraud. Rule 32:3.1 notes that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not frivolous. Our prior Canons provided specific guidance that is undoubtedly included in the general descriptions contained in 32:1.16 and 32:3.1 providing that a lawyer shall not knowingly: (a) make a false statement of material fact or law to the tribunal; (b) fail to disclose a material fact to the tribunal when necessary to avoid assisting a criminal or fraudulent act by the client; (c) fail to disclose adverse legal authority to the tribunal; (d) offer evidence the lawyer knows to be false, and shall take remedial measures with respect to evidence offered which is later discovered to have been false, and such obligations continue to the conclusion of the proceeding. Prior DR 7-106(B)(1) and DR 7-102 (A). A lawyer may refuse to offer evidence the lawyer reasonably believes is false. In all cases with regard to the preparation of returns and negotiating administrative settlements the lawyer is clearly under a duty not to mislead the IRS deliberately, either by misstatement or by silence or by permitting a client to mislead. ABA Model Rules 4.1 and 8.4(c); ABA Comm. on Professional Ethics and Grievances, Formal Op. 85-352 (July 7, 1985). Knowingly giving or participating in any way in the giving of false or misleading information to the Department of Treasury, a Treasury officer or employee, or any tribunal authorized to pass upon Federal Tax matters in connection with any matter pending or likely to be pending before them, constitute a disreputable conduct for purposes of Circular 230, §10.51(b). In addition, it can constitute a crime under, at least, 26 U.S.C. § 7212 and 18 U.S.C. §1001. Circular 230 prohibits practitioners from neglecting or refusing to properly submit records or information of any matter before the IRS in response to a proper and lawful request by a duly authorized IRS officer or employee. Circular 230 also prohibits practitioners from interfering with any proper and lawful information in an effort by the IRS unless the practitioner believes in good faith on unreasonable grounds that the information is privileged or the information gather activity of doubtful legality. Circular 230, §10.20.

As to issues of advice given to a client relative to documents or items in the client's possession that may undermined a tax position ABA Model Rule 3.4 provides that a lawyer shall not: (a) unlawfully obstruct another parties access to evidence, or unlawfully alter, destroy or conceal materials having potentially evidentiary value, nor counsel or assist another in doing so; (b) falsify evidence, counsel or assist a witness to commit perjury, or offer an illegal inducement to a witness; (c) knowingly disobey an obligation under the Tribunal's rules, except for an open refusal based on the assertion that no valid obligation is present; (d) make frivolous discovery requests or fail to be reasonably diligent in complying with opponent's discovery requests; (e) in trial, elude to irrelevant or inadmissible matters, assert personal knowledge of the facts, (except when testifying as a witness) or state personal opinions as to the justness of a cause, the credibility of a witness, or the culpability or guilt or innocence of a civil litigant or accused in a criminal proceeding.

B. Who is (are?) the client(s)? Further Ethical Issues

Engagement letters, conflict discussions, maintaining privilege, multiple representation

Multiple representation is a common "problem" in tax practice. It arises in the preparation of joint income tax returns (where joint and several liability can arise), in entity returns and the like. Such "joint" representation can become far more of a problem in the event of audit and/or collection activities. Iowa Rules of Professional Conduct, Rule 32:1.7 provides, in part, that " . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation …is directly adverse to another client; or (2) there is a significant risk that the representation …will be materially limited by the lawyer's responsibilities to another client…or a personal interest of the lawyer." As to the second part, such rule provides for informed waiver of the conflict as long as the claims are not against the two clients.

Husband and wife can pose conflicts of interest in their joint representation particularly where innocent spouse provisions may be available. Even the recommending the signing of joint return (joint liability) can be a problem in some cases. Rule 32:1.8 (g) notes the issues relative to trying to resolve conflict issues for multiple clients (an IRS audit of a couple's tax return for example) requiring that the lawyer shall not participate in an aggregate settlement unless each client gives informed consent, *in writing* signed by the clients.

The joint representation of entities and the individuals that control them pose similar problems. Rule 32:1.13 provides that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. While one person entities may pose little practical problems and pursuant to 32:1.13(g) the lawyer, with the consent of the entity (where required under 32:1.7), may also represent its directors, officers, employees, members, shareholders, or other constituents. However, where there are partners or more than one shareholder, significant problems can develop for the attorney in the joint representation of individuals and entities. Where potential criminal allegations exist, the attorney-client privileges may be later waived by the entity to the surprise and detriment of individual employees. In cases of potential criminal allegations, certain constitutional rights (including that of counsel) can make this an even more difficult issue to resolve. At the bare minimum, counsel must disclose to clients potential conflicts that exist to the joint representation and the possible consequences of such conflicts if they become actual (including withdrawal from representation of all parties). Generally these warnings should be put in writing.

Similar to 32:1.7, ABA Model Rule 1.7 provides that a lawyer shall not present a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents. A lawyer shall not represent a client if the representation may be materially limited by the lawyers' responsibilities to another client or a third person, or the

lawyer's own interests, unless the lawyer reasonably believes the representations will not be adversely affected and the clients consent after full explanation of the positive and negative factors. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients unless each client consents after consultation and disclosure. ABA Model Rule 1.8 (g), Devore v. Commissioner, 963 F.2d 280 (9th Cir. 1992) (Dual representation of couple, one spouse having potential innocent spouse defense.) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after disclosure and consultation, or use information relating to the representation to the disadvantage of the former client except as provided in the Rules relating to confidential information or when the information is generally known. ABA Model Rule 1.9. ABA Comm. on Professional Ethics and Grievances, Formal Op. 93-377 (December 9, 1993) addresses the question of issue conflicts. It holds that with the consent of the interested clients an attorney may only assert opposing positions in the same jurisdiction if the attorney reasonably concludes neither case is likely to produce harmful precedent. ABA Comm. on Professional Ethics and Grievances, Formal Op. 93-377 further holds that inconsistent positions may be asserted in different jurisdictions with informed client consent if the attorney reasonably believes one decision will not affect the other. Section 10.29 of Circular 230 likewise prohibits a practitioner from presenting conflicting interests in practice before the IRS without the express consent of all directly interested parties after full disclosure has been made.

In a potentially criminal tax situation this concern becomes even greater and probably the best advice is that multiple representation will not be undertaken. Despite that, there are occasions when "cost" and other factors lead to clients strongly urging multiple representation. Without modifying the foregoing perhaps something like this in the engagement letter can provide some degree of comfort (not a great deal):

> **Section 7. Conflict of Interest/Waiver of Objections/Joint Defense.** Each of the Clients acknowledge that the Attorneys have discussed with them the conflict of interest issues related to this joint representation as well as the potential consequences of a joint representation in a criminal investigation. Clients have determined that they wish joint representation and each specifically agrees that they will not assert that any of their respective communications or document produced by them to the Attorneys during this representation may be relied upon as a basis to later claim that the Attorneys should be disqualified from further representation of the other Client. In addition, both Clients agree that the Attorneys shall not be precluded from utilizing in the examination of such testifying Client any or all information acquired from such Client. Clients authorizes Attorneys to enter into joint defense arrangements with attorneys representing other potential targets of the Government as the Attorneys reasonably determine is appropriate to advance the interests of Clients.

Clients acknowledges that in Joint Defense arrangements information gained from the other attorney's clients (directly or through his attorney) that is intended to be confidential may not be released to any outside party without the express consent of the clients providing the information.

II. ADDRESSING CIVIL DISPUTES

A. ADMINISTRATIVE

1. Agent.

Certain adjustments (such as Automated Underreporter (AUR) cases or math error notices and Automated Substitute for Returns (ASFRs) where the service substitute a return for a nonfilter based on third party information result in the Service increasing the tax liability for the taxpayer via an assessment with no hearing or "live" agent to discuss it with and without a formal notice of assessment. Typically if there is a basis to contest the issue it is done by paying the assessment and then filing a claim for refund and following the refund procedure outlined under the Court Options below (assuming no one responds to the refund claim) or if a collection notice you may be able to obtain results (at least with a live human being that has access to the file) by requesting a collection due process hearing.

Otherwise, returns are selected based on a (secret) scoring system either for compliance purposes (say for a particular industry) or simply because it is felt that such a score is likely to lead to audit adjustments. Audits can then occur through correspondence, office interviews or during a so-called field exam. Correspondence or office "audits" typically relate to verifying a specific item on a return and is resolved based on the substantiating information provided. Field exams typically involve more complex business returns where the Agent comes out to the location (or the accountant's or lawyer's office) to examine the requested records.

Typically in audits meetings are scheduled and documents requested informally by letter format but 26 U.S.C. §7602(a) permits the Service to obtain records and/or interviews by summons. If the Service summons third party record-keeper's documents (such as the taxpayer's bank records from the bank), 26 U.S.C. §7609(a) requires that the Taxpayer (or his/her representative) receive a copy of the summons. The Taxpayer has rights to object to the production of such third party records but there are few objections that would prevail.

At the conclusion of the audit the return is either accepted or a proposed deficiency is proposed. Substantial delays in the completion of the audit and the issuance of the proposed deficiency documents where relatively large "errors" have come to light during the audit can be a source of concern (has the case been referred for criminal investigation?). Otherwise, where a proposed deficiency assessment is received relatively quickly following the audit, if the taxpayer agrees he or she normally signs a form agreeing to immediate assessment. Otherwise a so called 30 day letter is issued (15 day in the case of office audits typically) and the taxpayer can either appeal

within that time frame or if no appeal or agreement, normally a statutory notice of deficiency will be issued (a so called 90 day letter by certified mail). At that point the Taxpayer can either file a petition in Tax Court within such 90 day time period or allow it to expire and then (or before) pay the assessment. Should Taxpayer ignore the 90 day letter and decide later he wishes to appeal the issue he then must pay the assessment (or a portion of it for divisible taxes), file a claim for refund and, after 6 months assuming no resolution, proceed to Federal District Court or the U.S. Court of Federal Claims.

2. Supervisor. In cases involving audits with an agent, an option exists to request a conference with the Agent's supervisor who can change results. A procedure that does not normally appear to be cost efficient.

3. Appeals. Assuming an unagreed case then an appeal must be filed with the IRS within, normally, the 30 day time period. In smaller dollar cases it can be as simple as asking for an appeal but for most disputes involving attorneys it must be done in a formal written appeal. The format is clearly described in the written notices regarding appeal rights and at the IRS website and requires setting forth the asserted facts, issues in dispute and relevant law. The Appeals Division is required to be independent of the rest of the Treasury Department with a goal of achieving a result that is fair and impartial to both the Taxpayer and the Government. It has a high degree of success in this mission.

Appeals handles administratively a due process review of jeopardy or termination assessment (26 U.S.C. §7429) and in some cases can provide the Taxpayer if he/she is the prevailing party with reasonable costs in the proceeding (26 U.S.C. §7430). Beyond normally assessment disputes, Appeals also can handle collection cases, liens, rejected offers in compromise, termination of installment payment agreements and early filing of liens including jeopardy levies. Appeals also has jurisdiction to determine abatements of interest on a deficiency attributable, in whole or in part, to delays of Service managers and employees in performing a managerial or ministerial act, or their error or delay in paying any tax. 26 U.S.C. §6404(e). Again, if matters can be resolved at the appeals level it is clearly the most cost efficient of the tax dispute appeal proceedings and statistically a very large percentage of disputes are resolved at the Appeals Division. Where resolution is not achieved at Appeals (or the step is bypassed) the Statutory Notice of Deficiency (90 days letter) will be issued (normally by certified mail) and the Taxpayer has 90 days to file in Tax Court. If the petition is not timely filed the only remaining remedy is to pay the amounts assessed and file a claim for refund and pursue the other Federal Court options.

B. COURT OPTIONS

1. TAX COURT

a. Jurisdiction

The Tax Court is a court of limited jurisdiction. Typically its jurisdiction is predicated on a deficiency asserted by the IRS in income, gift, or estate taxes (Subtitle A and B taxes) often evidenced by a Statutory Notice of Deficiency (served by certified mail). Thus the need for statutory notice of deficiency for these taxes and certain excise taxes (excise taxes on public charities, private foundations, qualified pension plans) and then the timely filing of a petition. Note that if the IRS issued a deficiency arising from a math or clerical error (not accompanied of course by a deficiency notice) the Tax Court does not have jurisdiction nor does it have it for certain excise taxes and employment taxes. The Tax Court does have jurisdiction in regards to penalties included in a notice of deficiency (26 U.S.C. §§6651, 6665(b)), accuracy related penalties and failure to pay penalties and taxes asserted against a transferee. Under post-TEFRA partnership rules, once a Notice of Final Partnership Adjustment (FPA) is issued, the personal representative of the partnership has 90 Days to file a petition contesting the FPA. Tax Court also has jurisdiction to issue declaratory judgments regarding qualifications of exempt organization, qualification of certain retirement plans, valuation of gifts, elections to pay estate taxes in installments, failure to grant innocent spouse relief as well as collection due process hearing results and employment status determinations by the Service and several other areas.

b. Attorneys

Attorneys representing the IRS in Tax Court are from within the Treasury Department. There is a small case division (taxes at issue cannot exceed $50,000 in any year).

c. Procedures/Appeal

There is a small case division (taxes at issue cannot exceed $50,000 in any year). If the taxpayer did not initially use the Appeals Division there is a short period of time where that is still available and then settlement efforts must be with the attorneys representing the IRS here. The Judge "rides circuit" and thus trial normally will be close to the taxpayer's residence (same state at least). Discovery is very much informal (but also required) where each side must exchange pretty much all relevant information without formal discovery requests. Depositions are rare and only with Court approval, and stipulations are substantially encouraged (read "required"). In the event either party wishes to appeal the decision it will be to the Circuit in which the taxpayer resides (here of course the 8th Circuit) which could be relevant in the event there is a split of authority on an issue relevant to the case. The Tax Court here should follow 8th Circuit guidance. While there are technically shifting of the burden of proof after the Plaintiff has handled part of its burden, as a practical matter in issues other than fraud penalties (where the

Government has the burden by clear and convincing evidence), the burden of proof is on the taxpayer.

d. Costs, fact decider

This is the least expensive of the Court options, the Judge only handles tax cases and thus tends to be knowledgeable in most tax issues (and probably "technical") and trial itself is again informal (as compared to other federal court options) and a jury is not an option. Depending on the Courts travel schedule it can be a relatively fast (year or so) trip to trial or perhaps longer. During the period that the case is pending, absent court order normally all collection efforts regarding the assessment are suspended. In the event the taxpayer losses, he/she will owe interest on taxes and penalties sustained. Payment of the taxes during the pendency of the case removes the Tax Court's jurisdiction (however a so called cash bond approach can be used with the IRS pursuant to Rev. Proc. 2005-18 and 26 U.S.C. §§ 6402(a), 6511(a) and 6511(b) that will stop interest running on the amount sent to the IRS under those provisions as of the date of the IRS receipt).

In the Tax Court the taxpayer is vulnerable to an additional deficiency if the IRS raises new issues during the litigation because the filing of a petition here suspends the statute of limitations on assessments until a final decision is rendered, plus 60 days. 26 U.S.C. §6503(a). In that case the burden of proof as to the new matters would be on the Government. In either the Federal District Court or the Court of Federal Claims, the statute is not extended (to other than the issues in the complaint) and normally will run before litigation is concluded.

2. FEDERAL DISTRICT COURT

a. Jurisdiction

The federal district courts have concurrent jurisdiction with the Court of Federal Claims over suits for refund of federal income taxes, penalties and interest. 28 U.S.C. §1346. The federal courts (but not the Court of Federal Claims) have jurisdiction over suits for refund of §6700 penalties for promoting abusive tax shelters and §6701 penalties for aiding and abetting understatements of tax liabilities under §6703(c)(2), 28 U.S.C. and the 15% tax return preparer penalties under §6694. As with the Court of Federal Claims, the full taxes and probably penalties must be paid in (other than for perhaps divisible taxes), a refund claim filed and then 6 months permitted to pass before suit can be brought.

b. Attorneys

Attorneys representing the IRS in Federal District Court tax cases normally are attorneys in the Tax Division of the United States Department of Justice (Washington, D.C.) not the local assistant United States Attorney.

c. Procedures/Appeal

Jurisdiction as noted above normally requires payment of all of the taxes at issue, filing a claim for refund and then waiting 6 months (without the refund being granted), suit can be brought in the U.S. District Court appropriate for the tax payer. If the tax is a divisible tax (like payroll taxes, excise taxes and the like), it may be possible to pay the tax (under protest) for one period for one transaction and then file a claim for refund and wait the required 6 months and file suit. Appeal will be to the 8th Circuit here in Iowa and presumably the trial court will follow any case history in the 8th Circuit. The case proceeds as a normal federal action, with required discovery, depositions, interrogatories, document production and the like. It is a relatively expensive forum for tax litigation (the Government attorneys are not overly concerned about costs, their client prints money).

d. Costs, fact decider

Here the Federal District Judge will handle the case but either party may request a jury for fact issues. Depending on the Judge, knowledge of the tax issues would be mixed and there are relatively few tax cases tried in the Federal District Court. Presumably with consent a Federal Magistrate can handle the case and if both sides agree, a jury can be waived. A relatively expensive venue for tax litigation.

3. UNITED STATES COURT OF FEDERAL CLAIMS

a. Jurisdiction

As it relates to tax issues, in general the Court of Federal Claims can hear claims for money against the federal government pursuant to the Tucker Act, 28 U.S.C. §1491(a)(1) and Title 26 §7422. In general the taxpayer is the Plaintiff (with the burden of proof on all but certain items such as the fraud penalty) and must have paid the full amount of the disputed money to the Government and then sought it back with a refund claim filed more than 6 months before filing suit. Normally the statute on the refund is 2 years from the date of payment but still subject to the normal 3 (or 6) statutes as to anything other than the money just paid in. Suit normally must be brought within 2 years of a disallowance of the refund claim. Certain divisible taxes can be handled by paying for a divisible unit (assuming similar legal issues involved with the others and then filing the refund claim for those amounts). Divisible taxes are things like excise taxes, wagering taxes, withholding taxes, trust fund recovery tax, There is a split in authority regarding whether penalties and interest must also be paid in full before suit is brought but assuming penalties are anything other than automatic penalties, they too must be paid.

b. Attorneys

Attorneys representing the IRS in the United States of Court of Federal Claims are attorneys in the Tax Division of the United States Department of Justice, Claims Court Section.

c. Procedures/Appeal

Jurisdiction as noted above normally requires payment of all of the taxes and probably penalties at issue, filing a claim for refund and then waiting 6 months (without the refund being granted), suit can be brought in the U.S. Court of Federal Claims. While many of the normal rules and procedures applicable to U.S. District Court apply, they do have separate and somewhat distinct rules and requirements as well and of course you must be admitted to the United States Court of Federal Claims. Formal discovery is in the discretion of the Court here (although still similar to federal district court). Most all of the filings are electronic. The Court is located in Washington, D.C. but most matters are handled by phone and the Court can appoint a special master to travel to the taxpayer's state to take evidence for factual determinations. Again, if the tax is a divisible tax (like payroll taxes, excise taxes and the like), it may be possible to pay the tax (under protest) for one period for one transaction and then file a claim for refund and wait the required 6 months and file suit. Appeal here will be to the U.S. Court of Appeals for the Federal Circuit and presumably the trial court will follow any case history in that Circuit (and/or Court of Claims decisions). Depending on the case law in the Circuit (here for us the 8th Circuit) it does provide forum shopping opportunities. Otherwise, the case proceeds as a normal federal action, with required exchanges of witness lists and factual assertions, followed by discovery, depositions, interrogatories, document production and the like. It is an expensive forum for tax litigation (As noted above, the Government attorneys are not overly concerned about costs, their client prints money).

d. Costs, fact decider

An expensive forum, no jury is available; the Judges tend to be more familiar with tax matters as that is a material portion of their work. Since normally taxes have been paid in, interest no longer is running which can ease the ultimate cost and further payments under protest can be made without adversely impacting jurisdiction (in cases where a portion of the divisible tax was paid for jurisdiction).

III. IT IS JUST A MISUNDERSTANDING FEDERAL CRIMINAL TAX AND RELATED ISSUES

Because federal tax crimes are generally crimes of specific intent (the individual actually knew what was on the return or what was done was "wrong" and knowingly violated the tax laws rather than being assumed to know the law), much of a case often is built on the Taxpayers' statements to Agents (civil and criminal) and, as will later be noted, false statements to an Agent doing an examination is a crime (a felony) in of itself as well also being evidence that the "mistake" was not necessarily that innocent.

The Criminal Investigation Division (CID) of the Internal Revenue Service handles most tax crime investigations using "Special Agents". Cases can arise in a number of ways (disgruntled

spouse, ex-employee [perhaps seeking the "reward" that may be available], co-conspirator now under investigation, suspicious transaction report filed by a financial institution (normally related to cash withdrawals or deposits)) but most often arise as a result of a referral from a civil agent during an audit. Things that may trigger the civil agent to refer include finding changes or errors in the taxpayer's books, excessive deposits (particularly to a previously non-disclosed bank account) for reported income, or the purchase of assets that seem out of proportion to the earnings reported. The civil agent will not likely disclose that the case is being referred for criminal investigation but keys include a substantial delay with no action in a civil audit following discoveries of substantial "errors" in a return. The next thing typically to happen (assuming a power of attorney is on file requiring the Service to go through the attorney or accountant to meet with him/her) is a request for a meeting to include the taxpayer to button up the civil case that is "unexpectedly" attended by one or two new individuals who have just a few questions to clear everything up. Normally a bad interview to permit.

For years most attorneys dealing in this area felt (and prosecutors and courts tended to agree with them) that an individual simply denying something to an agent (such as he knew the tax return was not accurate) was not actionable. Then two circuits took the position that the "Exculpatory No" doctrine did not have a legal basis. In Brogan v. U.S., 522 US 398 (1998) rejected the "exculpatory no" doctrine holding there is no exception to criminal liability under 18 U.S.C. §1001 (false statement), making interviews or "clever" answers all the more risky.

While all tax crimes do not require that any tax be due and owing from a return that was filed, as a general statement part one is that there is something "wrong" with a return or form under the law and the second part (normally the important part) is "why". If the "why" is an intention act presumably intended to either conceal things or obtain benefits not entitled to under the law that is the crime (often for felonies along with a requirement that an affirmative act must be done to help achieve the objective.

Criminal tax cases tend to drag out for an extended period of time. The statute of limitations for most of the Title 26 allegations is 6 years from the due date of filing the return or the date it was filed (whichever is longer). After the Special Agents finished their investigation (and the collection of document to support the case), it is subject to approval and a Special Agents Report (SAR) is prepared. Assuming approved out of that office, it is then sent to Saint Louis where it is reviewed again. You can go to Saint Louis but normally they will provide no information so it is up to you to talk them out of the case in the dark. After that the case goes to the Justice Department in Washington, D.C. which must approve all primary tax crime prosecutions. If you send a letter to the Justice Department requesting a hearing when the investigation starts you normally will be granted such a hearing. It can be productive but it is not a discovery process.

If the Justice Department decides the case should be prosecuted it will be returned to U.S. Attorney's Office in the taxpayer's district with instructions (normally to indict for specified charges and specified years (normally 3 years) but on occasion with local discretion.

This is an extended processes and of course interest is running on any taxes and penalties that will ultimately be determined to be owed (the federal fraud penalty is 75% of the taxes related to the fraudulent amounts) and interest on both accrues from the due date of the return and Iowa will later assess based on the resolution of the federal case. Cash bonds discussed above should be used in these cases where it is clear some amounts will be owed in an effort to reduce the overall civil tax impact that will continue following resolution of the criminal case (and where fraud is established, there is no statute of limitations for such year for the IRS is assessing.

What then are the potential crimes?

1. TITLE 26 OFFENSES

A. 7201. When people talk about tax fraud they generally are talking about a violation of this section. What is required? (i) Tax Due And Owing (income, gift, estate taxes, payroll taxes); (ii) an affirmative act done to further the objective; and (iii) Willfulness-subjective standard (subjective standard, subject to willful blindness exceptions [basically the jury can conclude you knew if you, in effect, put your hands over your eyes to avoid knowing the law], collective corporate intent, legal uncertainty (can you be prosecuted for violating the law if it is unclear what the law is?). It is important to note that it is not limited to false tax returns (evasion of assessment) but can also include evading payment (shell entities, hidden assets when you owe taxes and the like). Also, while not used often, helping someone else commit a tax crime (evading payment or assessment) can make you guilty of the crime they are committing (along with conspiracy).

B. 7202 Trust Funds—failure to account for and pay over—willful, there have been prosecutions for failure to remit the funds withheld from an employee's salary, normally when it is a repeat situation or different entities are used to repeatedly avoid payment the so called responsible officer can be prosecuted for this felony section (or the Service can use §7215 where the responsible person fails to remit after the Agent makes it clear what the obligation is and that it is a crime not to remit…misdemeanor).

C. 7206(1) - false material statement (return, affidavit, claim)-under oath similar to 7201 but no tax liability needs to be established (3 rather than 5 maximum prison term and somewhat lower fine but such reductions of little ultimate value as normally we are dealing with multiple years). False means not true and known to be not true when made. Material doesn't have to be very material to qualify and is a mixed question of fact and law. Would the information have

helped the IRS in an investigation or audit probably always enough. This section can be used to prosecute return preparers that knowingly include false material on the taxpayer's return.

D***. 7206(2) -*** In addition to potentially being chargeable with the actual crime (like tax fraud), anyone that aids or assists someone to commit a tax crime commits a tax crime under this section. Again, an application of the section relates to return preparers.

E. 7212(a) Interference-making their job harder? Isn't that what you are paid for? Typically used where someone threatens an agent or file false claims against them but it is being expanded and would include a customer that provided a false invoice to a company that requested it to "shore up" a false deduction. U.S. v. Marek, 548 F.3d 147 (1st Cir. 2008). Destroying records? What if they are the 'phony invoices'? Probably. Submitting false financial statements to IRS collection agent. Yes.

F. 7203-failure to file return or failure to pay or failure to supply information (keep books? yes)

G. *Others-* 7204, 7205(a), 7207, others.

2. TITLE 18 & 31 OFFENSES

(i) 18 U.S.C. 1001 false statement (is "no" enough? i.e. did you commit the crime? Probably can be prosecuted if you did)***; (ii) 18 U.S.C. 2(a) or (b)*** (if you help, you are in for the ride and can be prosecuted for the primary crime)***; (iii) 18 U.S.C. 287(False Claims); (iv) 18 U.S.C. 371 Conspiracy; (v) Money Laundering; (vi) 18 U.S.C. §1956 (***Financial Transaction Money Laundering; Transportation Money Laundering; and Financial Transaction Undercover Money Laundering***); (e) Structuring, 31 U.S.C. 5324; (f) FBAR reporting, 31 U.S.C. §5322*** (there is that little box on your schedule B to the 1040 then there is another form to file come April 15th [FinCen report 114 filed separately and perhaps Form 8938 with the 1040 for certain foreign assets])***; Forfeiture (civil 18 U.S.C. 981& criminal 18 U.S.C. §§ 1956 & 1957)*** (You know you have violated it when the bank will not tell you what is going on but your account is frozen, but in a few minutes some nice Special Agents will be by to talk to you about it)**.** Structuring is not just putting currency into a bank in less than $10,000 amounts at a time to avoid the bank reporting the currency transaction (of course the bank may well report it as a suspicious transaction for less than that) but can also include taking cash out of a bank in less than $10,000 amounts when you need in excess of $10,000 for some purpose. Advising someone to do it to avoid "attention" is of course advising someone to commit a crime. See above.