

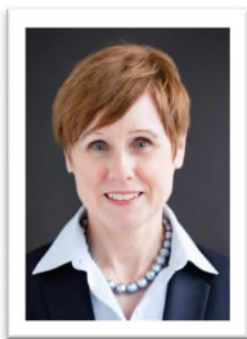
California Journal of Tax Litigation

A Publication of the Tax Procedure & Litigation Committee
Taxation Section of the State Bar of California

Q2 2017 Edition

Message from the Chair

*Carolyn M. Lee, Morgan, Lewis & Bockius LLP**



Our heads are round so our thoughts can change direction.--Francis Picabia.

In times such as these, we need to remain both flexible and steadfast. Flexible to effectively advocate for our clients with tax authorities who themselves are dealing with unpredictable, unprecedented internal and external pressures. Steadfast to our duties of competence and ethical practice while advocating zealously for our clients. Fortunately, the California Tax Bar – both private and public practitioners – remains true to

its culture: Productive and constructive, seeking the right (or at least fair) result when addressing taxpayer issues. What would we do without one another for knowledge sharing, humor, and a shoulder to cry on?

Please set aside time to read this issue of the California Journal of Tax Litigation (the Journal) to the very last word. The Journal speaks to federal and state controversy topics of interest. The table of contents to the left showcases each feature. We are most grateful to all the contributors. I also want to recognize in particular the over-and-beyond collaboration of Jason Galek, Galek Law, and Jeff Titus, Law Offices of Jeffrey A. Titus, who were crucial to this issue's development.

Anticipating comments, no doubt regular Journal readers are scrutinizing the Table of Contents for Robert Horwitz's Recent Tax Cases of Interest, a regular and always anticipated Journal feature. We plan to publish these case profiles as a Journal supplement in June, to accommodate Robert's current profusion of Court and client deliverables.

TP&L's quarterly member meetings are underway, beginning with the March 24, 2017 Sacramento meeting addressing the intersection of IRS and FTB penalties which included a thoughtful discussion about bringing first time FTB penalty abatement protection to California taxpayers. Our next meeting will be held June 16, 2017 in Santa Ana. Lavar Taylor, the Law Offices of A. Lavar Taylor LLP, will speak with us about a taxpayer's right to challenge a

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KEY DATES

Quarterly Meeting of the Tax Procedure & Litigation Committee <i>Law Offices of A. Lavar Taylor LLP, Santa Ana, California</i>	June 16, 2017, 11:00 a.m. – 3:00 p.m.
Q3 2017 <i>California Journal of Tax Litigation</i> Submission Due Date	August 15, 2017
2017 Annual Meeting of the California Tax Bar and California Tax Policy Conference <i>Carlsbad, California</i>	November 1-3, 2017

Interested in learning more about the TP&L Committee, or publishing in the California Journal of Tax Litigation?
Contact Chair Carolyn Lee, carolyn.lee@morganlewis.com, or Vice-chair Kevan McLaughlin, kevan@mclaughlinlegal.com.

tax liability in a Collection Due Process (CDP) posture pursuant to IRC §6330(c)(2)(B) or §6330(c)(4). Lavar's advocacy placed him in argument before three Courts of Appeal in the span of three months. Members will learn about the issues, results from the Courts of Appeal, and next steps. These TP&L quarterly meetings are accessible to more members through remote telephone conferencing (sadly, not yet equipped for remote lunch delivery).

Articles and other content always are welcome for the Journal, devoted to providing value to TP&L members and all readers. In particular, we encourage contributions from YTL lawyers; that is, attorneys practicing tax for fewer than ten years (whatever other practice area you may have had previously). Ideas for articles or features also are appreciated. Let us hear from you: Chair Carolyn Lee, carolyn.lee@morganlewis.com, or Vice-chair Kevan McLaughlin, kevan@mclaughlinlegal.com. Remember the TP&L adage: Publish. Fame follows. (Other benefits include referrals, notes from acquaintances and friends and a deeper understanding of your submission topic.)

* Carolyn Lee practices tax controversy with Morgan, Lewis & Bockius, LLP from the Firm's San Francisco office. Carolyn represents individual and business taxpayers in federal and state matters including audits, administrative challenges, offshore disclosures, and litigation before the Tax Court and US District Courts.

Highlights of the Q1 2017 TP&L Meeting – Sacramento

The program: Bridging the Gap between California and Federal Tax Controversy Practice.

Speakers: Eric Yadao, FTB Tax Administration and Procedure Bureau, and Jason Galek, Galek Law

The TP&L Committee conducted its Q1 meeting on March 24, 2017 in Sacramento. Eric Yadao, counsel with the FTB Tax Administration and Procedure Bureau, and TP&L advisory member Jason Galek, Galek Law, spoke regarding Bridging the Gap between California and Federal Tax Controversy Practice. Greenberg Traurig LLP kindly and generously hosted the meeting yet again at its Sacramento offices, for which we thank G-T attorney Courtney Hopley. Courtney is the immediate past TP&L Chair, and is the Committee's liaison from the Taxation Section Executive Committee.

Eric and Jason explained the FTB and IRS penalty regimes, comparing and contrasting provisions. They highlighted the purpose and burdens of proof pertaining to penalties, and particularly addressed common federal and California penalties. Eric and Jason chose to spotlight the application of reasonable cause and other common abatement defenses, as well as the FTB's non-conformity to the IRS's policy of first time abatement. The federal first time penalty abatement provisions apply penalties for failure to file returns, failure to pay tax, and failure to deposit tax penalties under IRC sections 6651(a)(1); 6698(a)(1); 6699(a)(1); 6652(a)(2), (a)(3); and 6656 (see Internal Revenue Manual 20.1.1.3.6.1 (08-05-2014)).

Eric and Bruce Langston – participating as a TP&L member in the Q1 meeting – detailed the history of the

FTB's non-conformity with the IRS's first time abatement practice. Serendipitously, in February 2017, California Senate Bill (SB) 375 was introduced to modify the California Revenue & Tax Code to allow a waiver program that would largely mirror the provisions of the IRS's first time abatement practice. Following the TP&L meeting, TP&L members privately submitted comments in support of SB 375. Jason and Taxation Section Executive Committee member Haleh Naimi appeared before the Senate Governance and Finance Committee in Sacramento in their private, individual capacities as tax practitioners, advocating for a first time abatement provision in the California. The concept has general legislative support as a good governance measure; unfortunately, there is little legislative support for measures that reduce revenue as SB 375 surely would. As of this writing, SB 275 is languishing in the suspense file of the Senate Appropriations Committee.

TP&L warmly thanks Eric Yadao and Jason Galek for their informative and practical program. If you would like a copy of the program materials, please contact carolyn.lee@morganlewis.com.

Other business:

Ask the Tax Court:

Members brainstormed questions and suggestions for the Tax Court, for presentation by members of the 2017 Taxation Section DC Delegation. TP&L members submitted additional recommended questions and suggestions following the meeting. The question topics were wide-ranging, including among others: When the Court's rules will be issued pertaining to determining

whether a passport seizure or denial is proper; when the Court will convert to the EFT/PACER system to make documents filed with Court more readily available; and, to the extent possible, organizing Los Angeles-area Tax Court trial sessions to hear matters for taxpayers with geographic proximity (e.g., Laguna petitioners, Woodland Hills petitioners, and Los Angeles-proper petitioners). TP&L requested feedback from the DC Delegation regarding the Court's informal responses to the questions that ultimately are presented.

Spotlighting Women in Tax and California Young Tax Lawyers:

Women in Tax (WIT), a standing committee of the Taxation Section launched during Q4 2015. Members discuss issues particularly relevant to women tax practitioners. Adria Price and Annette Nellen are co-Chairs, and membership is expanding as news about the Committee spreads. **WIT conducts telephone conference calls on the third Tuesday of each month, addressing topics of member interest.** In addition, WIT encourages in-person member networking. Book clubs are forming in Sacramento and the San Francisco Bay Area. A WIT networking reception drew approximately fifty members on April 27, 2017, hosted by the WIT members Wendy Abkin and Carolyn Lee at the San Francisco offices of Morgan Lewis. Everyone is welcome to join and participate in WIT. More information may be found on the CalBar Taxation Section website: <http://taxation.calbar.ca.gov/#wit>.

California Young Tax Lawyers (CYTL), a popular standing Committee with leadership and members who have been practicing tax for fewer than ten years, regardless of whether the lawyer practiced a different area of law before realizing tax is the attorney's destiny. **The Fourth Annual CYTL Conference will be held May 23, 2017, between noon and 5:00 p.m. in San Francisco.** This Conference offers 3.5 MCLE units, networking opportunities, and an opportunity to revel as a young tax nerd with other young tax nerds and the more tenured tax attorneys with an interest in the development of the profession's next generation. Senior attorneys: Please encourage (and authorize time away from the office for) your newer attorneys to participate. It will be time well spent. Panel topics include careers in tax, building a record in a tax case (regardless of practice specialty), the tax aspects of the marijuana business, and what any tax attorney should know about the California FTB. More information about this affordable and valuable experience may be found here on the CalBar Taxation Section website: <http://taxation.calbar.ca.gov/#young>.

Biennial Tax Legal Specialization Exam - October 24, 2017:

Is this the year you sit for the Tax Legal Specialization exam? Or encourage the mid-level tax attorneys who work for you to take the exam? 2017 is the biennial year for the Tax legal specialization exam, conducted by the California Bar's Department of Legal Specialization. Register now for the October 24, 2017 exam, involving eight short essays and 75 multiple choice questions. Exam sites are located in Oakland and Pasadena. The exam is rigorous but not impossible, and rewards those who shamelessly – or, perhaps more accurately, responsibly – verify everything in the Internal Revenue Code (allowed as a resource during the exam). Learn more here:

<http://ls.calbar.ca.gov/Certification/ExamInformation.aspx>.

Hot topics – Jim Counts, CPA, CFTA:

Jim Counts, a loyal and regular presence at TP&L meetings, serves on several IRS and California CPA advisory committees and is active in many national and state practitioner organizations. A fount of tax practice knowledge, Jim briefed the meeting participants regarding a number of hot topics. Jim has graciously agreed to contribute a regular column to the California Journal of Tax Litigation. Jim's inaugural column in this issue addresses the topics he surfaced during the Q1 TP&L meeting.

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Call for TP&L 2018 leadership!

TP&L is one of the most vibrant of the Taxation Section standing committees, thanks entirely to decades of leadership dedicated to serving the membership through topical programming, legal scholarship, opportunities to share practice tips, and a welcoming, inclusive culture. As of this writing, the 2018 leadership team will include Chair Kevan McLaughlin, McLaughlin Legal, San Diego, and three additional officers. The leadership's responsibilities include planning and conducting three quarterly meetings, publish the California Journal of Tax Litigation, and otherwise serve the membership's interests. One 2018 Committee enhancement in discussion is a TP&L listserv, to electronically connect all members who choose to participate for tax problem solving, referrals, practice management tips, and more.

If you would like to more directly participate in TP&L's continued success, please send a statement of interest of no more than 500 words to carolyn.lee@morganlewis.com or kevan@mclaughlinlegal.com. Deadline: May 22, 2017. You will be glad you became more involved.

TAX ALERTS

Assembled by Jeffrey A. Titus
Law Offices of Jeffrey A. Titus

FEDERAL TAX

IRS Private Collection Of Tax Begins

In April, the Internal Revenue Service will begin sending letters to some taxpayers whose overdue federal tax accounts are being assigned to one of four private-sector collection agencies. See IRS Publication 4518 for more detail. The four private collectors authorized are: CBE Group of Cedar Falls, Iowa; Conserve of Fairport, N.Y.; Performant of Livermore, Calif.; and Pioneer of Horseheads, N.Y.

The IRS Debt collection page link is <https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection>.

Federal Updates, later in this issue, provides more information regarding the IRS private debt collection initiative.

IRS Fast Track Programs

In Rev. Proc. 2017-25, the IRS made permanent a fast-track resolution procedure that had been operating as a SB/SE fast-track pilot program since 2003. The permanent version of the pilot program takes effect immediately.

LB&I Programs

IRS rolls out new Large Business and International Compliance Campaigns. There are 13 new campaigns in the initial rollout. Go to <https://www.irs.gov/businesses/large-business-and-international-compliance-campaigns>

IRS Offer In Compromise

Beginning with offers received on or after March 27, 2017, the IRS will return any offer if all tax returns have not been filed. The IRS will return the application fee and apply any payments received to the outstanding tax liability. <https://www.irs.gov/individuals/offer-in-compromise-1>

Blogs Of Note

Several tax blogs of interest:

- Procedurally Taxing: <http://procedurallytaxing.com/>
- Tax Litigator: <https://taxlitigator.me/>
- Federal Tax Crimes: <http://federaltaxcrimes.blogspot.com/>

Sign Up FOR IRS News Alerts, Etc.

The IRS has several helpful and timely subscriptions that provide useful and daily updates. One of them is the IRS Newswire. The link is: <https://www.irs.gov/uac/subscribe-to-irs-newswire>

There are links there to other subscription services such as IRS Guidewire, Quick Alerts, E-news for Tax Professionals and more.

CALIFORNIA STATE TAX

Last-known address

There is a new Form FTB 3533-B, Change of Address for Business, Exempt Organizations, Estates and Trusts, to change the address for a business.

For individual taxpayers, use the revised Form FTB 3533, Change of Address for Individuals.

Practitioners with a power of attorney on file can submit a change of address through MyFTB in lieu of Form 3533.

Doing Business in California

Good news for out-of-state passive investors in a California LLC. The FTB announced that it will not be appealing the Swart decision. (**Swart Enterprises, Inc. v. California Franchise Tax Board** (January 12, 2016) California Court of Appeal, Fifth District, Case No. F070922). The court rejected the FTB's expansive definition of doing business.

What's Happening At The Office Of Professional Responsibility?

Karen L. Hawkins*



The IRS Office of Professional Responsibility (“the OPR”) recently released a FY2016 Accomplishment Report (https://www.irs.gov/pub/irs-utl/oprs_2016_accomplishment_report.pdf) (“the Report”).

This is the first such document from that office and it is interesting to see what is,

and what is not, contained in the 14 pages.

Preliminaries.

As a preliminary matter, the background information traces the “new” OPR from its creation in 2003 through its substantial reorganization in 2012. There’s some interesting information in the Report but not much new for anyone who has been following that office’s activities in recent years. It is reassuring, however, to see the up-front acknowledgment of the OPR’s independence from the IRS’ general tax enforcement mission coming from the current Director, Stephen A. Whitlock. The Report stresses the OPR’s status as the sole authority for interpretation and application of the regulations under Circular 230 (31 C.F.R. Subtitle A, Section 10 et seq.) and for pursuit of discipline against practitioners. The introductory material also describes the transfer in 2012 of former OPR responsibilities for administering the IRS’ practice enrollment program (examination, licensing, continuing education for enrolled agents, enrolled actuaries, enrolled retirement plan agents) to the Return Preparer Office (“RPO”).

While nothing in the report discusses it directly, there is an organizational chart which shows a substantially slimmed down OPR. The Office of the Director has been stripped of a Deputy (an executive level position); the Operations & Management Branch has been stripped of a Chief (a Senior level position); and, while the chart shows three teams in the Legal Analysis Branch, one team has apparently been eliminated as the subsequent narrative references only two teams currently operating. This seems to foreshadow the scenario anticipated by the Director that expects the “raw number” of cases pursued by OPR to decline as the OPR’s strategy for identifying and working cases is implemented.

Nuts & Bolts.

The Legal Analysis Branch (“LAB”) of the OPR is the disciplinary workhorse. LAB’s lawyers and paralegals “investigate, substantiate, and interpret” allegations made against tax professionals to determine whether a violation of the regulations has occurred and, if so, whether the conduct suggests a lack of fitness to continue to practice without some consequence. It is LAB employees who negotiate disciplinary case resolution, and if necessary initiate disciplinary proceedings before an Administrative Law Judge (“ALJ”). Even though a formal complaint is filed, and any ALJ hearing is conducted by lawyers attached to IRS Chief Counsel’s General Legal Services Office (“GLS”), the LAB lawyers stay actively involved drafting the complaint, assisting with evidentiary compilation and discovery. It was unclear from the report whether the LAB lawyers are assisting GLS at the administrative hearings as they have in prior years. This may be because only two formal complaints were filed against practitioners in FY’16 with no hint of their ultimate disposition or pending status.

The Report provides some general statistics for LAB reflecting that the OPR received (846) and closed (889) fewer cases in FY’16 than in FY’15 (1002 and 1066, respectively) while at the same time reducing over-aged inventory (18 months or more since intake) by 40%. Some cases are apparently being resolved through “group-think” panel meetings held monthly with all LAB personnel where specific cases are discussed. The intent is to provide both education for LAB staff and final resolution for outstanding cases. The case dispositions that are broken down in the Report include: one disbarment, 53 suspensions, four censures and six deferred disciplinary agreements. The Report does not state this but by reviewing the Internal Revenue Bulletin (“IRB”), one can ascertain that nearly all the suspensions result from expedited suspensions under section 10.82 of the regulations. This means that the practitioners involved were already disciplined by a licensing body or court, or failed to file the requisite number of income or employment tax returns under section 10.82(b). Continuing a policy started in 2009, the OPR also issued 305 either reprimands or “soft notices”. These letters are not discipline as such but warnings or reminders that

future misconduct could end with more serious consequences. A reprimand is a stronger communication warranted for more serious conduct. Soft letters are often used for practitioners who have been non-compliant with their own tax filings.

What Gets You In Trouble?

The one area of the Report where I hoped there might be some useful information was, by necessity, couched in generalities. Since December 2015, the OPR has not made public the details of any disciplinary matter. The fact of discipline is periodically published in the IRB along with practitioner name, city, state and type/length of discipline but no details of the transgressions committed are provided. This unfortunate situation relates to the IRC section 6103 restrictions on disclosure of taxpayer information which IRS Chief Counsel has interpreted in a very broad fashion. Consequently, only general observations are made in the Report about what kind of conduct might result in discipline. The Report says 23 cases (related to which totals – discipline or reprimand/soft notices is unclear) involved violations of Sections 10.34(a) (standard for advising, preparing and signing with respect to positions on tax returns) or 10.35 (competence); and another five cases involved violations of section 10.22(a)(2) (accuracy of oral or written information given to IRS personnel) and section 10.51(a)(6) (failure to file the practitioner’s own tax returns).

It isn’t surprising that the key due diligence provisions in Circular 230 would be implicated in many of the referrals sent to the OPR from IRS field personnel. The Report identifies common characteristics of these cases as: practitioners neglecting or ignoring their due diligence obligations and acting incompetently in tax return preparation, specifically with respect to not properly reporting, documenting or characterizing: 1) income; 2) losses (PALS); 3) expenses (personal vs business); 4) deductions (charitable); 5) credits (EITC). The Report highlights that these due diligence deficiencies are often a consequence of a practitioner’s failure to make adequate inquiry regarding relevant facts, or to do adequate research regarding applicable law before taking a position on, or preparing/signing, a tax return.

Where’s Waldo?

Another highlight of the Report is the description of the OPR’s new disciplinary look-up feature. Until recently, there was no organized way for external audiences to easily access information about the current disciplinary

status of a practitioner. The OPR has taken steps to rectify this deficiency by introducing an Excel spreadsheet reflecting the status of more than 3000 disciplinary cases covering the last 25 years: <https://www.irs.gov/tax-professionals/enrolled-agents/search-for-disciplined-tax-professionals> (this link will get you to the main discipline page; scroll to the bottom and select “look-up chart”). The bulk (55%) of the spreadsheet lists practitioners disciplined within the last ten years, with 87% of those listed still in current disciplinary status. The spreadsheet is searchable using the “Sort & Filter” and “Find & Select” features in Excel. The database captures not just Circular 230 discipline but also suspensions of representation rights of unlicensed return preparers under Revenue Procedure 81-38 ([https://www.irs.gov/pub/irs-utl/rev_proc_81 - 38 2.pdf](https://www.irs.gov/pub/irs-utl/rev_proc_81_-_38_2.pdf)), and injunctions imposed by the courts on return preparers and promoters.

Just how useful this feature becomes will be dependent on how current the data is- the OPR intends to update the spreadsheet every time it publishes a discipline report in the Internal Revenue Bulletin but that has occurred only twice in the past two years and the Justice department’s monthly injunction rate far exceeds the OPR discipline rate so there will be significant lag time for adding that portion of the database to the spreadsheet. Whether the general public uses the database to check a practitioner’s credentials before engaging his/her services will be another determining factor for measuring the success of this new feature.

Circular 230 Interplay With Preparer And Promoter Penalties.

The Report describes an on-going initiative to capture and act upon data from the IRS associated with the imposition of preparer penalties under sections 6695, 6700, 6701, and 6694(a) and (b). Most of these penalties are identified for IRS field personnel as “mandatory” referrals to the OPR but that obligation has been largely ignored in the past. The OPR is now doing “self-help” by accessing databases within the IRS system which track preparer/promoter penalty assessments. In this way, the OPR personnel theoretically can identify the most egregious practitioner conduct as well as patterns of conduct by a single practitioner. The OPR hopes to also use the data to educate IRS field personnel about their mandatory referral obligations.

The open question for this OPR initiative is how the office will square its pursuit of “mere” return preparers under Circular 230 with the current state of the law after

Loving (*Loving v. IRS* 742 F.3d 1013 (D.C. Cir. 2014)), *Ridgley* (*Ridgley v. Lew* 55 F.Supp. 3d 89 (2014)), and the recent *Sexton* case (*Sexton v. Hawkins*, No 2:13-cv-00893 (D. Nev. 2017)).

Miscellany.

The balance of the Report describes various Memoranda of Understanding with IRS functions (RPO and Chief Counsel), collaborations with IRS functions (SBSE), release of an IRM segment on Processing Circular 230 Disciplinary Cases (IRM 1.25.4, published June 2016), and relinquishment of a significant portion of the OPR's educational and outreach activities to the IRS Stakeholder Liaison and National Public Liaison functions. This latter decision seems unfortunate to me as it will continue to blur the independence lines between OPR and the IRS and will result in non-OPR personnel interpreting the nuances of Circular 230 provisions for many practitioners.

The Report contains statistics for the OPR education and outreach activities during FY'16 (total internal and external audiences = 27,740) which is about half of what was being done in each of the previous 6 years (nearly 1/3 of the external audience watched a webinar recorded in October 2014 which will continue to be broadcast on

a quarterly basis and used by the IRS liaison functions in their interactions with practitioner groups).

Back To The Future?

Looking forward, the OPR intends to focus on 1) developing a "more strategic approach" to selection of cases; 2) documentation of its case selection criteria; 3) providing professional development opportunities for OPR staff; and 4) "increasing awareness and understanding through communication and outreach".

Some good news is that the OPR intends to continue the previous six years' focus on selection of cases based on conduct violations rather than practitioner personal tax compliance deficiencies. The goals being to prioritize the types of cases on which to expend resources, and achievement of earlier and more effective resolutions for cases. Laudable goals which we will have to wait for the FY2017 Accomplishment Report to assess.

** Karen L Hawkins is a California licensed attorney and former Director of the IRS Office of Professional Responsibility. Ms. Hawkins speaks and writes extensively on Circular 230 matters and is available for consultation with other professionals regarding tax practice ethics and tax penalties.*

IRC Section 831(b) Captive Insurance Company Update

*Bruce Gioner**



The Captive Insurance Company Association 2017 International Conference met in San Diego on March 12 – 14. Among the most discussed topics were the status of the cases pending in Tax Court and IRS Notice 2016-66 which labels micro-captives as transactions of interest (requiring the filing of an IRS Form 8886 by participants and 8918 by material advisors). Following are some items of note.

Increased Premiums, Increased Capitalization.

The increase in the Section 831(b)(2)(A) limit on premiums from \$1,200,000 to \$2,200,000 means that micro-captives will no longer be able to rely on the old statutory minimum capitalization requirement of \$250,000. At \$2,200,000 of premium, a reasonable capitalization is more likely to be \$500,000, using a four-to-one rule of thumb.

Effectively A Coordinated Issue.

Although micro-captives are not *officially* a nationally coordinated issue at Appeals, they are functionally coordinated. Julie Ward out of the Dallas IRS office is, at a minimum, consulted in every micro-captive appeal.

Pending Tax Court Cases.

In addition to the well-known case of *Avrahami v. Commissioner*, T.C. Docket Nos. 17594-13, 18274013, tried in front of Judge Holmes in March, 2015, two more cases were tried in 2016 in front of him: *Caylor Land & Development, Inc.*,

(June) T.C. Docket Nos. 17204-13, 17223-13, 23921-13, 23931-13, etc., and *Wilson, et al.*, (August) T.C. Docket Nos. 26547-2, 15011-14, etc. Decisions on those two are expected in 2018, after the judge's decision in *Avrahami*.

Transactions Of Interest.

Though those in the industry are preparing to file forms 8886 and 8918 by the May 1, 2017 deadline (extended by Notice 2017-08), many expect to see the IRS either further extend the deadline or withdraw the notice completely. As to withdrawing the notice, they see parallels in what happened with the IRC §2704(b)(4) regulations which would have effectively eliminated valuation discounts in estate tax planning: issued August 2, 2016, three months before the election of President Trump, the IRS began the December 1, 2016, hearings by effectively conceding that it didn't mean what it had written. Since that hearing nothing more has been heard from the IRS about the regulations.

Conclusion.

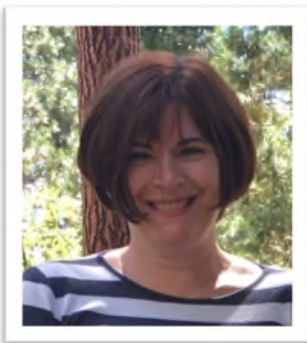
The big news in 2017 will be Judge Holmes's decision in *Avrahami*. It is expected to be a decision by the full Tax Court. Once that occurs, the industry may have the guidance it needs to give comfort to taxpayers.

* *Givner & Kaye, A Professional Corporation, Los Angeles. Represented the winning taxpayer in L&B Pipe & Supply Company, Inc. v. Commissioner, T.C. Memo 1994-187; author or co-author of 7 chapters in CEB treatises on drafting Wills, revocable and irrevocable trusts; over 100 articles published in professional journals; AV Preeminent 5.0 out of 5 rate for 32 years by Martindale-Hubbell; SuperLawyer.⁷*

INTERVIEW: Sharyn Fisk

Attorney at Law, Assistant Professor of Accounting, Cal Poly Pomona

Interview Conducted by Jason Galek, Galek Law*



Why did you decide to go to law school?

You could say I went for love! I knew I wanted to pursue a second degree. My husband was interested in law school, and I thought it would be a great idea for the both of us to attend together—built-in study

partners! At that time, I was working for Morgan Stanley in New York City handling SEC compliance matters for the company's Private Client Services Division. Thus, a law degree would fit in nicely with this career path. Ironically, I was accepted to Rutgers Law School-Newark, and my husband went on to get his MBA. To this day, he still chuckles "my plan worked!"

When did you decide that you wanted to focus on tax law?

While at Rutgers, I was involved in the law school's low-income tax clinic. It was interesting to see how tax touches every aspect of a taxpayer's life. Success or loss of a business; the economy; serious health issue or death; marriage or divorce; getting a job, the type of job

or loss of a job; the birth of a child, etc. all have tax ramifications.

Is an LL.M. necessary to practice tax law? Has it been helpful in your career?

After earning my JD from Rutgers, I went to NYU Law School for an LL.M. in taxation. I don't believe an LL.M. in taxation is necessary to practice tax law, but it is *very* helpful and shows a commitment to practicing in this field. My LL.M. helped my career—it was a significant factor in obtaining my clerkship at the US Tax Court and my first job at Hochman, Salkin, Rettig, Toscher & Perez, PC. Also, participating in an LL.M. taxation program connects you with a large group of like-minded individuals. I stay in touch with some my classmates from NYU. We are all practicing in the various aspects of tax law across the US.

What kind of experience has been most helpful to you becoming a tax attorney?

My undergraduate degree in journalism has been quite helpful as a lawyer. Who/what/when/where/why is critical to any legal issue, as well as telling the story so the reader can understand what is going on, what is being sought and the positions of both parties. Like a journalist, a lawyer needs to investigate to collect all the facts. My journalism degree also helped me with

interview techniques to solicit information from clients and third-parties on a matter. As for tax, volunteering at a VITA (Volunteer Income Tax Assistance) center on a military base was a great introduction to taxation in general, the possible complexities of the subject (even when it seems like the answer should be simple), how people perceive tax reporting, and the importance of proper reporting. Volunteering with VITA was a very rewarding experience.

What kind of tax law did you practice?

Most of my practice has been in tax controversy. I had a great introduction to tax controversy during my clerkship for the Honorable Maurice Foley, US Tax Court. I cannot think of better way to have started my career—helping to decide a tax issue as an impartial third-party. After my clerkship, I was fortunate to continue to develop my career in tax controversy at Hochman, Salkin, et al. The 14 years I worked at the firm provided me with the opportunity to work many different types of tax controversy issues (e.g., corporate, international, real estate, estate & gift, tax-exempt, individual, criminal, procedural, etc.).

What's the difference between tax controversy and tax planning?

I see the difference as a matter of your mindset. In tax planning, your work is focused on trying to avoid all issues (both known and unknown). While in tax controversy, your work is focused on finding a solution(s) to a defined issue. I like working with a defined issue!

Do you find there's a difference in dealing with the IRS or FTB?

No; throughout my career, I have encountered great professionals in both organizations. In handling a controversy matter, mutual respect and cooperation between the parties are necessary. Having adverse interests does not mean that you cannot get along great with the *individual* on the other side. For example, while pregnant with my third child, I was working a large number of listed transaction cases and dealing with a specialized group of IRS revenue agents. After my son was born, I receive a congratulations card signed by several IRS revenue agents and group managers. One of the managers expressed concern about how my firm would react to me receiving such a card from the IRS. My firm loved it.

When did you become a certified specialist in taxation law? Have you found it to be helpful in your career?

I have been a Certified Specialist in Taxation Law by Board of Legal Specialization, State Bar of California since 2004. Like my LL.M. from NYU, this certification has also been very helpful in my career. Again, it shows a level of dedication to the field of tax law. Also, I believe clients find such certifications helpful in choosing a practitioner and lets them feel confident their tax matter is being handled by a qualified professional. My certification has also come up several times while handling matters with the IRS/FTB. I would not say being certified tax specialist intimidates them, but they were impressed by it. Anything that helps!

Do you have any advice for law students and young attorneys who may be interested in pursuing a career in tax law?

Find a mentor and get involved! I was *very* fortunate to find several mentors over my career. Judge Foley was the first. While clerking for him, he emphasized the importance of having a work/life balance throughout your career. Since my clerkship, Judge Foley keeps in touch making sure I am maintaining that balance. When he has trial sessions in Los Angeles, Judge Foley makes it a point to have dinner with all his prior clerks living in this area. During our dinners, he checks in on how we are doing, what is happening with our families, careers, etc.

After my clerkship, I joined Hochman, Salkin et al. and I got a whole firm of mentors! Choosing to work at a place where you feel comfortable walking into a senior attorney's office to seek guidance, bounce an idea, hash out a problem, or just chat about life is invaluable. One of the things Hochman, Salkin, et al. encouraged its attorneys to do was to be actively involved in the tax practitioner community. The firm encouraged associates to participate in professional conferences, speak before professional organizations (e.g., CalCPA, AICPA, ABA, etc.), join the leadership of tax bar associations, and write articles. With this encouragement, I became involved in local, state and national tax bar associations. Through this involvement, I met tax practitioners locally, throughout the state and the nation. When you become involved like this, you feel like part of a team, you expand your networking contacts, and it opens new opportunities to you. In fact, it was at Hochman, Salkin et al. that I began to teach taxation to graduate students. The firm also encouraged its attorneys to do pro bono work.

Should tax attorneys participate more in pro bono programs?

I believe attorneys, in general, need to be active participants in pro bono programs. It is always great to give your time to those in need. I have provided pro bono services through the Los Angeles Superior Court's Guardian *Ad Litem* program, the Los Angeles County Bar Association's Tax Court pro bono program, and the ABA's Adopt-a-Base VITA and the Operation Stand-By programs. The experiences you get from participating in pro bono programs supplement your practice and keep you grounded. Plus, such participation will make you feel *really* good. While providing pro bono services through the ABA's Operation Stand-By, I received a certificate from the Army stating, "your counsel helped soldiers overcome seemingly insurmountable issues on the homefront." Wow, I felt like a superhero! Plus, my kids thought the certificate was more impressive than anything else I had ever done at work.

You moved from private practice to teaching, how do you like the change?

Teaching is different! There are pros and cons to both private practice and teaching. There are parts of private practice I miss, but at this time in my life teaching is a great fit for me. I started as an adjunct professor at Golden Gate University School of Taxation MST program teaching various tax courses. In 2008, I became an adjunct professor at Cal State University Northridge, teaching Federal Tax Procedures in the school's Masters of Taxation program. I love this subject, and my passion must have shown because I was awarded "Outstanding Professor of the Year" by one of the cohorts. Now, I'm approaching the end of my third year at Cal Poly Pomona, where I teach graduate and undergraduate taxation courses. I enjoy teaching, and I believe my "real world" examples are helpful to my students to understand the tax concepts we are discussing. Plus, teaching forces you to master your subject matter! In my first quarter teaching at Cal Poly Pomona, I was explaining the additional standard deduction allowed for taxpayers over the age of 65 and for taxpayers who are blind. You know, basic stuff. A student raised his hand and asked, "Why for just the blind as opposed to other disabilities?" Hmmm . . .

You were recently appointed to the IRS Advisory Council (IRSAC). What prompted you to seek that role and what does IRSAC's work mean to practitioners?

The IRSAC serves as an advisory body to the IRS Commissioner providing an organized public forum for IRS officials and representatives of the public to discuss relevant tax administration issues. The IRS selects 5-6 new members a year to serve three years on the Council. I was thrilled to be selected this year. As I mentioned before, it is important for tax practitioners to be actively involved in our community. The IRSAC membership is balanced to include representation from the taxpaying public, the tax professional community, small and large businesses, academia, and the payroll community. As a member, I can suggest operational improvements, offer constructive observations about IRS' current or proposed policies, programs, and procedures, and advise the IRS on issues having a substantive effect on federal tax administration. I'm looking forward to joining these discussions.

Your career path has taken you from working for the government to private practice, to teaching. What advice would you have for tax attorneys looking for career choices?

You may have heard the advice, "don't be afraid to make a change." My advice slightly different: it's okay to be afraid, but don't let that stop you from making a change! I enjoyed working at the Tax Court and, based on the great individuals I have met I believe I would have greatly enjoyed working for the IRS. My 14 years in private practice, seven years as an associate and seven years as a principal, were great as well. I moved on to being a full-time faculty member at Cal Poly Pomona because I enjoy teaching and I wanted to have more flexibility to spend time with my family. In my experience, the most important factor in choosing a job is who you will be working with. You are going to spend most your day at your place of employment; make sure you are spending this time with people who are enjoyable to be around. I have had the opportunity to work with some outstanding individuals at the US Tax Court, at Hochman, Salkin, et al., and now at Cal Poly Pomona.



* Jason Galek, Galek Law, is a tax attorney certified as a specialist in taxation law by the California State Bar Board of Legal Specialization. Jason represents individuals and business entities in tax controversy and planning matters before the Internal Revenue Service, California Franchise Tax Board, and Board of Equalization. Jason has an LL.M. in Taxation from Golden Gate University School of Law and is adjunct professor at Golden Gate University School. Contact Jason at jason@galek-law.com.

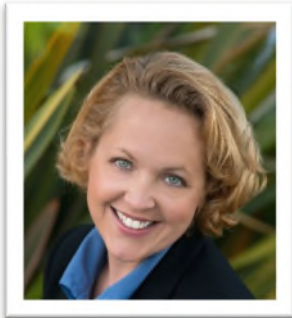
Failure to Timely File California Tax Returns May Represent a Criminal Intent to Evade or Avoid Paying Tax, Punishable by Imprisonment

California Revenue & Tax §19706

Hudson v. Superior Court

7 Cal.App. 5th 1165 (2017)

Barbara N. Doherty*



Tax practitioners who represent clients with unfiled or late-filed tax returns in California should review closely the provisions within California Tax & Revenue (CTR) §19706. While the federal tax evasion statutes generally require an actual bad act for conviction, a

California Appellate Court recently determined that a taxpayer who did not timely file tax returns for three consecutive years intentionally evaded paying taxes, even without an overt act of intentional evasion, and should be imprisoned for violating CTR §19706.

On January 26, 2017, a three-part California Appellate Opinion was entered on direction from the California Supreme Court to set aside that Appellate Court's prior denial of Blake Hudson's motion during preliminary hearings to set aside certain felony information charged to him under CTR §19706. Under the provisions of this statute it is a crime to willfully fail to timely file any return with intent to evade tax and is punishable by imprisonment not to exceed one year.

Mr. Hudson filed his 2007, 2008, and 2009 personal state tax returns about five years late. He had filed and paid tax in the years prior to 2007, knew that he owed tax, and had received demands from the Franchise Tax Board for the tax returns. Later charged with felony tax evasion, Mr. Hudson argued in his motion that an overt action is required for a tax evasion conviction, citing *Spies v. United States*, 317 U.S. 492 (1943).

In comparing the federal statute in *Spies* with the California statute herein, Judges Moore and Aronson determine that under the provisions of CTR §19706, the willful failure to timely file returns when combined with intent to evade tax can lead to criminal charges absent any overt act.

After additional briefing from the parties, the Appellate Court affirmed that the combination of Mr. Hudson's previous tax filings prior to 2007, and his inaction during the years at issue and timely filing period thereafter, provided a rational basis for the lower court to determine the defendant harbored the requisite intent to evade paying his taxes when he failed to timely file.

Judge Aronson concurred to distinguish the federal tax evasion statutes that require attempt, and that the distinction from misdemeanor to felony charges includes an attempt requirement.

Judge Fybel presented arguments in his dissent that compared the parity between several federal and California tax evasion statutes to dissuade the majority opinion holding that no affirmative act is required under CTR §19706. The dissent would look for an affirmative act such as a double set of books, destruction of records, and concealment of assets to show an attempt to evade taxes in order to maintain consistency between the different federal and state laws, sentencing guidelines, and case precedents.

* *Barbara N. Doherty, Law Office of Barbara N. Doherty, specializes in tax controversy with a particular interest in representing individual and small business taxpayers during federal and state audits as well as collection matters. Barbara also is an experienced return preparer. Contact Barbara at barbara@dohertytaxlaw.com.*

Yes, There Is A Statute Of Limitation On Collection Of Income Tax, Penalty And Interest Owed To California.

*Jeffrey A. Titus, Law Offices of Jeffrey A. Titus**



I have been asked many times over the years if there is an expiration date on the collection of income taxes, penalties and interest owed to the State of California. Many clients that owe income taxes to California also owe taxes to the federal government. While the statute of limitations for federal tax debts is clear and often comes into play, California's limitation on collection of income tax debts is less well known. The California statute of limitations on the collection of income taxes was enacted on July 1, 2006, and applies to "any liability 'due and payable' before, on, or after that date." (R&TC §19255).

California has twenty years from the time a tax liability becomes "due and payable within the meaning of Section 19221" (statutory lien date) to collect unpaid liabilities. By comparison, the IRS has a ten-year statute of limitations on collection from the date of assessment. At the end of the 20 years California extinguishes the debt by abating the tax. Under Federal law, once the ten-year collection statute has expired, the IRS is barred from collection unless it takes further action to extend its power to collect.

A taxpayer can have more than one liability "due and payable" for a tax year. In addition, the statute applies to filing enforcement assessments issued by the FTB. However, the FTB has no time limit for issuing a proposed assessment for unfiled returns. Note that a taxpayer that files a return after an FTB assessments starts the twenty-year clock all over again. Likewise, a federal tax audit can create a new "due and payable" liability.

Several events can suspend the running of California's statute on collection. Perhaps the most common of those are bankruptcy (plus six months) and installment agreements (R&TC §19008).

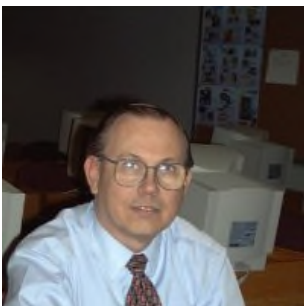
Stay tuned for more to follow.

** Jeffrey Titus is a sole practitioner focusing on tax controversy matters in Santa Rosa, California. Over the last 30 years, Jeff has litigated on behalf of his clients in the U.S. Tax Court, District Court, Bankruptcy Court, Bankruptcy Appellate Panel, and the U S District Court of Appeals for the 9th Circuit. Jeff has represented numerous individuals and entities in administrative matters before the IRS, Franchise Tax Board, Employment Development Department and the State Board of Equalization ranging from collection, audits, and appeals. In addition to tax controversy work, Jeff has represented and guided several small businesses in their formative years. Contact Jeff Titus at jaitken@sonic.net.*

Federal Updates

A New Regular Feature Of The California Journal of Tax Litigation

*James C. Counts II, CPA, CTFA**



I have been asked to write a column on various items of interest to practitioners for the *California Tax Journal* on any interesting information. In this issue I will be discussing:

1. IRS Budget
2. Scams and E-mail Compromises and Practitioners' Data Breaches
3. Form W2/SSN Data Theft Update
4. Automated Under-reporter Update
5. Private Debt Collector Program
6. Silent Returns
7. Taxpayer Digital Communications
8. Pilot Program for Correspondence Exam

1. IRS Budget

The budget submitted by the current administration to Congress for the fiscal year (FY) 2018 (October 1, 2017 to September 30, 2018) was about \$239 million lower than what was approved for FY 2016. For the current fiscal year, which is FY 2017, the federal government is operating on a continuing budget resolution (CBR) through September 2017. This CBR is at the same level as the FY 2016 budget.

Every year due to various costs going up (such as employee raises, inflation of other goods and services) there is about \$200 million in additional costs the IRS has in the following fiscal year without any changes. With the cut in actual budget and the additional costs the effective budget reduction for the IRS would be about \$440 million IF the final approved budget for the IRS is what was submitted to Congress by the President.

The IRS has had their budget cut by about \$900 billion, so far, since 2010 – plus add to that the additional costs the IRS has had to absorb due to being assigned additional program administration and enforcement responsibilities.

2. Scams and E-mail Compromises and Practitioners' Data Breaches

The IRS alerts taxpayers and practitioners about new types of emails and malware being sent out by the fraudsters trying to gain access to tax practitioners' computers. Because the IRS publishes the PTIN listing (<https://www.irs.gov/tax-professionals/ptin-information-and-the-freedom-of-information-act>), fraudsters have a listing of who to target.

Currently some of the new methods that will give the fraudster access to the practitioners' computers are:

- Fraudsters are sending emails that appear to be from your tax software vendor.
- Fraudsters try to get a practitioner to do something to fix a system error.
- Fraudsters send an email saying to change a client's bank account information to send the tax refund.
- Fraudsters send emails to businesses trying to get an employee to email copies of all the W-2s for the employees.

If a tax practitioner has a problem the IRS wants the practitioner to contact their local IRS Stakeholder Liaison (SL) contact. A practitioner can find their local SL contact by going to irs.gov and entering in the search box "stakeholder liaison". The first item that comes up

click on it and a table comes up with who to contact by state.

If a business has a problem then they should email phishing@irs.gov and state what is the problem. The business should provide who the IRS should contact. Their name, phone number and email address. The IRS follows phishing@irs.gov and will contact the named contact for the business.

While it is important to be careful about which links users click on in emails the IRS says the largest problem with fraudsters gaining access to practitioners' computers is when the practitioner remotely accesses their office computer. The IRS states there are two main reasons why the fraudsters are gaining access to practitioners' computers. First is the practitioner does not use a "good" remote access program. The second reason is the practitioner does not use a difficult password.

If you remotely access your computer check with your IT advisor to ensure you are using a good remote access program and then ensure you are using a strong password.

For a strong password use at least one capital and one lower case letter, at least one number and at least one character. The longer the password the better as it makes it more difficult for a fraudster to identify the password. One easy way to have a longer password is to have 8 to 10 digits in a password but then double it by repeating the first 8 to 10 digits. Thus having a 16 to 20 digit password but you only have to remember the first 8 to 10 digits.

Currently from 2 to 5 practitioners daily report to the IRS their system has been taken over. As mentioned earlier if you suspect your system has been taken over contact your local IRS SL contact. They will forward your information to the correct IRS unit and you will be contacted.

If a practitioner's computers have been breached the IRS will provide guidance to the practitioner on what to do.

The IRS will request from the practitioner's:

- PTIN and Firm name
- List of all practitioners in the firm
- List of all clients and their dependents (names and SSNs)

The practitioner's e-Services will be deactivated along with their EFIN. The IRS will give them a phone number to call and they will get a new EFIN on the spot.

The IRS will do a risk assessment on this breach and the IRS will enter protection markers on each of the taxpayers and dependents.

An issue the IRS is having once a practitioner contacts them or if the practitioner has engaged someone to represent them, such as an attorney, is the practitioner or their representative does not want to provide to the IRS the above requested list of clients and dependents. Once the IRS gets this information they will put an alert flag on the taxpayers' account. The longer it takes for the IRS to get this information from the practitioner then the longer the fraudster has to file fake tax returns and receive refunds from those fake tax returns.

The practitioner and their representative may spend time reviewing the issues as to disclose the required information to the IRS or not to disclose but each should be aware that the more delay in disclosing the requested information could increase any damages that their clients may seek.

There are several programs available to remotely access another computer. In discussing with an individual that is knowledgeable about computer security they mentioned that at a minimum a remote access program should have multi-factor authentication. The following three programs were mentioned but other good programs are available. Practitioners should do their own research regarding these programs to determine what provides the security they need and the program features they would like in their program.

- Logmein - two factor authentication is in the program but the user has to turn it on.
- Duo - Duo integrates with Microsoft Windows client and server operating systems to add two-factor authentication to Remote Desktop and local logons. <https://duo.com/docs/rdp>
- _Gotomypc – user has to enable two factor --- <http://www.ricksdailytips.com/enable-two-factor-authentication-on-gotomypc/>

You can find reviews of remote access programs by entering a search term of “remote access program reviews” and several will be listed such as:

<http://www.toptenreviews.com/software/utilities/best-remote-pc-access-software/> and

<http://remote-pc-access.no1reviews.com/>

To give you some idea on what is out there to break into a remote access program enter a search term of “rdp hijacking” and a list of articles comes up. If reading the articles on hijacking does not scare you and you want to

watch a video on how easy it is to do it one is available in the list from the search.

3. Form W2/SSN Data Theft Update

In 2016 fraudsters began sending emails asking for copies of W-2s for all the employees. This year it continues and these emails have better spelling and grammar such that they read and sound like a person that understands our language. The Fraudsters normally make the e-mails appear to be from the CEO / President to an HR person. This year the IRS is seeing a 700% increase in the volume. I am not sure if the 700% increase is in the number of email requests or it is a 700% increase in the number of W-2s sent out incorrectly to the fraudsters.

The IRS has created a new webpage that gives current procedures in what a business should do if they have a data loss. The website is <https://www.irs.gov/individuals/form-w2-ssn-data-theft-information-for-businesses-and-payroll-service-providers>.

I have provided the initial process for a business to report a data loss. The IRS site has much more information.

How to Report a Data Loss Related to the W-2 Scam

If notified quickly after the loss, the IRS may be able to take steps that help protect your employees from tax-related identity theft. Ways to contact the IRS* about a W-2 loss include

- Email dataloss@irs.gov to notify the IRS of a W-2 data loss and provide your contact information listed below so that we may call you. In the subject line, type “W2 Data Loss” so that the email can be routed properly. Do not attach any employee personally identifiable information (PII) data.
- Business name
- Business employer identification number (EIN) associated with the data loss
- Contact name
- Contact phone number
- Summary of how the data loss occurred
- Volume of employees impacted

*The IRS doesn't *initiate* contact with taxpayers by email, text messages or social media channels to request personal or financial information. Any contact from the IRS will be in response to a contact initiated by you. Cybercriminals, when they learn of a new IRS process,

often create false IRS web sites and IRS impersonation emails.

Practitioners are encouraged to inform their clients with payroll of this site and about this type of e-mail scam.

4. Automated Under-Reported Update

Every year the Automated Under-Reported (AUR) unit sends out about 6.5 to 7.0 million notices. When the IRS compares information returns sent to the IRS with the tax returns filed they find about 25 million mismatches.

AUR will prioritize these errors to determine which mismatches will generate a notice to the taxpayer. In September, February and May each year AUR will make their selections. AUR is required to cover all types of income and not just focus on certain types of income.

The CP 2000 and CP 2501 in February 2017 were redesigned. Sample CP 2000 is at https://www.irs.gov/pub/notices/cp2000_english.pdf and CP 2501 is at https://www.irs.gov/pub/notices/cp2501_english.pdf.

As we know the worse thing a taxpayer could do is ignore an AUR notice. If the taxpayer ignores the notice an adjustment to the return will be made, the tax assessed and IRS will begin collection of the tax.

If a deadline is missed the taxpayer or representative may request a reconsideration.

A few suggestions made by AUR for taxpayers are:

- Do not group income amounts.
- Do list separately sales transactions. AUR sees the attachments if sales transactions listings are attached in PDF format.
- Report income items on the correct line on the tax return.
- If a taxpayer gets an information return that is to the wrong taxpayer then report the amount on the tax return and make a notation on the return reversing the amount.
- Include all backup schedules when responding to an AUR notice.
- If the issue is a cancellation of debt and exclusion of income due to taxpayer insolvency then include the worksheet on computing the insolvency.
- Answer CP notices quickly.
- If need the taxpayer needs additional time to respond fully then call the phone number on the notice and request an extension. If the year covered by the notice has a statute of limitation issue then AUR cannot give an extension.

- If the taxpayer requests an abatement of a penalty due to reasonable cause, AUR will do so if they can.
- If an amended tax return is filed for the changes in an AUR notice then the AUR unit will process the amended tax return.

5. Private Debt Collector Program Update

The IRS will begin using Private Debt Collectors (PDC) in April 2017 for IMF (Individual Master File) returns. The IRS does not know when BMF (Business Master File) returns will become part of this process. While it was suggested it might be in about a year it could be sooner.

The IRS has trained and signed off on training guidance for the four companies that will be a PDC. A link below to the IRS website has more information than in this article, including the names of the four collection agencies being used by the IRS.

PDCs cannot levy, lien, accept OICs nor authorize partial installment agreements.

If a taxpayer wants to submit an OIC, ask for a partial installment agreement, do an extended installment agreement or just want to deal with the IRS they may request the PDC to send the matter back to the IRS.

The IRS will send a letter to the taxpayer and a representative (if in the Central Authorization File when the letter created) telling them the collection matter is being referred to a PDC and provide the name of the PDC.

The PDC will send a letter to the taxpayer saying their IRS matter has been sent to the PDC for collection.

A PDC will not get any information on a power of attorney representative.

The PDC will have the usual collection abilities under federal law. A collector may call the taxpayer and to identify them as an authorized PDF collector will ask the taxpayer for their first five (5) digits of their SSN and the collector will give the last four digits.

Taxpayers are still entitled to go to the Taxpayer Advocate Service even if the matter is with a PDC.

This link is to the most recent information posted to the IRS website but still is dated as of September 26, 2016. If you do a search for "private debt collector" this is the first item. Others are shown but with earlier dates on when last updated.

<https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection>

6. Silent Returns

A silent return is a return that does not disclose if the taxpayer(s) and dependent(s) have had medical insurance as required under the Affordable Care Act (ACA).

President Trump signed an Executive Order that the IRS was not to require the ACA information with tax returns as it was expected ACA would be canceled.

If a return is e-filed without the required ACA information, the return will not be rejected by the IRS for e-filing. The IRS may at a later date send a request to the taxpayer for the required information. The IRS currently has no estimated time frame when they may request the additional ACA information. It will depend on what Congress and the President does to either cancel ACA or modify it.

If the tax return is a silent return it will not cause any delay in issuing any refund that may be due the taxpayer.

Taxpayer still need to do the reconciliation of the Advance Premium Tax Credit (APTC).

If a taxpayer wishes to file an amended tax return removing a previously reported penalty under ACA the IRS is not expected to refund the penalty. The reason is the current law still requires the IRS to assess the penalty.

7. Taxpayer Digital Communications

The IRS has been working on a new system to electronically communicate with taxpayers and taxpayer representatives.

The basic system is a platform system written by a large company that sells the system to businesses. Then the business using the platform writes their sub-programs and templates to use the platform.

For example think of this platform as being like Microsoft Office Suite. Office Suite has many programs in the suite package such as Word, Excel, PowerPoint and many more. A user of the Office Suite can write macros, formulas, templates etc. to use the many programs. Over time Microsoft will update the Office Suite as the underlying operating system is updated. For instance, current operating systems are Windows 10, 8.1, 7 etc. Thus, the Office Suite programs are updated to work in the new operating systems as they are released or changed. When the Office Suite is updated or a new version is released the prior macros, formulas, templates etc. will continue to work in the new version. A user that has created macros, formulas and templates does not

have to worry about them all of a sudden not working or have to worry about updating them as a new operating system or a new version of Office Suite is released.

So with the IRS buying this standard platform the company that sells this platform is responsible to keep it working in the various operating systems and the company will issue updates and new versions over time.

This makes it much easier for the IRS to keep this new system current as long as they purchase the updates to the platform on a regular basis.

Given this the IRS has begun testing some of the new features they have created in the new system.

The current system for the IRS to contact taxpayers and representatives is by mail, phone, fax and in person. The future system while will still have the current system but it will add secure messaging, secure text chat, secure voice chat, secure video and secure co-browse (both parties looking at the same information on their screens).

The new system is not expected to be for everyone in the beginning but eventually will be available for everyone.

In December 2016 the IRS began testing for Affordable Care Act (ACA) use of the system and testing for Taxpayer Advocate Service (TAS) began in February 2017. In April 2017 it is expected to be launched for use by TAS. In July 2017 it is expected that it will be available for Automated Collection System (ACS).

Currently the system is in a pilot program for selected taxpayers in correspondence exam for Schedule A, Form 1040 only exams. More on this pilot program in the next topic below.

So as new sub-programs are written by the IRS they will be tested and made available to the IRS units, taxpayers and their representatives.

One unit of the IRS that does not currently have a time frame when this new system will be available is Appeals.

8. Pilot Program for Correspondence Exam

As mentioned previously the IRS is running a pilot program for Schedule A, Form 1940 correspondence exams. Taxpayers have to be invited into the program. Taxpayer representatives may participate only if the taxpayer they are representing is in the pilot program.

Only secure messaging is available in this pilot program for those taxpayers selected. When the notice for the correspondence exam is sent to the taxpayer a stuffer in the envelope will invite the taxpayer to sign up for the

pilot program secure messaging. About 150 taxpayers each week will be invited to participate in the pilot program with a total of 4,200 to be invited.

If the taxpayer should sign up for the pilot program then their representative may also sign up for the system if the representative has a Form 2848, Power of Attorney, on file with the CAF unit. If the taxpayer gets the notice for exam and then signs a Form 2848 it is not until the CAF unit has it on record may the representative sign up for the pilot program.

The system will allow either the IRS or taxpayer or representative to attach files to send to the other party (not for communication between taxpayer and taxpayer representative).

Also, the taxpayer representative will not see prior communications between the taxpayer and the IRS. Later if the representative signs up after the POA is on file, the IRS will send copies of communications to the representative of any communication sent to the taxpayer. The IRS will NOT stop communicating with the taxpayer when there is a POA on file.

* *James C. Counts II, CPA CTFA, is a member of a group of tax practitioners that meets regularly with the IRS at their headquarters to discuss practitioner issues they have in dealing with the IRS and the IRS discusses issues and programs in which they wish to update practitioners. Jim represents clients from his practice base in Hemet, California. Contact Jim at james@countscpa.com.*

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