

Four IRS Agents Reprimanded For Demanding to Interview Clients

Since 2005, IRS examiners have insisted on interviewing the CPAs/EAS client, the client's employees and taking a tour of the business premise *after* being presented with Form 2848, Power of Attorney. This tactic is an admitted attempt by the IRS examiner to catch the taxpayer with "their pants down" so to speak ... before they get "Lawyered up" or "CPA/EAed up." One IRS examiner admitted some auditors are calling the taxpayer BEFORE sending out a contact letter to catch them by surprise, e.g., "the best time to talk with the taxpayer is initially without representation so you can obtain a candid picture of the taxpayer's situation."

- In 2009, we started receiving reports that IRS examiners conducting correspondence (desk) audits were insisting that the taxpayer be available in the CPA/EA's office for questions by telephone.
- In 2010, the "candid picture" argument was used by an IRS Appeals Officer who repeatedly requested that I bring the taxpayer to the appeals hearing. He wanted to independently determine the effectiveness of the taxpayer's testimony, acting as the "trier-of-fact." I respectfully refused his request.
- But this IRS tactic isn't new. An e-mail I received in September, 2005 said: "Hi Vern, What happened to the 'kinder, gentler IRS'? I have 2 clients who have received audit notices in the past week. Both auditors are DEMANDING interviews and office tours. When I responded to one of the auditors that the client will not attend due to the taxpayer bill of rights, the auditor said 'Fine, I will bring a summons with me.' These are both brand new audits with no bad history. One of my clients is a fairly large client, \$300M annual revenue, the auditor is based in Kansas City and I am in Tulsa. The other auditor is local. Thus, I can only assume this is a new national attack on taxpayer rights. Have you heard this from any other CPAs? Any ideas on how to handle this? Thanks, Warren Fisher."

We think *most* front-line IRS examiners believe they have the *right* to directly contact the client, albeit with the CPA/EA present, after the signed Form 2848, Power of Attorney, has been delivered. As the Treasury Inspector General for Tax Administration (TIGTA) properly concludes, they don't, and ***violation of §7521 can result in the IRS being sued.*** Four IRS examiners have recently been reprimanded for bypassing the restrictions on directly contacting taxpayers¹.

TIGTA Report 2010-30-060 suggests that potential direct contact violations are very small. Our anecdotal experience indicates the improper bypassing of the taxpayer representative is far more extensive nationally than the four instances discovered by TIGTA's Office of Investigations. For example, in some of our classes, up to 75% of the CPAs/EAS representing taxpayers in an IRS audit last year faced an IRS examiner demanding that the taxpayer be present for interview! This is a shockingly high percentage.

As discussed in TIGTA Report 2010-30-060, the Omnibus Taxpayer Bill of Rights (P.L. 100-647), enacted in 1988, created a number of safeguards to protect taxpayers being interviewed by IRS

¹ See: Treasury Inspector General for Tax Administration's 2010 Report to Congress titled: Fiscal Year 2010 Statutory Review of Restrictions on Directly Contacting Taxpayers; Reference Number: 2010-30-060.

employees as part of an examination or investigation (see Publication 1, Your Rights as a Taxpayer), including the *direct contact provisions* which required IRS employees to:

- Stop a taxpayer interview whenever a taxpayer requests to consult with a representative §7521(b)(2); and
- Obtain their immediate supervisor's approval to contact the taxpayer instead of the representative if the representative is responsible for unreasonably delaying the completion of an examination or investigation (§7521(c)).

7521(b)(2) RIGHT OF CONSULTATION.—*If the taxpayer clearly states to an officer or employee of the Internal Revenue Service at any time during any interview (other than an interview initiated by an administrative summons issued under subchapter A of chapter 78) that the taxpayer wishes to consult with an attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service, such officer or employee shall suspend such interview regardless of whether the taxpayer may have answered one or more questions.*

7521(c) REPRESENTATIVES HOLDING POWER OF ATTORNEY. --*Any attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer may be authorized by such taxpayer to represent the taxpayer in any interview described in subsection (a). An officer or employee of the Internal Revenue Service may not require a taxpayer to accompany the representative in the absence of an administrative summons issued to the taxpayer under subchapter A of chapter 78². Such an officer or employee, with the consent of the immediate supervisor of such officer or employee, may notify the taxpayer directly that such officer or employee believes such representative is responsible for unreasonable delay or hindrance of an Internal Revenue Service examination or investigation of the taxpayer (P.L. 100-647).*

In a most heavy-handed reaction to those CPAs/EAS denying the request to interview the client, IRS examiners have occasionally threatened to issue a taxpayer summons. This tactic really scares both the CPA/EA and the taxpayer and is having a shockingly negative impact on the IRS's future liaison with that CPA/EA³. A summons will generally not be enforced unless the CPA/EA is interfering with the audit

² The Fifth Amendment to the Constitution provides that no person shall be compelled to be a witness against himself or herself (see IRM 25.5.5.4.1) and this right extends to the relationship between a Federally authorized Tax Practitioner (e.g., a CPA or EA) and the taxpayer, which is held to be confidential and privileged between them (see IRM 25.5.5.4.3(1)(B)). But the Fifth Amendment right does not arise automatically and therefore must be asserted by the taxpayer (see IRM 25.5.5.4.3.(1)(B)). This means that the IRS agent can, and often will, threaten to request an administrative summons, but the summons will not be enforced by the courts ... if the taxpayer is knowledgeable enough to protest and assert his or her Fifth Amendment rights for this protection. Of course, all CPAs and EAS should assert this protection to protect the client.

³ Unreasonably delaying the completion of an IRS examination or investigation by a CPA or EA is a violation of their ethical standards, a Circular 230 discreditable act. Under normal circumstance, the IRS examiner must forward these potential charges to the Office of Professional Responsibility for potential action, including suspension or revocation from the ability to practice before the IRS. When receiving this threat from the examiner, a

process (the taxpayer's representative is responsible for unreasonable delay or hindrance), which isn't possible as the IRS examiner is making the threat at the **beginning** of the audit process! Another violation of §7521(c).

To make matters worse, granting permission to allow the IRS examiner to interview the client may be considered a "discreditable act" under state professional standards for not properly representing the client, resulting in malpractice exposure. The reality is that the IRS examiner is an expert in tax law, but the taxpayer is not. That is the specific reason the taxpayer hires qualified representation ... because the taxpayer is afraid to say the wrong thing to the IRS examiner and find it being used against her or him in court!

To illustrate the problem, one only needs to examine the recent *Soholt* case. James Soholt was a financial adviser and retirement planner for Metropolitan Life Insurance Company. James worked from his home office. James admitted to the IRS examiner that he kept a few de minimis personal papers (e.g., his will) in an office filing cabinet, upon which the IRS examiner, with the concurrence of both his supervisor and an IRS Appeals Officer, denied the office-in-home deduction for the entire year on the grounds that James didn't meet the §280A "exclusive use" requirement. This required James to request judicial relief from the IRS examiner's extreme "exclusivity" position, which was granted! (*James A. & Joan H. Soholt v. Comm.*, TCS 2007-49). The IRS examiner was technically correct ... forcing the taxpayer into Tax Court for fairness and justice.

This case leads to some questions. Why should the taxpayer trust the IRS when the examiner is permitted to use such aggressive tactics? Does the IRS auditor have the taxpayer's interest at heart? Is the IRS agent attempting to assure the taxpayer is paying his or her fair share but no more? Will IRS personnel tell the taxpayer how to minimize their taxes by telling them what tax deductions they are missing, or how to minimize the reporting of income? Not in our experience! There is a disconnect between the IRS examiner who is trying to *maximize* tax collection and the IRS's own mission statement of "assisting taxpayers who try to comply with the law and work to continually improve the quality of our systems and service to meet the needs of our customers."

The IRS examiner's continued insistence to interview the taxpayer puts the CPA/EA into a "heads IRS wins, tails the CPA/EA loses" situation and has damaged the IRS's future relationship with the professional tax preparer. When a CPA/EA faces this illegal audit strategy in the future, consider handing the IRS examiner a copy of TIGTA's 2010 report and mention that four IRS examiners were recently reprimanded for violating the §7521 direct contact provisions! Isn't it emboldening to battle the bully?

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prudent CPA/EA will immediately withdraw from the audit engagement and retain counsel. How can the CPA/EA properly represent the taxpayer while simultaneously facing a personal threat to her or his own livelihood?