GUIDING CLIENTS THROUGH EGGSHELL AUDITS

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So what is an "eggshell audit"? The term refers to the possibility that the subject of a civil audit could, under pressure, crack open and provide information leading to a referral for criminal investigation. The goal of the attorney advising a client facing an eggshell audit is clear: resolution of the audit without a referral by the civil examiner to the IRS's criminal investigation division (CID). Reaching that goal can be difficult, complex, and perilous—for both the client and the attorney.

This article explores four key aspects of representing a client undergoing an eggshell audit:

1. How civil IRS audits arise and the steps you should take as counsel to prepare for the audit;
2. Recognizing when your client is facing an eggshell audit and how to recognize whether your client might have committed criminal tax fraud;
3. Techniques to employ when representing an eggshell audit client and the signals to look for when evaluating whether a civil investigation has turned criminal; and
4. Steps the subject of an eggshell audit can take after a criminal investigation has started to lessen the possibility of referral for prosecution.

AUDITS AND PREPARATION FOR AUDITS

Causes of audits

The IRS examines tax returns to determine whether taxable income has been accurately reported on the tax return.[1] The IRS's authority to examine the books and records of a taxpayer, and to interview the taxpayer directly, is codified at Code sections 7602 and 7605. A number of factors may trigger an IRS examination including, but not limited to:

- Excessive deductions in relation to income;
- IRS receipt of conflicting information from a third party (e.g., a 1099 or K-1 which does not match the amounts reported on a taxpayer's return);
- Whistleblower complaints;
- Tips from disgruntled employees or ex-spouses;
- Taxpayer participation in a particular transaction or type of transaction that the IRS has flagged for review (e.g., a tax shelter);
- Information obtained by the IRS from a John Doe summons;
- The expansion of a previously limited audit.

Furthermore, the IRS has recently articulated a renewed emphasis on examining the compliance of high-wealth taxpayers. In addition, the IRS applies internally developed formulas, generally referred to as the Discriminant Function System (DIF), to "score" returns for purposes of determining whether they should be audited. However, ultimately, the initial trigger of the audit is inconsequential in most cases. The IRS may examine a taxpayer merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[2]

While some audits are conducted solely through correspondence with the IRS, audits that the IRS anticipates will involve relatively complex issues will be handled in the field by revenue agents. Revenue agents do not collect tax; rather, their primary job is to determine whether a taxpayer has accurately reported his or her taxable income, ferreting out issues of potential fraud in the process.

Most often, a taxpayer will first learn of an IRS exam through a notice received in the mail. The notice will often identify the tax years being audited and the issues underlying the audit. However, the scope of the audit is not limited to the issues identified in the initial notice and may expand as the revenue agent obtains more information. Typically, that notice will also include an Information Document Request (IDR) requesting the taxpayer to produce specified documents by a date certain.

Preparing for the audit

Preparation for an audit is crucial. An attorney representing a client undergoing an IRS audit should strive not to be surprised by anything raised by the IRS agent conducting the audit or disclosed by your client to the IRS during the course of the audit. Preparation for an audit involves interviewing the taxpayer and conducting independent research based on the attorney's understanding of the issues likely to be raised. For instance, unreported income may be an issue in the audit, so the attorney should review the client's bank statements, 1099s, and other evidence of income to get an idea of whether a material discrepancy between taxable income received and reported for the year exists. If the client claimed deductions relating to a home office, a visit to the client's home to verify the legitimacy of the deduction may be worthwhile. If the client's business is under examination, a visit to the business to review its record keeping and accounting processes could be helpful. If the client's sale of an investment property appears to be an issue in the examination, the advisor should obtain copies of the settlement sheet and the sales agreement, and should review publicly available information regarding the sale. These are just examples of situations which may arise—the key point is that thorough preparation is vital, and, to the extent possible, the audit should not yield anything that you weren't prepared for.

The client interview should cover not only the issues known to be the current focus of the examination but should also attempt to glean insight into other issues that the client may not have considered and of which the IRS might not yet be aware, but is likely to ask about. For instance, in recent years, the IRS has maintained a focus on tax evasion accomplished through offshore bank accounts and entities, so a line of questioning regarding foreign accounts and assets is essential, regardless of how unlikely the client's ownership of such assets appears to be. Similarly, cryptocurrency has become a topic of focus for the IRS and should be raised in the interview.

Another area of intense IRS focus is the payment of employment taxes, particularly the "trust fund" portion required to be withheld from employees and paid over to the IRS on the client's behalf. If the client is subject to an employment tax audit and is likely to be treated as a "responsible person" under Code section 6672, the attorney's interview should delve into how any trust funds were spent, particularly if they were spent to cover costs unrelated to the business involved. Again, comprehensiveness is key. The more you know about your client's situation, the less likely you are to be sideswiped during the audit. Moreover, you will be in a better position to identify the audit as an eggshell audit early on.

RECOGNIZING WHEN AN EGGSHELL AUDIT MIGHT ARISE

Almost every audit will reveal errors in a return. People are inherently prone to mistakes, and the summation of an entire year's financial activity on a tax return presents countless opportunities to err. Further, audits often will reveal substantial errors resulting in large deficiencies in tax. But not every error or deficiency in tax constitutes, or even presents the risk of, criminal tax fraud. Before an audit becomes an eggshell audit, there must be the specter of criminal tax fraud, and it is the attorney's job to recognize when a client's conduct rises to that level.

While a comprehensive discussion of the criminal provisions of the Code is well beyond the scope of this article—and could fill several books—a brief discussion of the main criminal provisions helps provide an understanding of when the issues presented by an audit are potentially criminal. The most commonly asserted criminal violations are:

- Tax evasion under Code section 7201;
- Willful failure to file a return under Code section 7203; and
- Tax perjury (i.e., willfully subscribing a false tax return or other document signed under the penalties of perjury) under Code section 7206(1).

A conviction under Code section 7201 requires the government to prove three elements: (i) willfulness; (ii) a deficiency in tax; and (iii) an affirmative act constituting the evasion or attempted evasion of tax.

In contrast, the elements of a violation of Code section 7206(1) are: (i) the taxpayer's submission of a return or other document which is false as to a material matter; (ii) the submitted document or return contained a written declaration that the submission could subject the signer to penalties for perjury; (iii) the signer's knowledge that the document was false; and (iv) willfulness. Note that a violation of section 7206(1), unlike section 7201, does not require the existence of a tax deficiency due and owing. In other words, a return may be false and subject the signer to prosecution under section 7206(1) even if additional tax is not due and owing as a result of the falsity (e.g., the taxpayer reported the correct amount of income but lied about the source of the income so as to not reveal the illegal activity underlying the income). Finally, a violation of Code section 7203 involves a taxpayer's willful failure to file a required return (including, for most taxpayers, a Form 1040).[3]

Each of these crimes includes willfulness as a necessary element. In this context, willfulness means the intentional violation of a known legal duty.[4] To be willful, a taxpayer must be aware of his or her legal duty (e.g., reporting all gross income) and intentionally violate that duty. A bona fide misunderstanding of a legal duty, negligence, mistake, accident, or a genuine belief that a particular aspect of the tax law does not apply, is a defense to tax evasion. In contrast, however, a belief in the illegality or unconstitutionality of a tax statute or regulation, no matter how bona fide, is not a defense. Thus, in evaluating whether a client's audit carries potential issues of criminal tax fraud, the focus must be on factors relating to willfulness—the client's intentional violation of the tax law.

The government understands that in most cases, direct evidence of a taxpayer's willfulness is hard to come by, if it exists at all. Consequently, the likely focus of the government's efforts to establish willfulness will be circumstantial evidence tending to show the intentionality of the client's conduct. Thus, in evaluating whether your client may be facing an eggshell audit, this circumstantial evidence should be your focus as well. Over time, certain acts have become indicators of willfulness. These are generally referred to as the badges of fraud. When sufficiently present in your client's fact pattern, your client is likely facing an eggshell audit:

- Repeated conduct, tending to show that any violations of the tax law were not one-off mistakes (e.g., multiple years of unreported income or overstated deductions);
- A significant amount of unreported income, when looked at in relation to the taxpayer's other circumstances. Omission of $50,000 of income looks particularly suspicious when the taxpayer's true total income is $100,000. Conversely, it is more plausible that $50,000 of income could be mistakenly overlooked when the taxpayer otherwise reports $10 million of gross income;
- Obvious accounting errors beneficial to the taxpayer (e.g., characterizing a distribution otherwise constituting income as a deductible business expense);
- Double sets of books and records, one containing true records of receipts and expenses, and one containing a false, more beneficial accounting of the taxpayer's or his business's activities;
- A lack of records which would normally be created and kept in the ordinary course of business;

- Misstatements made by the taxpayer to the return preparer;
- Asset concealment or placing assets in the names of nominees while retaining beneficial control of the asset;
- Extensive use of cash, structuring of cash transactions to avoid the triggering of reporting requirements, or the apparently unnecessary cashing of checks as opposed to depositing them;
- Statements made to the IRS or to third parties (e.g., loan application documents inconsistent with the client's tax return);
- Elements of the client's background pointing toward substantial education or financial sophistication;
- Efforts to obstruct an investigation before your involvement (e.g., destruction of records, misstatements to the revenue agent, attempts to influence witnesses, and similar conduct);
- Elaborate lifestyle inconsistent with the client's reported income or assets;
- Illegal source income. A client is more likely to seek to conceal income when it is from an illegal source.

The Internal Revenue Manual (IRM) includes a longer list of "indicators of fraud," which align with and often overlap the badges of fraud listed above.[5] The IRS treats indicators of fraud as "signs or symptoms" of fraud,[6] which signify whether actions were done for the purpose of deceit, concealment, or other improper reasons. Thus, the indicators of fraud provide a more detailed review of what revenue agents look for when determining whether fraud exists and whether a referral should be made for criminal investigation.

MANAGING EGGSHELL AUDITS

General techniques

Once you have determined that your client is facing an eggshell audit, your primary goal should be to prevent the initiation of a criminal investigation. When potential criminal issues are present, financial issues are, temporarily at least, relegated to the backburner. Consequently, if the auditor proposes to close an eggshell audit by making adjustments that you or your client deem excessive or subject to challenge, the better part of discretion is to agree to the proposed assessment and move on. The value in ending the audit and preventing any further digging by the revenue agent is that great.

If the revenue agent keeps prying, there are numerous issues to think about. First, making a traditional voluntary disclosure is no longer an option. IRS guidelines regarding voluntary disclosures state that once an audit of the taxpayer has begun, the taxpayer is no longer eligible to participate in the voluntary disclosure program.[7] However, there is nothing preventing a taxpayer from simply filing correct amended returns and, ideally, paying the deficiency and interest through one lump-sum payment. Obviously, this is a risky strategy. By doing so, the taxpayer is admitting to previous errors on the tax return, admitting to the existence of a deficiency, and providing a road map for the revenue agent to follow. If there are sufficient indicators of willfulness, then the taxpayer may be sealing his own fate. Furthermore, it is likely that any amended returns will be subjected to serious scrutiny without giving the taxpayer any benefit of the doubt, making completeness and accuracy absolutely essential. Conversely, identifying errors in prior returns and—crucially—paying all additional tax and interest, may blunt any momentum that may have been building toward a criminal investigation referral. The IRS and the Department of Justice (DOJ) may believe a jury is unlikely to punish a taxpayer who recognized his mistakes, paid his liability, and acted contritely early in the process, thereby reducing the value of a potential prosecution to the government. Ultimately, whether to come forward voluntarily early in the audit process is a difficult decision driven by the facts of each particular case. It is a decision that should not be made lightly.

In the event your client decides to ride out the audit, there are several steps that can be taken to protect your client's interests. First, as noted, if the IRS proposes an assessment and closure of the audit, the opportunity should be accepted. Second, you should make sure you have filed a power of attorney with the IRS's Centralized Authorization File (CAF) unit so that any notices sent to the taxpayer will also be sent to you. Further, having a Power of Attorney (IRS Form 2848) on file will allow counsel to regularly request account transcripts thereby keeping tabs on IRS-initiated developments in the case. Familiarity with the codes utilized by the IRS on taxpayer account transcripts may provide clues as to whether a criminal investigation has begun. Third, the taxpayer is statutorily entitled to request identification of third party contacts the IRS has made.[8] Extensive IRS efforts to contact third parties may be indicative of a brewing criminal referral. Fourth, you may choose to file a Freedom of Information Act (FOIA) request seeking the auditor's case activity reports, case notes, and other material that could provide insight into the auditor's thoughts on the case.[9] A FOIA request may be made for any records in the possession of the IRS, subject to the IRS's confidentiality obligations (meaning that a POA will be necessary), but may not be used to compel the IRS to create documents or research or analyze an issue. Fifth, it may be necessary to seek the assistance of a third-party accountant.

Kovel engagements

Often, a forensic accountant may be able to spot issues or identify explanations for a client's accounting failures that were not previously apparent. Further, an accountant may be able to identify additional deductions or characterizations of income which reduce the potential deficiency in tax. However, the privilege provided by the Internal Revenue Code for certain communications between an accountant and a taxpayer does not exist in the context of a criminal case. Thus, absent taking specific precautions, communications between the client and the third-party accountant would be subject to IRS discovery and potentially admissible evidence in the event of a criminal trial. The way to circumvent this issue is to have the accountant work for you, not the client. This principle is primarily associated with *Kovel v. United States*,[10] in which the Second Circuit analogized an accountant assisting an attorney to an interpreter assisting an attorney with a client who only speaks a foreign language—a relationship entitled to come within the ambit of the attorney-client privilege. Such a relationship should be documented with an engagement letter between you and the accountant, generally referred to as a Kovel letter. The letter should specify that direct communication between your client and the accountant is prohibited without your presence and that the accountant's files relating to the client are the property of your firm. Moreover, payment for the accountant's services should come directly from your office, rather than from the client. The overriding principle is that a Kovel accountant works for you, the lawyer, not the client. The advice rendered under the Kovel agreement is subsumed under the lawyer's legal advice; however, accounting advice provided to the client, even by a Kovel accountant, will not be privileged. The accountant's advice needs to supplement and be tied to your legal advice. Similarly, preparation and filing of returns by the Kovel accountant will waive the privilege; thus, returns prepared by the Kovel accountant should be in draft form and never filed. Moreover, prior to the Kovel engagement the accountant must not have any knowledge of the case's relevant facts or issues—that information can only be provided after the Kovel engagement has been established. In effect, this rules out the client's current accountant from serving in a Kovel capacity.

In addition, it is important to keep in mind that Kovel status is not limited to accountants or tax professionals. Rather, it can apply to a variety of consultants whose skills are necessary to assist you in understanding your client's behavior or business. For example, if your client is in the construction industry and you need specialized assistance to understand a particular aspect of that industry, a contractor, engineer, or other construction professional may be engaged under a Kovel engagement.

Assertion of relevant privileges

During the course of the audit, it is inevitable that the revenue agent conducting the audit will request documents from the client, likely on multiple occasions, and may request an interview with the client. As noted, the IRS has a statutory right to do this. A taxpayer's refusal to cooperate will likely lead to an IRS summons, which, absent a very narrow set of circumstances, a court will uphold if challenged. Consequently, it is important to be aware of the taxpayer's rights and the potential pitfalls when responding to IDRs or IRS questioning. First, it is important to ensure, to the extent possible, that all information provided to the IRS is accurate. Otherwise, a bad situation may be made worse by creating the potential for an obstruction of justice or similar charge. Second, the scope of the taxpayer's privileges must be determined. There are three primary privileges that may come into play during the course of an eggshell audit.

The first is the attorney-client privilege, the scope of which is well defined. Communications between you and your client, or your client and previous counsel, should not be provided to the IRS absent a court order to the contrary, or some other overriding factor such as a grant of immunity. The attorney-client privilege may not be invoked generally but instead must be asserted as to each specific document sought or question raised by the IRS. Business entities, such as corporations, are also protected by the attorney-client privilege, so long as the communications at issue are limited in their scope, typically with the control group of the entity or employees speaking with counsel about matters at the direction of a superior to allow the entity to receive legal advice.

The second is the attorney work-product privilege, which protects an attorney's statements, memoranda, notes, correspondence, and mental preparations prepared in anticipation of litigation.[11] A key limitation to the scope of this privilege is that the subject documents must have been prepared in anticipation of litigation. While the work-product doctrine clearly applies to documents prepared post-indictment, documents prepared prior to that point often must be prepared "because of" the prospect of litigation. Generally, tax workpapers and other analyses underlying return positions will not be privileged under the work-product privilege.

The third key privilege is the protection against self-incrimination provided by the Fifth Amendment to the Constitution. Fifth Amendment protections may be raised in a purely civil context, so long as the witness reasonably believes that his testimony would show criminal liability or provide a link in the chain of evidence necessary to prosecute him for a criminal act.[12] Invocation of the Fifth Amendment privilege can only be made with respect to a testimonial act, meaning that the production of documents in response to a subpoena or summons will not be privileged unless the responding party establishes a testimonial aspect to the production, e.g., that the act of production will establish the responding party's possession of certain documents or will provide insight as to the responding party's understanding of the documents requested in the subpoena. Further, the Fifth Amendment privilege is limited to individuals—corporate entities, partnerships, and other collective entities may not assert the privilege, regardless of their size or closely-held nature.[13] This can place the records custodian of such an entity in a difficult position, because the custodian may be personally involved with the corporate records being produced, but nevertheless have no basis to prevent their disclosure. Conversely, sole proprietors may invoke the Fifth Amendment, even with respect to business records (again, assuming testimonial significance to the act of producing the documents). Although they share many attributes with proprietorships, most courts have held that owners of single-member LLCs may not invoke Fifth Amendment privilege with respect to business records.[14] As with the attorney-client privilege, the Fifth Amendment must typically be asserted on a question-by-question or document-by-document basis. As discussed below, whether to invoke the Fifth Amendment—thereby inviting inevitable scrutiny of the underlying issue by the IRS—is a difficult question and must be informed by the context of the audit.

Meeting filing obligations going forward

A related issue is your client's compliance with her reporting and filing obligations going forward. Given that IRS audits often take more than a year, it is possible, if not likely, that your client will be required to file a tax return during the course of the audit. By doing so, however, the taxpayer provides a relatively simple means for the auditor to compare and contrast the current return with prior years, potentially highlighting previously unreported sources of income or large disparities in categories of income. If it appears that an audit is nearing its closing stages around the time for the initial filing deadline for a return (e.g., April 15 for Form 1040) then the client should file an extension request to secure another six months to file the return, by which point the audit may well be closed. If that is not possible, it goes without saying that any tax return filed during the course of an audit (or any other time) should be true, correct, and complete to the best of the client's knowledge. Further, there is no Fifth Amendment right to refuse to file a tax return. However, the Fifth Amendment privilege may be asserted with respect to specific questions raised in the tax return (e.g., the source of income), but generally not the numbers necessary to compute an accurate tax return (e.g., the amount of income).[15] Whether your client should avail herself of that option depends on the current status of the case. If the audit appears to be winding up without significant indicators of a fraud referral, then asserting the Fifth Amendment privilege on a newly filed tax return will likely revive any scrutiny for fraud. Conversely, if it appears the revenue agent has built a strong fraud case and a criminal investigation referral seems likely, or it appears one has already happened, then asserting the Fifth Amendment on a newly filed tax return may make more sense. As ever, this decision is difficult, fact-intensive, and eludes categorical answers.

RECOGNIZING AND RESPONDING TO A CRIMINAL REFERRAL

If a revenue agent suspects fraud, the IRM directs the agent to notify his manager and a Fraud Enforcement Advisor (FEA).[16] The role of an FEA is to serve as a resource and liaison to compliance employees (e.g., revenue agents) and to assist in fraud investigations and offer advice on matters concerning tax fraud.[17] Thereafter, the goal of the revenue agent and the FEA working on the case will be to establish sufficient affirmative acts to confirm a finding of fraud. In all likelihood, the revenue agent will seek to gather as much information as possible before making a referral to criminal investigation, because once such a referral is made, IRS policy generally mandates that the civil audit cease.[18] The revenue agent will not volunteer the fact that he is working with an FEA to build a case for criminal referral.

Although IRS policy bars continuation of a civil examination following referral of the case for criminal investigation, a violation of that policy may not always be advantageous to the taxpayer. If the revenue agent misleads the taxpayer about the status of the case, thereby allowing the IRS to gather additional information under the guise of a civil examination, subsequently obtained information may be subject to suppression. For instance, in *United States v. Tweel*,[19] taxpayer's counsel asked the revenue agent whether a special agent (of the CID) was involved in the case. The revenue agent said no, but in fact the audit had been requested by the DOJ. The Fifth Circuit suppressed the evidence that the IRS obtained thereafter, because, while literally true, the revenue agent's answer was misleading and the resulting information was obtained via deceit, trickery, and misrepresentation.[20]

However, since *Tweel*, courts have been reluctant to suppress evidence or dismiss indictments based on the IRS obtaining information in furtherance of a criminal case under the guise of conducting a civil audit. While the rules vary across jurisdictions, a commonly used test requires the taxpayer to show: (i) that the IRS had firm indications of fraud; (ii) clear and convincing evidence that the IRS intentionally misled the taxpayer; and (iii) the conduct prejudiced the taxpayer's constitutional rights.[21] Other than violating internal IRS policy, maintenance of a civil examination following referral for criminal investigation will not result in suppression of evidence obtained following the referral. This uncertainty can place taxpayers and their counsel in a difficult position. While the inclination may be to cooperate with the revenue agent's audit requests, the decision-making calculus shifts radically when it is known or suspected that a criminal investigation has begun or is imminent. One way to gain clarity is simply to ask the revenue agent, in writing, whether the case has been referred for criminal investigation. If the revenue agent answers yes, then you know where you stand, while a denial should provide some comfort because a false answer may very well create issues for the IRS under *Tweel*. Often, a revenue agent's response will be vague and non-committal, refusing to rule out the possibility. In that circumstance, a taxpayer and his counsel should view a referral for criminal investigation as a very real possibility, and should act accordingly, including invocation of Fifth Amendment rights as necessary. Given that this question (whether a referral has been made) reveals the taxpayer's concerns about such an investigation, it should not be asked until you, as counsel for the taxpayer, have reason to believe that the IRS has identified firm indications of fraud. Other telltale signs of the IRS's focus on a potential criminal referral include substantial contacts with third parties, particular focus on a specific transaction or type of transaction involved in the audit, a period of sustained silence from the auditor (in particular a failure to respond to your inquiries), and questions regarding your client's intent.

Once a referral is made, the CID will evaluate all aspects of the referral including:

- The affirmative acts of fraud identified by the revenue agent;
- The taxpayer's explanations, if any;
- The estimated liability resulting from the fraud;
- The method used by the agent to verify the taxpayer's income;
- Past discussions to settle the liability civilly or other efforts that could be viewed as the IRS condoning the taxpayer's behavior; and
- The taxpayer's age, health, and level of education.

Having an idea of what the CID and DOJ will be looking for will definitely inform your representation during the audit stage.

For instance, before deciding whether to move forward with a criminal prosecution, the Tax Division of the DOJ will consider whether there is sufficient evidence to support a conviction under the "beyond a reasonable doubt" standard, and whether there is a reasonable likelihood of a conviction in light of the available defenses.[22] Further, the DOJ will exercise prosecutorial discretion, including determining whether a substantial federal interest would be served by proceeding with the prosecution. Given that the chief goal of tax prosecutions is deterrence,[23] including through the specter of a prison sentence, anything you can do at the audit stage to reduce the likelihood of a prison sentence in the event your client is prosecuted, may cast doubt on the value of moving forward with a prosecution. One of the chief determinants of whether a sentence includes a prison term and, if so, the length of the prison term, is the tax loss caused by or intended to be caused by the taxpayer's conduct. Thus, even if the evidence compiled against your client at the audit stage appears more than sufficient to support a criminal prosecution and subsequent conviction, sufficiently lowering the tax loss may dissuade the government from moving forward with the prosecution. Anything you can point to—unclaimed deductions, characterization of a corporate distribution as a return of capital, previously unasserted theft or casualty losses, to name just a few—may tip the balance in the government's mind that a prosecution of your client is not worthwhile. This will also prove valuable in the event you successfully head off a criminal referral, but your client still faces a civil fraud penalty, equal to 75 percent of the deficiency.

CONCLUSION

Representing a client facing an eggshell audit can be harrowing, for you and for the client. At a fundamental level, the focus of your efforts must always be preventing a referral of the case for criminal investigation. To do that, you must obtain as much knowledge as possible about your client and his financial activities; you must stay attuned to the revenue agent's actions and the focus of the investigation; and you must decide when or if cooperation with the revenue agent fits your client's best interests. A good outcome will not ultimately be measured in dollars and cents; it will be measured by whether your client retains his liberty.

Notes

1 IRM 4.10.4.1 (8-9-2011).

2 United States v. Powell, 379 U.S. 48 (1964).

3 In addition to the primary tax crimes discussed above, you should also analyze and inquire of your client whether anyone else was involved in the potential fraud. This is necessary to determine whether your client was part of a conspiracy, which could affect the manner in which you approach the representation. See 18 U.S.C. § 371. Additionally, you should ask your client whether she has recently disposed of any records or taken other steps to impede the IRS's investigation, which itself could constitute a separate criminal act. Moreover, you should always advise your client to not destroy records and to suspend any previously implemented record destruction or email purging policies to avoid any future accusations of obstruction.

4 Cheek v. United States, 492 U.S. 192 (1991).

5 IRM 25.1.2.3 (4-23-2021).

6 IRM 25.1.2.4 (4-23-2021).

7 IRM 9.5.11.9 (9-17-2020). Although beyond the scope of this article, the IRS's voluntary disclosure program should be considered with respect to clients that come to you with issues pointing toward criminal tax fraud, but the IRS has not yet learned of the issues or otherwise commenced an investigation of the client. The specific parameters of the voluntary disclosure program are set forth in the IRM.

8 IRC § 7602(c)(2).

9 See 5 U.S.C. § 552; https://www.foia.gov/how-to.html; and https://www.irs.gov/privacy-disclosure/freedom-of-information-act-foia-guidelines.

10 United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

11 Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

12 Hoffman v. United States, 341 U.S. 479 (1951).

13 Braswell v. United States, 487 U.S. 99 (1988).

14 See, e.g., United States v. Lu, 248 F. App'x 806, 807-08 (9th Cir. 2007) ("[T]he business records of Lu's [single-member limited liability companies] are not protected by the Fifth Amendment, and the district court properly denied Lu's motion to quash the subpoena.").

15 United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982).

16 IRM 25.1.2.2 (4-23-2021). This role was previously referred to as a Fraud Technical Advisor. See IRM 25.1.2.1.3(2) (4-23-2021).

17 IRM 25.1.2.1.3 (4-23-2021).

18 IRM 25.1.2.2(9) (4-23-2021).

19 United States v. Tweel, 550 F.2d 297 (5th Cir. 1977).

20 Id. at 299-300.

21 See, e.g., United States v. Wadena, 152 F.3d 831, 851 (8th Cir. 1998).

22 U.S. Attorney's Manual (USAM) § 9-27.220; 6-4.211.

23 USAM § 6-4.010.