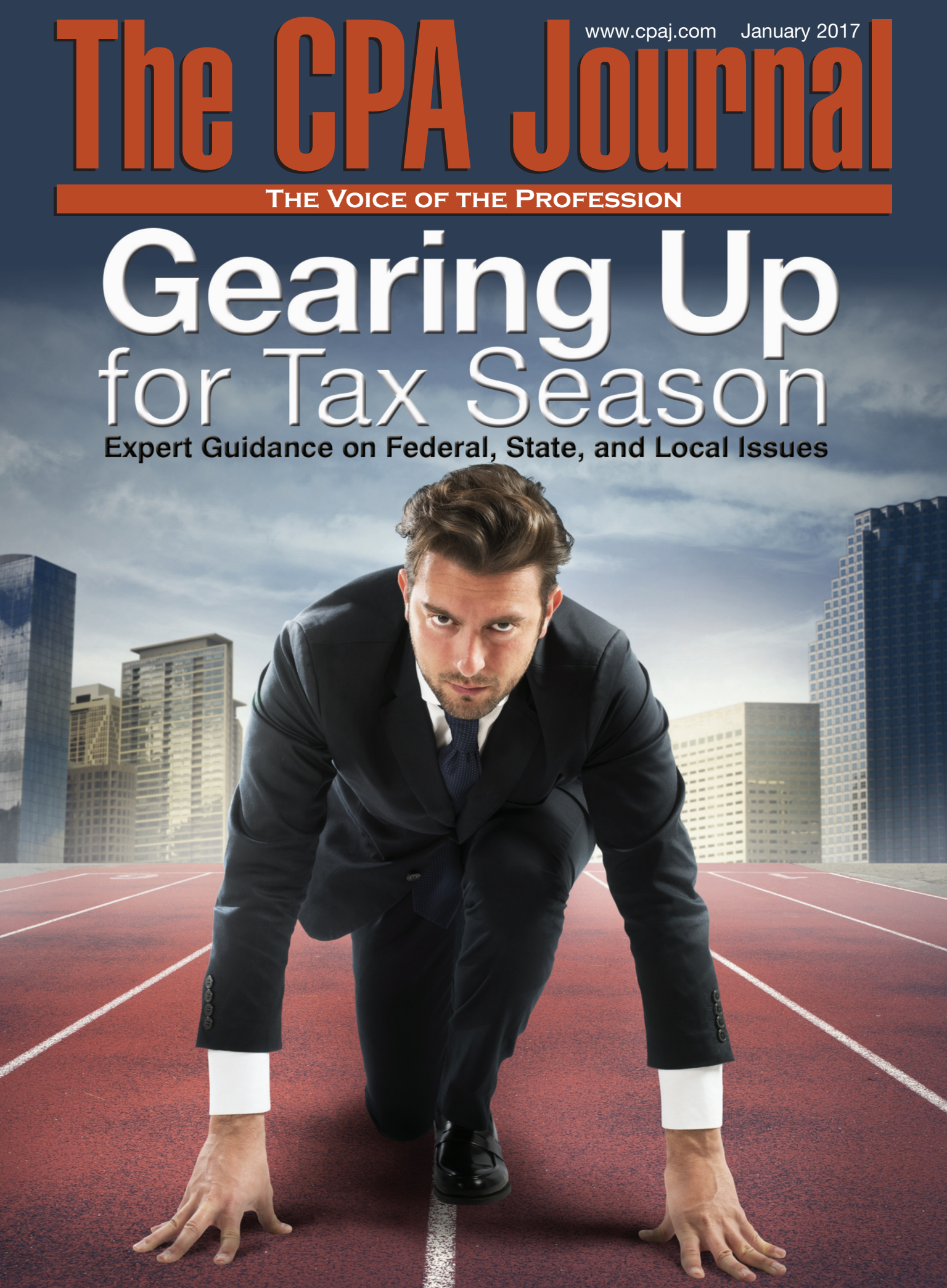
www.cpaj.com January 2017

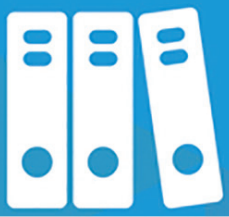
# The CPA Journal

THE VOICE OF THE PROFESSION

# Gearing Up for Tax Season

## Expert Guidance on Federal, State, and Local Issues





# Federal Tax Preparation

## Issues and Insights

### *Highlights of the IRS Representation Conference*

On November 17 and 18, the NYSSCPA co-sponsored the Third Annual IRS Representation Conference. The event covered a wide range of issues—from the routine to the exceptional—encountered by CPAs when representing taxpayers before the IRS. Participants were drawn from a number of accounting and legal firms as well as the IRS, Justice Department, and Federal Court System. Eric Green and Jeffrey Sklarz from Green and Sklarz LLC and Sid Kess from Citrin Cooperman organized the conference and moderated a number of the sessions.

The following articles cover the highlights from the conference. The first panel, "Dealing with Nonfilers" begins with the issues confronting a CPA with new clients that have not filed their taxes for years prior. "Gift Tax Returns & IRS Examination" uses a sample fact pattern to illustrate the issues surrounding gift tax returns and the necessary disclosures. The third article, "Preparer Penalties" discusses the civil and criminal penalties preparers could face if they violate professional ethics rules. "Receipts? What Receipts?" covers the all too common issue of taxpayers who lack the information necessary to properly prepare a return. "Bankruptcy versus Offer in Compromise" presents the pros and cons of these two approaches to resolving the issues facing taxpayers with large tax liabilities. Finally, "Criminal Investigation and Prosecution of Tax Preparers" delves into the worst-case scenarios for CPAs: preparer penalties and potential criminal charges related to ethical or legal violations in preparing returns.

# Dealing with Nonfilers

## About the Panel

**Eric L. Green**, of Green & Sklarz LLC, moderated the panel. **Walter Pagano**, forensic accountant at EisnerAmper LLP; **Joel Crouch**, partner at Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP; and **Steven I. Hurok**, forensic accountant at Citrin Cooperman, were the panelists.

The comments below represent the speakers' own views and do not necessarily represent those of their partners, affiliates, or employers, nor do they represent official policy of the government or any government agency.

One of the panels conducted at the 2016 IRS Representation Conference concerned the myriad issues confronting CPAs whose clients have simply not filed their tax returns, sometimes for decades. Topics included assessing fact patterns, the intersection of ethical standards and the *Kovel* privilege, the effect of whistleblower programs, and the use of voluntary disclosure procedures.

### What to Do When a Client Admits Not Filing

Green started the panel off by speaking about chronic nonfilers, who may not have filed for years or even decades. "How did we get here?" he asked. "Sometimes it can be greed. Sometimes it can be stupidity. What I see most often goes something like this: I can't pay the tax, so I won't file, because if I don't file, then [the IRS] doesn't know. But don't worry, I'll make it up next year.' This rarely works, as Green outlined for the audience; simply not filing imposes an immediate penalty, and the IRS will investigate further, as will the state, which can sometimes be even more aggressive and unforgiving.

Turning to Crouch, Green asked what the options were for CPAs who encounter extreme cases of nonpayment or evasion. "You've got to develop your facts," Crouch said. Under one option, which he called "quiet disclosure," the taxpayer simply files the missing information. This is not generally considered a voluntary disclosure and opens up the possibility of penalties and criminal exposure. On this point, Hurok asked if any of Crouch's cases had ever risen to the level of criminal charges. Both Crouch and Green agreed that the IRS generally does not do so when the disclosure is about matters that have not yet come to its attention; that is, when the taxpayer is owning up to his own mistake. Green did note the case of a taxpayer who was prosecuted for making an *incomplete* quiet disclosure; the lesson there is that such disclosures should contain everything.

Pagano noted that, while preparers have no obligation to verify each item on an original tax return, in the case of failure to file or the need to file an amended return, "it is absolutely incumbent upon us to go beyond the mere compiling of information." The other option, Green continued, is a formal voluntary disclosure.

Crouch noted that nonfilers often have other problems. "When a client comes in and tells you about a problem, it's about the best the story is going to get, because after that it's going to go downhill. You start digging deeper, you start finding all these problems." As more issues are revealed, CPAs need to ask themselves who their client is: Is it the owners or the business? A married couple or an individual spouse? CPAs should decide whom they can represent before the matter goes to the IRS and everyone starts pointing fingers. This is the point where Crouch recommends hiring legal counsel because "you may not have a privilege with this client."

Crouch shared advice that he received when he began practicing: "When they close the jail cell door, make sure you're on the outside." Green agreed, saying, "If they're on a sinking ship, I see no reason to jump on and go down with them."

### Due Diligence and the *Kovel* Privilege

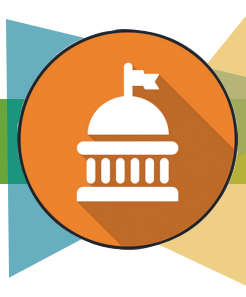
Green then asked Pagano about a CPA's responsibilities with nonfilers. "My advice is we have an obligation to do due diligence," Pagano noted, "but we also have an obligation to do two other things: not to harm our clients and put them in an adverse situation and not to do harm to ourselves." Pagano also referred to Circular 230 and the AICPA standards, agreeing that at a certain point, CPAs' ethical obligations require them to refer the client to legal counsel. They may also need to consult their own counsel.

Green reminded the panel that attorneys can bring in accountants under the *Kovel* privilege, and that the CPA who originally handled the case may be able to stay on it in that capacity if he was able to stop the client from divulging the incriminating information. This requires developing a sense of whether a case may be headed in a criminal direction from just the initial information. "It's human nature," he said, "to want to know what happened, but you really want to not know if you can avoid it." He also noted that, even with *Kovel*, CPAs still have the obligation to file a complete and accurate return.

Hurok asked about the advantages and disadvantages of using the original accountant as the *Kovel* accountant. "I don't love the idea," Green admitted, saying that it makes the accountant a target of inquiry and weakens the privilege. Crouch agreed, asking rhetorically, "if the *Kovel* accountant turns around and prepares the returns, is there some sort of waiver at that point of your privilege?" Hurok followed up by saying that in his experience, serving as the *Kovel* accountant limits the degree of scrutiny a CPA will face.

"My advice is we have an obligation to do due diligence," Pagano noted, "but we also have an obligation to do two other things: not to harm our clients and and not to do harm to ourselves."

Pagano returned to the subject of due diligence, saying that intent often makes a big difference in cases of inaccurately filed returns. In cases of error, he said, CPAs have an obligation to determine the tax liability consequences and disclose them to the client. What to do about the error, however, is the taxpayer's decision. "Sometimes accountants will have this knee-jerk reaction to prepare a draft amended return," which he advises against. He also said that accountants must have a good-faith belief that the violation was unintentional.



On the subject of *Kovel* privilege, Pagano noted that the *Kovel* accountant is an agent of counsel and must take direction from counsel. He also cited a recent case where a *Kovel* accountant had prepared draft amended returns without advising counsel; the returns were determined to be discoverable and are now with the IRS's Criminal Investigation Division. As a ground rule, he said, *Kovel* accountants should inform and obtain authorization from counsel before taking any such steps.

### Whistleblower Cases

Hurok brought the issue of whistleblowers into the discussion by citing a case where a junior business partner who was bought out of the company blew the whistle on his former senior partner's wrongdoing after a personal conflict arose between them. He noted that law firms have sprung up specializing in whistleblower cases, and that the incidence of such cases is likely to increase. Green noted that while revenge is a frequent motive for whistleblowing, it often redounds to the whistleblower, who is usually also complicit in the wrongdoing.

Hurok continued with the observation that the IRS encourages businesses to reform flawed accounting methods that lead to errors on returns, sometimes even preferring this to filing an amended return. He illustrated his point with an example where a client's flawed method for estimating inventory was identified when the client was already under examination, but not actually identified by the IRS. The CPA firm advised the client to reform the method after the examination was completed (as it could not be done while the investigation was ongoing), but the client then reconsidered and decided not to make the change because of the expense involved. This created an ethical dilemma; even after the client dropped the firm, was it obligated to disclose this flawed method, since it had previously advised that the client would engage them to review their compliance? Ultimately, the firm elected not to volunteer the information, reasoning that the client might change his mind again in the future. "Sometimes you can't do everything," Hurok said.

> "You're going to have to cooperate with them in determining how much the tax liability is," Crouch said, "and then make a good-faith effort to pay."

Green also noted that when CPAs advise clients to file amended returns, they should document such meetings in case such evidence is needed during a later examination.

### Formal Voluntary Disclosure

Green asked Crouch to outline the process of formal voluntary disclosure. Crouch said that the two important things are to meet the criteria for voluntary disclosure (i.e., the income must be from a legal source) and to make the disclosure in a timely manner (i.e., before the IRS becomes aware of the deficiency). "You're going to have to cooperate with them in determining how much the tax liability is," he added, "and then make a good-faith effort to pay."

Crouch also noted that, in the case of an offer in compromise, the required form asks if the taxpayer has filed all tax returns; this is not always the case, as the upper limit in voluntary disclosure is generally six years, and the taxpayer may be delinquent for a period well beyond that (panelists cited examples of 17 and 26 years). In such a case, Crouch recommends letting the IRS know about the other outstanding years, and to cite from the relevant manual section regarding the six years requirement. "I don't want somebody thinking we're making a false statement," he said, "so a lot of times we either disclose it on our form or we don't check the box one way or the other. I think the safer approach is to disclose it."

Hurok shared a case regarding the foreign bank account (FBAR) voluntary disclosure program wherein the taxpayer's noncompliance for a small amount in two years out of six could have led to severe penalties for all six years due to IRS guidance and the large balance of the foreign account. In the interests of full disclosure, the filing included the representation of the small noncompliance. The IRS ultimately did not challenge the filing or assess any penalties, but Hurok was still glad to have made the disclosure, saying, "We felt comfortable that we had disclosed it by saying it was an interpretation." He concluded by noting that he reads the "Did you file every return?" question as applying to the six required years, and not all returns throughout history. ❑

# Gift Tax Returns & IRS Examination

## *Challenges and Pitfalls for Practitioners*

## About the Panel

**Seth Cohen**, a partner of Withers Bergman, moderated the panel. **Mark G. Sklarz**, partner at Green & Sklarz; **James R. Grimaldi**, partner at Citrin Cooperman; and **Anthony F. Vitiello**, partner and chairman of the tax and estate planning group at Connell Foley, were the panelists. The comments below represent the speakers' own views and do not necessarily represent those of their partners, affiliates, or employers, nor do they represent official policy of the government or any government agency.

At the 2016 IRS Representation Conference, one panel covered gift tax returns and the dangers they pose to unwary CPAs and taxpayers. Using a sample fact pattern, the panelists covered issues surrounding adequate disclosure, proper preparation of a gift tax return, what to do if such a return comes under audit, and the impact of the generation-skipping transfer tax.

### A Sample Fact Pattern

Cohen opened by noting that the panelists had prepared a fact pattern ahead of time that would drive the discussion and highlight relevant issues in preparing gift tax returns. Sklarz led off the discussion by covering the basics of the fact pattern. The fictional clients, Davida and Theo Fenway, were married and had two children, Dustin and Mariana. Among their assets were $8 million in proceeds from the sale of Davida's public relations firm and $10 million in stock that Theo inherited from his grandfather; they have gifted approximately $3.5 million of assets to their children and grandchildren over the past four years. Theo, Dustin, and Mariana also co-own a sports information business,

Beantown; due to expected growth over the next five years, Theo has consulted with the family's financial planner on how to transfer his interest in the company to Dustin and Mariana.

Davida and Theo are 60 and 56 years old, respectively, and would like to avoid exhausting their remaining gift tax exemptions too soon while receiving some value for Theo's Beantown membership interest and excluding the appreciation from their estate. Their planner has thus recommended an installment sale to an intentionally defective grantor trust (IDGT). Under this plan, Theo would create an IDGT and sell his membership interest to it in exchange for a promissory note for the interest's value. The note would gain interest at the midterm AFR (applicable federal rate) rate, payable annually in arrears and in a balloon payment nine years after the sale. As the grantor, Theo would retain the right, in a non-fiduciary capacity, to reacquire the membership interest in exchange for an asset of equivalent value. Sklarz noted that this can provide some valuable advantages, based on the term of the trust.

### Benefits and Risks of an IDGT

Sklarz then explained the planning benefits of the IDGT transaction: "The important aspect is that this is considered a completed gift for transfer tax purposes, but not a completed gift for income tax purposes." Theo would therefore remain responsible for the trust's income tax responsibilities. Furthermore, there would be no capital gain; Theo would effectively be paying the interest to himself, and thus not be taxed on it. The income taxes on the trust itself would further reduce his estate without incurring any gift tax liability (because he received consideration for his membership interest) or using up his exemptions.

There are also some risks to this plan, Sklarz said. He noted that regulations require the value of the interest must be properly ascertained in order to avoid being designated a gift. Finally, Sklarz reminded the audience that taking substantial discounts in minority interests in LLCs and limited partnerships may be dramatically more limited under the proposed section 2704 regulations.

> Vitiello opined that if a preparer has done everything they are supposed to do, then "the real issue in most cases today is fighting over valuation discounts."

### Adequate Disclosure and the Gift Tax Return

Grimaldi and Vitiello then turned to the gift tax return itself, which Grimaldi noted is different from a standard income tax return. They can be "pretty voluminous," he said, requiring valuations, elections, and disclosures. It is important, he said, to always assume that a gift tax return will be examined thoroughly by the IRS. Vitiello noted that even properly prepared gift tax returns can still be subject to litigation, and proper documentation during preparation is "the first step of your litigation defense."

Grimaldi then turned to the subject of adequate disclosure, noting that if the IRS determines that the disclosure is inadequate—that is, reported in a manner adequate to apprise the IRS of the nature of the gift and the basis for the valuation so reported—the IRS can revalue the gift, and therefore the gift tax owed, even after the normal three-year statue of limitations has passed. The threshold, he said, is an omission that exceeds 25% of the total amount reported.

Vitiello described the standard for adequate disclosure as ambiguous: "I anticipate that there will be a significant potential amount of litigation in high-stake cases relating to adequate disclosure." He cited a pre–adequate disclosure case where, in 1990, a father merged a business that was in the red with his son's successful business, leading to an overall 80/20 split in the son's favor. The merged business was sold in 1998 for $30 million, and the father died in 2001. After the son filed the estate tax return, the IRS auditors found that no gift tax return had been filed for the 1990 merger. The IRS determined that the merger qualified as a gift and eventually levied $25 million in tax, interest, and penalties. The moral, according to Vitiello, is that inadequate disclosure can have severe consequences, and that this situation could have been prevented under the subsequent adequate disclosure law and regulations.

Sklarz then returned the discussion to the sample fact pattern, under which there are both the gift of assets (the stock Theo inherited and proceeds from the sale of Davida's business) and the sale of the Beantown membership interest to the IDGT. He and Vitiello agreed that adequate disclosure is critical in the IDGT arrangement, including filing a gift tax return; this would be true even if there were only the IDGT sale and no other gift. An audience member asked whether this would be true even if the business had zero or negative value; Vitiello conceded no return would be

required in that case, but that the better course of action is to file a gift tax return to take advantage of the adequate disclosure statute of limitations and to retain proper documentation of the valuation in case of audit.

Grimaldi asked if filing the gift tax return by itself would increase the likelihood of an audit. Vitiello thought not: "The number of gift tax return audits, last time I checked, is under 1% of those filed."

Returning to disclosure, Grimaldi then discussed the concept of safe harbor. Safe harbor requires a description of the transferred property and any consideration received for it, an identification of the relationship between donor and donee, a description of the trust (in this fact pattern), an appraisal of the transferred property, and a statement describing any position in the return contrary to any proposed temporary or final regulations or revenue ruling. The appraiser must be an independent party, and his qualifications must be included in the appraisal.

Vitiello explained why adequate disclosure is so important. "We don't want the IRS to have more than three years to audit the return," he stressed. "We don't want to get into an audit over the value 10, 15 or 5 years down the road." He also urged CPAs to use a qualified appraiser instead of just providing financial statements. Most ethics rules permit a CPA to use another arm of the firm to appraise the business interest for gift tax purposes, but one should consider using an outside valuation firm to avoid arguments of conflict of interest by the IRS.

On the issue of the final criterion for safe harbor, the statement of contrary position, Vitiello said that he has never actually seen it on a gift tax return. Nevertheless, he said, making the statement, as opposed to asserting that the disclosure is statutorily adequate without it, is a case of "better safe than sorry."

Returning again to the fact pattern, Grimaldi noted that *non–gift* transfers are considered adequately disclosed if reported properly by all parties for income tax purposes; no gift tax return is required. The transfer must also be in the ordinary course of business, and the income tax return must contain an explanation of why the transfer is not a gift. Vitiello, however, said that under the fact pattern, a gift tax return is still the best strategy because the transfer in this case is "income tax-neutral; there's nowhere to really disclose it except on a gift tax return." An audience member brought up the possibility of filing a Form 1041, which Vitiello said would not satisfy adequate disclosure requirements in this case because the form does not include the necessary information; that is, the value of the transferred asset and how it was determined.

## Preparing the Gift Tax Return

Grimaldi then turned to the subject of amending a gift tax return. Revenue Procedure 2000-34 provides the method for amending a gift tax return to address adequate disclosure, even if these is no explicit duty to do so if an error is discovered. Vitiello, however, noted the possibility that filing an amended return could increase the risk of being audited.

On preparing the gift tax return itself, Grimaldi recommended viewing the IRS's instructions for Form 709 and making a checklist of what materials and information need to be collected. "What you really have to do," he said, "is put your head around the whole transaction." Reviewing the trust document is particularly important, he said, as is the issue of gift splitting, which may require filing two separate returns, one for the donor spouse and one for the non-donor spouse.

"In our office, normally, we'll prepare two returns," Grimaldi said. "It just signifies that there is consent even though the non-donor spouse is required to consent on the donor spouse's [Form] 709." With regard to omitting charitable contributions on the return, Vitiello said that, in his experience, "failure to disclose most charitable gifts doesn't have any bite because there's no gift tax exemption used."

## Audits of Gift Tax Returns

Vitiello moved on to the subject of audits. He reiterated that proper preparation of a return includes planning for a potential audit defense. Cohen then discussed how a gift tax return comes under audit; the process is similar to that of an ordinary income tax return.

Notice is then sent to the taxpayer and, possibly, the representative; Cohen noted that filing a power of attorney (Form 2848) can help ensure that the taxpayer's representative is included on the notice. The audit can take three forms, he said: a request to perfect the return, a limited review of certain items, or a full-blown audit. He and the other panelists recommended that practitioners with clients under a gift tax audit brush up on the relevant portions of the Internal Revenue Manual, with Cohen going to far as to say that failure to do so is "almost committing malpractice."

Vitiello opined that if a preparer has done everything they are supposed to do, then "the real issue in most cases today is fighting over valuation discounts. … And if you've gotten the right appraisals, you've basically increased your credibility when you walk into a negotiation." With detailed information backing up the return, he said, that negotiation is less likely to exhaust the lifetime exemption or result in a gift tax liability.

As a final point, Sklarz asked about the generation-skipping transfer tax. Vitiello noted that "you have to make the choice when you're filing a gift tax return whether to opt out of the automatic allocation [of the generation-skipping tax exemption] or allow the allocation." Grimaldi said that his firm affirmatively allocates on the return, or opts out. ❑

# Preparer Penalties

## *Everything You Need to Know*

## About the Panel

**Frank Agostino**, principal at Agostino & Associates, moderated the panel. **Noelle Geiger**, tax principal at Grassi & Co.; **Chaya Kundra**, owner at Kundra and Associates PC; and **Karen L. Hawkins**, a tax attorney and former director of the IRS's Office of Professional Responsibility (OPR), were the panelists.

The comments below represent the speakers' own views and do not necessarily represent those of their partners, affiliates, or employers, nor do they represent official policy of the government or any government agency.

Another panel at the 2016 IRS Representation Conference discussed the penalties levied against preparers who violate the ethics rules and fraud statutes. Topics included civil and criminal penalties and examples of recent disciplinary cases.

### Civil Preparer Penalties

Agostino opened the panel by reminding attendees that the United States's tax assessment system is voluntary. He continued by noting that tax preparers, along with CPAs and tax attorneys, who abrogate their ethical responsibility to that system in favor of helping clients evade tax—"the most unpatriotic thing I can think of"—are coming under closer scrutiny from the IRS, which "more and more is realizing that one bad preparer could be worse than 100 bad taxpayers." Consequently, the penalties for such behavior can be severe.

At Agostino's prompting, Geiger then began to lay out the civil penalties faced by unethical preparers. "It's really important for us to do our due diligence," Geiger said, both

to uphold the system and to shield oneself from penalties. The foremost penalty comes from section 6694 of the Internal Revenue Code (IRC), which covers whether the preparer has substantial authority or reasonable basis for a position. Section 6694(b) covers conduct deemed reckless, intentional, or willful; such conduct has no statute of limitations.

Avoidance of the "laundry list of penalties," Geiger said, requires due diligence and adherence to procedure. "We need to sign the returns, we need to furnish the taxpayers a copy of the returns, we need to retain a copy or a client list."

Agostino noted, however, that many times such audits do result in "very substantial civil penalties for noncompliance." Geiger agreed, citing a recent case where a preparer was essentially defrauding the government out of "principle." According to Geiger, the preparer had stated, "I think that the government should be allowed to have only what people are willing to pay, and in that regard I'll decide what that should be." Ultimately, the preparer's tax identification number (PTIN) and electronic filing identification number (EFIN) were revoked, but she set up new ones through her daughter and continued preparing returns. Overall, the government spent 480 hours investigating her, and her clients were hit with large assessments: "The people who had to pay the assessments, a lot of them were innocent people who really had no idea as to why she was beefing up expenses and she was increasing itemized deductions." In another case, the preparer, while not given any criminal penalty, was required to inform all clients of the revocation of credentials and turn over a client list to the government.

Geiger also noted that civil and criminal penalties can be "far-reaching and intense." To protect themselves, she said, preparers and taxpayers must review the return and all information in it for accuracy. For preparers, she said, "there is nothing to gain" in assisting taxpayers in defrauding the government; the truth will ultimately come out.

Agostino cited a case where, out of 3,000 returns, 543 had errors in excess of $10,000. Despite this approximately 80% "success rate," the preparer received a "very substantial fine." He concluded, "Don't think that because you're not doing the outrageous material things that [Geiger's examples] did, that you're safe." A preparer's signature on the return, he said, connotes a significant responsibility: "The government wants you to sign that return because you play an important part in the system."

Hawkins brought up another collateral consequence: penalties for section 6694(b) violations must be reported to the Office of Professional Responsibility (OPR). Field agents may also refer section 6694(a) penalties as well, which cover negligent errors. Such reports, she said, can establish "patterns of behavior," and are kept in a database, giving the OPR a clearer view of the big picture. Agostino noted that a Freedom of Information Act request can illustrate the scope of such referrals.

### Criminal Preparer Penalties

Kundra began the discussion of criminal penalties by advising preparers to know what their clients are getting them into. "You're going to want to go with your gut," she said, because the excuse that the preparer was just following the client's directions does not fly with the IRS. She noted that occasionally, preparers' PTINs will be stolen by scammers, and the original preparers may find themselves facing penalties for the scammers' actions. Thorough recordkeeping can provide a strong defense in such cases.

The actual penalties can constitute monetary fines, imprisonment, and restitution (i.e., the preparer paying the taxpayer's unpaid tax and penalties). Agostino added that criminal cases can put preparers out of business. Kundra then displayed criminal penalty statistics for the past three years. While the statistics appear to show a downward trend in investigations, prosecutions, and indictments, the incarceration rate was very high in 2014 and 2016 (86% and 72%, respectively), and Kundra expects it to increase in the future. Kundra attributed the higher incarceration rate to the IRS's use of data mining to focus on cases more likely to succeed on prosecution.

> Agostino noted that tax preparers are coming under closer scrutiny from the IRS, which "more and more is realizing that one bad preparer could be worse than 100 bad taxpayers."

Hawkins noted that the Department of Justice (DOJ) and the IRS's Criminal Investigation Division (CI) do have different criteria for what makes a case more winnable, but cases that CI flags for prosecution are also referred to the OPR and can be subject to disciplinary action even if the DOJ passes on them.

"The stats give you some comfort in there are fewer preparers going to jail," Agostino added. "But there are more preparers being put out of business from the injunctions. There are more preparer fines ever being levied." He also noted that state offices are also increasingly prosecuting cases that the IRS has declined.

### Sample Cases and Their Effects

Kundra then turned to the determination of whether a case is civil or criminal. Sometimes, she said, a civil audit can become criminal; the IRS may even conduct a sting, sending an agent to pose as a client to request an unethical or even fraudulent return. Criminality, she said, ultimately hinges upon willfulness. "The government has to demonstrate willfulness—that you knew what you were doing, that you knew it was going to end up causing an evasion or fraud."

Kundra then cited a case where a New York attorney pled guilty for preparing fraudulent tax returns, adding false medical expenses, state and local taxes, and other deductions. She quoted the reaction of Caroline Ciraolo, head of the DOJ's tax division: "His conviction sends a clear message: We will fully prosecute crooked tax preparers, whether they be lawyers, tax professionals, or temporary storefront operators." In another case, two sisters in Detroit generated fake W-2s for clients and fabricated self-employment returns; they ultimately pled guilty to more than $3 million of fraud. Finally, in Kansas City, a preparer not only made false deductions on clients' returns, but also filed a false bankruptcy petition, gave false statements during meetings with creditors, and made a false statement on an application for citizenship. In addition, Geiger brought up a case where the preparer bifurcated refunds, having a portion wired into his own account, but giving his clients fake returns that left them none the wiser.

Criminality, Kundra said, ultimately hinges upon willfulness—"that you knew what you were doing, that you knew it was going to end up causing an evasion or fraud."

Hawkins commented on the issue of clients giving false information. Computers have made generating fraudulent W-2 or 1099 forms much easier, impairing professionals' ability to perform due diligence. "You really don't have any easy way of asking the questions about that or finding those answers," she said. Agostino then gave some colorful details about the fake W-2 cottage industry, including going prices and the fact that some preparers will advise clients where to obtain them. He also shared a story about a fake 1099 ring that was shut down after a customer complained to the IRS that the price for the fake forms was too high. He also advised practitioners to double-check their personal returns for errors, as the IRS considers poor personal filing on a practitioner's part "one of the tells."

Hawkins took over the remainder of the panel, providing more insight into the policies and procedures of the OPR. She noted that the OPR, being under the aegis of the Treasury Department, operates under the Treasury Regulations as opposed to the IRC. She discussed two points with respect to due diligence obligations and the information taxpayers provide. First, the ethical rules under Circular 230 "somewhat mirror [IRC section] 6694 in the sense that you shouldn't be advising a position on a tax return or signing a tax return that contains a position that lacks a reasonable basis." Furthermore, when taking a position that has a reasonable basis but not substantial authority, "you just have to advise the client of their penalty exposure and what they can do to avoid it, which essentially is make the disclosure on the tax return. But you're not obligated under the ethics rules to force the client to make the disclosure." Second, while a provision in the regulations allows practitioners to "rely on good faith and without verification on information that your client gives to you," that does not excuse preparers from blindly accepting the client's characterization of it. "We don't have to audit our clients," she noted. "But you'd better know your client well enough to spot inconsistencies, incorrect information, or incomplete information so you can make additional inquiries to expand the factual information."

Hawkins concluded the panel on an optimistic note, saying that 75% of cases she saw referred to the OPR ended with no disciplinary action. The office, she said, is "very judicious" about applying the rules of ethical conduct. ❑

# Receipts? What Receipts?

## About the Panel

**Noelle Geiger,** tax principal at Grassi & Co., moderated the panel. **Megan Brackney,** partner at Kostelanetz & Fink; **Walter Pagano,** partner at EisnerAmper; and **Claudia Hill,** president of Tax Mam Inc. and editor-in-chief of the *CCH Journal of Tax Practice and Procedure*, were the panelists.

The comments below represent the speakers' own views and do not necessarily represent those of their partners, affiliates, or employers, nor do they represent official policy of the government or any government agency.

At this panel, the group discussed how to deal with a lack of sufficient information from a client, including how to obtain or deduce that information and the regulatory standards on such matters.

### Filling the Gaps

Geiger began the panel by asking the general question: What is a tax preparer supposed to do when a client with a cash business hasn't kept the necessary receipts and documentation regarding sales? She turned to Brackney, who laid out some information from the IRS's Audit Techniques Guide for Cash Intensive Businesses.

Ideally, Brackney said, "you should be working with [cash businesses] to educate them about how to keep their books and records in a businesslike way, so that every year it's not some big guess as to what their actual income is." When a new client comes to the CPA with inadequate records, however, some digging will be required. Bank records, invoices, and past returns may help with cross-checking computations of income;

expenses not matching reported income is one possible red flag.

Hill remarked on the perception gap between clients and practitioners regarding the difficulty of preparing returns and the wealth of information needed. Pagano noted the unlikelihood of any cash business not involving some type of skimming. The bottom line, he said, is to look for reasonability and consistency in the gross profit figures; if things don't add up, a CPA should inquire further. Even though there is no obligation to audit the return, it's still appropriate to apply a reasonableness standard and compare margins and expenses to industry sources in these cases.

Brackney brought up a question that many practitioners might not want to ask clients: "Do you have two sets of books?" If income is not being fully reported, she said, there will be two sets, because "they have to know whether their business is profitable." Geiger pointed out that it is also important to know which people know about the two sets of books, as such persons are potential whistleblowers. She mentioned a case she worked on where, after she had conducted a bank deposit analysis alongside an IRS agent and resolved the case with all income reported and penalties paid, the agent confided in her that there was a whistleblower, and had Geiger not been forthcoming and cooperative in her work, the case would have gone quite differently.

Hill brought up the lack of accountant-client privilege. The panel agreed that, outside of the limited privilege provided by Internal Revenue Code (IRC) section 7525, there is no protected confidentiality for these sorts of conversations. For this reason, Hill said, she would be reluctant to ask questions about multiple sets of books, saying such a case may leave the preparer no choice but to "fire the client." Geiger and Brackney both cited cases of such recordkeeping that eventually landed clients in hot water, one where a whistleblower posed as a prospective buyer to gain access to the "real" books. Pagano also noted that cash businesses often misreport cash payroll and employment tax as well.

Pagano noted the unlikelihood of any cash business not involving some type of skimming. The bottom line, he said, is to look for reasonability and consistency in the gross profit figures.

Turning to poor recordkeeping rather than actual fraud, Brackney recommended several methods for analysis, such as industry ratios, year-to-year comparative analysis, and inventory analysis. Hill said that her company uses software with an analysis section that can show the proportion of Schedule C income deductions taken compared to industry norms. She also recommended the website BizStats.com for such comparative analysis, noting that the information gained is usually not intended for the business owner, but for the practitioner to gain a sense of what issues to discuss with the client.

Pagano added that comparing costs of goods sold to beginning and ending inventory can be a helpful measure of real gross profits. "More likely than not," he said, "[the fraud is] on the cash payroll side, and there you run into not only an income tax issue but clearly an employment tax issue and perhaps even a criminal referral."

### Whether to Continue the Relationship

Geiger then segued into the applicable professional standards, in particular the AICPA's Statement of Standards for Tax Services (SSTS) 3, *Certain Procedural Aspects of Preparing Returns*. Hill noted that enrolled agents are covered by Circular 230, as are small firms that are not members of the AICPA. "You don't know what your client chooses not to share with you," Hill said. "You need to have something in your possession that shows where those numbers came from. And if you get into a reconstruction, then you need the tools to help you reconstruct."

Hill then shared a case where an enrolled agent was doing the business's books and reconciling the bank statements, but the IRS was still pressing the issue. Unbeknownst to him, the business owner's wife was depositing checks in a second account. An analysis of industry norms would have revealed that the business's margins were out of line. Ultimately, Hill said, "none of us in this room would have the kind of practices we have today if we didn't begin from the assumption that our clients come to us with a desire to help us help them comply with the law." That position of trust is vital, even if it occasionally borders on naiveté.

Pagano returned to the standards, saying that the operative word in SSTS 3 is "reasonable"; that is, what any CPA would have done in a similar situation. If another accountant would have inquired about a certain issue, but the accountant at issue did not, then the standard has been violated. He said that this language is in Circular 230 as well.

Brackney asked what the professional obligation is to keep or terminate the

relationship with such a client: where does one draw the line? Hill's first answer was that "a client who makes my stomach hurt isn't a good match for me." She elaborated that if the client had an unusual circumstance that caused the lack of records, she considers that more of a "teachable" situation, whereas annual faults with Schedule A or C deductions, especially charitable contributions, are more of a red flag.

Geiger pressed the issue, asking about repeated Schedule C business losses and how many years a practitioner can see them before deciding whether a venture is a hobby rather than a viable business. Pagano said that this is part of due diligence, and ultimately, if such losses continue, a professional must ask how the losses are being funded. Worse yet, he said, "you could have a potential problem for aiding and abetting in the preparation of a false return." He noted that CPAs possess "an obligation that goes beyond simply satisfying the client." Hill added that a Cash T analysis is an easy way to point out these sorts of problems. "It's up to us to raise that flag when we see it happening and not let it go on from year to year," she said.

### Using Estimates

Brackney returned to the issue of estimating incomplete information so that a return can be filed on time. Pagano gave an example of a Chapter 7 trustee who does not have all the information necessary to do a full accounting of a nonprofit entity. In that case, he suggested using a Form 8275 to disclose and explain the gaps in the information and detail which information has been provided by the trustee. Hill added that in such cases, it is important to carefully follow the instructions for Form 8275, and also that the form is useful for explaining the numbers on attached schedules that the practitioner cannot validate.

Hill then discussed the AICPA's SSTS 4, *Use of Estimates*. She said that while the statement allows the use of estimates, it does not allow the return preparer to be the one creating the estimates. "The taxpayer has to have a reasonable basis for information upon which you form the estimate," she said. "The whole thought of making up a number for a client, that's just a time bomb." Brackney also cited Revenue Procedure 2016-13, which defines adequate disclosure. "The two functions it serves," Brackney said, "are to protect the taxpayer against accuracy penalties if the IRS does disagree with the amounts stated on the return later and protect the return preparer from penalties under [IRC section] 6694, regardless of whether the taxpayer actually includes this Form 8275 in its filing."

> "It's up to us to raise that flag when we see it happening and not let [losses] go on from year to year," Hill said.

Brackney then asked the audience how many of them had filed a Form 8275 on any return; approximately 20% raised their hands. Of those, none reported being audited on that return. Brackney said that this result is consistent with when she speaks on this topic.

An audience member asked about having a client sign and initial certain items on a Schedule C and then keeping a copy in his file. Brackney thought this could be useful, but did not obviate the responsibility to act on suspect information. "It's not a silver bullet," she said. Pagano agreed, saying, "that's nice, but to me, especially being a former agent, it's irrelevant." Hill added that an agent conducting an audit will still ask where the numbers came from, and Geiger said that one's duty is always to inform the client about the error once it is discovered and ensure that it is corrected.

Another audience member asked about correcting an accounting method that requires the IRS's consent to change—that is, once the deadline for doing so for the current year has passed. Brackney answered that, while the situation is not ideal, her advice would be to seek the consent: "It's kind of assumed that you're going to continue with the old method until you get consent to change it, and that no one is going to criticize you about that." She also suggested filing a Form 8275 to disclose the method and then seeking consent to change it.

### Illegal Source Income

Pagano mentioned a case where a check-cashing business was found to be laundering money. That prompted Brackney to say that "the right advice isn't to not report that income or to not file a return, it's to call your friendly tax controversy attorney about how to file a Fifth Amendment return—which is outside the scope of this panel."

As another example, Hill brought up the fact that a number of states have legalized the growing and sale of marijuana, which is still illegal under federal law and thus considered illegal source income. "It's an industry that really needs competent people to prepare the returns," she said, "and preparers are in a Catch-22 in terms of what they do." ❑

# Bankruptcy versus Offer in Compromise

## A Comparison of Resolution Options

## About the Panel

**Jeffrey M. Sklarz,** of Green & Sklarz LLC, moderated the panel. **L. G. Brooks,** CEO and senior consultant of the Tax Practice; **Eric J. Engelhardt,** self-employed practitioner and chair of the NYSSCPA's IRS Relations Committee; **Renee Meskill,** settlement officer with the IRS Office of Appeals in New Haven, Conn.; **Marvin J. Garbis,** senior judge of the U.S. District Court for the District of Maryland in Baltimore; and **Nancy V. Alquist,** chief judge of the U.S. Bankruptcy Court for the District of Maryland in Baltimore, were the panelists.

The comments below represent below represent the speakers' own views and do not necessarily represent those of their partners, affiliates, or employers, nor do they represent official policy of the government or any government agency.

This panel discussed the pros and cons of declaring bankruptcy versus entering into an offer in compromise (OIC) when confronted with a large tax debt. Topics included how to prepare the OIC, the appeals process, and bankruptcy as it relates to tax liabilities.

### Preparing an Offer in Compromise

Sklarz began the panel by asking Engelhardt to cover the steps for preparing an OIC. Prequalifying the client is extremely important, Engelhardt said, as is advising the client that the attempt may fail. An initial consultation can reveal whether the client is a good candidate in the first place, although he also noted that the process of filing and receiving approval or rejection can buy time for the case no matter the outcome. In addition, the engagement letter should contain a clause giving the practitioner the right to terminate the engagement if the client provides false information or pressures the practitioner to do so.

Engelhardt continued by stressing that the proposed payment plan must be formally documented. He also explained the for-

mula used to determine the payment amount under an OIC, which incorporates the taxpayer's net assets, future income potential, and various exclusions and expenses allowed by the IRS.

Engelhardt also advised CPAs to remain in contact with the IRS collections department during the OIC process to avoid levy action. Even though credit card bills are not among the allowed exclusions, a credit report can help "show a story" to the IRS regarding the taxpayer's financial straits. He also advised applying for a low-income certification "when it's appropriate."

If the taxpayer also has a significant New York State tax debt, Engelhardt said, paying off that amount as fully as possible can allow a tax deduction on the federal amount and lower the available income for the IRS. In addition, there is "a good chance" that the taxpayer will lose net operating loss deductions going forward; "you can't double dip," he said. He also advised making any necessary amendments to outstanding tax returns before beginning the OIC. Furthermore, self-employed taxpayers should not overpay their estimated taxes in the year of the OIC.

Engelhardt warned against hiding assets and noted that agents may look at the taxpayer's standard of living and suggest adjustments rather than accept the OIC. It is important to establish a rapport with the examiner and lay out the economic reality of the taxpayer's situation; humanizing the taxpayer can go a long way.

### The OIC Appeals Process

Sklarz then turned to the OIC approval process, saying that the initial assessor, called campus OIC, is notoriously strict and has not approved an OIC he submitted in a decade. "The good news," he said, "is after it comes out of there, we get to go to IRS appeals." Brooks described the official rejection letter, which gives the taxpayer 30 days to file a formal appeal. He also noted that rejection is often the result of discrepancies on the asset equity table (AET) or income expense table (IET). Once the appeal is filed, the matter goes to a settlement officer.

The panel explained that the appeals office will generally only review the specific issues raised in the appeal, unless other issues are raised later. Brooks raised the issue of bankruptcy, asking what happens if the taxpayer files for bankruptcy after the OIC process has started. The government panelists said that in such a case, the OIC is returned without possibility of appeal. Brooks noted, however, that a taxpayer whose OIC is returned can request reconsideration within 30 days as a last resort. One advantage of an OIC is that certain items can be abated that cannot be discharged in bankruptcy. "Maybe an offer-in-compromise is your best collection alternative and the IRS can make a decision on that," he said. "They cannot make a decision on a bankruptcy, because they have no jurisdiction."

Brooks said that not enough emphasis is placed in the preparation of Form 433A or B, which serves as the starting point for the IRS to evaluate what the client can pay. "Appeals will not just overlook something just because the taxpayer is in dire straits," he said. While the office does consider some extenuating circumstances, such as age or other considerations that might affect the taxpayer's ability to pay over the life of the collection statute.

Brooks then asked whether an appeals officer would review the OIC against a potential bankruptcy settlement. The IRS generally does not accept an offer for less than what it could collect through the bankruptcy. But if the issue is raised and the Appeals officer thinks it's something that might be followed through on, then it will be considered.

"Maybe an offer-in-compromise is your best collection alternative and the IRS can make a decision on that," Brooks said. "They cannot make a decision on a bankruptcy, because they have no jurisdiction."

Sklarz then asked which types of matters are worth fighting the IRS over when negotiating an OIC. Brooks replied that the calculation of income is a sticking point with him, especially the disallowance of expenses. "I want to ensure that my client is allowed all of their allowable deductions before it gets to Appeals," he said. Practitioners, having been involved with OIC longer than the appeals officer, would have an advantage in knowing which matters are most critical to the taxpayer. Brooks then raised the question of whether items are able to be excluded if they are considered to be income-producing assets.

Filed tax liens ride through the bankruptcy. They remain attached to the property, and even if the personal liability of the individual taxpayer is discharged, the lien will remain on the property.

Sklarz then asked about the particulars of business OICs. Brooks said that while the forms differ, the process and criteria for inclusion are substantially the same. The IRS looks at the value of assets versus the income they produce. The issue of whether the analysis of a possible bankruptcy outcome factors into a business OIC, and the panelists agreed that it does.

### The Alternative of Bankruptcy

Sklarz then turned the discussion to bankruptcy. The government panelists began by describing the bankruptcy court process, noting that cases are technically referred to the bankruptcy court by the district courts, and that in some cases it renders a recommendation that the district court considers when making its own judgment. In general, he advised taking into consideration the tax status of the client. When a petition is filed, a new taxpayer is created, and this requires tax planning as if it was a new corporation.

The government panelists then spoke about the appropriateness of bankruptcy in tax cases. They laid out for criteria for consideration of whether a tax liability is dischargeable in bankruptcy: the time periods set forth in the bankruptcy code for the discharge of taxes, the question of payroll trust fund taxes, whether the taxpayer has fraudulently understated any taxes or otherwise evaded payment, and the effect of any existing tax liens.

On the subject of time requirements, they noted the three-year rule, which requires the return in question to have been due more than three years before the filing of the bankruptcy case; the 240-day rule, which requires the tax to have been assessed at least 240 days before the filing; and the two-year rule, which requires a late-filed return to have been filed at least two years before the filing. They also noted that the 5th, 10th, and 1st Federal Circuits have recently overturned the two-year rule, barring all tax liabilities from late-filed returns from being discharged in bankruptcy; however, a bankruptcy appellate panel in the 9th Circuit rejected the arguments in those cases and allowed discharge, a decision the 11th Circuit later agreed with. In short, the status of the two-year rule is currently uncertain.

The panel then turned to the other three criteria. They repeated the firm rule that payroll trust fund taxes are not dischargeable in bankruptcy, nor are public trust fund sales taxes. The government panelists also quoted a provision of the bankruptcy code that excludes from discharge any debt with respect to which the debtor willfully attempted to evade or defeat taxation, noting that the government bears the burden of proof in such situations. They noted that filed tax liens ride through the bankruptcy. They remain attached to the property, and even if the personal liability of the individual taxpayer is discharged, the lien will remain on the property. An audience member asked whether this includes state taxes, and Sklarz said that it does, with the caveat that several states have declared that liabilities from late-filed returns are non-dischargeable; the IRS does not hold to this view.

The panel also noted that the IRS may take refunds from a pre-bankruptcy year and offset them against pre-bankruptcy liabilities, even if the pre-bankruptcy taxes are discharged. But the IRS cannot offset refunds for a post-bankruptcy period against discharged pre-bankruptcy tax liability. The panelists also discussed challenging the liability for the trust fund portion of payroll taxes by utilizing a disconnect in the rules to get the responsible person off the hook for the taxes. ❑

# Criminal Investigation and Prosecution of Tax Preparers

## About the Panel

**Eric L. Green,** of Green & Sklarz LLC, moderated the panel, which included **Peter Hardy,** a partner at Ballard Spahr; **Maria Papageorgiou,** of the IRS's criminal investigation office in New Haven, Conn.; **Caroline D. Ciraolo,** principal deputy assistant attorney general of the Department of Justice's (DOJ) tax division; **Marvin J. Garbis,** senior judge of the U.S. District Court for the District of Maryland in Baltimore; and **Frank Agostino,** principal at Agostino & Associates.

The comments below represent the speakers' own views and do not necessarily represent those of their partners, affiliates, official policy of the government or any government agency.

The final panel from the 2016 IRS Representation Conference covered in this issue concerned preparer penalties and the criminal prosecution of tax professionals.

### How Criminal Investigations Gets Involved

Green introduced the panelists and asked the government panelists to discuss how the IRS's Criminal Investigation Division (CI) receives its cases. Referrals can come from IRS examiners but also from taxpayers, other law enforcement agencies, such as the FBI or Secret Service, and concerned practitioners looking to save their clients from themselves. In such cases, preparers can get themselves in hot water by lying to the IRS in order to protect their clients, which is of course a felony.

CI conducts two types of investigations: administrative and grand jury. Grand jury investigations, the more prevalent of the two, require approval from the Department of Justice to undertake and are worked alongside an assistant U.S. attorney. The grand jury entails subpoena power, she noted, and can lead witnesses to be more forthcoming than they would in an administrative proceeding.

"We have an obligation as officers of the court to the public, as well. Can we, in essence, mislead by silence?" Agostino asked.

Green then shared accounts of preparers shooting themselves in the foot by being honest about their unethical practices, seemingly unaware of what they were admitting to. His point, he said, was that clients will not hesitate to let preparers take the fall when they can, and that preparers should thus always have their own legal counsel. He also warned against endangering one's entire career for the sake of a single client: "If one of them goes to jail, I just have one less client. If I lose my license, I'm not fit to do anything else."

The government panelists agreed with this, and also raised the thorny issue of what counsel to given when one discovers, in the course of defending a client referred by a preparer, that the preparer may have engaged in criminal activity. Green said that he would advise the client and the preparer to seek separate counsel; Hardy disagreed, saying that "your duty and loyalty is to the client, full stop," even if it means having the preparer sign an affidavit that places criminal liability upon himself.

Agostino raised the issue of the American Bar Association rules preventing lawyers from taking advantage of unrepresented persons. "We have an obligation as officers of the court to the public, as well. Can we, in essence, mislead by silence?" he asked. In response to a question from the audience, Green stressed that representing both the taxpayer and preparer is a clear conflict of interest and both parties should seek separate representation. Agostino and Hardy both stressed that it is important that all parties know who is and is not representing them legally.

Green then brought up the issue of fraud technical advisors (FTA), who are involved in civil IRS examinations and collections and also serve as another source of referrals to CI. The government panelists said that collection cases can and do go criminal, and cited a recent offer in compromise case in their office. Revenue officers are trained to spot fraud and consult with FTAs, with the government panelists noting that some of the best cases come out of fraud referrals.

Green asked the government speakers what CI investigators specifically look for when judging a case. Among the variety of factors were the volume of returns prepared, Schedule A deductions that look inflated, the proportion of returns resulting in a refund, and the appearance of the same deduction on multiple returns (or every return). In addition, other items cited were inflated Schedule C income, incorrect filing status, and false dependency exemptions or withholdings.

### Escalation and Sentencing

There was a general discussion of how the DOJ's tax division handles cases referred to it from CI. Cases are referred for either a grand jury investigation or prosecution depending upon how far along the investigation is. In addition, grand jury cases might not proceed to prosecution, depending on the outcome once all the evidence is presented. The division is also selective about prosecution, since a number of other civil and criminal tools exist. For prosecution, the DOJ is trying to pick high-impact cases around the country in different venues, looking for high dollars and egregious conduct. Incarceration is the DOJ's goal. The government wants prison time in these cases to send a strong message to preparers that may be contemplating similar conduct.

Green asked how the DOJ and IRS decide to run parallel investigations on a case, and whether they are concerned about misleading targets about the nature of an examination. The government panelists answered that while civil injunctions are sometimes issued against preparers before, during, or after crim-

inal proceedings in order to shut down the business and notify customers, criminal investigations are a separate proceeding. The DOJ doesn't use a civil examination or a civil injunction proceeding to build a criminal case.

At Green's urging, the discussion moved to sentencing. The courts begin with the general U.S. sentencing guidelines, but also look at the charge and the weight of the tax loss. If an offense's impact is small or the preparer's role is minor, the sentence can be reduced, but the converse also applies. Criminal history is also a factor. Finally, sentences comprise not just the question of prison time, but also penalties, fines, and restitution. Notably, restitution assessments cannot be challenged by the defendant, nor can they be subject to an offer in compromise or offset through operating losses.

Charges can include not only aiding and abetting the filing of false returns, but also false claims and statements and even conspiracy. Maximum prison sentences for such charges range from three to ten years, and the IRS chooses to focus on felony cases. The DOJ rarely agrees to a misdemeanor in a return preparer prosecution.

While the guidelines are not insignificant, the government representatives noted that sentencing is very, very discretionary. Regarding restitution orders, defense counsel has a tremendous burden to talk the presiding judge out of them. The problem noted with a restitution order is that the IRS can then make an assessment that is binding. Once the restitution order is converted to an assessment, the district court is out of the loop. They can use their full collection powers and seize everything; there has never been a chance for the taxpayer to defend him- or herself against the amount of the liability or to do all the things that are possible to ease the burden.

Some of the panelists criticized restitution orders on the basis of the inherent complexity of determining the ability to pay, allocating and monitoring payments, and determining the assessment. They also questioned whether the IRS would continue to pursue restitution assessments against preparers.

The government speakers responded that the government is obligated to pursue restitution against those who aid and abet taxpayers in evasion. Although there may be issues with the process, the IRS and the DOJ will continue pursuing restitution where appropriate. While the procedural issues are outside of CI's scope, they will be addressed, and the law will continue to develop.

Green turned the panel back to sentencing in general, noting that the preparers generally receive heavier sentences than the taxpayers they represent. Agostino agreed, attributing this to the egregiousness of the preparer's abuse of trust. Green then asked about defense strategies, to which Hardy replied that there are basically two: that there is no underlying violation, or that the violation was unwillful and unintentional. Most cases, he said, come down to the latter, because the IRS usually has its facts straight. For preparers, this comes down to shifting the blame to the client. Rarely, he said, is the argument a good-faith misunderstanding of the law.

Hardy then opined that cases involving preparers who make limited mistakes, as opposed to fraudsters cranking out false returns on industrial level, are rare and hard to prove: "I think that most of the time, if you have a situation like that, you need super-clear bad e-mails or an undercover tape, basically." He cited a case where a taxpayer had several undisclosed offshore bank accounts that the preparer advised him in an email never to tell the IRS about. "Most people aren't that stupid," Hardy continued, also saying that U.S. attorneys with high caseloads generally deprioritize tax cases in favor of bigger fish, such as drug dealers.

Green noted that preparers generally receive heavier sentences than the taxpayers they represent. Agostino agreed, attributing this to the egregiousness of the preparer's abuse of trust.

There was then some discussion about the IRS's whistleblower process. While the IRS does have a reward program for whistleblowers, the DOJ's tax division does not, although the panelists from the DOJ did urge attendees to send the division a copy any claim involving a pending case or any information pertinent to a criminal investigation.

As the panel drew to a close, Green asked for some final words. The panelists all stressed the importance of consulting counsel, regardless of one's innocence. One panelist likened many taxpayers and preparers to a fish mounted on a wall. "Look at that guy," he said, "he thought he was innocent, too, and if he didn't open his mouth he'd still be in the Chesapeake Bay." ❑