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ORANGE COUNTY ESTATE PLANNING COUNCIL

When a Tax Case Goes Criminal – How to Avoid It and How to Deal with It

Tuesday, March 23, 2021 | 4:45 p.m. – 6:00 p.m.

Purpose of Form

An individual or entity (Form V information return with the IP identification number (TIN) or (SSN), individual taxpayer or taxpayer identification number (EIN), to report on an information amount reportable on an information return.

12a Taxable income. Subtract lines 9 and 10 from line 11. This is your adjusted gross income.
b Tax (see instructions). Attach Form 1041.



STEVEN TOSCHER specializes in civil and criminal tax controversy and litigation. He is a Certified Tax Specialist in Taxation, the State Bar of California Board of Legal Specialization, a Fellow of the American College of Tax Counsel and has received an “AV” rating from Martindale Hubbell. In addition to his law practice, Mr. Toscher has served as an Adjunct Professor at the USC Marshall School of Business since 1995, where he teaches tax procedure. He has also served on the faculty of the American Bar Association Criminal Tax Fraud Program since 1998. He is a former Internal Revenue Agent with the Internal Revenue Service and a trial attorney with the Tax Division of the United States Department of Justice in Washington where he received its Outstanding Attorney Award.

Mr. Toscher is past-Chair of the Taxation Section of the Los Angeles County Bar Association and served as a member of the Editorial Board for the Los Angeles Lawyer during 1996-1999. He is a member of the Accounting and Tax Advisory Board of California State University, Los Angeles, Office of Continuing Education.

Mr. Toscher was the 2018 recipient of the Joanne M. Garvey Award. The award is given annually to recognize lifetime achievement and outstanding contributions to the field of tax law by a senior member of the California tax bar.

Mr. Toscher is a frequent lecturer to professional groups and author on civil and criminal tax controversy topics. He is frequent contributor to the Los Angeles Lawyer, The Journal of Tax Practice and Procedure and Tax Management Bureau of National Affairs. He is a co-author of “Tax Crimes,” Bureau of National Affairs - Tax Management, Publication 636 2nd.

Mr. Toscher received his Bachelor’s Degree in Accounting from the University of Nevada, Las Vegas (with honors), and received his Law Degree from the University of San Diego (summa cum laude). Mr. Toscher is a member of the State Bars of California, Nevada, and Colorado. Mr. Toscher has been a member of the Faculty of the ABA Criminal Fraud Program for many years.

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Prior to joining the firm as a principal, **Sandra Brown** spent more than 26 years as a federal trial lawyer, including serving as the Acting United States Attorney and twice as the First Assistant United States Attorney, in the Office of the U.S. Attorney, Central District of California. In addition to leading the Central District of California's United States Attorney's Office, where she supervised approximately 270 attorneys in the largest Justice Department Office outside of Washington, D.C., Ms. Brown also served as the Chief of the Tax Division for more than ten years where she supervised lawyers within the United States Attorney's Office, the Department of Justice Tax Division and the Department of Treasury who were responsible for complex Federal civil and criminal tax matters, including related grand jury proceedings, trials and appeals.

Ms. Brown's broad range of experience in complex civil tax controversies and criminal tax investigations and litigation, includes having personally handled over 2,000 cases on behalf of the United States before the United States District Court, the Ninth Circuit Court of Appeals, the United States Bankruptcy Court, the United States Bankruptcy Appellate Panel and the California Superior Court. She obtained her LL.M. in Taxation from the University of Denver, is a fellow of the American College of Tax counsel as well as a member of the California State Bar, American Bar Association Tax Section & Criminal Justice Section, NYU Tax Controversy Institute Advisory Committee, Beverly Hills Bar Association Taxation Section, Federal Bar Association, California Lawyers Association Tax Section, and the Women's White Collar Defense Association.

Ms. Brown's practice focuses on individuals and organizations who are involved in criminal tax investigations, including related grand jury matters, court litigation and appeals, as well as representing and advising taxpayers involved in complex and sophisticated civil tax controversies, including representing and advising taxpayers in sensitive-issue audits and administrative appeals, as well as civil litigation in federal, state and tax court.

Disclaimer

The views and statements expressed by the panelists are the unofficial, individual views of the panelists individually, and unless otherwise expressly stated, do not necessarily represent the views or statements of any firm or agency by which they may be currently be employed or associated or may have been employed or associated in the past. The panel materials that are part of this presentation were prepared by the private-sector participants, and not by the government participants unless otherwise noted.

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Presentation Overview

- The Role of the Criminal Sanction in Tax Enforcement and Compliance.
 - Criminal Tax Law - The Basics
 - Some Enforcement Statistics
- How does a tax dispute become a criminal tax case?
 - The Concepts of Willfulness and Good Faith.
 - The Fraud Referral Process.
- The IRS New Office of Fraud Enforcement - The 7% solution.
 - Purpose and Goals
- High Wealth/High Income Examination Focus
- High Income Non-Filers
- Global High Wealth
 - IRM Provisions
 - Information Document Requests
- It's never too late - but sometimes it is too late- tips on avoiding the fraud referral.
 - IRS Voluntary Disclosure Practice

Civil Tax Fraud Penalty & Criminal Tax Prosecutions The Basics

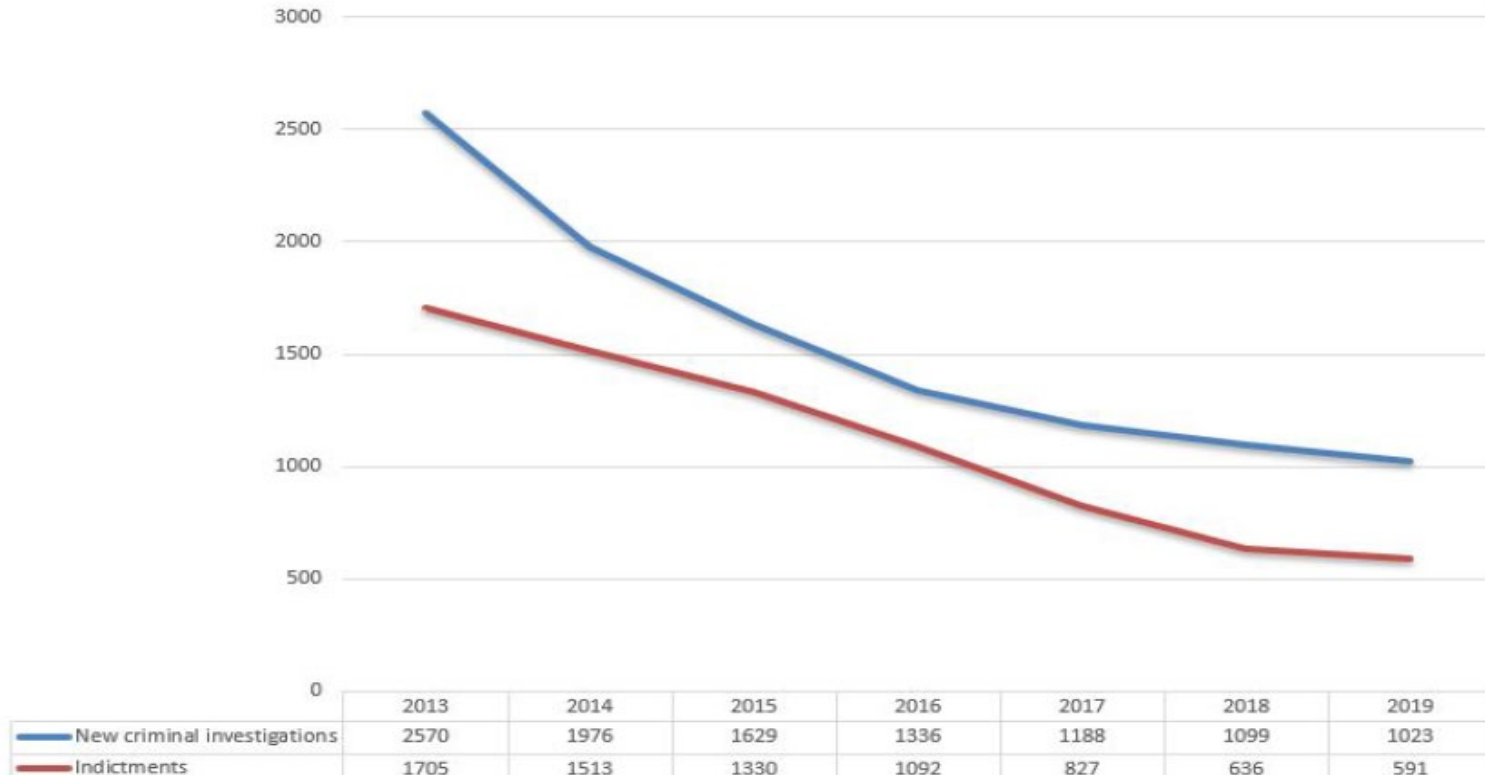
- IRS audits can be time consuming and stressful, forcing taxpayers to produce evidence and documents that may or may not be readily available
- The IRS's decision to pursue a fraud referral for civil tax penalties versus a referral for criminal tax prosecutions often depends on specific facts and circumstances provided by the taxpayer under review.
- According to the IRM (25.1), the requirements of proof are critical for establishing fraud.
 - In Civil Tax Fraud matters - the standard of proof is “clear and convincing evidence”. These cases result in remedial action taken by the Government, such as assessing the correct tax and imposing civil penalties as an addition to tax, as well as retrieving transferred assets. Civil penalties are assessed and collected administratively as part of the unpaid balance of assessment.
 - In Criminal Tax Prosecutions - the standard of proof is “beyond a reasonable doubt”. These cases result in punitive action with penalties consisting of fines and/or imprisonment which are enforced only through prosecution, are provided to punish the Taxpayer for wrongdoing and serve as “deterrents” for other Taxpayers.

Civil Tax Fraud Penalty & Criminal Tax Prosecutions

The Basics

- Committing tax evasion or tax fraud allows the IRS to prosecute and seek incarceration for individuals. Generally, most tax evasion criminal penalties carry a maximum three or five-year prison term and a fine of \$250,000 (\$500,000 for corporations). However, the same conduct that is considered to be criminal tax fraud can also be considered civil tax fraud. Unlike criminal penalties for tax evasion, civil tax fraud does not result in jail time. However, civil tax fraud sanctions can result in a financial penalty of 75% of the tax due, in addition to any interest owed
- There is no limit on the time the IRS has to enforce a Civil Tax Fraud Penalty.
- Generally, the DOJ/IRS must bring a Criminal Tax Prosecution within 6 years of the last affirmative act of evasion (e.g., filing a materially false return signed under penalties of perjury).

IRS Criminal Investigations: legal source tax crimes (2013-2019)



Criminal Tax Fraud – The Recent Past (2013-2019)

Crossing the Line

Tax Avoidance v. Tax Fraud

- Tax Avoidance: a legal and strategic tax method. Taxpayers have the right to reduce, avoid, or minimize taxes through shaping or preplanning events to reduce and or eliminate tax liability within the law.
 - *Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.*
 - ~ Judge Learned Hand in *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934).
- Tax Fraud: deliberate—*actual intent or willfulness*—underreporting of income, over-deducting business-related expenses, affirmative acts of evading a tax or payment of tax through deceit, subterfuge, camouflage, concealment, or obstruction.
 - *Criminal tax cases really are: All about the lies.*
 - ~ Often-repeated words of former Chief of IRS CI Nancy Jardini

Tax Fraud – The Present & Future

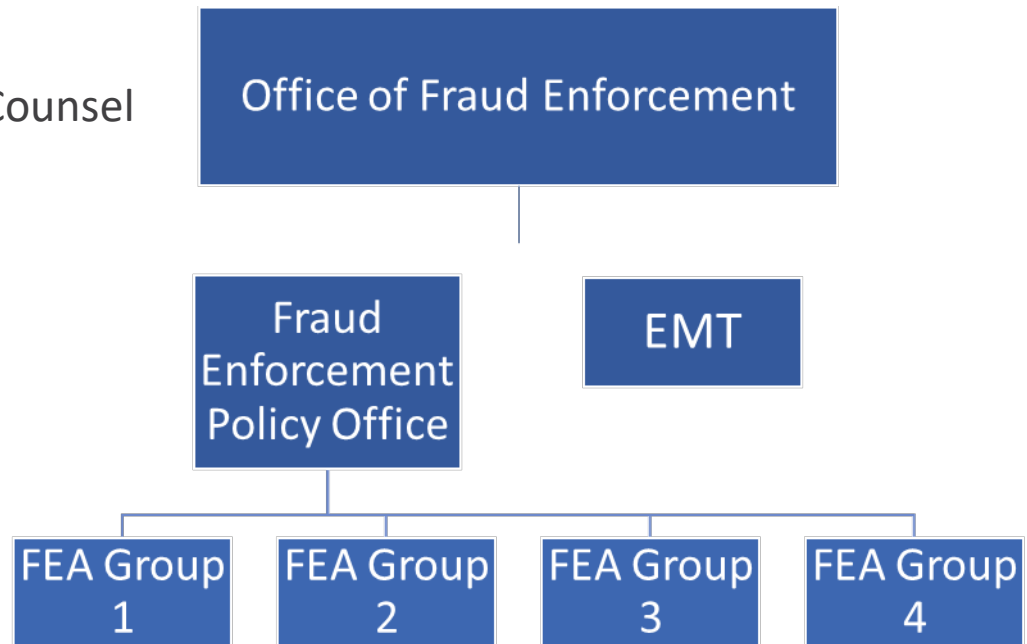
IRS Office of Fraud Enforcement (2020)

- IRS's new Office of Fraud Enforcement Office, created March 2020
- IRS's new National Fraud Counsel, created May 2020
- Overall goals:
 - Devote additional agency resources to focus on combatting tax fraud by small businesses and business owners.
 - Help strengthen the IRS's compliance work as well as strengthen the agency's capacity and resolve across all business units with coordinated enforcement efforts.
 - Continue to strengthen the internal compliance relationships in the IRS between CI agents and the civil-side revenue agents and revenue officers as well as external partners.
 - Assist in the oversight and enforcement efforts targeting businesses that have:
 - Underreported their federal tax obligations - AUDITS
 - Underpaid their federal tax obligations - COLLECTION
 - Failed to file their federal tax returns - ENFORCEMENT

IRS Fraud Enforcement Efforts

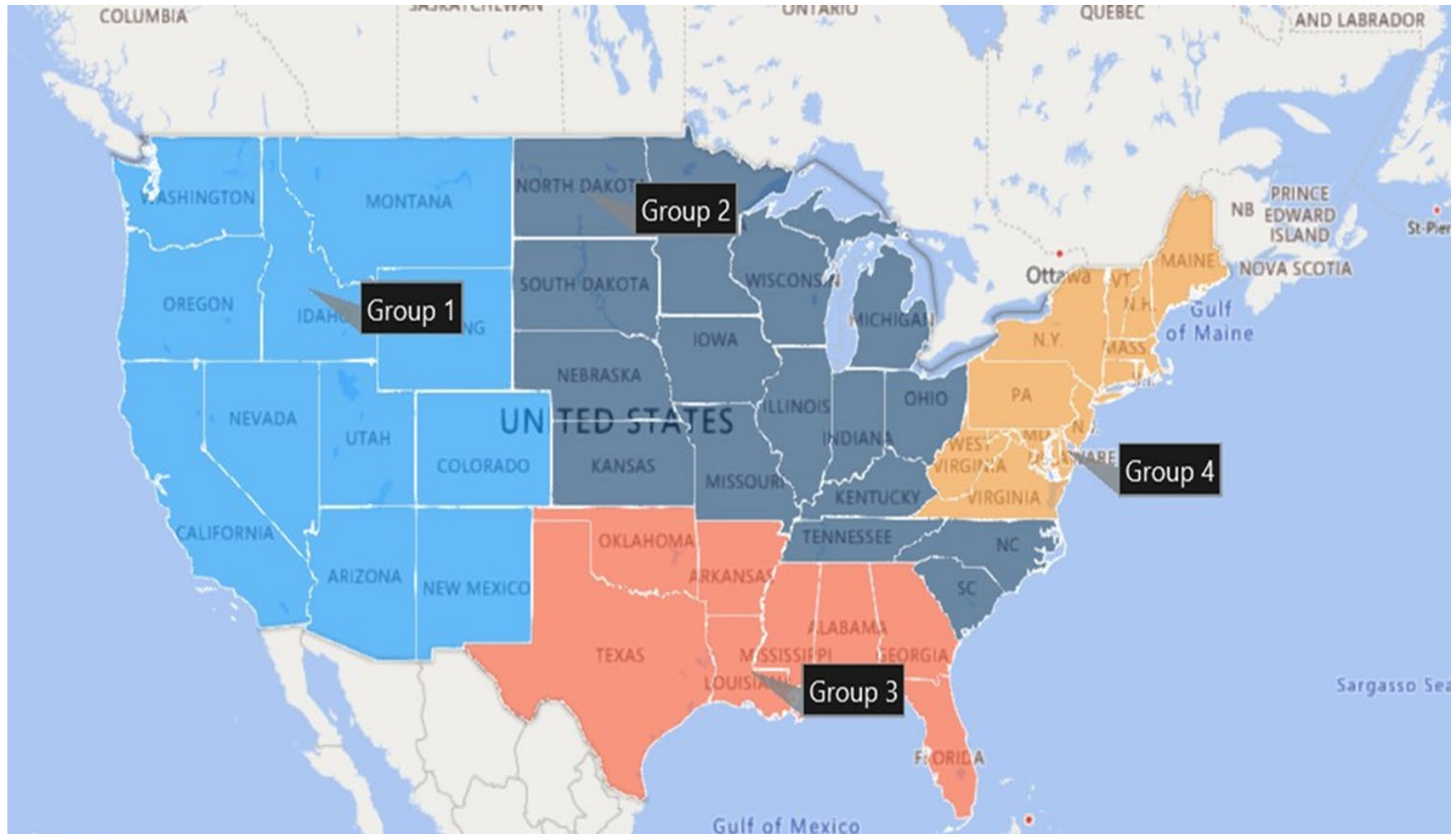
Office of Fraud Enforcement

- Direct report to SB/SE Deputy Commissioner, Collection & Operations Support
- Damon Rowe, Executive Director
- Carolyn Schenck, National Fraud Counsel
- Team
 - Headquarters
 - Enforcement Policy Office
 - Fraud Enforcement Advisors
- Focus
 - Enforcement initiatives
 - Civil fraud cases
 - Criminal referrals



IRS Fraud Enforcement Efforts

Office of Fraud Enforcement



FRAUD REFERRALS – To CI

- The IRS wants to increase the number of cases referred from examinations and collection matters for both civil fraud penalties and criminal investigations.
- Recently, statistics show fraud referrals comprised about 7% of the division's caseload. Collection referrals outpaced Exam referrals.
- The IRS Commissioner, Chief of CI and the DOJ Tax Division Principal Deputy Assistant Attorney General have all publicly noted that looking at whether a civil tax case should be worked as a criminal case is being looked at more closely.
- IRS initiative to increase the number of tax fraud referrals to IRS-Criminal Investigation "CI".
- In addition to a budget increase and additional resources on the way, the use of big data analytics, will factor into this priority area.

SPECIFIC PRIORITIES AND FOCUS AREAS FOR TAX FRAUD INVESTIGATIONS

- High wealth related schemes: Syndicated conservation easements and micro-captive insurance arrangements.
- High wealth taxpayers: High-wealth taxpayers who have other businesses, like a related S corporation.
- Non-filers: Taxpayers deliberating not filing required returns.
- International taxpayers: International taxpayers now face scrutiny and possible fraud investigations when they come back into the system or make a voluntary disclosure to the IRS.
- Questionable refunds: Tax preparers and taxpayers involved in fraudulent method to obtain refunds such as tax identity theft and earned income tax credit fraud.
- Offer in compromise: Taxpayers and their representatives who make false financial disclosures in an attempt to fraudulently settle their tax liability.
- Employment taxes: Taxpayers who repeatedly withhold from their employees and evade payment of the taxes to the IRS as well as employers who do not file required payroll returns.

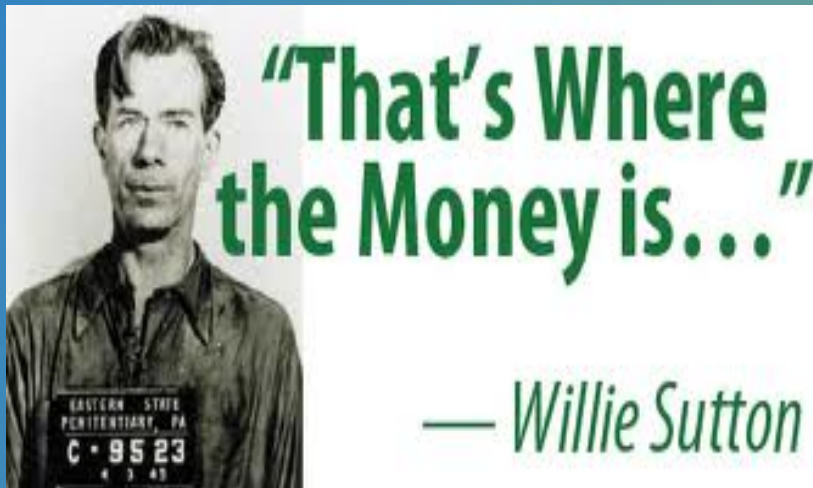
United States v. Mr. S

- 26 Count Indictment
 - Counts 1-24: Violation of 26 U.S.C. 7202 (Willful failure to Collect or Pay Over Tax; e.g., employment tax fraud)
 - Count 25: Violation of 26 U.S.C. 7203 (Willful Failure to File Tax Return)
- Plea Agreement
 - One count of 7202; One count of 7203
- Sentence
 - 2 years incarceration
 - \$1,793,771 restitution to the IRS
- Key takeaways:
 - Pattern - serial non-filer (Defendant willfully failed to file 27 of 29 required employment tax returns during a 7-year period and willfully failed to pay \$1.3 million in employment taxes due)
 - Area of IRS focus - employment tax non-compliance and abuse
 - Additional tax non-compliance and abuse - individual tax return issues (Defendant failed to file income tax return or pay \$463,000 in taxes due individually for 2012, the year he sold his business for \$5.9 million)

United States v. Agee

- 1 Count Information - Plea Agreement
 - Violation of 18 U.S.C. 371 (Conspiracy to Defraud the USA (IRS))
- Sentence - Maximum
 - 5 years incarceration, restitution and penalties
 - \$1.2 billion in fraudulent tax deductions and hundreds of millions of dollars in tax losses
- Factual Assertions/Admissions:
 - From at least 2013 through 2019, S. Agee and C. Agee, then partners at an Atlanta accounting firm, marketed, promoted, and sold together with co-conspirators, investments in fraudulent syndicated conservation easement (SCE) tax shelters. The SCE tax shelters were designed to produce tax deductions for high-income taxpayers through partnerships that purported to make “real estate investments.” In truth, the partnerships were a sham, lacking economic substance and serving no legitimate business purpose. The placement of conservation easements over the real estate was a foregone conclusion, which fraudulently enabled the investors to shelter their income from the IRS with no economic risk and to claim substantial tax deductions to which they were not entitled. S. Agee, C. Agee, and their co-conspirators marketed the SCE tax shelters by promising investors that for every \$1 invested in the partnership, the investor would receive more than \$4 in charitable tax deductions.

IRS TAX FRAUD ENFORCEMENT



High Wealth / High Income Examination Focus

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Upcoming Audits of High Income Filers?

- Expectation of several hundred examinations of high income taxpayers beginning by this fall
- LB&I and TEGE Commissioner statements in June 2020 at NYU conference
 - LB&I Comm'r Douglas O'Donnell and TEGE Comm'r, Tammy Ripperda at NYU Tax Controversy Forum. Other top Executives as well.
 - Coordination between LB&I, SBSE, TEGE, and potentially Criminal Investigation
 - Description of enterprise level examinations, including tiered partnerships, retirement plans, private foundations.
 - Increased Data Analytics

Internal Revenue Service

Operating Divisions

- Cross-Operating Division Approach to High Income / High Net Worth Taxpayers
 - Tax Exempt / Governmental Entities (TEGE)
 - Large Business & International (LB&I)
 - Small Business / Self-Employed (SB/SE)

Why now? Recent High Wealth Focus Indicators

- 2015 Treasury Inspector General for Tax Administration (“TIGTA”) Report
 - Title: “Improvements Are Needed in Resource Allocation and Management Controls for Audits of High Income Taxpayers”
- New TIGTA Report, May 29, 2020
 - Title: “High Income Non-filers Owing Billions of Dollars are Not Being Worked by the IRS”
 - Note the sample set addressed by TIGTA was for periods 2014-2016
- Congressional Oversight and Pending Legislation

IRS High Income Efforts Overview

- High Income Initiative
 - LB&I and SB/SE effort to maintain compliance efforts in the area of high income taxpayers
 - Based on total positive income
- Global High Wealth
 - LB&I program since 2009
 - Enterprise approach looks at the complete financial picture of high wealth individuals and the enterprises they control
 - Based on income or assets, wealthiest taxpayers
- Non-filer
 - initiative to step up efforts to visit non-filers who have incomes above \$100,000 and failed to file one or more tax returns

High Income Non-Filer Focus

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IRS Response to TIGTA Report re High Income Non-Filers

- Highlights of Response to TIGTA report
 - Written by SBSE Commissioner, Eric Hylton, May 7, 2020
 - Former Deputy Chief of IRS Criminal Investigation
 - Reference to Commissioner Rettig's repeated emphasis at conferences
 - High income non-filers remain a major enforcement focus of the IRS
 - Former budget limitations, and a thank you to Congress and the Administration for new and continuing investment in enforcement (budget increases)
 - Examples of steps already taken

IRS Response to TIGTA Report (cont.)

- Examples of steps already taken for high income non filers
 - Revenue Officer Compliance Sweeps (ROCS)
 - Face to face engagement with taxpayers across all communities
 - In 2020, focus on high income non-filers (this was a noted exception to cessation of most enforced collection under the People First Initiative in response to COVID-19)
 - 2018 SBSE Non-filer Strategic Plan
 - Efforts involve multiple functions including Collection, Examination, and Criminal Investigation

TCJA Compliance Campaign

- Broader in approach than other campaigns.
- Review entire tax return and thus give examiners the authority to look beyond a specific issue.
- Encompasses review of impact of both TCJA and CARES act.
 - Think about how these Acts impacted your high income clients
- May include examinations, soft letters, and development of future issue-based campaigns.
- Data Sharing
- Sharing information with tax agencies in other countries.
international counterparts

New Client (Previous Non-Filer) Considerations

- Explanation of current year compliance obligations
 - Explain difference between tax payment and tax filing obligations
 - Explain estimated payments vs. withholding
- Consideration of prior year compliance
 - Consider client's engagement of attorney and potential *Kovel* arrangement
 - The IRS continues to mention cross referrals to CI.
- Review of potential refunds, NOLs, or other attributes for prior years with no filings

Global High Wealth Internal Revenue Manual Provisions

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Updated Global High Wealth IRM

- Internal Revenue Manual 4.52.1., Global High Wealth Program Processes and Procedures, 12/26/19
- Material Changes
 - Replaces Scope / Incorporates Internal Controls
 - Update procedures for IDRs
 - Updated procedures for field case closings
 - Added record retention procedures
 - Updated procedures for enterprise case examination plan

GHW Program Scope and Objectives, IRM 4.52.1.1

- Purpose: Overview of GHW Program and procedures used by GHW
- Audience:
 - LB&I GHW employees responsible for case building and risk assessing;
 - and GHW teams (and other teams) who are examining GHW enterprises cases
- Policy Owner: Under Pass through entities (PTE) practice area
- Practice Owner: GHW is responsible for administration, procedures, and updates
- Program Goals: Use limited resources to identify high wealth taxpayers with the highest compliance risk in a consistent and fair manner.

GHW Background, IRM 4.52.1.1.1

- Holistic approach for high wealth taxpayer population
- Look at the complete financial picture of high wealth individuals and the enterprises they control.
 - “Key case” = Individual income tax return
 - “GHW enterprise case” = Key case, plus related income tax returns where the individual has a controlling interest and significant compliance risk is deemed to exist.
 - Interests in partnerships, trusts, subchapter S corporations, C corporations, private foundations, gifts, and the like.
- Inter-operating division cooperation (i.e. TEGE / CI / SBSE)
- GHW consists of two functions:
 - Workload Services (WLS); and
 - Field examination groups.

GHW Population Identification, IRM 4.52.1.2

- What gets you into GHW from the list of wealthy taxpayers?
 - Business and financial enterprises controlled by individuals with assets or earnings in the tens of millions of dollars.
 - LB&I Compliance, Planning and Analytics (CP&A) has primary responsibility for overall coordination of the Annual Examination Plan and workload identification.
 - CP&A provides WLS with an initial listing of the high wealth taxpayer population.
 - CP&A then utilizes computations to determine the examination potential of the enterprises controlled by high wealth individual taxpayers.
 - Computations use Compliance Data Warehouse data and are used to preliminarily assess the level of compliance risk on filed (or unfiled) returns.
 - The returns with the highest risk indicators are further risk assessed by WLS and potentially resulting in the enterprise being selected

GHW Risk Assessment and Case Building, IRM 4.52.1.3

- Risk assessment process
 - Review taxpayer forms and related data
 - Identifying specific issues, observing trends
 - Review of a yK-1 analysis to gain an understanding of the taxpayer enterprise (Form 1040 and all related entities)
 - During the risk assessment, large, unusual, or questionable items (LUQs) are noted by WLS for consideration by field agents for all entities in the enterprise that are determined to pose a risk of noncompliance.
 - Related entities considered to be high risk are identified for inclusion in the case building package.

GHW Risk Assessment and Case Building, IRM 4.52.1.3

- WLS risk assessors determine whether the case will be included in inventory ready for assignment.
- WLS builds enterprise case files for delivery to the field with all related returns to be examined and other tax-relevant materials.
- Once assigned, a virtual case team folder is established on a secure shared drive:
 - Examination workpapers
 - Examination-related materials.
 - Forms 1040, 1065, 1120, 1120S, 1041, 990, 990PF, 990T, 706, 709
- Practice pointer. Compare to prior exams where Revenue Agents had difficulty getting tax returns.
 - Additional return requests sent to WLS.

Consolidated Enterprise Case Examination Plan

- IRM 4.52.1.10
 - The Enterprise Plan is a compilation of the examination of an individual taxpayer and the related entities comprising his/her financial enterprise.
 - Not to be disclosed or shared outside the IRS.
 - These may represent various tax return filings, tax jurisdictions and filing periods, which have common ownership or control.
 - The taxpayer and the various related entities are risk assessed and an Enterprise Plan is developed to consolidate the actions to be taken and provide an overall risk for GHW management.
 - Excel document that provides a roll-up of each examined return within the enterprise and includes summaries of issues, time, and examiners assigned for each return being examined.
 - The Enterprise Plan should be prepared for every GHW enterprise case with multiple separate taxpayers.

Consolidated Enterprise Case Examination Plan

- IRM Exhibit 4.52.1-1
 - Examination Plan Tax example information:
 - Key case (i.e. the 1040 that is the key taxpayer)
 - Individual/entity examination tab and risk analysis
 - Issues
 - Senior Revenue Agent notes on issues
 - Examiner assigned to each issue
 - Estimated time by issue by examiner
 - Specialist involvement
 - Counsel/Technical Specialist involvement
 - Potential Adjustment amount
 - 50% review comment – reasoning for continuing the issue or not.

Global High Wealth Information Document Request

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Global High Wealth Program Area

- Unified, holistic look at the entire web of business entities controlled by a high wealth individual to better understand the entire economic picture of the entire and to assess the tax compliance of that overall enterprise.
- Enterprise analysis of related **trusts, private foundations, flow thru entities, real estate investments, privately held corporations**, etc.
- Exam teams comprised of **flow-through specialists, international examiners, economists to identify economic trends, appraisal experts to advise on valuation issues, and technical advisors** to provide industry or specialized tax expertise.

Global High Wealth - IDR

- Provide complete copies of the **tax preparation workpapers**, including adjusting trial balances, tax mappings, and closing adjustments used to prepare your return.
- Provide copies of all **tax opinions received** impacting any return under examination.
- For any **assets (tangible or intangible) you sold or transferred from the U.S. to any foreign person or entity or vice versa**, indicate each asset sold or transferred, the value at the time of sale or transfer, and describe how the value was determined. Provide copies of any appraisal or reports received that indicate how the value was determined.
- **Identify any properties** that you directly or indirectly leased or rented.

Global High Wealth IDR (cont.)

- Provide copies of all **organizational charts** (including all tax organizational charts) of any related entity.
- **Identify any asset transferred and/or sold utilizing estate planning** to reduce potential estate tax obligations, including:
 - Family Limited Partnerships (FLPs),
 - Living Trust Agreements,
 - Grantor Retained Annuity Trusts (GRATs),
 - Private Foundations (PFs)
 - Community Foundations (CFs)
 - Donor Advised Funds (DAFs)
 - Qualified Personal Residence Trusts (QPRTs)
 - Charitable Remainder Trusts (CRATs), and/or
 - Intentionally Defective Grantor Trusts (IDGTs).

Global High Wealth IDR (cont.)

- **Detail any fees you paid with regard to tax or estate planning** including the amount paid, provider who received the fee, description of the planning that was done for the fee, whether a confidentiality agreement was signed, and copies of any marketing materials received with regard to the planning.
- Indicate whether you had an interest or signatory authority over a **foreign financial account** with assets in excess of \$10,000 and provide copies of FBARs.

International Individual Compliance Campaigns

- **Virtual Currency** -- addressing noncompliance related to the use of virtual currency through multiple treatment streams including outreach and examinations. The compliance activities will follow the general tax principles applicable to all transactions in property, as outlined in Notice 2014-21. Taxpayers with unreported virtual currency transactions are urged to correct their returns as soon as practical. The IRS is not contemplating a voluntary disclosure program specifically to address tax non-compliance involving virtual currency.
- **Offshore Private Banking Campaign** – addressing tax noncompliance related to taxpayers' failure to report income generated and information reporting associated with offshore banking accounts. Foreign Account Tax Compliance Act ("FATCA") records, including those received under Model 1 and 2 intergovernmental agreements (IGAs), will be reconciled with U.S. domestic reporting.
- **Foreign Investment in Real Property Act (FIRPTA)** -- FIRPTA taxes foreign persons on the disposition of their U.S. real property interests. Generally, the buyer/transferee is the withholding agent and is required to withhold 15% of the amount realized on the sale, file the required forms, and remit the tax to IRS. This campaign is intended to increase FIRPTA voluntary compliance through issue-based examinations and external education and outreach.

IRS Voluntary Disclosure Practice A Potential Solution to Non-Compliance

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IRS Voluntary Disclosure Practice

- IRS issues new guidance in November 2018
- Voluntary disclosure remains centralized with IRS-CI in Philadelphia
- IRS-CI now requires preclearance for all voluntary disclosures
- IRS revised Form 14457 in March 2019:
 - Part 1: Preclearance (Do Not Fill Out Part 2)
 - Part 2: Preliminary Acceptance
- IRS revised Form 14457 in April 2020, adding Detailed Instructions
- IRS updated IRM in September 17, 2020 (IRM 9.5.11.9)

IRS Voluntary Disclosure Practice

- After preliminary acceptance, CI sends cases to a civil compliance unit in Austin for distribution to appropriate civil examination unit.
- All cases will be assigned for examination
- All cases will follow standard examination procedures
 - 6-year disclosure period
 - All required returns and reports for the disclosure period
 - Full cooperation
 - Interim/IRM guidance in considering penalties
- IRS expects most cases to be resolved by agreement

IRS Voluntary Disclosure Practice - Penalties

- Penalties:
 - Willful FBAR penalty will be asserted in accordance with existing IRS penalty guidelines under IRM 4.26.16 and 4.26.17 (50% of highest balance of accounts during disclosure period)
 - Civil fraud penalty (75% of tax due) on one year with highest tax deficiency
 - Estimated tax penalties for all years (time value of money)
 - Penalties for failure to file information returns will be at examiner's discretion
 - Penalties related to excise taxes, employments taxes, estate and gift tax, etc. will be based on facts and circumstances with examiners coordinating with subject matter experts

IRS Voluntary Disclosure Practice

- Taxpayers may:
 - Request imposition of accuracy-related penalties instead of civil fraud penalties or non-willful FBAR penalties instead of willful penalties.
 - Given the objective of the voluntary disclosure practice, granting requests for the imposition of lesser penalties is expected to be exceptional. Taxpayer must present convincing evidence to justify the reduction.
 - Request an appeal with the Office of Appeals.

IRS Voluntary Disclosure Practice

- Revocation of Preliminary Acceptance:
- “The Service will provide procedures for civil examiners to request revocation of preliminary acceptance when taxpayers fail to cooperate with civil disposition of cases.”
- Revocation = potential criminal prosecution

IRS Voluntary Disclosure Practice

Benefits

- Avoiding referral to IRS-CI and therefore, referral to U.S. Department of Justice Tax Division
- Some degree of predictability
- Some reduction in potential penalty exposure
- Most beneficial for clients with high risk of prosecution

Burdens

- Civil fraud penalty, estimated tax penalties, and where applicable, willful FBAR penalty, are a given and may carry over to state tax liabilities
- Failure to reach an agreement at the audit stage may result in increased look-back period and civil penalties
- Failure to cooperate, including participation in and full disclosure during interviews, could result in loss of protection from criminal referral

Other Paths to Come Into Compliance

- Prospective Compliance
- Payment without an Original or Amended Return
- File Original or Amended Returns (“Quiet”)
- File Qualified Amended Returns
- Streamlined Submission Procedures (May be Terminated)
- Delinquent FBAR Submission Procedures (May be Terminated)
- Delinquent International Information Return Submission Procedures (Clarified)

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