THE ULTIMATE GUIDE TO IRS CRIMINAL INVESTIGATIONS

BROTMAN LAW

INTRODUCTION

To date, I've written several articles that provide an overview of the major tax crimes found under the internal revenue code. You'll find information on where these crimes come from, how the Government can prove a violation of these tax-related laws, and how these violations can be punished.

Questions you may have regarding specific crimes such as tax evasion, filing false returns, interfering with tax laws, or failing to pay a tax have been addressed, but should one of the tax crimes hit closer to home, give my office a call. We can set up a time to discuss your interest in the particulars of that crime in further depth.

What Is the Internal Revenue Code?

You may have heard of the "IRS tax code" through politicians or in the media. They are referring to the internal revenue code ("IRC"), which encompasses most of the tax-related laws in the United States.

The IRC is enacted by Congress and administered by the IRS, despite the colloquial name implying that the IRS is mainly responsible for the way the code is written.

In the United States, our laws are codified, which means they are grouped together into relevant sections by subject matter. Federal laws are published as the United States Code ("USC"), which contains 53 major categories of law, called "titles". The IRC is found under title 26. If you are looking for a tax law, you will probably find it under Title 26 of the U.S. Code.

Are You Under Criminal Investigation by the IRS?

If you believe that you are under criminal investigation by the IRS, you probably have a good sense as to why. Depending on how certain you are of this, you need to stop right now. You need to contact a criminal tax attorney to help you. This is certainly not a situation to try to handle on your own or with your CPA or tax preparer. This is very serious business and the stakes are too high.

The IRS Criminal Investigation Division (CID) is exactly what it sounds like. It is the central investigative body charged with investigating and building cases against people who are charged with tax crimes.

Criminal investigation works with a variety of different agencies to help build up the tax side of a case. For example, they can work with the FBI, Homeland Security and other agencies to help build and prosecute those who cheat on their taxes.

The reality of the situation is the criminal investigation division is a very small but focused unit with a very high conviction rate. Currently, when it comes to tax crimes, the U.S. Attorney's Office has a 90 percent conviction rate. That is pretty staggering and can be attributed to the work that the criminal investigation division does.

Too Much at Stake

The most obvious risk of an IRS criminal investigation is jail. The reason why the U.S. Attorney's Office has a 90 percent conviction rate when it comes to criminal tax cases is because they have your tax return as evidence that you did something wrong and they have got you dead to rights.

The CID also wants to send a message to other people who may be thinking about committing tax crimes or who are committing tax crimes, "Do not mess with the United States Government." That is why you often see media coverage of criminal tax cases that are high-profile, involving business moguls, politicians or celebrities. The government wants to make an example of these offenders.

The other consequences and risks of a criminal investigation are ones that you may not think of. Number one, criminal investigations are very public matters. Once you get indicted, there is a certain amount of press coverage that comes with it. The U.S. Attorney's Office issues a press release.

Oftentimes, it involves the liquidation of your assets. The feds may take your retirement accounts, they take your homes, they take all sorts of things in order to satisfy the restitution amounts that often get served in these cases.

The shock waves from these cases often extend to families. Many families do not survive criminal tax cases. Many marriages do not survive criminal tax cases. Many spouses go through a very, very hard time during these investigations.

A lot of the time, our role is not just about dealing with the defendant in the case or who is being charged. It is also about providing support for their families, for their wives, their children, the husbands, and anybody else who is involved in these types of cases.

The fallout also ripples through business relationships. Even in cases where there is innocence or an acquittal, the lasting effects of an IRS criminal investigation can scar a taxpayer for life.

I am not saying this to be overly dramatic, I say this because I have watched my clients go through this and that is why I believe so passionately about defending their rights against the government.

It is really important when you are dealing with a criminal investigation, even if you know for sure that you have not done anything wrong, that you take the appropriate actions to protect yourself, your family and your livelihood going forward.

You Need an Experienced Defense Team

My law firm, Brotman Law, is highly-experienced in addressing criminal tax situations. We will work with you to build a strong defense and lessen the likelihood of incarceration and exorbitant fines and penalties. We specialize in small business tax matters and have years of experience in dealing with the IRS on all levels — from simple audits to high-profile criminal investigations.

In the related articles, I will address criminal tax investigations, their complexity, what the IRS is looking for, consequences of investigation, the possibility of conviction, and why it is imperative that you need a

criminal tax attorney to defend the IRS's case against you. At the conclusion, I will answer "8 Frequently Asked Questions about the Criminal Tax Process."

It is my hope the articles help you fully understand what you may be up against, should you find yourself in the unhappy shoes of someone who is a target of the IRS Criminal Investigative Division. Again, give my office a call if and when you do, and we'll use our years of experience to get it worked out to the best possible conclusion.

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01 Why Is The IRS Charging Me with a Tax Crime?

Reading this chapter will give you an overview of the criminal justice system and how it relates to violations of laws regarding the tax process. It will provide an initial layout of the roles of the agencies that are responsible for criminal tax enforcement in the United States and why criminal tax cases are charged.

02 How Do Tax Crimes Get Prosecuted

This chapter will walk you through the process of a criminal tax case from the initial investigation through a plea or trial. Any questions you may have as to what a specific step in the process will look like to you, or what goes on behind the scenes will be answered in this chapter.

03 What is a Criminal Tax Administrative Investigation

In this chapter, we discuss what happens when a tax case has been deemed to have criminal potential by the IRS and they decide to conduct an administrative investigation. The administrative investigation is generally the first step into the criminal tax arena

04 What Should I expect After Being Charged With A Tax Crime?

The events that occur at this initial appearance including a determination of counsel, determination of bond, upcoming court dates, and any restrictions on the defendant's release. In this chapter we will discuss all of these factors and why they can be subject to change throughout the process.

05 Criminal Tax Restitution, Fines and Forfeiture

We begin this chapter by defining the three different types of financial punishments that may be ordered by the court in a criminal tax case: (1) restitution (2) forfeiture and (3) fines.

06 How To Protect Yourself In A Criminal Tax Situation

If you've violated a tax law there's still a number of things that can be done to help avoid or reduce the most serious penalties.

It is important to discuss your options with an attorney at this stage because the best practice can be different for each individual case. Read more about what you need to know in this chapter.

07 6 Frequently Asked Questions about the Criminal Tax Process

There are always a lot of nervous questions in the criminal tax process.

This chapter provides the answers to the six most frequently asked questions clients have posed before hiring me as their legal defense.

08 Conferencing with Criminal Tax Authorities

In this chapter I discuss the conferences that should occur before the indictment: the IRS Conference, the Tax Division Conference and the USAO Conference.

This is also the time where the Government can decide to offer immunity from prosecution.

09 Criminal Liability and Voluntary Tax Disclosure

The IRS rarely goes after people for small dollar amounts. They are looking to send a message to the big offenders.

In this chapter, learn why most criminal tax charges can be mitigated.

10 How Are Tax Crimes Punished?

In this chapter, I will explain what you can expect after a guilty plea or a finding of guilt by a jury.

There is also a discussion about how and why a sentence is chosen, and what some of the common punishments are for a tax crime.

11 How Can Brotman Law Help Me In My Criminal Case?

In a criminal case, strategies must be devised from both a legal and a resource perspective.

In this chapter I will highlight the stakes and how we muster everything possible on our end to mitigate any consequence to our clients.

12 How Much Will It Cost for Brotman Law to Take My Criminal Tax Case?

Cost questions are complex in criminal tax cases and in this chapter I'll explain why.

13 What Happens at a Tax Crime Pre-Trial?

In this chapter I will discuss the pre-trial phase of the criminal tax process from working out evidentiary issues, to setting a timeline, to discovering evidence and negotiating a plea.

14 What Happens When a Tax Crime Goes To Trial?

In the rare instance that a criminal case goes to trial, this chapter outlines the components of the federal criminal trial and what to expect when you walk into the courtroom on trial day.

15 What is a Willful Failure to Collect or Pay Over Tax?

In this chapter we will discuss the significant impact employment taxes have, and why the enforcement of employment taxes is one of the Tax Division's top priorities.

16 What is Tax Evasion?

When an individual or business attempts to avoid the collection of a tax by preventing the IRS from becoming aware that an unpaid tax is due, or underreports the amount due, this is what is known as tax evasion. Find out all its ramifications in this chapter.

17 What is the Criminal Tax Fraud and False Statement?

Understand more about the two most commonly charged tax crimes – including making and signing false documents and belief and willfulness in this chapter.

18 What is the Omnibus Clause?

There are three elements for this criminal tax clause to take effect including obstructing or impeding the IRS from doing its administrative duty.

Find out more about the Omnibus Clause in this chapter.

19 What is the Tax Crime of Omission?

When a taxpayer fails to file a return, it can be considered a crime.

In this chapter learn more about the Tax Crime of Omission and why someone who doesn't file a tax form with sufficient information about income could still be charged with a failure to file.

Thank you in advance for reading
"The Ultimate Guide to IRS Criminal Investigations."

It was a labor of love and our law firm welcomes all questions, comments, concerns, and feedback that you may have about this free resource.

Questions? Speak with us today at
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01 Why is the IRS Charging Me with a Tax Crime?

INTRODUCTION

How do you think taxpayers decide it is in their best interest to avoid cheating on their taxes? The same way most children learn from watching other children try something they were told not to do, and see the precocious child get hurt or punished for the action.

Staying compliant with the state and federal government and paying your taxes isn't enforced quite as simply as a "time out," or a loss of privileges – although you likely will lose in some way if you don't pay and are caught. However, studies have shown that although honest math mistakes on tax returns are fairly common, even the real cheaters seldom go to jail.

Reading this chapter will give you an overview of the criminal justice system and how it relates to violations of laws regarding the tax process. It will provide an initial layout of the roles of the agencies that are responsible for criminal tax enforcement in the United States and why criminal tax cases are charged.

Why Am I Being Charged with a Tax Crime and Who is Bringing These Charges?

Anyone who has allegedly violated the internal revenue laws can be charged with a tax crime. This includes civilian taxpayers, corporations, or professional tax preparers. As we noted in the introduction, very few criminal tax cases are brought all of the way to prosecution and even fewer are brought through trial, but those cases that are prosecuted are usually quite strong for the Government.

The Department of Justice Tax Division is chiefly responsible for enforcing laws on most tax related offenses. 28 C.F.R. § 0.70. The Tax Division is a specialized unit within the

United States Department of Justice, which is given authority by Congress to investigate and prosecute tax crimes and other crimes relating to tax offenses. See Id.

Essentially, the Tax Division is responsible for overseeing criminal proceedings relating to internal revenue laws, and must approve all criminal charges brought under these laws. USAM § 6-4.200.

There are limited exceptions to this broad power, but if you find yourself charged with a tax-related crime, odds are that it is covered under the authority of the Department of Justice Tax Division. See 26 U.S.C. 7212(a); 26 U.S.C. 7212(b); 26 U.S.C. 7213; 26 U.S.C. 7208; 28 C.F.R. § 0.70.

The official mission of the Tax Division is to "enforce the nation's tax laws fully, fairly, and consistently, through both criminal and civil litigation, in order to promote voluntary compliance with the tax laws, maintain public confidence in the integrity of the tax system, and promote the sound development of the law." United States Department of Justice, Tax Division, About The Division, Mission (October 22, 2020) https://www.justice.gov/tax/about-division.

This may seem to you like a lofty (and wordy) goal… and it is! There are only so many government resources available to to prosecute all crimes under the internal revenue laws. See Criminal Tax Manual § 1.01[4].

> **Therefore, one of the significant purposes of the Tax Division is to deter the average taxpayer from violating tax laws. USAM § 6-4.010. This is done by properly and effectively prosecuting and punishing tax violators to promote respect for the laws in place, and ultimately…make taxpayers decide it is in their best interest to avoid cheating on their taxes. See Id.**

So, what does this all mean for those individuals who are charged with a tax crime? The bottom line is: The Government takes these charges seriously. In fact, if you are charged with a tax crime, the chances of being found guilty are very high. See Internal Revenue Service, IRS: Criminal Investigation Annual Report, 12-13 (2019).

The most recent conviction rate (the number of criminal cases brought divided by the number of convictions) reported by the IRS is a staggering 91.2%. Id.

While the Tax Division is one major players in the prosecution of a Tax Crime, the Tax Division works together with a number of different entities, who you will probably interact with more directly, in order to enforce internal revenue laws.

These other entities include the Internal Revenue Service ("IRS") (specifically IRS Criminal Investigation ("CI"), special agents, and attorneys with the IRS's Office of Chief Counsel Criminal Tax Division ("CT")), the Treasury Inspector General for Tax Administration ("TIGTA"), and Assistant United States Attorneys ("AUSA"). We'll give you more details on these entities throughout this chapter.

The United States Attorney's Office ("USAO") is largely responsible for the prosecution (the conducting of legal proceedings in regard to criminal charges) of tax crimes, with oversight and advice from the Tax Division. Criminal Tax Manual § 1.01[4][b].

Many criminal tax cases are referred to the USAO from the Tax Division. However, if the USAO wants to initiate its own investigation into a possible criminal tax matter or to bring charges, it generally needs to seek approval from the Tax Division. § 1.02[1].

There are some instances in which the USAO does not need Tax Division Approval. If there is already an investigation of a non-tax matter pending, the USAO may "expand" that investigation to include allegations of tax crimes, as long as they first let the Tax Division know. § 1.03[2][b].

Even in this instance, the Tax Division still has to approve the charges. Id. There is also a limited category of cases, mostly false refund claims filed in the names of taxpayers who either don't know or don't exist, where the Tax Division has already given authority to the USAO to prosecute without going up the chain. See § 1.05[1].

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What if I am Under Investigation by the IRS Criminal Investigation Division and I Haven't Done Anything Wrong?

First, I want you to take a breath and think about the phrase, "I haven't done anything wrong." "I haven't done anything wrong," is a very absolute statement. If you are going to make that sort of that absolute statement, you need to be absolutely sure you have not done anything wrong.

The problem in a lot of these cases is that you *have* done something wrong. You may have not had criminal intent behind it, you may have not intended to defraud the government, but for some reason, your actions triggered an IRS criminal investigation.

If you did not trigger a criminal investigation, the agents would not be looking at you. There has to be some reason. Special agents do not just fall out of the sky. It is really important to assess your level of culpability and have

an honest conversation about that in the beginning. With that said, special agents are by no means perfect and criminal cases are by no means 100 percent accurate.

> **What you usually deal with in criminal cases are levels of truth. You deal with things that are 100 percent true. You deal with things that are sort of true and then you deal with things that are absolutely not true.**

The important thing is to understand that this is a strategic position that you are in and that your goal is to mitigate and minimize any impact that this criminal investigation is going to have.

It is not even about indictment, although many cases head towards the U.S. Attorney's Office and they do not spend time on you unless they are charging you. You do not get in their crosshairs by accident, but the important thing is that criminal investigations have a lot of detrimental impacts on people.

It is very important that you work to protect yourself in any way that you can. Even if you are completely innocent, retain criminal tax counsel and have a consultation with us.

At the very least, we can sit down and build a strategy so that at worst, you are completely prepared for something that never happens. Then you do not have to worry about it, but at best, you are in a great position to prevent some serious consequences going forward.

How Does the Criminal Tax Process Work? A Brief Summary

The typical criminal tax process begins with the IRS. This portion of the process is known as the IRS phase and we will discuss this phase in more detail in Chapter 2. The IRS may receive a tip from an informant, information of criminal activity from other federal agencies, look into suspicious activity on its own, or conduct a civil audit that turns bad.

The civil audit that takes a turn for the worse, known as an "eggshell" audit, is a large feeder of criminal tax cases so we'll start from there.

Civil audits can be triggered by random selection based on a computer database that compares tax returns to the "norm" for a similar return or from a relation to other taxpayers who showed issues on an audit. See, Internal Revenue Service, IRS Audits, https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits.

A real auditor will then review the random selections to determine if there are actually issues worth investigating. See id. If you are one of the unlucky few to be audited, an internal revenue agent will be examining and reviewing your accounts and returns to ensure that financial information is being correctly reported and that the taxpayer is complying with internal revenue laws.

If at any point during the civil audit, the revenue agent has a "firm indication" of fraudulent activity, the agent will stop the civil audit and the criminal administrative

investigation with the IRS will begin. See IRM 25.1.3.2 (1). During this time, you may not hear from the revenue agent, so a long silence during a civil audit is generally an indication that it will turn criminal.

This quasi-criminal phase is known as an administrative investigation. It is technically not a criminal proceeding, however you will have some of the same rights as it is criminal in nature.

During an administrative investigation, a special agent for the IRS will pay a visit to the subject of the investigation, and utilize a number of different techniques to gather information and evidence in order to determine whether the case should be referred to the Department of Justice for prosecution. See 26 U.S.C § 7602. Prior to referral, the recommendation must go through many different layers of review.

If the case passes the test on each review, it will be sent to the Tax Division for approval. This is called the DOJ Tax Phase. In this phase, the Tax Division reviews the report of recommendation from the IRS as well as the facts of the case and determines if: (1) the case is ready for prosecution (2) the case requires further investigation by a grand jury or (3) if the case will be declined and kicked back to the IRS. See USAM § 6-4.200.

If the Tax Division determines the case is ready for prosecution, it will be sent over to the appropriate United States Attorney's office to be handled by an Assistant United States Attorney. We have now entered the prosecution phase.

The Tax Division may still assist the USAO if it is so requested. USAM § 6-4.219. Typically in a criminal Tax Case, the USAO will charge the defendant by a formal document known as an indictment. See Fed R. Crim P. 7(c)(1). The indictment will be presented to a jury of 16 to 23 individuals, called a grand jury, to determine whether there is sufficient evidence to charge the taxpayer with a tax crime.

If the jury does decide there is enough evidence, they will return the indictment known as a true bill for signing and execution, and the taxpayer will be formally indicted. See United States Department of Justice, Justice 101, Charging, https://www.justice.gov/usao/justice-101/charging.

After indictment, you may be sent a date to appear in court or you may be arrested and taken into custody by a federal agent. If you are taken into custody you will be brought before a magistrate judge within a short period of time, who will determine if you can be released on bond and set the amount of bond as well as any restrictions on your release. See Fed. R. Crim P. 5(a)(1)(A). If released, you, or an attorney in your stead, will be required to be present at all future hearings.

The first formal court appearance, where you will stand in front of a judge and be read the charges against you is called an arraignment. At arraignment you will be advised of your rights and may also determine your financial ability to hire counsel. See Fed. R. Crim P. 10.

The prosecutor may also provide an initial offer at arraignment. In some cases, you may choose to plead guilty at arraignment. It should be noted that at multiple points throughout this process, and even before indictment in some rare cases, plea negotiations can take place.

However, for the sake of drawing you this verbal roadmap of a criminal tax life cycle, we will assume that no plea is taken and you choose to proceed to trial. However, if a plea is accepted, you will be asked a series of questions by the judge called a plea colloquy to ensure that the plea is in the best interests of justice. Fed. R. Crim P. 11(b).

Once the colloquy is complete and the plea is accepted by the presiding judge, you will advance to the sentencing phase. With a negotiated plea, the AUSA will recommend a specific sentence to the sentencing judge.

After the arraignment, during the pre-trial period, a number of important events can take place. First is discovery. Through discovery you can formally request documents and evidence in the Government's possession, and have an opportunity to see all of the evidence that the Government has against you. See ed. R. Crim P 16.

During this time any motions, including those to dismiss the charges or keep out improperly obtained evidence can be made. See Fed. R. Crim P. 12(b). Additionally, a pre-trial conference between your lawyer, the AUSA, and the court can take place to discuss unresolved issues and allow further opportunities to negotiate a plea. Fed. R. Crim P. 17.1.

If the case proceeds to trial, you will attend with your lawyer and sit at a large desk on one side of the courtroom. If at trial you are still in custody, you will be permitted to wear plain clothes to sit in front of the jury. Estelle v. Williams, 425 U.S. 501 (1976).

While it is important to be present for the entirety of the trial, including the selection of the jury you will not be required to take the stand and testify. Prior to the trial both defense counsel and the Government will have the opportunity to question a group of potential jurors and select those six or twelve to sit on the case. See Fed. R. Evid. 47.

Any motions in ***limine***- a motion to exclude testimony from trial- will be conducted prior to the trial and outside of the presence of the jury. Luce v. United States, 469 U.S. 38, 41 n.4 (1984). Once these motions have concluded the case will proceed to trial.

Here both sides will have the opportunity to call witness to the stand to testify and present evidence to the jury. The lawyers will be permitted to make opening and closing statements, but these statements are not law or evidence. They are simply to guide the jury on interpreting the law read by the court. Once the trial has concluded, the court will read the jury instructions on the applicable law, and allow the jurors to leave to make their decision.

If the jurors come to a unanimous decision on the guilt or innocence of the defendant, this is called reaching a verdict. Fed. R. Crim P. 31(a). The jurors will then present their verdict in open court to the defendant, lawyers, and judge.See id.

If the defendant is found guilty, the judge will proceed to the sentencing phase. At this point a date is set for a sentencing hearing. Before this date, the probation office will ask you a series of questions called a presentence investigation to aid in the court's decision. See Fed. R. Crim P. 32(c); 18 U.S.C. § 3552.

At the sentencing hearing both sides will get a chance to argue their case for what the sentence should be and any victims of the offense may be afforded the opportunity to speak. Fed R. Crim. P (i).

You will also be advised of your right to appeal the final judgment and sentence.

Once the judge pronounces their sentence, it will be recorded as a final judgment. If you are sentenced to prison, you will likely be remanded (taken into custody) at that time, or in some rare cases given a certain date to report for your prison sentence.

CONCLUSION

In most tax crimes, the government is the victim and therefore "assessing the impact of the misconduct can be difficult." The community at large must be reminded that not paying taxes can be severely punished and compliance is really not a choice. Unless that is, you are willing to risk the odds. Remember, the conviction rate is high!

In recent news, Paul Manafort, an advisor to President Trump, had hidden millions of dollars in foreign accounts to evade taxes. Eventually, he was convicted of five counts of tax fraud, two counts of bank fraud and one count of failure to disclose a foreign bank account.

If you don't pay your taxes – even if you work for the government – that same entity will eventually come after you. Whether you live a plush lifestyle like Mr. Manafort or are as miserly with your money as Ebenezer Scrooge, there is little chance of a get-out-of-jail-free card. At best, we can negotiate the amount of time served and the restitution owed.

02 How Do Tax Crimes Get Prosecuted?

INTRODUCTION

There is a section on the IRS website titled "The Truth About Frivolous Tax Arguments." Not paying your taxes because they're "voluntary," or deciding for yourself how much your taxes should be has been tried many times. These tax dodging attempts have been much abused – so much so that the IRS has addressed them in particular.

For example, in the 2003 case *Banat v. Commissioner*, the 2nd Circuit upheld $2,000 in sanctions against a taxpayer because his argument that "the payment of income taxes was voluntary" was "contrary to well-established law and thus was frivolous."

As you know, not paying your taxes has its very non-frivolous side as well. I have written much about it and if the IRS has notified you that you are under investigation, you are in some serious hot water.

This bears repeating (and I will): the Government only has so many resources available to prosecute tax crimes, so the IRS carefully selects those cases which have the greatest conviction potential. In other words, if you've been targeted by the IRS, you need an attorney – now.

The IRS Phase

A criminal tax case generally begins with the IRS. The IRS has its own criminal investigation ("CI") branch, dedicated to investigating taxpayers suspected of violating the internal revenue laws.

Within the CI branch are special agents who are responsible for conducting these investigations. CI Special Agents are considered law enforcement officers, and they have many of the same powers as traditional law enforcement officers, such as the ability to make arrests and carry firearms. See IRM 9.1.2.4.1 *Authority To Carry Firearms* (11-10-2004).

CI Special Agents can conduct their investigations without the assistance of other outside law enforcement. However, they may work together with other entities within the IRS such as revenue agents, IRS attorneys, and Fraud Technical Advisors ("FTA").

Revenue agents are civil accountants employed within the IRS to ensure compliance with tax codes by examining and auditing tax returns and records. If you are going through a civil audit by the IRS, these are generally the individuals who will be conducting your audit.

They are often a large source of referrals to CI. IRS Attorneys work as a form of "in-house" counsel and provide legal assistance to CI Special Agents.

You probably won't have much contact with the IRS Attorneys, but they become especially involved if the CI Special Agent wishes to enforce a summons or seek a search warrant during an investigation.

FTAs are a type of specialized consultant with the IRS, and their main job is to look specifically at any indications of fraud to determine whether a referral to CI for a criminal tax administrative investigation is appropriate.

DOJ Tax Approval Phase

The approval phase begins when a case is referred to the Criminal Enforcement Section ("CES") of the Department of Justice Tax Division for authorization.

In most tax cases, the Tax Division's approval of a case is necessary before prosecution. CES has different offices for different geographic locations. CTM 1.04[b].The DOJ Tax CES organization chart is at CTM 1.13. Therefore, which CES office that reviews the referral is going to depend on where the tax crime took place. See id.

> **Since the Government only has so many resources available to prosecute these crimes, it is important that CES carefully selects those cases which have the greatest conviction potential, highest quality of referral from IRS, and align with its priorities to refer to grand jury investigation or USAO prosecution. See generally USAM 6-4.010. The idea behind this is the tax division brings fewer charges with better results so that the average taxpayer is deterred. See id.**

Most recently, the Tax Division's major litigation priorities include corporate and healthcare fraud, offshore tax evasion, stolen identity refund fraud, and employment tax crimes. See generally, Department of Justice Tax Division, FY2019, Congressional Budget. https://www.justice.gov/jmd/page/file/1034246/download.

The Grand Jury

A federal grand jury is made up of 16 to 23 citizens who are tasked with determining whether or not there is probable cause to charge a defendant with the crime presented. See Fed. R. Crim P. (6)(a)(1). A grand jury can only be used to gather evidence before a defendant has been indicted. Costello v. United States, 350 U.S. 359, 362 (1956).

The grand jury does not decide whether the defendant is innocent or guilty of a

crime. Therefore, their principal function is investigation. The Grand Jury phase doesn't fit squarely into the criminal tax case roadmap. It can be initiated in a few different ways and doesn't always, although in most criminal tax cases it will occur.

The most common way a grand jury investigation is initiated in a tax crime is through Tax Division referral to the U.S. Attorney's Office. JM 6-4.200. The USAO is authorized to conduct grand jury investigations into tax crimes that the Tax Division has already referred to the USAO for prosecution. See CTM 3.00.

The USAO is also authorized to conduct a grand jury investigation into a tax crime with the tax division's prior permission, or if the Tax Division believes further investigation is required to decide if a case should be prosecuted.See id.

The USAO can initiate a grand jury investigation into a Tax Crime without a Tax Division referral in limited circumstances. For example, the USAO can expand a non-tax investigation in order to include tax related offenses. See id. at 9.

However, in these cases, the Tax Division has to authorize the specific tax charges before the USAO files an information or seeks the return of an indictment. See Tax Division Directive No. 86-59 (October 1, 1986), available in Criminal Tax Manual, Chapter 3.

The IRS can also initiate a grand jury investigation in some instances. If CI for some reason is unable to either finish its investigation, decides further investigation is needed, or determines that it is unable to use its administrative investigation to properly gather evidence, it can request that the Tax Division authorize a grand jury to investigate the suspected tax offense. JM 6-4.121.

There are also limited cases in which CI is allowed to refer a case directly to the USAO for prosecution and grand jury investigation. See JM 6-4.243. In the event that the IRS requests a grand jury investigation, this will be considered a referral to the justice department.

Once a criminal referral is made, the IRS can no longer use their administrative summons powers. See 26 U.S.C. § 7602(d).

Why would the IRS want to turn their investigation over to a grand jury? The grand jury is a powerful tool for a couple of reasons. First, the grand jury has subpoena power. See JM 9-11.000. This means they can legally compel a person to come before them and testify or produce documents.

You can't just ignore a subpoena. A failure to comply with a subpoena could cause serious legal consequences. Unlike an administrative summons used by the IRS, the taxpayer will not be notified of a subpoena, and the requirement to return documents or appear to testify can be on very short notice.

Grand juries are not subject to evidentiary rules, meaning they can consider all types of evidence, even evidence that may not be allowed at trial. JM 9-11.232. Finally, the grand jury allows a prosecutor to test out their case prior to trial.

Unlike an administrative investigation, while you may have a lawyer assist you through the grand jury phase, no other lawyers are allowed in the grand jury room. Fed. R. Crim P. 6(d). The prosecutor, testifying witness,

and a court reporter are the only individuals who are permitted to be in the grand jury room. Id.

The Prosecution Phase

If the Tax Division approves a case for prosecution, it will typically be sent to the appropriate United States Attorney's Office to be handled by an Assistant United States Attorney.

The United States Attorney's Office that receives the case isn't selected at random. When the Government charges a crime, they have to show that the trial for this crime will occur in the right place. This place is called a venue.

Under the Constitution, the proper venue is the place where the crime was committed. U.S. Const. art. II, § 2, cl. 3; U.S. Const. amend. VI. This applies to a federal criminal tax case unless there is a statute or rule that says otherwise. Fed. R. Crim. P. 18.

In the federal criminal system, trials are heard in one of the 94 federal judicial districts throughout the United States. See United States Department of Justice, Justice 101, Charging, https://www.justice.gov/usao/justice-101/charging.

Each state has at least one district, and many states have multiple districts, which each contain a district court. See id. The exact location within the judicial district is decided by convenience to the defendant and witnesses. See id. When we discuss each of the major tax crimes below, we will also discuss any special rules relating to the venue.

The Government only has to show that the venue is proper "by a preponderance of the evidence". United States v. Maldonado-Rivera, 922 F.2d 934, 968 (2d Cir. 1990), cert. denied, 501 U.S. 1210 (1991); United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987). A preponderance of the evidence is the legal way of saying that it is more likely than not. If you had to put a number to that concept it would look something like 50.000000001 percent.

How Are Tax Crimes Charged?

After a case is received by the Tax Division or USAO, the Government looks at all of the information provided as well as any recommendations by the IRS, and decides what crime can be proven from the facts of the case. The prosecutor is instructed to initially charge the most serious crime that can be proven.JM 9- 27.300.

The formal document the Government uses to charge the crime will either be an indictment or an information. In most federal tax crimes, the Government will use an indictment to charge the crime.

The indictment is a formal written accusation containing the charges against the defendant and the facts supporting them. Fed R. Crim P. 7(c)(1). The indictment is presented to the grand jury by the Government.

If the grand jury decides there is sufficient evidence to indict the defendant (only 12 of 16 are needed to indict), they will return the indictment known as a "True Bill" and present it to be signed and filed with court,

United States Department of Justice, Justice 101, Charging, https://www.justice.gov/usao/justice-101/charging.

When the indictment is returned, a warrant for the defendant's arrest may be issued, and the defendant may be arrested. However, an arrest warrant does not absolutely need to be issued.

The court may instead issue a document called a summons, legally requiring the defendant's appearance in court. See Fed. R. Crim P. 9. Prior to the indictment there will be a chance for discussions with the AUSA at which point, the Government can agree to request a summons rather than an arrest warrant.

The decision to do this is fact specific and depends on the individual AUSA handling the case. However, in criminal tax cases, an arrest may be the preferred means to deter others from committing a violation of tax laws. See Lauro v. Charles, 219 F.3d 202, 212 n.7 (2d Cir. 2000).

An information is also a formal written accusation, but instead of going through the grand jury process, it is filed with the court under oath. Fed. R. Crim P. 7(b). An information may only be used in federal misdemeanor cases unless the defendant specifically agrees to be charged by information. See id.

Are You Facing Prosecution for Tax Crimes?

The IRS website actually does define paying one's taxes as voluntary. They "refer to our system of allowing taxpayers initially to determine the correct amount of tax and complete the appropriate returns, rather than have the government determine tax for them from the outset."

Would you be more likely to pay your taxes if it was required and the Government determined the set amount and when you should pay? Some people have also tried to argue that "the Sixteenth Amendment to the United States Constitution did not authorize a tax on wages and salaries, but only on gain or profit." That would be nice... but only for a select group of individuals and businesses.

Whether you've chosen to disregard paying your taxes for what the IRS terms "frivolous reasons," or for reasons entirely your own and now are in some legal trouble and in need of a tax attorney, give my office a call and we'll discuss your situation.

03 What is a Criminal Tax Administrative Investigation?

INTRODUCTION

You may be aware that the U.S. tax code allows deductions of “ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business.”

This happened in the 1966 case U.S. v. Tellier, when the The Supreme Court noted that punishing illegal behavior is not the purpose of the tax code.

Stated simply it means that a person paying taxes can deduct legal fees from income earned illegally, “as long as the legal fees were incurred directly as a result of his illegal business.”

This demonstrates a curveball found by some enterprising defense attorney. It is the kind of decision that can divert a criminal tax case, but the IRS is very quick, and usually prepares ahead of time for a play like that.

When a tax case has been deemed to have criminal potential by the IRS, they will conduct an administrative investigation. The administrative investigation is generally the first step into the criminal tax arena.

We say generally because criminal tax cases can also be initiated directly through a grand jury investigation, although the administrative investigation is the preferred method (in some special cases, CI or the USAO may request a grand jury investigation be conducted right out of the gate).

What is a Grand Jury Investigation? The transition from a civil audit to a criminal investigation may not always be clear. If you believe you are being subject to an administrative investigation from the IRS, you should contact an attorney immediately.

How will I know if I’m Being Investigated for a Tax Crime?

Criminal investigations are multi-year investigations. They are very focused and the agents who work these cases put in a

lot of time. Often, when the subject of these investigations becomes aware that a criminal agent is looking into their conduct, it is already too late, because the government is very far along on the case.

The government will make its presence known, either through contacting third-party witnesses or the subject of their investigation directly.

Government agents stay under the radar until they are pretty far along in their case. It is not as if they get assigned a case and go knocking on somebody's door. They work behind the scenes, looking at tax returns that were filed. They look at other information, such as source documents, like bank records, to build a case.

Only after they have built that case and they are certain or fairly certain that they are going to attain a conviction, do they go out in the field and start corroborating it.

By the time you become aware that a criminal agent is on to you, it may be very very far along — maybe almost the point where you are going to be indicted. That is why it is important to involve a criminal tax attorney who knows what they are doing. They will build a strategy to figure out why the feds are looking at you and what you can do about it in this stage.

The earlier that you get counsel involved, the earlier that we can build a strategy. The earlier that we can start mitigating issues, the better. We will start working immediately, to mitigate your risk, build your defense, and work quickly to solve your criminal tax issue.

What Starts an IRS Administrative Investigation?

An administrative investigation is initiated after CI becomes aware of potential violations of internal revenue laws. CI can be made aware of these potential violations in a number of different ways, and each criminal tax case is different.

One significant way CI may be made aware of a criminal violation is through a referral from other sections within the IRS. Commonly, this type of referral occurs when a revenue agent for the IRS conducts a civil audit and finds "badges or fraud" which suggest possible criminal activity.

Badges of fraud are specific indicators that revenue agents are taught to look for during their investigation to determine if a case is potentially criminal. IRM 25.1.2.3 (6-9-15). These specific indicators include, but are not limited to, omissions of line items or sources of income, concealments of accounts or property, failure to file a return, overstatement of deductions, and failure to keep accurate records. See Id.; see also infra What is the IRS Looking For.

However, just because a revenue agent finds some badges of fraud, it does not mean they need to refer the case to CI.

If at any point during a civil audit, the revenue agent consults with their supervisor and FTA and determines that there is "a firm indication of fraud" the revenue agent must suspend their civil investigation and should refer the case to CI. IRM 25.1.3.2 (1).

A firm indication of fraud is determined on a case by case basis. It requires firm indicators of fraud which are described in the internal revenue manual as affirmative actions which are done for the specific purpose of deceit. For example, a firm indicator of fraud could be keeping fake or inaccurate records of business transactions.

The revenue agent may not unreasonably delay this referral in order to obtain information for a criminal investigation by acting as though the taxpayer is still being civilly investigated. See United States v. Knight, 898 F.2d 436 (5th Cir. 1990); United States v. Peters, 153 F.3d 445 (7th Cir. 1998), (statements made during a civil audit need not be suppressed as Fourth or Fifth Amendment violations since the civil audit was routine and not a disguised criminal investigation). See also United States v. McKee, 192 F.3d 535 (6th Cir. 1999) (fraud conviction upheld even though IRS agent obtained information from defendant after she, according to defendant, had firm indication of fraud and should have turned investigation over to CI).

The reason for this is that there are rights and protections afforded to you during a criminal investigation that are not guaranteed during a civil audit. See id. See also Smith v. United States, 250 F. Supp. 803, 806 (D.N.J. 1966).

However, if you are being criminally investigated by the IRS, they may not directly come out and say it. This is because revenue agents are not required to expressly state why the civil investigation is being suspended. In fact, they are instructed not to disclose the reason for this suspension. IRM 25.1.3.2.

However, if the taxpayer being investigated asks if the case is being referred to CI, the revenue agent is not allowed to give a deceitful response. United States v. Powell, 835 F.2d 1095 (5th Cir. 1988) (although evidence obtained by IRS through fraud, trickery, and deceit is not admissible in criminal tax prosecutions, mere fact that Revenue Agent failed to warn taxpayer that investigation may result in criminal charges is not fraud, trickery, and deceit). See United States v. Knight, 898 F.2d 436 (5th Cir. 1990); United States v. Peters, 153 F.3d 445 (7th Cir. 1998), (statements made during a civil audit need not be suppressed as Fourth or Fifth Amendment violations since the civil audit was routine and not a disguised criminal investigation).

They may, however, decline to discuss the "badges of fraud" discovered or the criminal potential of the case. IRM 25.1.3.2. All that the revenue agent legally has to say is that when there is a firm indication of fraud, a referral to CI is required. Id.

Administrative investigations can also be initiated through information provided by other government entities or by private parties or informants. See USAM § 6-4.110. See also United States v. Cardwell, 548 680 F.2d 75, 76 (9th Cir. 1982).

In deciding whether to use an informant's tips, there are a number of factors that need to be taken into account, such as the informant's criminal background and his source of information. IRM 9.4 2.5.4 (3-15-07).

The reason informants must be carefully judged is because the use of informants could lead to legal issues. For example, the

Fourth Amendment protects citizens from search and seizure by the Government, but not private parties.

Therefore, information obtained through a private informant may not be admissible in Court. See United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998); United States v. Snowadzki. 723 F.2d 1427, 1430–31 (9th Cir. 1984). Additionally, the informant's motives for providing the information could be used to show bias during trial.

What Is the IRS Looking For?

IRS criminal investigators are looking for what we call ***badges of fraud***. They are looking for circumstances that would be clear indicators that the taxpayer committed a ***willful violation*** of our country's tax laws. These willful violations can include tax evasion, willfully failing to file a tax return or any other number of tax crimes.

> **Badges of fraud are things like concealing records, destroying evidence, lying, falsifying documents, or taking other actions to conceal or evade investigations. Those are the things that the CID is looking for. Criminal cases depend on willfulness.**

You may have heard that the standard of proof in a criminal case is "beyond a reasonable doubt."

Criminal investigators (CIs) are really seeking a very high bar to try and prove beyond a reasonable doubt that someone is guilty of a tax crime. They are getting lots of evidence to support that somebody fraudulently committed a violation by digging into these badges of fraud, interviewing people and gathering documents to support their case.

The CI is trying to paint you in the worst light possible because they want to leave no doubt; they want to leave no stone unturned in showing that you are a bad guy and that you deserve a criminal conviction.

They are developing a case, not only around the actions that were taken but trying to pigeonhole the intent that you had in committing those actions. That is really the focus of most IRS criminal investigations.

A Long, Drawn-out Process

As you can imagine, building a criminal case against a taxpayer can take a very long time. The IRS really picks and chooses its cases. Criminal investigations are very personal to the agents who work them and the IRS gives them a lot of freedom to build and develop their cases.

It gives its agents the license to work as much as they need to within reason, to build the best case they can to turn it over to the U.S. Attorney in order to secure a conviction. That is the goal of a criminal agent … to build and secure that conviction.

As a result, criminal investigations can take years. There is a lot of fact-finding. There is a lot of collecting information. There are a lot of witness interviews. There are a lot of third parties. **The CIs are really trying to build as much of a case as possible so that they can get to the point where once you're caught, you're caught.**

The problem with criminal tax cases, in particular, is that the conduct in question may be several years old. We are in 2020 right now, so we could be dealing with charges that stem from 2013 or 2014. These charges are old, which drives home the point that these cases take a long time to develop.

Just remember … CIs are basically ready to convict you long before you step into a courtroom. That is why you need a strong criminal defense.

So, What Are They Doing All of This Time?

A number one tactic of an IRS criminal investigation is secrecy. Government agents do not like to shine a light on their investigations. They do not like to reveal details in their investigations or for you to know that they are there until it is too late.

A lot of times what we see in criminal investigation situations is by the time you become aware of the agent, they have already built a tremendous case against you or against people that you may know, whether you are a subject or target or simply a person of interest. That is one of the tools that they use. They use secrecy and they use time to build these cases up.

I have already touched on that the CID will be gathering evidence in the form of documents and this can take a tremendous amount of time. They will use any means necessary to gain access to your financial documents, even executing search warrants. And while you are blissfully unaware of all of this, they will be interviewing third-party witnesses.

The CID is trying to build a case. By the time they come to interview a target or subject of an investigation, they have all this information. They have their case built and they are trying to trap that person into a story or a lie. Those are the most common techniques we see with criminal investigations.

Obviously, the facts in every case are different and the methods that the CID uses in every case are different, but those are the ones we routinely see. We see government agents spend a lot of time working on these cases and developing them in order to secure their convictions. They have all of the resources of the U.S. Government at their disposal to move forward against the taxpayer.

That is why it is very important when you think you are the subject of a criminal investigation to get criminal tax counsel involved as soon as possible so that we can start throwing roadblocks in the way of that investigation and ultimately work on securing your innocence.

What Should I Expect During An IRS Administrative Investigation?

In an administrative investigation, Special Agents may conduct interviews of the taxpayer and other witnesses to obtain information. This stage can become very complicated, and it is important to contact an attorney if you are under CI investigation. During an administrative investigation, you have not been formally charged with a crime and lines can therefore become quite blurry.

For instance, anyone who has watched a crime television show has probably heard of the "Miranda Warnings." ("You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish.")

The full traditional Miranda warnings do not need to be read in an administrative investigation where you are not in custody and free to leave at any time. Beckwith v. United States 425 U.S. 341 (1976). In fact, you will not be appointed a lawyer at this stage, and technically, your right to an attorney comes from statutes and agency rules. See Smith v. United States, 250 F. Supp. 803, 806 (D.N.J. 1966).

However, the CI Special Agent should read some simplified form of the Miranda Warnings or inform you of these rights as directed by the Internal Revenue Manual. § 9.4.5-8

CI Special Agents can make you hand over documents or force witnesses to provide their testimony through an IRS administrative summons. 26 U.S.C § 7602. The summons does not require any approval by a court prior to its use. See id.

However, if a witness does not comply with the administrative summons, the IRS can ask the court to enforce it.

Generally, a summons is used when informal requests for documents are not sufficient. See United States v. McLaughlin, 126 F.3d 130 (3d Cir. 1997), cert. denied, 524 U.S. 951 (1998). In United States v. Powell, the Supreme Court established the minimum requirements for an administrative summons:

1. The inquiry must have a legitimate IRS administrative purpose, rather than just for settlement or harassment;
2. The testimony or documents sought must be relevant to that purpose;
3. The information sought must not be within the IRS's possession, interpreted to mean must not be reasonably available within the IRS's system of keeping records; and
4. The Code's administrative steps must have been met. 379 U.S. 48 (1964).

The CI Special Agents may also seek search warrants, with the assistance of the USAO. 26 U.S.C § 7602(d). For a warrant however, the special agent must show that there is a need and probable cause to believe that a crime has been committed. Fed. R. Crim. P 41(d) (1).

After the conclusion of an administrative investigation, if the CI agent determines that there is sufficient indication of a violation of tax law, the CI special agent will prepare a special agent's report ("SAR") recommending prosecution.

The SAR contains a detailed account of the investigation and the special agent's recommendations. The SAR will be reviewed through many levels of the IRS before it is referred. If after this report the CI still concludes that the case should be prosecuted, the CI Special Agent-in-Charge ("SAC") will refer it to either the tax division or the USAO. USAM § 6-4.243.

If the CI refers the case to the Tax Division, the referral will typically go to a special section of the Tax Division called the Criminal Enforcement Section ("CES"). CES is responsible for reviewing these referrals and deciding which cases are ripe for prosecution, which cases will not be prosecuted, and which cases may need further grand jury investigation.

If CES determines that the case is ready to prosecute or should be investigated by a grand jury, this is called a Justice Referral. If you have more questions about this portion of the process, check out the article: How Are Crimes Charged?

In some select cases, the IRS may refer a case directly to the USAO for prosecution. Some types of cases in which this option is available are trust fund cases and excises taxes. These types of referrals are still monitored by the Tax Division, and the Tax Division can intervene if it believes a case referred directly to the USAO was not proper.

The IRS can also refer the case to the USAO and the Tax Division at the same time in order to obtain quicker plea of guilty if taxpayer's attorney states that he or she wishes to plead guilty, and if subject income is obtained through legal means (i.e., drug or mob money would not qualify). See USAM § 6-4.310.

Once a criminal referral is made, the IRS can no longer issue a summons or ask the court to enforce it. 26 U.S.C. § 7602(d). If the Tax Division turns down a referral, CI can still conduct further investigation and resubmit the referral to the Tax Division. Id.

CONCLUSION

The transition from a civil audit to a criminal investigation may not always be clear. In fact, this stage can become very complicated. During an administrative investigation, you have not been formally charged with a crime and lines can therefore become quite blurry.

If you believe you are being subject to an administrative investigation from the IRS, you should contact my office and set up an appointment for a consultation immediately. We'll clear things up so we know how to deal with what comes next.

04 What Should I Expect After Being Charged With A Tax Crime?

INTRODUCTION

Oftentimes, individuals being charged with a tax crime will be arrested and brought into custody by a federal agent. This can be an intimidating and confusing procedure, and it is important to have an attorney present at this stage. However, if you are arrested at this point, this does not necessarily mean you will have to sit in jail until the resolution of the case.

If the defendant is arrested, there are certain protections and rules in place. The Federal Rules of Criminal Procedure require that a federal agent arresting a defendant must bring them before a Magistrate Judge (which is a judge who assists District Court Judges with many various duties including initial appearances) without "unnecessary delay." Fed. R. Crim P. 5(a)(1)(A). While the definition of unnecessary delay has been interpreted differently by different courts, if the delay happens because law enforcement wants to question the defendant, it will likely be found to be unnecessary. United States v. Harden, 758 F.3d 886 (7th Cir. 2014). Generally, the arrested individual will be brought for an initial appearance with a magistrate judge within 24 hours.

There are a number of important events that occur at this initial appearance including a determination of counsel, determination of bond, upcoming court dates, and any restrictions on the defendants release. However, all of these factors are subject to change throughout the process.

At the initial appearance, the magistrate judge will advise the defendant of certain rights under the Constitution, and ask the defendant if they will be represented by private counsel. If the defendant can't afford counsel, they will fill out a form, called a financial affidavit, which contains questions such as the defendant's income, occupation, and marital status. See United States Courts, CJA forms at https://www.uscourts.gov/forms/cja-forms. If the defendant meets the

necessary criterion, they will be appointed a lawyer. See generally Guide to Judiciary Policy, Vol. 7A, Ch. 2.

After a lawyer is appointed, the Magistrate Judge will read the charges and explain the maximum sentence that the defendant can receive under the law. The defendant may choose to not have the charges read. At this point the Magistrate Judge will go over the defendant's potential to be released prior to trial, and set an amount of money the defendant must post for bail. Oftentimes, certain restrictions, called conditions of release will be placed on the defendant.

Can I be Released Prior to Trial?

While there is no absolute right to bail under the Constitution (there is, however, a right to a reasonable bail if it is granted), a defendant who has been taken into custody may be released on bail while awaiting trial. 18 USC § 314. Decisions regarding bail can be made and changed at any time throughout the process. If decisions on bail are changed after the initial appearance, it will generally happen at a bond hearing in front of the district judge assigned to the case. The Government can request that the defendant be held without bond. 18 USC § 314(f). If this is the case, the prosecutor will ask for pre-trial detention during the initial appearance.See id. In moving for pre-trial detention, the Government will attempt to prove that the Defendant is a flight risk- that he may attempt to run from the law- or that he is a danger to himself or the community. See id. Examples of things that may be considered in determining the defendants bail, or lack thereof, is the defendant's criminal history, nature of the crime, financial status, connections with the community, and probationary status. See generally 18 USC § 314.

The Magistrate Judge will also decide whether or not there will be any conditions applied to the Defendants release. 18 USC § 314. The conditions can include no contact with the victim or co-defendant, no weapons or firearms, reporting to United States Probation, travel restrictions, no drugs or alcohol, and drug testing. 18 USC § 314(c). The defendant may also be released on their own recognizance ("ROR") which means that they may leave without posting bail or adhering to any conditions as long as they return for scheduled court dates. 18 USC § 314(b). If the defendant at any time fails to adhere to the conditions or fails to appear in court, their bond may -and likely will- be revoked. See CJS Standard 10-5.5.

What is an Arraignment?

Arraignment is oftentimes confused with an initial appearance. In some districts, the defendant may be formally arraigned at the same time as initial appearance, but they are usually distinct. Arraignment is the formal reading of the charges against the defendant. Fed. R. Crim P. 10.

A defendant in custody has the right to be arraigned within fourteen days of their initial appearance. A defendant who is not being held in custody will have an arraignment in twenty-one days. See Fed. R. Crim. Pro. 5.1(c). If the defendant is in custody, they will be transported to the court by law enforcement. If the defendant is not in

custody they may receive a document called a summons along with a copy of the formal indictment which gives a date on which the defendant must appear to be arraigned.

At the time of arraignment, the judge will read the indictment or information to the defendant, set the next court date, and note which district court judge will be presiding over the case. Fed. R. Crim P. 10. The defendant will also plead guilty or not guilty to the charges. See id. The prosecutor may present an offer for a guilty plea to the defendant at the arraignment. It should be noted that in felony cases, the Magistrate Judge is not authorized to accept the defendant's guilty plea. See United States v. Harden, No. 13-1323 (7th Cir. 2014). If the defendant charged with a felony wishes to plead guilty, the Magistrate Judge can conduct a plea colloquy at arraignment (we will discuss this in How Is a Plea Accepted infra.). See id.

If a defendant has counsel at this stage in the process, a defendant may waive their own appearance at the arraignment as long as their lawyer is present to stand in. Fed. R. Crim P. 10.

05 Criminal Tax Restitution, Fines and Forfeiture Defined

INTRODUCTION

For a taxpayer facing a criminal tax sentence the two questions that will resonate in his or her thoughts are: **1) How much will I owe?** And, **2) Will I go to jail?**

Much can depend on the crime and your defense of course. In many cases, a good attorney can keep you out of jail or shorten the amount of time spent in it, but the extent of what financial repercussions you will experience will remain in question until the verdict.

Let's start by defining the three different types of financial punishments that may be ordered by the court in a criminal tax case: (1) restitution (2) forfeiture and (3) fines.

The purpose of restitution is to compensate a victim, while the purpose of forfeiture and fines is to punish the defendant.

However, since the Government is the victim in a criminal tax case, it is possible that a taxpayer can be hit with all three. Such is the case of United States v. Sanjar.

What is Restitution?

Restitution is a legal way for victims to be paid back for a crime. In criminal tax cases, the victim is the United States Government, but it can still be owed compensation just like a civilian.

Restitution can only be ordered by a judge when a law or rule allows for it. There are three major sections that allow for restitution in tax related offenses.

The Victim and Witness Protection Act (VWPA), which was enacted by Congress in 1982 allowed for restitution to be ordered in criminal cases that fall under Title 18 of the U.S. Code, or in any criminal case where a defendant *agrees* to restitution in a plea agreement. Pub. L. No. 97-291, 96 Stat. 1248; See 18 U.S.C. § 3663.

Since most tax crimes fall under Title 26

of the U.S. Code, there is no express authorization in those cases for the judge to order restitution without an agreement by the defendant.

The Mandatory Victim Restitution Act (MVRA) which was enacted 14 years later, made restitution for Title 18 crimes mandatory, and included charges related to tax crimes such as conspiracy to defraud the United States and false or fraudulent claims. See 18 U.S.C. § 3663A. Pub. L. No. 104-132, § 204(a), 110 Stat. 1227.

Finally, the Sentencing Guidelines state that restitution may be ordered as a condition of probation or supervised release. USSG § 5E1.1. The power to order a defendant to pay restitution as one of these conditions come from 18 U.S.C. § 3563(b) (as a condition of probation) and 18. U.S.C. § 3583(d) (as a condition of supervised release).

All this means is that there are three ways restitution can be ordered in a criminal case: (1) the tax crime falls under Title 18 of the U.S. Code; (2) the defendant agrees to restitution as part of a plea agreement; or (3) the court orders restitution as a condition of probation or supervised release.

Under the sentencing guidelines, restitution *should* be ordered when a defendant has been found guilty of a tax crime and the government suffered a loss. See USSG § 5E1.1(a)(2).

However, restitution does not need to be ordered if there are too many injured parties to determine restitution or the issues are so complex and drag out the sentencing process so much that determining restitution is more of a burden than a benefit. § 5E1.1(b)(2).

If the judge decides not to order restitution, he or she needs to explain why. See 18 U.S.C. §§ 3663 and 3664.

How is the Amount of Restitution Calculated?

How much restitution you have to pay can be a complicated equation, but essentially it boils down to the money that was actually owed to the government that wasn't paid. See United States v. Chalupnik, 514 F.3d 748, 754 (8th Cir. 2008); United States v. Galloway, 509 F.3d 1246, 1253 (10th Cir. 2007).

Earlier we discussed how the sentencing guidelines for tax crimes rely heavily on what is known as the tax loss. The difference between the tax loss and the loss calculated for purposes of restitution is that restitution has to be the amount that was actually lost as a result of the crime, rather than the amount of loss that was intended.

Generally, Restitution can only be for the loss that caused by the crime *actually charged* and not any other related conduct. United States v. Serawop, 505 F.3d 1112, 1124 (10th Cir. 2007).

The only exception to this is if the loss occurred as part of a conspiracy to defraud the Government. See United States v. Cohen, 459 F.3d 490, 500 (4th Cir. 2006). Any penalties for the offense (for example, there is a civil failure to file penalty that can be added along with are not usually included in the calculation of restitution, but may be ordered in cases such as evasion of payment or failure to pay. See United States v. Chalupnik,

514 F.3d 748, 754 (8th Cir. 2008).

However, any interest can be included in the restitution, even interest accruing after the judgement is entered. See United States v. Perry, 714 F.3d 570, 577 (8th Cir. 2013).

How Goes the Government Collect Restitution?

To the Government, the ideal way to collect on a monetary punishment is payment in full, or as much as possible, either immediately or on a set date. However, if the defendant doesn't have the resources, the court can set a payment schedule. See U.S. v. Myers, 198 F.3d 160 (5th Cir. 1999).

The government can generally enforce restitution for 20 years after the formal written decision of the court was entered or 20 years after the defendant is released from prison, whichever is later. 18 U.S.C. § 3613(b).

Restitution acts as a lien (legal claim against your property or assets that you have now or will have in the future) in favor of the government. If restitution is collected while the defendant is in prison, restitution will be collected by the Federal Bureau of Prisons.

Once the defendant has been released, if they are subject to supervised release or probation, the local probation office will enforce restitution. After that, the burden to ensure compliance with the restitution is on the USAO and AUSA handling the case, and restitution will be paid directly to the clerk of court.

While restitution can still be collected outside of the term of probation or supervised release order by the court, the IRS' policy is that restitution that is ordered as a condition of probation or supervised release can only be collected during the period of supervised release or probation. PMTA 2018-19 (8/23/18) at 2-3.

What is Criminal Forfeiture?

Whereas restitution seeks to pay back money or property actually taken from the victim, criminal forfeiture seeks to penalize the defendant for any gains resulting from or used in illegal conduct.

Criminal forfeiture is different from restitution because it gives the Government the ability to actually seize assets and property you may have in your possession, if they were used in a crime or bought with the proceeds of a crime.

Unlike restitution, forfeiture is part of the actual sentence in a criminal tax case rather than just a condition of probation or supervised release. Libretti v. United States, 516 U.S. 29, 39-41 (1995).

A forfeiture allegation must be included in the criminal indictment, so the defendant will be on notice that the Government intends to seize assets. Fed. R. Crim. P. 32.2(a).

In other words, if the Government intends to take your property using this mechanism, you will be forewarned. The indictment can include either a list of the property to be forfeited, or just a general statement that the Government is intending to forfeit all property that can be forfeited. Id.

What is the Criminal Forfeiture Process?

In criminal tax cases, forfeiture is used sparingly however, we'll quickly walk you through the process. As soon as the defendant is found or pleads guilty to a tax crime where the Government is seeking criminal forfeiture, the court must determine what property is actually subject to forfeiture. United States v. Davenport, 668 F.3d 1316, 1320 n.7 (11th Cir. 2012).

The Government can't just waltz into your home and take everything you own, just because you have been convicted of a tax crime. If the Government intends to seize specific property, they must prove that the property was connected to the offense that was charged.

Typically only property that is used in or gained from the offense charged can be forfeited. United States v. Capoccia, 503 F.3d 103, 114 (2d Cir. 2007). However, the internal revenue code has its own forfeiture provisions which specifically allow only for the forfeiture of property used or intended for use in violating tax laws, and not for proceeds of the tax crime. See 26 U.S.C.7302 §§7303.

Forfeiture is not appropriate in criminal tax cases which deal only with unpaid taxes from legal income. See Tax Directive 145, §§ 8(a) & n.5.).

Once the judge or jury determines what can be forfeited, the court will enter a preliminary order of forfeiture which states the amount of money or property to be forfeited. Fed. R. Crim P. 32.2(b)(2). Once this preliminary order is entered, the Government is authorized to seize the noted property. Fed. R. Crim P. 32.2(b)(3).

The preliminary order becomes a final order at the time of sentencing unless the defendant consents for the final order to be entered prior to sentencing. Fed. R. Crim P. 32.2(b)(4)(A). However, if a third party has any claim to the property being forfeited, the order can't be finalized until that party's claim is resolved. Id.

CONCLUSION

If you have read through the entire article, you'll have a good understanding about the purpose of restitution – to compensate the victim – usually the government – and the purpose of forfeiture and fines – to punish the delinquent taxpayer.

As a tax attorney, it's my job to defend the taxpayer, and if we agree to work together, my firm will prepare a case to make your restitution reasonable. If you think that the level of your financial liability will more than likely end up on trial, we'll back you up with our experience dealing with both the state and federal tax authorities in and out of court.

06 How to Protect Yourself in a Criminal Tax Situation

INTRODUCTION

If you know you have violated a tax law there's still a number of things that can be done to help avoid or reduce the most serious penalties. It is important to discuss your options with an attorney at this stage because the best practice can be different for each individual case.

If your intentions were willful, deliberately done to defraud the IRS, e.g., "cooking the books," of your business, reporting to be married when you're single, claiming income from one job but neglecting to record income from your weekend gig for a few years – that type of tax evasion is much more serious than making an honest math mistake and will be weighted as such in court.

"Best Case" Scenario

It bears repeating, but since the U.S. Attorney has a 90 percent conviction rate with criminal tax cases, the odds are not exactly in your favor. It is important to understand what the goals are at the outset. The number one thing to be aware of is that most criminal tax charges can be mitigated.

Oftentimes, there is a pattern of criminal conduct – it is exactly that – a pattern. It occurs over multiple years, it occurs over multiple tax returns. The tax loss has to be enough to whet the appetite of the U.S. Attorney.

The IRS does not go after people for $5,000 or $10,000 dollars. They are looking for bigger cases because they are dealing with limited resources and they are looking to send a message.

At the very least, tax counsel can come in and try to mitigate the tax loss, mitigate and lessen the charges, penalties and possible sentencing. That happens at the U.S. Attorney level.

However, in a lot of cases — if you have the facts to support it — you can completely

derail a criminal investigation. Criminal investigations have a very high bar. You have to prove beyond a reasonable doubt that someone did something. There are a lot of things that you can do to throw roadblocks into the system.

There are also a lot of things that you can do to work with the criminal agents and work with the U.S. attorneys to achieve a global resolution to the civil and criminal side of things.

For example, if you run a business and you are accused of committing tax fraud in that business, we can plead the business to criminal charges and reduce the criminal charges or eliminate them completely for the individual, coupled with payment of the tax.

There are a lot of reasonable goals. It depends on two things: number one – the facts of the case and, number two – the tax loss and how much culpability you really have.

Anything is possible but it is important that you are honest with yourself at the beginning. You must be honest about your conduct and candid with your attorney.

Your candid conversations with tax counsel are protected under attorney-client privilege. Once the facts are displayed, we can lay the cards on the table and call it what it is. From that point, we can build a strategy that works around reasonable expectations for the case.

At the very least, a reduction in criminal charges or elimination of them completely is a pretty good goal and I think it is one that is fairly achievable, depending on your circumstance.

Voluntary Disclosure

There are technically two types of voluntary disclosure which may help with mitigating the damage, or in some cases, avoiding criminal liability altogether. Both the IRS and DOJ Tax have policies which offer some form of consideration for letting the government know of a tax violation.

IRS Voluntary Disclosure

Some cases may qualify for the IRS' voluntary disclosure policy, which could help to avoid criminal liability altogether. Under the voluntary disclosure practice, a taxpayer who may have violated internal revenue laws can willingly let the IRS know of this non-compliance with some protection. See IRM 9.5.11.9.

The tax system relies heavily on the voluntary self-reporting of the public, and this policy is just another way for the government to encourage this compliance. ***However***, this is a policy of the IRS and not the law, so it does not ensure immunity from prosecution.

Each case is different, and if you are considering making a voluntary disclosure, it is imperative you discuss this option with your attorney first. This practice is usually best suited in a situation where a taxpayer willfully files a false tax return and quickly wants to make amends before being contacted by the IRS.

If a timely and truthful disclosure is made, the taxpayer cooperates with the IRS to determine the actual amount of taxes due, makes a good faith effort to pay, the IRS may not refer the taxpayer for prosecution. See id.

Timing is important with a voluntary disclosure. While it is possible that you may still be able to disclose the violation if you are being civilly audited, if the government has already been made aware of the tax violations and/or you are reasonably certain you are being investigated criminally by the IRS, the disclosure would not be considered timely.

According to the IRS disclosure is timely before the IRS has: (1) Commenced a civil examination or criminal investigation; (2) Received information from a third party (e.g., informant, other governmental agency, John Doe summons, etc.) alerting [them] to your noncompliance; (3) Acquired information directly related to your specific noncompliance from a criminal enforcement action (e.g., search warrant, grand jury subpoena, etc.). See id. If a voluntary disclosure is made, CI will likely be involved from the outset.

A voluntary disclosure as contemplated by the IRS practice is different from what is known as a "quiet disclosure" which involves the filing of amended returns reporting the assets or property previously not reported or under reported. This is a risky practice, and one that is disfavored by the IRS.

DOJ Tax Voluntary Disclosure

The Tax Division ultimately decides whether or not to pursue prosecution for a tax case referred to them, and voluntary disclosure of a tax offense is one factor that the Tax DIvision will take into account in making this decision. See generally USAM, § 9-27.220, et. seq.

The DOJ Tax voluntary disclosure policy is in line with the IRS. If the defendant has complied with the IRS practice, the Tax Division "may consider" this in making its own decision to prosecute. See CTM § 4.01 [1]. However, there is no guarantee that the Tax Division will not prosecute an offense where the defendant complied with the IRS practice. See id.

Specifically, DOJ Tax looks into the timeliness of the disclosure and the cooperation of the taxpayer. See id. The Tax Division does not look at timeliness as an objective standard (i.e, if the disclosure occurred before or after an objective event) but rather a subjective case-specific approach. See id.

For example, if the taxpayer is already being audited, but is aware of something that the auditor would never find and discloses this fact anyway, the Tax Division may still consider this timely.

For cooperation, this generally requires that the taxpayer pay what is due to the government. However, if the taxpayer doesn't have the ability to do this they must fully disclose their financial situation along with the violation. See id.

A voluntary disclosure may also be used in sentencing as a reason for downward departure from the sentencing guidelines. See USSG A75K.16.

Know Your Rights

If you are the subject of a civil audit, the case does not necessarily have to be turned over to CI. Even if you are already being investigated by CI, the IRS administrative investigation, while criminal in nature, does

not need to be recommended to the Tax Division for prosecution.

Even if the IRS has referred the case to the Tax Division, the case must first be authorized by the Tax Division for prosecution. Each of these steps can weed out weak cases. Therefore, understanding your specific situation, knowing your rights and consulting with a lawyer early on can be greatly beneficial in mitigating the damage.

There are a number of rights and privileges afforded to defendants throughout the process. These can and should be used appropriately to avoid offering statements or evidence that may indicate criminal intent, display willfully misleading conduct, or could be used against the defendant in prosecution.

Oftentimes, a bad situation can be made worse by over-divulging or lying. The proper use of privileges and rights can avoid this situation.

Many people have already heard of the attorney-client privilege. The essence of this privilege is that information told in confidence to an attorney for the purposes of obtaining legal advice, does not have to be disclosed. Fed. R. Evid. 501; see Johnson v. Commissioner, 119 T.C. No. 27 (2002). This can be waived if the taxpayer also told this information to a third party. Fed. R. Evid. 502.

The work-product privilege is another applicable privilege in the tax world where information generated in "anticipation of litigation" does not need to be disclosed. See United States v. Foxworthy, 457 F.3d 590 (6th Cir. 2006).

For example, a document created to assist with the defense of a taxpayer's case after they have been investigated by CI would be created in anticipation of litigation and may be privileged.

Marital privileges allow for the non-disclosure of information provided in the confidence of marriage, and there are two separate privileges within this category. In the marital communications privilege, either spouse can invoke the privilege in regard to communications that occur between them during the marriage. United States v. Ramirez, 145 F.3d 345, 355 (5th Cir. 1998); United States v. Chagra, 754 F.2d 1181, 1182 (5th Cir. 1985).

Even if the couple is no longer married, the privilege can still be invoked for communications that happened during the marriage. United States v. Entrekin, 624 F.2d 597, 598 (5th Cir. 1980).

On the other hand spousal immunity can only be invoked by the spouse who is not the defendant, and can't be invoked after the marriage is over. Crawford v. United States, 541 U.S. 36 (2003). A partner who invokes spousal immunity can't be forced to testify against the defendant partner.

The Fifth Amendment to the United States Constitution grants many important rights to individuals accused of a crime. Among these rights is the right against self incrimination, or the right to remain silent. There are many points within a criminal tax case where this right is abundantly important and the taxpayer needs to consider whether or not to exercise this right.

Stages at which it is possible to exercise this right are in answering certain questions on a tax form, during a civil or criminal investigation, while in custody of law enforcement, and at all court proceedings including trial.

Conferences with CI, DOJ Tax, and AUSA

Since there are many levels of review before the prosecution stage, and most tax crimes can't be prosecuted by the USAO prior to Tax Division approval, the ability to conference can be a major benefit, and possibly even resolve a case altogether.

Prior to indictment there are two major times when a conference can and should be had. After the conclusion of the administrative investigation and prior to a Tax Division referral to the USAO.

IRS Conference

Once CI completes their administrative investigation and prepared a special agent report, the taxpayer will be afforded a conference with the special agent in charge ("SAC"), or designated assistant special agent in charge ("ASAC"), and the IRS' criminal tax attorney as a matter of course unless the case is being handled by grand jury investigation. IRM 9.5.12.3.1

If the conference occurs, the SAC will determine where the conference is held. IRM 9.5.12.3.2. Defense counsel may appear at the conference on behalf of the taxpayer without the taxpayer present. IRM 9.5.12.3.4. However, the taxpayer can attend as well as CPAS, enrolled agents, or anyone who has important knowledge of the case.

If any of these parties is deemed disruptive, the SAC may end the conference or ask the disruptive party to leave. See id. The conference may also be recorded if the SAC requests. See id.

Before the conference occurs, the taxpayer will be read their Fifth Amendment Right to remain silent. See id. Counsel for the taxpayer will still be read these rights even if they are attending alone. See id. During the conference itself, the IRS will give the taxpayer and their attorney basic information about the case against them and the proposed charges, so that they have an understanding of why the IRS intends to refer them to prosecution. 26 CFR 601.107(b(2).

However, the information given will be very limited as the IRS Manual specifically requires. After the conference, the taxpayer will be told whether the case will or will not be referred to the Tax Division. IRM 9.5.12.3.5 .

Tax Division Conference

The Tax Division will generally grant a written request for a pre-indictment conference if the Government thinks it will be beneficial in assisting with the prosecution decision. See USAM 6-4.214.

However, there is no absolute right to this conference, and the Tax Division may deny the request. See id. According to the Tax Division, the official purpose of the conference is to provide "an opportunity to present any explanation or evidence which [the taxpayer] desires the Tax Division to consider." See id.

The conference is not meant as a way for you to determine what evidence the government has against you. Generally the only

information provided will be the proposed charges, the income and tax computations recommended by the IRS, and the tax years involved.

The taxpayer or counsel is permitted to present their explanations of what occurred or any evidence they want the Tax Division to consider in making their decision. See id. Plea negotiations may also be conducted during conferences in non-grand jury cases. See id. However, the plea has to be consistent with Tax Division policy and the policies of the USAO which would prosecute the case. See Tax Division Directive No. 86-58 (May 14, 1986), supplemented by Memorandum dated October 1, 2013, available at Criminal Tax Manual, Chapter 3.

Early pleas can be beneficial because the taxpayer will know the recommended sentence, and can generally negotiate for a lower sentence in exchange for the efficiency. While these conferences may sound only good at this point, it is important to note that the government can use information obtained at the conference in court proceedings. See Fed. R. Evid. 801(d)(2).

AUSA Conference

If the Tax Division has already sent the case to the USAO, the request will be denied.

However, the taxpayer may also request a conference with the USAO. USAM 6-4.214. Like the Tax Division, the USAO gets to choose whether they want to grant or deny the conference. Each USAO is distinct, but the idea of the conferences is generally the same as with the Tax Division.

Immunity

In certain circumstances (generally relating to a larger scheme to defraud or where an individual representative of a company who has a lesser role in the offense is charged) the Government may decide that the taxpayer would be a more valuable witness than a defendant in line with their prosecution priorities.

In this instance if the taxpayer is willing to cooperate and testify on behalf of the Government, they could be offered immunity from prosecution. See USAM 9-23.000.

However, this isn't a risk-free practice, even if the taxpayer is granted immunity in exchange for their cooperation, they could still be charged on conduct unrelated to their testimony in the immunized case, and the witness can't refuse to testify under the Fifth Amendment right against self-incrimination.

CONCLUSION

I have said this before, but it bears repeating: because there are many levels of review before the prosecution stage, and most tax crimes can't be prosecuted prior to Tax Division approval, the ability to conference can be a major benefit, and we could possibly even resolve your case altogether.

If you have serious tax problems, give me a call and let's have a no frills, just-the-facts conversation. Depending on your scenario, I can help you find shelter from some if not most of the fallout before you get prosecuted.

07 6 Frequently Asked Questions about the Criminal Tax Process

INTRODUCTION

There are countless ways people get themselves into messy, financial jams. As a tax attorney I've consulted with such people who just refused to see the writing on the wall until special agents came charging out of the woodwork and through their doors.

Many – too numerous to count – people think they can get out of paying their taxes only to discover that not paying is actually more expensive than paying them in the first place. It shouldn't surprise you to know then that many of those same clients could have avoided needing my services "if only…"

With regard to the criminal law tax process, I still get a fair amount of questions, from "What do I do if I get visited by special agents?" to the perennial "How much are you going to charge to defend me?" Six questions come up the most frequently so in writing this, I hope to answer them as clearly as possible.

What Should I do if I am Visited by Special Agents?

You've heard the phrase: ""You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney..." Most of us have, if only in books or at the movies. The Miranda Warning is given for a reason – to protect you.

If a special agent ever gives you the Miranda Warning, do not talk to him or her. They usually travel in pairs, and if and when you are visited, there will usually be two of them. Get their business cards but say little besides "I would like to consult with my attorney and I will call you back."

Even if you are just a witness to a possible crime, it is important that you do not expose yourself to liability. Do not consent to an on-the-spot interview or start answering questions.

Special agents will prod you and try to push your buttons. Part of their job is to get as much information as possible. It is important that you realize these are criminal investigative agents — the people who carry badges and guns — and step away from the situation.

Think about having somebody intercede on your behalf and get down to the bottom of what this is about. Once you do that, then you can go into your special agent interview prepared.

Decide which questions you are not going to answer ahead of time because you may be at risk. Therefore it behooves you to gauge the interview carefully.

Make sure that you approach the situation with the degree of caution that it deserves. Remember, it is the job of the special agents to build cases that put people in jail. Review the situation and act when you are certain that you know what the outcome is going to be.

What Should I do if I Suspect That My Tax Preparer is Being Investigated by the IRS?

If you think that somebody might be a subject or a target of an IRS criminal investigation you are going to want to think about cutting off contact with them sooner rather than later. If somebody is under the microscope of IRS-CI, you do not want to be anywhere near that person; you do not want to touch them with a 10-foot pole.

A lot of tax preparers get investigated by CI because they present a huge problem for the IRS. Think about it this way. If you are an individual and you cheat on your taxes, the loss is really mitigated to your individual return. I am not saying that is a good thing but from the government's perspective, when the government looks at tax cases, one of the factors they consider is tax loss.

The tax loss with an individual may not be as great, but when you are dealing with a preparer, the tax loss associated with tax preparer cases can be greatly amplified across all the preparer's clients. If you are one of those clients, there could be errors on your return whether you know about them or not.

You are going to want to mitigate your own risk. Most often in tax preparer cases, you will face some sort of a civil audit and so it is important to be prepared going into that.

You are not just dealing with civil liability, penalties and interests at this point; you are dealing with potential criminal liability. If you do not think that your tax preparer is going to throw you under the bus in order to save themself, then you are kidding yourself.

The best thing that you can do is consult with a tax attorney. Depending on the circumstances, you may not need to get tax counsel involved right away, you may just need a little bit of a consultation and wait to see and assess the situation.

But, it is important that you understand what your risks are, what your rights are and have a clear path going forward on how you should handle things.

If I am Contacted by an IRS Special Agent or by the Criminal Investigation Division About Somebody Else, What do I do?

The biggest mistake that I see in witness investigations is when the witness assumes that because the special agent is asking about somebody else that witness is not at risk. There is a reason why that special agent is talking to you, and often they will handle their interviews in pairs.

Even though they may say that they are seeking information about somebody else, it does not mean that you are not under the microscope for your actions as well. I never recommend that people talk to special investigation agents in the initial interview.

The best thing to do is get the special agent's card. Take a breather, prepare for that interview and then come back so you can give the agent your full cooperation. Know very clearly what questions you are going to answer and what you are not going to answer.

When you are dealing with these people, you need to exercise your right to remain silent. You need not give them information that could lead to problems for you down the road.

It is important as a witness to understand that even if you say, "I have not done anything wrong. I have nothing to worry about," do not underestimate the agents. The agents do not have to be truthful with you. They do not have to tell you what they are really after. They do not have to give you anything.

You need to be very careful in the statements that you make to them. You need to be very careful in how you approach them and ultimately, the goal is to remove yourself from any element of risk whatsoever. Did I mention be very careful?

Should I Hire a Criminal Defense Attorney or Should I Hire a Criminal Tax Attorney?

It depends. These are different people who do different things. My experience with criminal defense attorneys is that most of them have a good handle on state cases because they see a lot of them. Even among those who handle federal cases, a lot of them do not practice tax cases very often.

They may have experience trying a criminal tax case because oftentimes, charges from the tax world get wrapped up into things like money laundering and bank fraud and a whole host of other crimes, but they are not a tax specialist.

A tax specialist is very valuable during a criminal tax investigation because we understand the playing field. We know how the civil audit side is supposed to respond. We know how civil collections works and we know what constitutes willfulness in a tax case. We know what positions the client takes and we understand the return. A criminal tax attorney understands these issues and can work to mitigate.

The downside with a lot of criminal tax attorneys is trial experience. Criminal tax attorneys live in the tax world. We are not necessarily experts in criminal trial procedure.

If your case goes to trial, you probably want somebody who is an expert in criminal trial procedure. Most criminal defense attorneys, because they spend the majority of their time in the courtroom, are experts at criminal defense and criminal defense procedure.

I usually recommend a combination of both. If you have a team of people who have criminal tax experience and potentially criminal trial experience, then you have a very well-rounded defense team. A lot of our most successful cases come from working in tandem with criminal defense counsel.

If you are in the middle of a criminal investigation or even if you have reasons to suspect you might soon be, you want to have the best team possible because the consequences are so severe. Again, I think it is best to have a blend of both.

No matter whom you hire, whether it is our firm or somebody else, I recommend that you interview them. Talk to them about what their level of experience is. Talk to them about ways they think they can help in the investigation and get honest feedback.

You have the right to choose who your counsel is. Make an informed decision. Talk to criminal defense counsel and talk to criminal tax counsel. Weigh the pros and cons and before making your decision.

Is it Possible to Just Pay Your Taxes and Make a Criminal Investigation Go Away?

No. When a case reaches the level where IRS-CID is involved, it has evolved beyond the point of paying the taxes because what they are doing is looking at your conduct, and even the payment of tax does not eliminate your previous conduct. It is an admirable thing to do, but at the same time, it is not going to make your criminal charges go away completely.

Now, the good news is that the payment of tax can mitigate the tax loss. It can let some of the air out of the tires with what the IRS is charging you with because from a practical perspective the U.S. attorney is saying, “We are going to charge you with these crimes. You did all this stuff, and you defrauded the government,” and blah, blah, blah.

If you pay the tax and the interest and the penalties, you can mitigate some of the harm done. There is still harm but it is a lot less of an appealing case for a prosecutor if they are not able to stand in front of the judge and argue a tax loss.

The answer is still no. It does not make it go away, but yes, it can help strategically within an investigation.

What I recommend is to not pay the taxes immediately. Wait, develop a strategy and offer that as a carrot potentially in the future to help mitigate your criminal exposure. It is better to play your cards at the right time than to hurry up and just do things without any sort

of strategy in place. Sit down with a criminal tax attorney, build a plan and then execute that plan over the course of the investigation.

Why Do I Need Legal Counsel?

A criminal investigation is a problem that you cannot solve on your own and that you cannot ignore and hope it goes away. The mistake that a lot of people make is they waste time. The sooner legal counsel can get involved and look at the facts, the sooner we can control what happens in the future, and the better off you are going to be.

You cannot change what happened in the past, there is nothing you can do. The past is the past, but you can certainly change the future. You can alter what the events are in the future by taking certain actions now.

The best thing that you can do in a criminal investigation is mitigate your liability. Take steps to undermine the government's case before it reaches its conclusion. Put things in front of the agent that would dissuade against willfulness.

Put things in front of the agent that would contradict their facts. Make it as hard for them as possible to hand that case over to the U.S. Attorney.

If you do enough of that from the beginning — especially when the agent is not in the conclusion stage of their investigation — there is a good chance you can sabotage their case and derail it, and that they ultimately, will not recommend it for prosecution.

You are not really going to be able to do that by yourself. When dealing with people who are not covered under attorney-client privilege, those people can eventually be used to testify against you. Having the protection of an attorney in a criminal matter is critically, critically important.

CONCLUSION

Criminal Tax Law can get very complicated and the investigations can last for years. When special agents show up at the taxpayer's home or business from the criminal division of the IRS, it's a serious matter.

You might ask: "Where do they get their information?" It can be as simple as an ex-spouse, or a former business partner tipping them off.

Failing to file currency transaction reports could also lead the IRS to dig around. In states like California, hiring illegal aliens to work without documentation can get a business in hot water, and if tax evasion charges are added to the infraction, it's time to call an attorney.

If you or anyone you know is skating that line of running a profitable and above-board business and falling behind on state and/or federal taxes, get some help before a fall. Give the offices of Brotman Law a call.

08 Conferencing with Criminal Tax Authorities

INTRODUCTION

There are many stories about people, both rich and famous and not – trying to outwit the IRS. One such story involves former businessman William Berroyer. He owed the IRS $60,000 in back taxes and they were trying to collect. Consenting to meet with the IRS in their Hauppage, NY office, Berroyer tripped over a phone cord and spent the next couple of weeks in the hospital.

After his medical release, Berroyer sued the IRS for $10 million. In the 2014 trial, the judge ruled in his favor (for a lesser amount), and waived Berroyer's tax bill. Strange things can happen, but even if you're being charged for a tax crime, I still wouldn't encourage you to try a stunt like this.

Since there are many levels of review before the prosecution stage, and most tax crimes can't be prosecuted by the USAO prior to Tax Division approval, the ability to conference can be a major benefit, and possibly even resolve a case altogether.

Prior to indictment there are two major times when a conference can and should be had. After the conclusion of the administrative investigation and prior to a Tax Division referral to the USAO.

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Once CI completes their administrative investigation and prepared a special agent report, the taxpayer will be afforded a conference with the special agent in charge ("SAC"), or designated assistant special agent in charge ("ASAC"), and the IRS' criminal tax attorney as a matter of course unless the case is being handled by grand jury investigation. IRM 9.5.12.3.1

If the conference occurs, the SAC will determine where the conference is held. IRM 9.5.12.3.2. Defense counsel may appear at the conference on behalf of the taxpayer without the taxpayer present. IRM 9.5.12.3.4. However, the taxpayer can attend as well as CPAS, enrolled agents, or anyone who has important knowledge of the case.

If any of these parties is deemed disruptive, the SAC may end the conference or ask the disruptive party to leave. See id. The conference may also be recorded if the SAC requests. See id.

Before the conference occurs, the taxpayer will be read their Fifth Amendment Right to remain silent. See id. Counsel for the taxpayer will still be read these rights even if they are attending alone. See id. During the conference itself, the IRS will give the taxpayer and their attorney basic information about the case against them and the proposed charges, so that they have an understanding of why the IRS intends to refer them to prosecution. 26 CFR 601.107(b(2).

However, the information given will be very limited as the IRS Manual specifically requires. After the conference, the taxpayer will be told whether the case will or will not be referred to the Tax Division. IRM 9.5.12.3.5 .

Tax Division Conference

The Tax Division will generally grant a written request for a pre-indictment conference if the Government thinks it will be beneficial in assisting with the prosecution decision. See USAM 6-4.214.

However, there is no absolute right to this conference, and the Tax Division may deny the request. See id. According to the Tax Division, the official purpose of the conference is to provide "an opportunity to present any explanation or evidence which [the taxpayer] desires the Tax Division to consider." See id.

The conference is not meant as a way for you to determine what evidence the government has against you. Generally the only information provided will be the proposed charges, the income and tax computations recommended by the IRS, and the tax years involved.

The taxpayer or counsel is permitted to present their explanations of what occurred or any evidence they want the Tax Division to consider in making their decision. See id. Plea negotiations may also be conducted during conferences in non-grand jury cases. See id. However, the plea has to be consistent with Tax Division policy and the policies of the USAO which would prosecute the case. See Tax Division Directive No. 86-58 (May 14, 1986), supplemented by Memorandum dated October 1, 2013, available at Criminal Tax Manual, Chapter 3.

Early pleas can be beneficial because the taxpayer will know the recommended sentence, and can generally negotiate for a lower sentence in exchange for the efficiency. While these conferences may sound only good at this point, it is important to note that the government can use information obtained at the conference in court proceedings. See Fed. R. Evid. 801(d)(2).

USAO Conference

If the Tax Division has already sent the case to the USAO, the request will be denied. However, the taxpayer may also request a conference with the USAO. USAM 6-4.214. Like the Tax Division, the USAO gets to choose whether they want to grant or deny the conference. Each USAO is distinct, but the idea of the conferences is generally the same as with the Tax Division.

Immunity

In certain circumstances (generally relating to a larger scheme to defraud or where an individual representative of a company who has a lesser role in the offense is charged), the Government may decide that the taxpayer would be a more valuable witness than a defendant in line with their prosecution priorities.

In this instance if the taxpayer is willing to cooperate and testify on behalf of the Government, they could be offered immunity from prosecution. See USAM 9-23.000.

However, this isn't a risk-free practice, even if the taxpayer is granted immunity in exchange for their cooperation, they could still be charged on conduct unrelated to their testimony in the immunized case, and the witness can't refuse to testify under the Fifth Amendment right against self-incrimination.

CONCLUSION

I have said this before, but it bears repeating: because there are many levels of review before the prosecution stage, and most tax crimes can't be prosecuted prior to Tax Division approval. This means that the ability to conference can be a major benefit, and we could possibly even resolve your case altogether.

If you have serious tax problems that lend themselves to the level of setting up conferences with the CI, DOJ and/or USAO, I urge you to give me a call and let's have a no frills, just-the-facts conversation. Depending on your scenario, I can help you find shelter from most of the fallout and negotiate for a lesser punishment before your case goes through prosecution – all without an extended stay at a hospital being involved.

09 Criminal Tax Liability and Voluntary Disclosure

INTRODUCTION

If you know you have violated a tax law there's still a number of things that can be done to help avoid or reduce the most serious penalties. It is important to discuss your options with an attorney at this stage because the best practice can be different for each individual case.

If your intentions were willful, deliberately done to defraud the IRS, e.g., "cooking the books," of your business, reporting to be married when you're single, claiming income from one job but neglecting to record income from your weekend gig for a few years – that type of tax evasion is much more serious than making an honest math mistake and will be weighted as such in court.

"Best Case" Scenario

It bears repeating, but since the U.S. Attorney has a 90 percent conviction rate with criminal tax cases, the odds are not exactly in your favor. It is important to understand what the goals are at the outset. The number one thing to be aware of is that most criminal tax charges can be mitigated.

Oftentimes, there is a pattern of criminal conduct – it is exactly that – a pattern. It occurs over multiple years, it occurs over multiple tax returns. The tax loss has to be enough to whet the appetite of the U.S. Attorney.

The IRS does not go after people for $5,000 or $10,000 dollars. They are looking for bigger cases because they are dealing with limited resources and they are looking to send a message.

At the very least, tax counsel can come in and try to mitigate the tax loss, mitigate and

lessen the charges, penalties and possible sentencing. That happens at the U.S. Attorney level.

However, in a lot of cases — if you have the facts to support it — you can completely derail a criminal investigation. Criminal investigations have a very high bar. You have to prove beyond a reasonable doubt that someone did something. There are a lot of things that you can do to throw roadblocks into the system.

There are also a lot of things that you can do to work with the criminal agents and work with the U.S. attorneys to achieve a global resolution to the civil and criminal side of things.

For example, if you run a business and you are accused of committing tax fraud in that business, we can plead the business to criminal charges and reduce the criminal charges or eliminate them completely for the individual, coupled with payment of the tax.

There are a lot of reasonable goals. It depends on two things: number one – the facts of the case and, number two – the tax loss and how much culpability you really have.

Anything is possible but it is important that you are honest with yourself at the beginning. You must be honest about your conduct and candid with your attorney.

Your candid conversations with tax counsel are protected under attorney-client privilege. Once the facts are displayed, we can lay the cards on the table and call it what it is. From that point, we can build a strategy that works around reasonable expectations for the case.

At the very least, a reduction in criminal charges or elimination of them completely is a pretty good goal and I think it is one that is fairly achievable, depending on your circumstance.

Voluntary Disclosure

There are technically two types of voluntary disclosure which may help with mitigating the damage, or in some cases, avoiding criminal liability altogether. Both the IRS and DOJ Tax have policies which offer some form of consideration for letting the government know of a tax violation.

IRS Voluntary Disclosure

Some cases may qualify for the IRS' voluntary disclosure policy, which could help to avoid criminal liability altogether. Under the voluntary disclosure practice, a taxpayer who may have violated internal revenue laws can willingly let the IRS know of this non-compliance with some protection. See IRM 9.5.11.9.

The tax system relies heavily on the voluntary self-reporting of the public, and this policy is just another way for the government to encourage this compliance. **However, this is a policy of the IRS and not the law, so it does not completely ensure immunity from prosecution.**

Each case is different, and if you are considering making a voluntary disclosure, it is imperative you discuss this option with your attorney first. This practice is usually best suited in a situation where a taxpayer willfully files a false tax return and quickly wants to make amends *before* being contacted by the IRS.

If a timely and truthful disclosure is made, the taxpayer cooperates with the IRS to determine the actual amount of taxes due, makes a good faith effort to pay, the IRS may not refer the taxpayer for prosecution. See id.

Timing is important with a voluntary disclosure. While it is possible that you may still be able to disclose the violation if you are being civilly audited, if the government has already been made aware of the tax violations and/or you are reasonably certain you are being investigated criminally by the IRS, the disclosure would not be considered timely.

According to the IRS disclosure is timely before the IRS has: (1) Commenced a civil examination or criminal investigation; (2) Received information from a third party (e.g., informant, other governmental agency, John Doe summons, etc.) alerting [them] to your noncompliance; (3) Acquired information directly related to your specific noncompliance from a criminal enforcement action (e.g., search warrant, grand jury subpoena, etc.). See id. If a voluntary disclosure is made, CI will likely be involved from the outset.

A voluntary disclosure as contemplated by the IRS practice is different from what is known as a "quiet disclosure" which involves the filing of amended returns reporting the assets or property previously not reported or under reported. This is a risky practice, and one that is disfavored by the IRS.

DOJ Tax Voluntary Disclosure

The Tax Division ultimately decides whether or not to pursue prosecution for a tax case referred to them, and voluntary disclosure of a tax offense is one factor that the Tax DIvision will take into account in making this decision. See generally USAM, § 9-27.220, et. seq.

The DOJ Tax voluntary disclosure policy is in line with the IRS. If the defendant has complied with the IRS practice, the Tax Division "may consider" this in making its own decision to prosecute. See CTM § 4.01 [1]. However, there is no guarantee that the Tax Division will not prosecute an offense where the defendant complied with the IRS practice. See id.

Specifically, DOJ Tax looks into the timeliness of the disclosure and the cooperation of the taxpayer. See id. The Tax Division does not look at timeliness as an objective standard (i.e, if the disclosure occurred before or after an objective event) but rather a subjective case-specific approach. See id.

For example, if the taxpayer is already being audited, but is aware of something that the auditor would never find and discloses this fact anyway, the Tax Division may still consider this timely.

For cooperation, this generally requires that the taxpayer pay what is due to the government. However, if the taxpayer doesn't have the ability to do this they must fully disclose their financial situation along with the violation. See id.

A voluntary disclosure may also be used in sentencing as a reason for downward departure from the sentencing guidelines. See USSG A75K.16.

Know Your Rights

If you are the subject of a civil audit, the case does not necessarily have to be turned over to CI. Even if you are already being investigated by CI, the IRS administrative investigation, while criminal in nature, does not need to be recommended to the Tax Division for prosecution.

There are a number of rights and privileges afforded to defendants throughout the process. These can and should be used *appropriately* to avoid offering statements or *evidence* that may indicate criminal intent, display willfully misleading conduct, or could be used against the defendant in prosecution.

Oftentimes, a bad situation can be made worse by over-divulging or lying. The proper use of privileges and rights can avoid this situation.

Many people have already heard of the attorney-client privilege. The essence of this privilege is that information told in confidence to an attorney for the purposes of obtaining legal advice, does not have to be disclosed. Fed. R. Evid. 501; see Johnson v. Commissioner, 119 T.C. No. 27 (2002). This can be waived if the taxpayer also told this information to a third party. Fed. R. Evid. 502.

The work-product privilege is another applicable privilege in the tax world where information generated in "anticipation of litigation" does not need to be disclosed. See United States v. Foxworthy, 457 F.3d 590 (6th Cir. 2006).

For example, a document created to assist with the defense of a taxpayer's case after they have been investigated by CI would be created in anticipation of litigation and may be privileged.

Marital privileges allow for the non-disclosure of information provided in the confidence of marriage, and there are two separate privileges within this category. In the marital communications privilege, either spouse can invoke the privilege in regard to communications that occur between them during the marriage. United States v. Ramirez, 145 F.3d 345, 355 (5th Cir. 1998); United States v. Chagra, 754 F.2d 1181, 1182 (5th Cir. 1985).

Even if the couple is no longer married, the privilege can still be invoked for communications that happened during the marriage. United States v. Entrekin, 624 F.2d 597, 598 (5th Cir. 1980).

On the other hand spousal immunity can only be invoked by the spouse who is not the defendant, and can't be invoked after the marriage is over. Crawford v. United States, 541 U.S. 36 (2003). A partner who invokes spousal immunity can't be forced to testify against the defendant partner.

The Fifth Amendment to the United States Constitution grants many important rights to individuals accused of a crime. Among these rights is the right against self incrimination, or the right to remain silent. There are many points within a criminal tax case where this right is abundantly important and the taxpayer needs to consider whether or not to exercise this right.

Stages at which it is possible to exercise this right are in answering certain questions on a tax form, during a civil or criminal investigation, while in custody of law enforcement, and at all court proceedings including trial.

CONCLUSION

Even if the IRS has referred the case to the Tax Division, the case must first be authorized by the Tax Division for prosecution. Each of these steps can weed out weak cases. Therefore, understanding your specific situation, knowing your rights and consulting with a lawyer early on can be greatly beneficial in mitigating the damage.

Call my office and set up an appointment for a consultation. At Brotman Law you'll attain the advice and defence of legal professionals with experience in civil and criminal tax law. We will help you decide on the timeliness and type of voluntary disclosure on your tax offence that can best help your case.

10 How Are Tax Crimes Punished?

INTRODUCTION

In 1931, Alphonse Gabriel Capone was sentenced to 11 years in prison and fined $50,000 for tax evasion. This was the harshest sentence ever delivered for tax evasion. Al Capone ran an enterprise that included many illegal doings – his was the era of our country's Prohibition – and he was said to have raked in as much as $100 million a year.

Many years hence, there have been a handful of tax evasion "criminals" that made the news from Willie Nelson to Leona Helmsley. As interesting as these stories may be, I don't intend to write about the rich and infamous' attempted tax evasion stories. Instead, I'll discuss the much more relevant (though relational) final phase in criminal-tax-case sentencing.

Here I will explain what you can expect after a guilty plea or a finding of guilt by a jury. I will also discuss how and why a sentence is chosen, and what some of the common punishments are for a tax crime.

The Sentencing Procedure

What Happens After I Plea or Am Found Guilty?

Generally, after the defendant pleads guilty or is found guilty, a probation officer will ask the defendant questions about the offense, the defendant's criminal and personal history, financial situation, and other questions relevant to sentencing. This is called the presentence interview. Fed. R. Crim P. 32(c); 18 U.S.C. § 3552.

Most districts agree that the defendant still has the right to counsel at the presentence interview, as it is a critical stage of the process. United States v. Rogers, 921 F.2d 975, 980 (10th Cir.).

The Defendant also has the right to remain silent at the interview. However, cooperation will probably lead to a better result at this stage as the "acceptance of responsibility" is one factor to be considered at sentencing. See USSG §3E1.

After the probation officer completes the interview as well as their own investigation into these matters, they will prepare a report called the presentence report, which will be reviewed and used by the judge to ultimately determine the proper sentence. Fed. R. Crim P. 32(d); 18 U.S.C. § 3552.

The presentence report includes the results of the investigation as well as a calculation of the defendants sentencing range under the federal sentencing guidelines. See id.

The defendant will be given a copy of this presentence report at least 35 days before the sentencing hearing, and will then have a chance to object to anything within the report that they disagree with. See Fed R. Crim. P (d)-(f).

After the presentence investigation and report are complete, the defendant will be called for another court proceeding, called the sentencing hearing. The sentencing hearing is where the defendant's final sentence will be pronounced.

Both the Government and the defendant's counsel will have an opportunity to make arguments and provide any input they may have on the sentence. Fed R. Crim. P (i).

Depending on the facts of the case, any victims involved in the offense may have the opportunity to address the court and provide their input on the sentence at this time. See id.

Unlike trial, any sufficiently reliable evidence can be introduced at the sentencing hearing and the court may consider all factors in determining the appropriate sentence. See id.

After hearing from the parties, the judge will pronounce the sentence and advise the defendant of his or her right to appeal the sentence. A defendant will have the right to appellate counsel, even if they can't afford it. The judge will then fill out a written report memorializing the orally pronounced sentence for public record.

The Federal Sentencing Guidelines

Why Are the Sentencing Guidelines Important?

When determining a sentence, one of the major factors is the defendants sentencing range, which is determined using a very detailed guidebook called the United States Sentencing Guidelines.

In regard to the major tax crimes, the United States Sentencing Guidelines were enacted as a remedy to what Congress determined was too lenient and disproportionate sentencing.

Before the guidelines, around half of taxpayers convicted of tax evasion were sentenced to a term of probation without any prison time, while the other half received prison sentences of about a year. USSG §2T1 (Introduction Commentary.)

Until 2005, the application of the United States Sentencing Guidelines was mandatory. However, after a Supreme Court case held that this mandatory application violated the sixth amendment rights of defendants, the guidelines became "advisory". United States v. Booker, 543 U.S. 220 (2005).

While judges now have greater discretion in sentencing and do not technically have to apply the guidelines anymore, they are still required by law to consider certain goals and factors in deciding a sentence.

One of these factors to be considered is the sentencing range calculated by using United States Sentencing Guidelines. Gall v. United States, 552 U.S. 38, 49 (2007). The sentencing range gives a minimum and maximum recommended sentence based on a number of different case- specific factors.

This range helps to narrow down the broad maximum and mandatory minimum range allowed by statute. For example, a defendant convicted of tax evasion can serve up to five years in prison. 26 U.S.C. § 7201. Based on the facts of the case, the guidelines will provide the judge with a reasonable sentence range that is somewhere within that five years.

If the judge decides not to follow the guidelines they have to explain what facts caused the increased or decreased sentence. Rita v. United States, 127 S.Ct. 2456 (2007).

Another reason judges will tend to follow the guidelines is that if a sentence is imposed through a proper application of the federal sentencing guidelines, the court of appeals may presume the sentence is reasonable. Gall v. United States, 552 U.S. 38, 49 (2007).

How do the Sentencing Guidelines Work?

The federal sentencing guidelines help calculate the defendant's sentencing range using a numeric system based on the seriousness of the offense and the defendant's criminal history.

There are 43 total levels representing the seriousness of the offense. See United States Sentencing Commision, Overview of the Federal Sentencing Guidelines.

The more serious the crime, the higher the base offense level will be. The base offense level can be lower or higher depending on specific characteristics of the offense, such as the use of a weapon during a robbery or amount of money involved in a fraudulent scheme.

There are also offense level adjustments which can be applied to any crime. Some examples of these adjustments include the role the defendant played in the crime, victim involvement, and the obstruction of justice. The offense level may also be reduced for the defendant's acceptance of responsibility for the crime.

The defendant's criminal history is taken into account because the policy behind the sentencing guidelines is that repeat offenders should be given a harsher sentence. Points are awarded for the number and severity of a defendant's prior convictions and added together to obtain a category.

There are six categories for criminal history represented by roman numerals. Category I has the lowest amount of points for criminal history and Category VI has the highest.

The final offense level range is determined using a chart with the criminal history categories horizontally on the top and the 43 offense levels vertically on the side. The sentencing range that should be imposed is where the offense level and categories

intersect. There are also four zones lettered A through D on the chart, which represent non-prison sentences such as probation and at home confinement.

As the guidelines are "advisory", the presiding judge may sentence the defendant above or below the sentencing range provided by the sentencing guidelines. If the judge does choose to depart from the guidelines, they must explain the reasons for this decision in writing. Rita v. United States, 127 S.Ct. 2456 (2007).

What are the Criminal Tax Sentencing Guidelines?

The guideline section which corresponds with tax crimes is Chapter 2, section T. This section provides the base level and specific offense characteristics for each of the tax crimes.

For tax crimes, the main consideration in determining the offense level is the amount of tax loss to the government, which the federal guidelines provide some input on how to compute. For crimes of tax evasion and fraud or false statement, tax loss is defined as "the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)."USSG § 2T1.1(c)(1).

For failure to file or pay cases, the tax loss is what the defendant didn't pay from what they owed. The Government has the burden of proving the amount of tax loss initially. United States v. Spencer, 178 F.3d 1365, 1368 (10th Cir. 1999).

However, the defendant may agree to what the tax loss is as part of a plea. In this case, the defendant will likely be held to the agreed tax loss. If the parties don't come to an agreement regarding the amount of tax loss, the court has to hold a hearing where evidence is presented to determine the disputed issues. United States v. Marshall, 92 F.3d 758, 760 (8th Cir. 1996).

If the court that sentences the defendant presided over the trial and can determine these facts through the trial record, a hearing does not need to take place.

If there is no agreed tax loss, calculating the exact amount is a complex procedure.

If the tax loss can't be reasonably calculated, it is presumed to be 28% of the gross income plus 100% of any false credits claimed for tax crimes involving underreporting. USSG § 2T1.1(c)(1).

In calculating the tax loss, the court can take into account amounts outside of what money the government actually lost or the IRS could have collected. These amounts include state taxes or relevant or uncharged conduct of the defendant, such as unpaid taxes for years prior. United States v. Tandon, 111 F.3d 482, 490 (6th Cir. 1997).

If there are penalties or interest related to the unpaid taxes, these are generally not included in the tax loss calculation, unless the crime charged is for evasion of payment or failure to pay. See USSG §2T1.1(c)(1).

Once the tax loss has been calculated, the base offense level can be determined using a chart within the federal sentencing guidelines manual called the tax table. USSG § 2T41.1 Base offense levels for tax crimes range from a level 6 to a level 36.

The base level of a tax crime can be increased or decreased due to the specific facts of each case. These base level adjustments are called specific offense characteristics. For example, there is a base level increase if the defendant failed to report income from criminal activity exceeding $10,000.00. USSG § 2T1.1

Another increase will be made if the defendant committed the crime using more complex or elaborate conduct or planning than the average tax evasion case. USSG § 2T1.1

For example, if the defendant evaded their taxes by using a corporate shell or money laundering scheme, this could qualify for a base level enhancement. There is also a significant increase for the planned or threatened use of violence in committing the offense, and for the intent to convince others to violate tax laws. USSG § 2T1.9

If the defendant can prove that he or she played a minor role in the offense, the level can be reduced. USSG §3B1.2. See United States v. Searan, 259 F.3d 434, 447-48 (6th Cir. 2001).

Another common reduction that can be granted is the defendant demonstrates that they have accepted responsibility for the offense. USSG §3E1.1(a). Generally, this is only available to defendants who have taken a plea or admitted to elements of the offense. USSG §3E1.1(a), comment. (n.2) (emphasis added). In a tax case, the early payment of the tax owed, voluntary disclosure to the IRS, or cooperation in an investigation could help demonstrate an acceptance of responsibility.

Professional Sanctions and Disciplines for Tax Crimes

For professionals, especially those requiring licensing or accreditation, tax crimes can have significant consequences beyond the criminal sentence. Professionals who commit tax crimes, including those in the tax arena such as attorneys and accountants, could be subject to discipline or sanctions that can affect their livelihood.

For example, the Office of Professional Responsibility ("OPR") within the IRS can, among other penalties, disallow tax professionals to practice before the IRS. See Circular 230, published at 31 Code of Federal Regulations, pt. 10.

Since the standard of proof for such professional discipline is lower than a criminal case, OPR could initiate proceedings against a professional charged of a tax crime even if they are acquitted.

Attorneys could face disbarment, suspension from practice, or monetary sanctions. CPAs may have their license taken, and could be subject to expulsion or suspension without a hearing if they are convicted of a felony tax crime.

CONCLUSION

If you are charged with a tax crime, it is critically important to consult a defense lawyer and one that knows tax law could be vitally important, too. Forty-three different levels of tax crimes offense promises a lot of sentencing wiggle room depending on your charges.

"The IRS estimates that about 17 percent of taxpayers fail to comply with the tax code in one way or another when filing their returns," but a very tiny percentage of that percentage are ever convicted of a tax crime.

Can the IRS tell the difference between illegal activity and an honest mistake? If you've met with some special agents from the IRS and now you need a good attorney, I think you know the answer to that.

Give me a call. I can and will defend you with all my resources and experience in tax law if we decide working together would be mutually beneficial. If not, I can give you references that could be of some help.

11 How Can Brotman Law Help Me in My Criminal Tax Case?

INTRODUCTION

Criminal tax issues are often woven together with other charges. Having an understanding of the center point of the government's investigation and whether the tax component is the steak or the side dish can have implications in most criminal tax cases from the beginning.

At Brotman Law we take special precautions in criminal matters and our initial meetings with our prospective clients are usually done in person. The goal of our initial meeting is to put all the facts on the table. When dealing with a subject or a target of a criminal tax investigation, our best advantage is having early access to information the government may not have.

Will An Experienced Criminal Tax Lawyer Help?

Should I retain Brotman Law to represent me in my criminal tax matter? When you go through a criminal tax case, there will be a lot of different phases. Criminal tax cases can be multi-year investigations. They are a huge commitment and they are a huge threat. Why? Because of the success of the U.S. Attorney's Office with its over 90-percent-conviction rate, you have to be on guard.

From our end, our firm has a lot of experience dealing with these types of cases. We know tax, we know tax on the civil side and we know it on all phases of the criminal side. When we reach a mutual decision with the client that it is in our best interest to move forward on a criminal case, there is a lot of strategy that goes into that process.

There is a strategy in terms of how we are going to handle this from a legal perspective. There is a strategy involved in terms of how we are going to handle this from a resource perspective. And it is a fight – make no mistake about it.

These are the biggest stakes that we face because there is a real possibility that at the end of the day our client is going to end up in

jail, and we take that very seriously. We are going to do everything that we can on our end to mitigate any consequence.

We are constantly looking for avenues to turn the case civil, to make it go away and to reduce things down to the lowest level possible. We are constantly derailing the investigative process. We are constantly working with the U.S. attorneys and the agents to take the air out of their case, and we fight as hard as we can on behalf of our clients.

I think it is our tenacity that really separates us as a firm because we have experience going through these cases. We empathize with our clients, and we fight on their behalf because it is personal to us. This is what I think really separates us.

If you are reading this and you want to know more, I invite you to come sit down and talk with us. Come meet me, come meet our senior team, come lay out the facts of your case and let us figure out if it is a good fit.

If it is not a good fit, I promise you we are not going to take the case, but will try to provide you with a reference of a good law firm that could be a better choice for your situation. Give us a call, set up a time to tell us the facts of your story and we'll work on a plan to give you the best defense against the IRS.

12 How Much Will It Cost for Brotman Law to Take My Criminal Tax Case?

INTRODUCTION

In some criminal tax cases, hiring a tax attorney when you have a problem with the IRS will relieve you of ever having direct contact with the government. Your tax attorney can file a petition with the Tax Court, argue the case, get it resolved and reduce your liability substantially. How much would that be worth to you? Keep this in mind as you read the following:

In Defence of Cost Questions

Cost questions are complex in criminal tax cases and I'll explain why by getting straight to the point. Criminal investigations usually take a long time to resolve. The government takes their time in building an investigation and there usually is a lot of complicated circumstances around the facts. There may be multiple witnesses involved as well as multiple years when the conduct is alleged. We may have unfiled tax returns, we may have fraudulently filed tax returns, or at the very least, tax returns that are not correct. When looking at defense cost, you have to consider that the behavior in question has generally occurred over an extended period of time.

With that being said, there is a lot of work that goes into these cases. Some of the work happens at the beginning in order to mitigate the damages. Some of it involves preparing for a special agent interview, preparing for a proffer session with the U.S. Attorney, or preparing for a number of different things that get submitted during the course of these investigations.

Generally speaking, we do not use a lot of paralegal time on criminal matters. The staff that has lower billing rates largely goes away. However, we can leverage our lower-billing-rate staff, to help offset the cost in terms of organizing documents and preparing them for submissions and things like that. But,

when it comes to a criminal matter, you want the best and the brightest in the firm handling the matter.

That is usually me in some combination with my senior team. Our billing rates for senior attorneys are anywhere between $350-$525 an hour. I want you to take that into perspective. A lot of it is driven by documents, by the conduct of the agent and by the facts, and so it is very hard to give an estimate.

When we take a criminal matter on, $25,000 is the usual retainer, although it can vary. If it is a witness investigation, we are not going to need anywhere near that much of a retainer to get the work done in the case. If it is a larger and more complex criminal matter, we have taken retainers that are $100,000 or more.

When we quote a retainer, we look at the volume of work that is involved and try to distribute that as efficiently as possible. As you can imagine, there are a lot of moving parts that go into this kind of case work.

With a criminal investigation particularly on the tax side, we will bring in a bookkeeper and a CPA under what we call a Covell agreement. This protects them under the envelope of our attorney-client privilege and we use that to offset costs.

There is a lot of care that is taken at my level and among our senior attorneys to really mitigate resources. We carefully protect things because we want to make sure our client has the best representation possible. We take our job as counsel very seriously.

We do not want to be a financial burden on anybody, but we want to make sure that the work gets done to the nth degree. It is in our client's best interest that we take every step firmly and carefully when defending a criminal tax case.

CONCLUSION

For most criminal tax cases, finding a lawyer to defend you will take a significant investment in time and money. In fact, it can take many, many months to resolve certain types of cases. That is the best definitive I can give you for how much a criminal tax matter generally costs.

When I know more facts about your case, I can definitely give you a better guideline of where you stand, and how much your case is going to cost. I can also help you create a plan to make sure that you are utilizing resources most effectively. This is ultimately best for any criminal tax matter and it is best for you, the client.

13 What Happens at a Tax Crime Pre-Trial?

INTRODUCTION

The IRS has a "Tax Crimes Handbook," and although you may not find this surprising, within its pages is a long list of what people and businesses have done to willfully avoid paying taxes.

One such scheme is "maintaining a cash lifestyle by conducting all personal and professional business in cash, possessing no credit cards, bank accounts, or accounting records and never acquiring any attachable assets."

I think maintaining an all cash lifestyle these days must be far more difficult, with most financial transactions now being conducted digitally. The handling of cash since the advent of COVID-19 is much less desirable as well.

Whether this is your tax offense or one of many others described in the "Tax Crimes Handbook," I've written about some facts here that should we ever go to trial, you might like to know beforehand, starting with the pre-trial.

The Pre-Trial

Many important events can occur during the pre-trial phase of the criminal tax process from working out evidentiary issues, to setting a timeline, to discovering evidence and negotiating a plea.

Before the trial, both parties may have some issues regarding the evidence or the charges that they want to address. Either party can do this by making a pre-trial motion. See Fed. R. Crim P. 12(b). See also Fed. R. Crim P. 47.

We've already discussed the Motion for Pre-Trial Detention, which the Government can make if they believe a defendant should not be released on bond awaiting trial.

Other pre-trial motions include motions to dismiss, motions to suppress evidence, motions ***in limine***, and severance motions. See generally, Department of Justice, Justice

101, Pre-trial Motions https://www.justice.gov/usao/justice-101/pretrial-motions.

A motion to suppress is one of the more commonly utilized pre-trial motions, and can have a major impact on the strength and outcome of a case.

While a motion to suppress is a tool which can be used by either party, it is often used by defense counsel to keep evidence from being presented at trial. This evidence can be testimonial, such as a defendant's statements, or physical evidence, such as documents or photographs that may have been improperly obtained.

We have discussed in previous sections some of the important rights that the defendant has at different stages of a criminal proceeding. If these rights are not afforded to the defendant, and evidence was obtained as a result, a motion to suppress this evidence is one important remedy.

For example, John Doe is arrested but is not told that he has the right to remain silent. When questioned about his tax return, John Doe admits that he under reported his income to avoid paying taxes in a higher bracket. John Does admission would likely be suppressed.

Pre-trial conferences are another useful tool in efficiently moving the case along and ironing out any unresolved issues prior to trial. See Fed. R. Crim P. 17.1.

Pre-trial conferences are generally formal meetings in court with the AUSA, defense counsel, and presiding judge present.

Some districts have mandatory pre-trial conference proceedings, which set timelines for actions such as discovery, pre-trial motions, and filing witness or exhibit lists. If a pre-trial conference is required, the defendant may be able to waive their appearance, as long as their defense counsel is present.

How do I Find Out the Evidence Against Me?

Prior to trial, the Government and defense counsel will conduct a sharing of evidence known as a discovery period. See Fed. R. Crim P 16. This includes a sharing of documents, photos, and other physical evidence or the sharing of testimony prior to trial, called a deposition. See Fed. R. Crim P 15.

Depositions are an important tool for both sides, and can be used not only to build a case, but also at trial to impeach a witness who makes a statement at trial that is inconsistent with their sworn deposition testimony. See Fed. R. Evid. 801(d)(1).

With the exception of limited privileged documents, the Government will generally turn over what evidence they have to defense counsel. In order to ensure a fair trial, the Government must automatically (even if the defense does not request this discovery) turn over all evidence they have that may exonerate the defendant, as well as any statements that the defendant made. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972).

If the court determines that there was a violation of the discovery rules it can impose strict penalties, including a mistrial or exclusion of the evidence.

Plea Agreements

Many federal criminal cases are resolved through plea bargaining rather than at trial. See Lafler v. Cooper, ___ U.S. ___, ___, 132 S. Ct. 1376, 1388 (U.S. 2012). A plea is when the defendant admits to the crime, and agrees that they may be sentenced by the presiding judge. Plea bargaining is an important part of the criminal justice system because it allows the case to be settled outside of the courtroom prior to trial and helps to keep the criminal justice system from getting bogged down.

The plus side of the plea agreement for the Government is appropriate punishment with less time and resources, while the plus side for defense is the ability to know what you're getting and the opportunity for a more lenient sentence.

The Government is authorized to offer the defendant a deal where in exchange for the defendant's plea, the prosecutor will recommend a specific sentence or sentence range to which the defendant agrees. See Fed. R. Crim. P. 11.

In criminal tax cases, the AUSA handling the case is permitted to enter into a plea agreement with the defendant even prior to the indictment, and pursuant to the Tax Division's Major Count Policy, they do not have to get tax division approval before entering a plea to the major counts on a tax case indictment. See USAM 6-4.310. The major counts are determined by the Tax Division on a case by case basis, but are generally the most serious charges with the most severe possible punishments. See id.

If the major count is a felony tax crime, the AUSA is not permitted to plea the defendant out to a lesser included charge (a secondary offense underlying a more serious offense) or misdemeanor offense. See id.

For example, if the charge is felony tax evasion, the Government can't accept a plea to the misdemeanor offense of failure to pay a tax. However, the Government is permitted to dismiss lesser counts of the indictment in exchange for the defendant's plea to one or more of the major counts. See id.

Plea discussions occur between the prosecutor and the defendant's counsel. The judge should not have a hand in any plea discussions, but will ultimately be the person who accepts the plea. See Fed. R. Crim. P. 11(c)(1).

While the Government can recommend the sentence negotiated in the plea, if the judge feels as if the plea is not in the "best interest of justice" he or she may reject the plea agreed on between the Government and the defendant. See H.R. Rep. No. 94-247, 94th Cong., 1st Sess., 6 (1975). See also United States v. Reasor, 418 F.3d 466 (5th Cir. 2005).

While this is not the norm, it is a possibility that the defendant should be aware of. If the defendant's plea is accepted, there will be no trial, and the defendant will be punished in accordance with the law.

What Are the Types of Pleas?

The defendant may plead guilty, not guilty, or ***nolo contedendre*** (no contest). See Fed. R. Crim. P. 11 (a)(1). The defendant can

also enter into a negotiated plea agreement or a plea to the bench. See Fed. R. Crim. P. 11 (c).

Anyone who has watched a crime television show has probably heard of a negotiated plea. This is an agreed plea between the Government and the defendant, which we discussed above in ***What is a Plea Agreement?*** supra.

If, however, the defendant does not like the offer made by the government, but would still prefer to plead guilty to the offense charged rather than go to trial, the defendant has the option to plead to the bench, sometimes referred to as an open plea.

This generally occurs if the defendant is guilty of the crime charged, but does not believe the Government is being fair and they have a weak case. Open pleas can sometimes be like rolling the dice. Some judges will inform the defendant of the sentence before the defendant enters a plea, but some judges will require that the defendant plead guilty without prior knowledge of the sentence that the judge will impose.

For a defendant to plead guilty, they must admit that they have actually committed the crime for which they are charged. If the defendant does not want to admit guilt, but agrees that the Government has sufficient evidence against him or her, they may be allowed to enter a plea of ***nolo contendere*** or no contest. See Fed. R. Crim. P. 11 (a)(3).

This has the same immediate effect of resolving the case without trial and moving to sentencing, but can have different future consequences. For example, a plea of ***nolo contendre*** may not be utilized in civil proceedings. Fed. R. Evid. 410(2).

However, the defendant does not have the right to a no contest plea. See Fed. R. Crim. P. 11 (a)(3). Some judges do not accept no contest pleas, or will accept them with certain conditions.

In fact, it is the Government's policy to strongly object to no contest pleas, and they may not accept them unless it is an extreme circumstance and only after formal written approval by the Assistant Attorney General of the Tax Division. See U.S.A.M. 9-16.010 and 9-27.500

How Is a Plea Accepted?

Once a defendant pleads guilty, the presiding judge will go through a series of questions called a plea colloquy to ensure that the plea is made in the best interests of justice, and to preserve the record for appeals. (We will discuss the appeal process in another article.)

The plea colloquy is different from judge to judge, but they will all have the same basic concepts. The judge will ensure that there are proper facts to support the guilty plea, ensure that the defendant is aware of their rights and the consequences of pleading guilty, and ensure that the defendant is voluntarily pleading guilty and is mentally able to enter a plea. See Fed. R. Crim. P. 11(b)(1).

If the prosecutor has recommended a sentence or sentence range, the judge will also decide if the sentence is fair and in accordance with the sentencing guidelines. If all of these criteria are met the presiding judge will accept the defendant's plea and either proceed to the sentencing phase. Once the court sentences the defendant the plea can't be withdrawn unless it is by motion or appeal. See Fed. R. Crim. P. 11(b)(e).

CONCLUSION

Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system," a quote Justice Anthony Kennedy made famous during Missouri v. Frye, 2012.

Guilty pleas can often open the door to reducing punishments to a less severe level than if convicted at trial. In addition, plea agreements shield defendants from a public display of potentially negative information, and from things they might not want the public to know, which could surface during a trial.

In most of my criminal tax cases I've succeeded in avoiding trial. My client's best interests are always mine and I know how important it is to make a plea and then get the punishment lessened, sometimes a lot. Working together with the evidence during pre-trial often helps me to stop a trial from proceeding altogether.

14 What Happens When a Tax Crime Goes to Trial?

INTRODUCTION

In a previous article, we discussed how the majority of criminal tax cases will resolve with the defendant taking a plea, but in the rare instance that a case does go to trial, we'll now discuss the components of the federal criminal trial and what you can expect when you walk into the courtroom on trial day.

What Is the Jury's Role in a Trial?

The jury is also known as the fact finders. Their role is to listen to the evidence presented by the Government and the defense, and then make a fair and impartial decision as to whether the Government has proved every element of the charged offense beyond a reasonable doubt. See Generally American Bar Association, How Courts Work, The Role of Juries (2019).

Prior to the trial, the Government and the defendant's lawyer will have an opportunity to ask the pool of potential jurors questions to determine if they can make a fair and impartial decision in the case. See Fed. R. Evid. 47.

These questions will be aimed toward discovering the juror's beliefs and biases and any conditions that would keep them from paying attention and judging fairly. Once the jury is selected, they will be sworn in and prepared to sit for the trial.

What Happens at a Federal Criminal Trial?

The federal criminal trial is a daunting, intimidating, and somewhat mythical practice. A federal trial is much more formal than a state trial, such as those that you may have seen on Law and Order.

Before the trial begins (this can occur either before or after jury selection), the parties may be given the opportunity to argue for the last-minute exclusion or inclusion of possibly

prejudicial evidence or testimony at trial in what is called a motion in ***limine***. Luce v. United States, 469 U.S. 38, 41 n.4 (1984).

Generally, at the trial stage both sides will have an idea of what the other side intends to bring out, and may wish to pre-emptively ensure that this information is not presented to the jury. Once these motions have been resolved, the jury will either be selected and sworn in or called in to begin the trial.

The defendant will sit at one table with their lawyer. It is important that the defendant is present for all of the proceedings on the day of trial, but the Government may not force the defendant to testify (although they will have an opportunity to do so during the defense's case in chief if they choose). See U.S. Const. amend. V.

If the defendant has been in custody they will be allowed to change out of their prison uniform into plain clothes for trial day. See Estelle v. Williams, 425 U.S. 501 (1976). At the other table will be the Government. The prosecutor may try the case alone or may have other prosecutors with them to assist in the trial.

The Government will get to go first. They will have the opportunity to present an opening statement which is their version of the story and what they believe the evidence will show before the jury. Defense counsel will be able to present their opening statement next.

Throughout the trial, both the Government and the defense counsel will have an opportunity to call witnesses and present evidence to the jury. The Government will put on their entire case first.

At the close of the Government's case, the defendant's lawyer has the opportunity – outside of the presence of the jury – to request that the judge acquit the defendant because no jury could reasonably find the defendant guilty based on the evidence presented by the Government. See Fed. R. Crim. P. 29.

This is generally only successful in the event that there is a major pitfall in the case where none of the evidence presented could even reasonably support one of the material elements of the case (i.e., Government is unable to identify the defendant).

Then, the defense will have a chance to present their case in chief. However, in a typical case (one where the defendant is not claiming an affirmative defense), the defendant does not have to put on any evidence or prove anything to the jury at all. See In re Winship, 397 U.S. 358, 364 (1970).

If defense counsel wanted to sit at the desk and play tic-tac-toe (hopefully they do not), they can. It is the Government's burden to prove each and every element of their case beyond and to the exclusion of every reasonable doubt. See id.

"Beyond a reasonable doubt" is the highest standard in the criminal justice system, but "reasonable doubt" does not mean no doubt. Just because something is possible, does not mean that it is reasonable, and the judge will instruct the jury on this fact.

For example, there is the old snow blower metaphor used by many prosecutors. Say you live in a cold area, where it snows often. It's winter time and you wake up and your driveway is covered in snow. What happened? You'd probably say it snowed. Now, is it possible that your neighbor came by in the middle of the night with a snow

blower and covered your property in fake snow? Yes. Is this reasonable? Depends on your neighbor, but probably not.

The defendant may choose to testify at trial, but he or she is not required to. The Government can't make the defendant take the stand, and if the defendant does choose to testify, he may at any point assert his Fifth Amendment rights and choose not to answer a question. U.S. Const. amend. V.

After the defendant presents their case in chief, they may again move for a judgment of acquittal. See Fed. R. Crim. P. 29.

At the close of the trial, the lawyers for both parties will have an opportunity to discuss the evidence presented to the jury and guide them on how this evidence should be interpreted.

This is called a closing argument, and it is not the law. The jury will be instructed by the judge on the law applicable to the case. Outside the presence of the jury and prior to this instruction by the judge, both sides will have a chance to review and object to the specific statement of the law that will be provided to the jury.

After the judge reads the jury instructions, the jury will leave to a separate room within the courtroom to decide on a verdict. This process is known as jury deliberation. No one can require a juror to discuss what occurred in a jury room.

During deliberation, the jurors will likely review the evidence, discuss if the evidence meets all of the elements of the crime beyond a reasonable doubt, and determine if the defendant is innocent or guilty. This is called the verdict.

A jury's verdict must be unanimous. Fed. R. Crim P. 31(a). If after serious deliberation the jurors can't come to a unanimous verdict, it will be considered a "hung jury" and, and the case may be tried again in front of a new jury. Fed. R. Crim P. 31(b)(3).

If a jury does come to a unanimous decision, they will present their verdict to the court. Fed. R. Crim P. 31(a). The clerk of court will then read the jury's verdict out loud. After the verdict is read, either party may "poll the jury" or request each juror to individually state that this is their true verdict and that they were not coerced into making that decision. Fed. R. Crim P. 31(d).

However, polling the jury rarely results in a different outcome. If the defendant is found not guilty, he will be acquitted and released if he is in custody. If the verdict is guilty, the next phase will be sentencing.

Post-Trial Recovery

Attempting to evade paying the government its taxes goes back as far as taxes were invented. In past civilizations, tax evasion was considered an insult to the ruling power of a government, and very brutal consequences – from debtors prison to torture, disfigurment and even death – were meted out.

If you were audited by the IRS and end up having to go to trial, it will be a stressful time, especially if you are found guilty. Depending on your situation, at the worst you'll spend some time in jail and have to make restitution. After that, when April 15 comes around, I will advise you to pay your taxes when your taxes are due.

15 What is a Willful Failure to Collect or Pay Over Tax?

INTRODUCTION

If you have worked a full-time job for a company, you have likely noticed, and anticipated, the chunk of salary held back from your paycheck known as taxes.

This happens because employers like myself, are required to withhold employee income tax as well as social security and Medicare taxes (social security and Medicare taxes are required by a law called the Federal Insurance Contributions Act ("FICA") and are known together as FICA taxes) from their employee's paychecks.

Employers are obligated to pay these withheld amounts over to the United States. 5 26 U.S.C. §§ 3102(a) (duty to collect employee's share of FICA), 3102(b) (duty to pay over collected FICA taxes), 3402 (duty to withhold income taxes) (duty to pay over income taxes).

26 U.S.C. § 7202 makes it a crime to:

1. Fail to collect a tax and,
2. fail to truthfully account for or pay over a tax. This statute is intended to deal with employment tax issues, such as the aforementioned responsibility of an employer to withhold taxes from an employee's paycheck. However, anyone who has a duty under law to collect and pay over a tax can be the target of a prosecution under this section.

Due to the significant impact employment taxes have, and the fact that surprisingly, they make up a large portion of the difference between true taxes that are actually owed to the IRS and those that are paid on time, enforcement of employment taxes is one of the Tax Division's top priorities. See generally Tax Division – Employment Tax Enforcement.

How does the Government Prove Willful Failure to Collect or Pay Over Tax?

To prove a failure to collect or pay tax under section 7202, the Government has to prove the following elements beyond a reasonable doubt:

3. There was a duty to collect, account for, and pay over a tax;
4. a failure to collect, truthfully account for, or pay over the tax; and
5. willfulness.

United States v. Thayer, 201 F.3d 214, 219-21 (3d Cir. 1999); see also United States v. Simkanin, 420 F.3d 397, 404-05 (5th Cir. 2005).

Duty to Collect

It is well established that employers have the duty to pay over withheld taxes to the IRS, so who specifically is responsible for that duty? Section 7202 applies to "any" responsible person.

Therefore, multiple individuals can be responsible and ultimately liable for a failure to collect, account for, and pay over the tax. See Barnett v. I.R.S., 988 F.2d 1449, 1455 (5th Cir. 1993).

A responsible person is defined by the courts as "someone who has the status, duty and authority to avoid the [employer's] default in collection or payment of the taxes." Ferguson v. United States, 484 F.3d 1068, 1072 (8th Cir. 2007).

In other words, responsibility for collecting and paying over taxes is dependent on the individual's involvement, duties, and position within the company.

If an individual has significant control over the company's financial resources, this will be a good indicator that the individual has responsibility. United States v. Carrigan, 31 F.3d 130, 132-33 (3d Cir. 1994); see also United States v. McLain, 646 F.3d 599, 603 (8th Cir. 2011).

If the Government can't prove that the defendant has a personal duty to collect, account for, and pay over the withheld taxes, the Government can still bring charges under this section together with the statute criminalizing aiding and abetting. 18 U.S.C. § 2.

Willfulness

Willfulness has the same meaning for a failure to collect or pay over taxes as it does in the other tax crimes. See supra Tax Evasion, Willfulness.

The Government can use circumstantial evidence (evidence which doesn't directly support a conclusion, but requires an inference to make a conclusion from a set of facts) to prove that the defendant willfully failed to collect, truthfully account for, or pay over the tax in question. See United States v. Lynch, 227 F.Supp.3d 421 (W.D. PA 2017).

For example, it may be inferred that a defendant intentionally failed to pay over the tax because of his or her level of responsibility in the company, awareness of the law or illegality of the conduct, or statements regarding the potential consequences of the conduct.

Just because the employer does not have the money to pay over the required taxes, does not mean the conduct was not willful. United States v. Easterday, 564 F.3d 1004 (9th Cir. 2009).

In fact, the courts noted that a conscious and intentional decision by a company to pay other parties to whom it owes money, including its employees, instead of paying over taxes to the Government was a clear indication of willfulness. Sorenson v. United States, 521 F.2d 325,328 (9th Cir. 1975).

If the Government is unable to show that the acts were willful, the defendant could still be charged under the misdemeanor statute for failing to deposit the required withheld taxes after notice from the IRS. 26 U.S.C. § 7512.

Venue

The Government also must show that the case was charged in the right place. See infra. The statute regarding a failure to collect or pay over tax does not specify the location of the crime for purposes of venue.

The offenses described in this section involve an omission or failure to do something. For crimes of omission, generally the location is where the act *could* have been performed. Johnston v. United States, 351 U.S. 215, 220 (1956). See United States v. Ross, 135 F. Supp. 842 (D. Md. 1955).

Typically, the proper venue for a failure to collect or pay over tax under section 7202 is the district where the responsible individual lives, the district where the employer has its main place of business office, or the district where employment tax returns were supposed to have been filed.

Statute of Limitations

The statute of limitations for a failure to collect or pay over taxes is six years. See United States v. Adam, 296 F.3d 327, 330-31 (5th Cir. 2002). However, there are a couple of districts where this six year statute of limitations was debated.

Specifically, the 5th circuit held that the failure to *pay over third party* taxes was only subject to a three year statute of limitations because it was distinct from a failure to pay taxes, and that the six year statute of limitations applied only to a failure to pay under section 7203. United States v. Block, 497 F. Supp. 629, 630-32 (N.D. Ga.), aff'd, 660 F.2d 1086 (5th Cir. 1980).

What is the Punishment for Failure to Collect or Pay Over Tax?

A failure to collect or pay over tax is a class E felony. A defendant convicted of the offenses under this statute can face up to 5 in years in prison. 26 U.S.C. § 7202.

Despite the fact that the statute provides a maximum fine of $10,000, an individual found guilty of a failure to collect or pay over taxes can be fined up to $250,000.00 and a corporation can be fined up to $500,000.00. See 18 U.S.C. §3571. The defendant may also be fined whatever the costs to the Government are in prosecuting the case.

CONCLUSION

"Business owners need to understand the importance of their obligations in the withholding of payroll taxes," said United States Attorney Joseph D. Brown. "They hold those taxes in trust for the employee and the government and there are criminal penalties for those who divert those funds for other uses."

I couldn't have said it better myself. As a business owner however, I understand that things can get really busy and what should be priorities sometimes get relegated to the back burner. If you are a business owner who has failed to collect and pay over tax for some time, get in touch with my office and we'll get you straightened out – hopefully before the IRS does.

16 What Is the Crime of Tax Evasion?

INTRODUCTION

If you're an American that earns at least $10,000 per year, $25,000 if you're married and filing jointly or over $400 if self-employed, you must file a federal income tax return. Selling your home or taking money out of your retirement account are also reasons you would need to file.

Since 1955, Tax Day has traditionally fallen on April 15, or in case of that day falling on a weekend, the first consecutive business day after that date. It might help to be reminded too, that the U.S. has a marginal tax rate system, so not all of your income is taxed at the same rate.

Of course, as long as taxes have been around, so has tax evasion. A math error won't get you thrown in jail, but crazy deductions and willful lying can. If you have entertained the idea of not paying the full amount due on your income taxes, hopefully on the tail of that thought would be the pivotal question of "How much time am I willing to serve?"

If you have received a formal letter or an in-person visit from an IRS agent or two (they usually come in pairs), I'd suggest you give my office a call and we'll get to work on keeping you on the right side of the bars.

Intent and Tax Evasion

Tax evasion is formally codified as 26 U.S.C. § 7201, and occurs when someone "willfully attempts in any manner to evade or defeat any tax imposed by this title." Basically, tax evasion is when a taxpayer intentionally avoids their tax liabilities.

When people think of tax crimes, tax evasion is generally what comes to mind. Some classic examples of tax evasion include underreporting of income, hiding sources of money, and falsifying records.

The tax evasion statute actually covers two different types of evasion. You can be charged with tax evasion for the evasion of assessment or payment. Sansone v. United States, 380 U.S. 343, 354 (1965). See also,

United States v. Shoppert, 362 F.3d 451, 454 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Mal, 942 F. 2d 682, 687-88 (9th Cir. 1991) (if a defendant transfers assets to prevent the I.R.S. from determining his true tax liability, he has attempted to evade assessment; if he does so after a tax liability has become due and owing, he has attempted to evade payment).

Evasion of assessment is when the individual attempts to avoid the collection of a tax by preventing the IRS from becoming aware that an unpaid tax is due. Most commonly, this is done by filing an incorrect tax return which leaves out or underreports income. See id. For example, John Doe works a 9 to 5 job for a company and includes his income from this job on his tax return.

Good so far, but John Doe also flips properties as a side gig. This year, John Doe has been renting out some of these properties. He receives monthly rent payments, but purposefully does not include these rent payments on his tax return. John Doe could be charged with evasion of assessment.

Evasion of payment is when the IRS is aware of the tax liabilities, but the individual attempts to prevent the IRS from collecting that tax. See id. This most commonly occurs by concealing money or assets out of reach of the IRS.

For example, Jane Doe has a bank account in Switzerland. Jane Doe does not report this account to the IRS and moves a substantial portion of her income into this offshore account to avoid paying taxes. Jane Doe could be charged with evasion of payment.

It is important to note that tax evasion and tax avoidance are not the same thing. Tax avoidance, when done correctly, is not a crime. See Gregory v. Helvering, 293 U.S. 465, 469 (1935). Tax avoidance is a legal use of methods to reduce the amount of taxable income or tax owed. See Internal Revenue Service, Understanding Taxes, Worksheet Solutions https://apps.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws_ans_thm01_les03.pdf. Some examples of these legal methods are claiming applicable deductibles or putting money into an IRA or 401(k) account. See id.

How Does the Government Prove Tax Evasion?

In order to successfully prove tax evasion, the Government must prove each of an essential set of facts called elements, beyond a reasonable doubt. See supra. How are Charges Selected? United States v. Marashi, 913 F.2d 724, 735-36 (9th Cir. 1990); United States v. Williams, 875 F.2d 846, 849 (11th Cir. 1989). If the Government fails to prove any one of these elements, the defendant should not be found guilty.

So, what are the elements for tax evasion?

1. An attempt to evade or defeat a tax or the payment of a tax;
2. An additional tax due and owing; and,
3. Willfulness.

Sansone v. United States, 380 U.S. 343, 351 (1965); Spies v. United States, 317 U.S. 492 (1943); United States v. Lavoie, 433 F.3d 95, 97-99 (1st Cir. 2005); United States v. Farnsworth, 456 F.3d 394, 401-03 (3d Cir. 2006).

Attempt to Evade

First is the attempt to evade. This element is a bit different if you are being charged with evasion of assessment or evasion of payment.

To prove evasion of assessment, the Government has to point to some affirmative action taken by the taxpayer for the purpose of attempting to evade or defeat the assessment of a tax. This affirmative action is important because simple neglect or failure to do something would not meet the requirement for an attempt to evade. United States v. Masat, 896 F.2d 88, 97-99 (5th Cir. 1990).

For example, not filing a tax return would not necessarily count as an attempt to evade assessment, but filing a fraudulent tax return would. Similarly, if you fail to file a tax return and you engage in misleading conduct such as destroying records, that could amount to an attempt to evade assessment as well. Spies v. United States, 317 U.S. 492, 498-99 (1943). See also, United States v. Brooks, 174 F.3d 950, 954-56 (8th Cir. 1999); United States v. Meek, 998 F.2d 776, 779 (10th Cir. 1993).

The key difference in the latter examples is a deceptive act. It doesn't matter if the taxpayer's main reason for this affirmative action is something other than avoiding taxes. As long as the Government can show that tax evasion was a part of the motivation for the dishonest conduct, it can still count as an attempt to evade assessment. United States v. Voight, 89 F.3d 1050, 1090 (3d Cir.), cert. denied, 519 U.S. 1047 (1996).

For evasion of payment, the affirmative act is generally going to be some form of hiding money or assets out of reach of the IRS. Like evasion of assessment, a failure to do something alone is not enough. The simple failure to pay your assessed taxes, without some other misleading conduct, would not constitute evasion of payment.

Examples of this misleading conduct for evasion of payment include hiding assets in family or friends' bank accounts, keeping assets off the books (using only cash, not keeping financial records, not using banks or credit cards), making false statements about assets or property owned, and untruthfully declaring bankruptcy to prevent the collection of a tax.

See, e.g., United States v. Huebner, 48 F.3d 376, 379-80 (9th Cir. 1994) (the defendant, having created false loan documents and then filed for bankruptcy, was successfully prosecuted for evasion of payment.); United States v. Shorter, 809 F.2d 54, 56-57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987); United States v. Shoppert, 362 F.3d 451, 460 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Brimberry, 961 F.2d 1286,1290-91 (7th Cir. 1992); United States v. McGill, 964 F.2d 222, 233 (3d Cir. 1992).

If one affirmative act was done with the intention to evade the payment of taxes over multiple years, the Government can charge a taxpayer with evasion for all of these years together. United States v. Shorter, 809 F.2d

54, 56-57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987)(upholding use of a single count of tax evasion covering twelve years of evasion of payment where the underlying basis of the count is an allegedly consistent, long-term pattern of conduct directed at the evasion of payment of taxes for those years).

Additional Tax Due

For both types of tax evasion, the Government also has to prove that there was a tax deficiency (some tax actually owed that hasn't been paid). To do this, the Government has to prove that the income in question was actually taxable. See, U.S.C. §§ 61, 62 and 63. Illegal sources of income such as gambling, drug proceeds, and kickbacks are actually taxable. See e.g., McClanahan v. United States, 292 F.2d 630, 631-32 (5th Cir.), cert. denied, 368 U.S. 913 (1961); United States v. Sallee, 984 F.2d 643 (5th Cir. 1993); United States v. Swallow, 511 F.2d 514, 519 (10th Cir.), cert. denied, 423 U.S. 845 (1975); United States v. Wyss, 239 F.2d 658, 660 (7th Cir. 1957).

The prosecutor doesn't need to show an exact amount by which the taxpayer was deficient, but many states require that it be substantial. See e.g. United States v. Johnson, 319 U.S. 503, 517-18 (1943); United States v. Mounkes, 204 F.3d 1024, 1028 (10th Cir.), cert. denied, 530 U.S. 1230 (2000); United States v. Bender, 606 F.2d 897, 898 (9th Cir. 1979); United States v. Marcus, 401 F.2d 563, 565 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969) ;United States v. Alker, 260 F.2d 135, 140 (3d Cir. 1958), cert. denied, 59 U.S. 906 (1959).

Willfulness

The last element of tax evasion is willfulness. This element is important to many of the tax crimes. The formal definition of willfulness is the "voluntary, intentional violation of a known legal duty." Cheek v. United States, 498 U.S. 192, 200-01 (1991); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Pensyl, 387 F.3d 456, 458-59 (6th Cir. 2004); United States v. George, 420 F.3d 991, 999 (9th Cir. 2005). Essentially, it means you meant to do it.

Willfulness is a subjective test, meaning if the taxpayer had good faith belief that he is not violating a tax law, he has a legitimate defense to tax evasion. Cheek v. United States, 498 U.S. 192, 199-201 (1991). See also, United States v. Grunewald, 987 F.2d 531, 535-36 (8th Cir. 1993); United States v. Pensyl, 387 F.3d 456, 459 (6th Cir. 2004). However, this does not mean the taxpayer should get too comfortable.

Willfulness can be inferred from intentionally misleading conduct such as concealing or covering up income. The taxpayer also can't simply turn a blind eye to an obvious tax liability. United States v. Willis, 277 F.3d 1026, 1031-32 (8th Cir. 2002); United States v. Dean, 487 F.3d 840, 851 (11th Cir. 2007).

Venue

The Government also has to show that the case was charged in the right place. See infra. For tax evasion crimes, venue is appropriate in the area that the crime was committed. Specifically, venue is proper in any judicial district where the tax return in question was made, signed, or filed. See,

e.g., United States v. Marchant, 774 F.2d 888, 891-92 (8th Cir. 1985), cert. denied, 475 U.S. 1012 (1986)(venue appropriate where accountant prepared return); United States v. King, 563 F.2d 559, 562 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978)(prepared and signed); United States v. Gross, 276 F.2d 816, 819 (2d Cir.), cert. denied, 363 U.S. 831 (1960) (prepared); United States v. Albanese, 224 F.2d 879, 882 (2d Cir.), cert. denied, 350 U.S. 845 (1955)(prepared and mailed).

Statute of Limitations

Tax evasion also has to be charged by the Government within the timeframe provided by the law, called the statute of limitations. The statute of limitations for tax evasion is six (6) years. 26 U.S.C § 6531(2).

There is some debate as to when the six (6) years begins, but the general rule is that the Government has (6) years to charge tax evasion from the date of the last action taken to evade the tax, or from the date that the tax return in question was due, whichever is later.

What is the Punishment for Tax Evasion?

Punishment for a crime varies based on the specific facts of the case as well as the Defendant's criminal history. However, if you are convicted of tax evasion, you could be facing some serious penalties.

Tax Evasion is a class E felony. It can be punished by up to five years in prison or five years of probation (you can also have a split sentence of some prison time and some probation time), and a fine of up to $100,000 (or $500,000 for a company), plus the costs to the Government for prosecuting the crime. 26 U.S.C. § 7201

CONCLUSION

If you've read this entire article, you should clearly know the difference between tax avoidance and tax evasion – sometimes quoted as "the difference between them being the thickness of a prison wall." In simple terms, putting money away in an IRA or 401(k) is considered tax avoidance. Not claiming the income you're making painting houses on weekends is tax evasion.

If you figured out the difference between the two a little late in the game, and are now facing possible felony charges for tax evasion, give my office a call. We will examine your situation and together decide on the best defence for your remuneration and acquittal.

17 What is Criminal Tax Fraud and False Statement?

INTRODUCTION

There have been many stories written and reported about Donald Trump's confidential tax returns and financial records. According to a NY Times article, there exists "a trove" of records showing that Mr. Trump helped his father sequester millions of dollars from the IRS.

Trump declined to comment on this particular article, but one of his lawyers, Mr. Charles J. Harder, stated that Trump "had virtually no involvement whatsoever with these matters...the affairs were handled by other Trump family members who were not experts themselves and therefore relied entirely upon licensed professionals to ensure full compliance with the law."

If you and/or your tax preparer have expertly or inexpertly taken false tax deductions or supplied fraudulent income statements and have now come to the attention of the IRS, you may be charged with the criminal tax act of fraud and false statement. If this is the case, it would be a very good idea to get in touch with me.

Understanding Fraud and False Statement

As you will come to more fully comprehend, fraud and false statements are two of the most commonly charged tax crimes. 26 U.S.C. § 7206 (1) and (2) makes it a crime to deliberately make or assist another person in making any IRS document that the maker does not believe to be true and correct.

If the Trump case and point isn't clear enough, here's a more simple example: John Doe is filling out his tax return. John Doe makes $87,000.00 annually, but he doesn't like the number seven, so decides to round down to $80,000.00. John Doe signs his return and mails it into the IRS using the $80,000.00 number. John Doe could be charged with making a false return under section 7206(1).

Say John Doe actually asked his friend in accounting school for help, and his friend tells him to round down to $80,000.00 (consequently putting John Doe in a new tax bracket) and send it in, his friend could be charged for assisting under section 7206(2).

The offense of aiding or assisting in the preparation or presentation of a false document is intended to target tax return preparers, but there is no requirement that the individual be a professional.

Anyone who knowingly assists in any way in the preparation of an IRS document that is untruthful, can be found guilty of this crime. United States v. McCrane, 527 F.2d 906, 913 (3d Cir. 1975), vacated on other grounds, 427 U.S. 909, reaff'd in relevant part on remand, 547 F.2d 204 (3d Cir. 1976) (per curiam).

The statute "has a broad sweep, making all forms of willful assistance in preparing a false return an offense." United States v. Hooks, 848 F.2d 785, 791 (7th Cir. 1988).

In our example John Doe was filling out a tax return, and this is one of the most common false documents, offenses under these sections are not limited to only tax returns.

Any document which is signed under the penalty of perjury can fall under section 7206. United States v. Marston, 517 F.3d 996, 1002 (8th Cir. 2008). This becomes important in a situation where the form doesn't actually count as a return. If instead fake numbers, John Doe filed a form with all blanks or symbols, this may not be legally considered a tax return. However, the Government could still charge with John Doe with filing a false document. See e.g., United States v. Mosel, 738 F.2d 157, 158 (6th Cir. 1984); United States v. Rickman, 638 F.2d 182, 184 (10th Cir. 1980); United States v. Moore, 627 F.2d 830, 835 (7th Cir. 1980); United States v. Smith, 618 F.2d 280, 281 (5th Cir.1980), United States v. Long, 618 F.2d 74, 75 (9th Cir. 1980).

How Does the Government Prove Fraud and False Statement?

In order to successfully prove a crime of fraud and false statement, the Government must prove each of an essential set of facts, called elements, beyond a reasonable doubt. See supra. *How are Charges Selected?* United States v. Marashi, 913 F.2d 724, 735-36 (9th Cir. 1990); United States v. Williams, 875 F.2d 846, 849 (11th Cir. 1989). If the Government fails to prove any one of these elements, the defendant should not be found guilty.

The elements of fraud or false statement under section 7206(1) are:

1. The making and singing of a false IRS document which states that the document is being signed under the "penalties of perjury";
2. The document was false as to a material matter;
3. The taxpayer making the false IRS document did not believe it was true and correct as to every material matter; and
4. Willfulness.

See United States v. Bishop, 412 U.S. 346, 350 (1973); United States v. Mathews, 761 F.3d 891, 893 (8th Cir. 2014); United States v. Hendrickson, 664 F.Supp.2d 793, 810-11 (E.D. Mich. 2009); United States v. Marabelles, 724 F.2d 1374 (9th Cir. 1984); United States v. Engle, 458 F.2d 1017 (8th Cir. 1972).

For the offense of aiding and assisting, the defendant does not actually need to make or sign the document. Section 7206(2) only has three elements:

5. The defendant helped, assisted, or advised the preparation or presentation of an IRS document;
6. The document was false as to a material matter; and
7. Willfulness.

Like the omission crimes, there is no need here for the Government to show that there was a tax actually due. See United States v. Mathews, 761 F.3d 891, 894 (8th Cir. 2014). The focus of these offenses is not a tax deficiency, but providing known false information to the IRS.

"Making" and Signing a False Document

In order for a taxpayer to be found guilty of fraud or false statement under section 7206 (1), the taxpayer has to actually file the false IRS document. See, United States v. Boitano, 796 F.3d 1160 (9th Cir. 2015) ("Filing" is an element of a conviction under § 7206(1)). See United States v. Swanson, 112 F.3d 512 (Table), at * 1-2 (4th Cir. 1997); see also United States v. Gilkey, 362 F. Supp. 1069, 1071 (E.D. Pa. 1973); United States v. Horwitz, 247 F. Supp. 412, 413-14 (N.D. Ill. 1965)).

If you fill out a false tax return, sign it, and leave it sitting on your desk, you have not technically "made" a false return as required under the statute. A tax return can be filed electronically, mailed to an IRS service center, or handed in person to an authorized agent of the IRS in order to meet this condition. §6091(b)(4) and Reg.§1.6091-2.

The Government also has to show that the defendant signed the document under penalty of perjury. The penalty of perjury part is fairly straightforward. The document simply needs to contain language stating that the signer declares the information to be true under penalty of perjury.

The defendant doesn't need to personally sign the document, if he gave permission for the return to filed with his signature. United States v. Ponder, 444 F.2d 816, 822 (5th Cir. 1971).

If you are being charged with the offense of aiding or assisting under section 7206 (2), there is no filing or signing requirement, because you do not actually need to make or prepare the false document.

As long as the defendant willfully had a part in the preparation of a false document or caused a false document to be filed, he or she can be convicted. Therefore, the Government may bring charges under § 7206 (2) even if the false document was not actually filed. United States v. McLain, 646 F.3d 599, 604 (8th Cir. 2010). See also United States v. Cutler, 948 F.2d 691, 695 (10th Cir. 1991); United States v. Monteiro, 871 F.2d 204, 210 (1st Cir. 1989).

The courts have stated that the filing requirement would not make sense for the crime of aiding or assisting a false statement because results of an undercover operation would be useless. The undercover agent would never actually file the fake document, and the crime would not be completed. United States v. Borden, 2007 WL 1128969.

False As To A Material Matter

Just because information on a IRS document is untrue, does not mean the government could support a false statement charge. The dishonest portion of the document must be material.

False information is material if it has or likely could have an effect on the IRS carrying out its duties or calculating a tax. United States v. Griffin, 524 F.3d 71, 76 (1st Cir. 2008) (citations omitted) ; United States v. McBane, 433 F.3d 344 (3d Cir. 2005).

Even if the IRS wasn't actually influenced or affected by the fake information, the information is still material if it had the possibility of influencing or impacting the IRS in their duties, or if the taxpayer intended the false information to have that effect. Genstil v. United States, 326 F.2d 243, 245 (1st Cir. 1964); accord United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975).

A false statement on an IRS document can still be material even if it is so ridiculous there is no reason that the IRS would assume it was serious. See United States v. Winchell, 129 F.3d 1093, 1098 (10th Cir. 1997). Omitting material information can also be considered false information. See United States v. Cohen, 544 F.2d 781, 783 (5th Cir. 1977).

Some examples of material information are the source of the income, total income, and improperly claimed deductibles. See e.g., United States v. Engle, 458 F.2d 1017, 1019-20 (8th Cir. 1972); United States v. Vario, 484 F.2d 1052, 1056 (2d Cir. 1973); United States v. DiVarco, 484 F.2d 670, 673 (7th Cir. 1973); United States v. Sun Myung Moon, 532 F. Supp. 1360, 1367 (S.D.N.Y. 1982).

Belief and Willfulness

If the taxpayer makes an inaccurate statement on an IRS form, it doesn't automatically mean they are in violation of section 7206(1). Under this section, the Government has to prove that the taxpayer did not believe that the statements were true, and that he or she made them willfully. See United States v. Balistrieri, 346 F. Supp. 341 (E.D. Wis. 1972); United States v. Scarberry, 208 F.3d 228 (10th Cir. 2000); United States v. Jernigan, 411 F.2d 471 (5th Cir. 1969); Escobar v. United States, 388 F.2d 661 (5th Cir. 1967); Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950).

The term willfulness has the same meaning here as it does in the previous sections. See supra. *How Does the Government Prove Tax Evasion*, Willfulness.

The taxpayer can file an amended return after filing a false return. The Government can't use the fact that the taxpayer filed an amended return alone to show willfulness. United States v. Dyer, 922 F.2d 105, 108 (2d Cir. 1990).

The Government can use circumstantial evidence (evidence which doesn't directly support a conclusion, but requires an inference to make a conclusion from a set of

facts) to show that the taxpayer knew about the contents of the document. United States v. Lavoie, 433 F.3d 95, 98 (1st Cir. 2005); United States v. Boulerice, 325 F.3d 75, 80 (1st Cir. 2003); United States v. Ytem, 255 F.3d 394, 396-397 (7th Cir. 2001).

If the taxpayer signed their name to the document, this could show that he or she was aware of the information in it. United States v. Mohney, 949 F.2d 1397, 1407 (6th Cir. 1991), United States v. White, 879 F.2d 1509, 1511 (7th Cir. 1989); United States v. Gaines, 690 F.2d 849, 854 (11th Cir. 1982); Paschen v. United States, 70 F.2d 491, 499 (7th Cir. 1934).

However, if the taxpayer relied on a professional, and can show that he or she provided the professional preparer with complete information, this is an affirmative defense to the crime of fraud or false statement under section 7206(1). See United States v. Tandon, 111 F.3d 482, 490 (6th Cir.1997).

For the offense of aiding or assisting under section 7206(2), a defendant can be found guilty of this charge whether or not the preparer assisting was aware of the false information. United States v. Jennings, 51 Fed. Appx. 98, 99-100 (4th Cir. 2002) (per curiam) (citations omitted). Even if the taxpayer knew the information on the document was false and chose to submit it, this fact does not absolve the preparer of liability.

Similar to the defenses under 7206(1) of reliance on a professional, a tax preparer could defeat a charge of aiding or assisting if they can show they relied in good faith on the information provided by a client.

However, if the information the client provided appears to be fake, the preparer must make reasonable inquiries to confirm this information. United States v. Akaoula, 1999 WL 61393, *1 (10th Cir. Feb. 10, 1999) (unpublished).

For the actions of the defendant to be willful under 7206(2), the defendant had to know that the actions likely would result in the filing of a false document, or intend for his actions to result in the filing of a false document. See e,g., United States v. Greer, 607 F.2d 1251, 1252 (9th Cir. 1979) ("section 7206(2) requires that the accused must know or believe that his actions will likely lead to the filing of a false return"); United States v. Salerno, 902 F.2d 1429, 1433 (9th Cir. 1990) (casino worker's conviction reversed because he did not know that his embezzlement scheme would influence false filing); United States v. Aracri, 968 F.2d 1512, 1523 (2d Cir. 1992) cf. United States v. Gurary, 860 F.2d 521, 523-24 (2d Cir. 1988).

Going back to the John Doe example, the Government may not be able to show willfulness if instead of giving John Doe specific advice to round down on his tax return, John Doe's friend was just telling an unprompted cocktail party story about a guy who rounded down on his tax returns.

John Doe's friend could argue he had no intention of causing John Doe to file a false tax return and no idea that this offhand story would influence John Doe to do so.

Venue

The Government can properly bring a charge under §7206, in any district where the document was signed, filed, or the acts of aiding and assisting took place. See e.g., United States v. Rooney, 866 F.2d 28, 31 (2d Cir. 1989); United States v. Hirshfield, 964 F.2d 318, 321 (4th Cir. 1992); United States v. Newton, 68 F. Supp. 952 (W.D. Va. 1946), aff'd, 162 F.2d 795 (4th Cir. 1947).

Statute of Limitations

The statute of limitations for the crime of fraud and false statement under 26 U.S.C. § 7206 (1) and (2) is six years.

For a false tax return, the Government has six years to bring charges from the date of filing. However, if the tax return was filed early, the Government has the full six years from the statutory due date (i.e. April 15th) for filing. 26 U.S.C. § 6531(5); United States v. Habig, 390 U.S. 222, 225 (1968); United States v. Marrinson, 832 F.2d 1465, 1475-76;.

For section 7206(2) the six years begins at the time the false document was filed. United States v. Kelly, 864 F.2d 569, 74-75 (7th Cir. 1989); United States v. Nuth, 605 F.2d 229, 235 (6th Cir. 1979); United States v. Kassouf, 959 F. Supp. 450, 452 (N.D. Ohio 1997).

What is the Punishment for Fraud and False Statement?

Punishment for a crime varies based on the specific facts of the case as well as the Defendant's criminal history. However, if you are convicted of a false and fraudulent statement, you could be facing some serious penalties.

Offenses under 26 U.S.C. § 7206 (1) and (2) can be punished by up to three years in prison or five years of probation (you can also have a split sentence of some prison time and some probation time), and a fine of up to $100,000 (or $500,000 for a company), plus the costs to the Government for prosecuting the crime.

CONCLUSION

A fine of $500,000 might be a slap on the wrist for a man or woman of Donald Trump's wealth. Prison and probation might be a different story, however, and in a case like this, a few months or a couple of years in a cell might grind home a point. Losing one's freedom and privileges could be said to be a priceless lesson.

If you have tried to save yourself a few bucks cheating on your taxes – let's call it what it is – as many people do, and you've had the "misfortune" to have the IRS get wind of it, give me a call and we'll work out a plan to keep you out of jail and get you back on the straight and narrow path that, for a short time, you veered from.

18 What is the Omnibus Clause?

INTRODUCTION

Lying about taxes, or in any other way trying to skirt the investigation of the government, is, to put it lightly, a risky move. The IRS is fairly unforgiving when taxes are filed incorrectly, so how do you think it will react to corruption?

Illegally interfering, or even threatening to interfere with an investigation can land a taxpayer in a lot of trouble. The following definition of the Omnibus Clause explains the process of what will happen if there is interference or an attempt to corrupt an investigation by the taxpayer.

The Omnibus Clause

The Omnibus Clause is the second portion of 26 U.S.C. § 7212(a) and it prohibits the use of force or any corrupt act which interferes or attempts to interfere with the administration of the Internal Revenue Code. United States v. Bostian, 59 F.3d 474, 477 (4th Cir. 1995); United States v. Popkin, 943 F.2d 1535, 1539 (11th Cir. 1991).

The first portion of this statute is known as the Officer Clause. See United States v. Przybyla, 737 F.2d 828, 829 (9th Cir. 1984). The Officer Clause makes it illegal to use force or threats to interfere with or intimidate any agents or officers acting in their duties under the IRC. As the Officer Clause is more specific, it is not as frequently charged, so the focus of this section will be on the Omnibus Clause.

The Omnibus Clause requires that some action be taken, and generally occurs after a tax return has been filed and the taxpayer is attempting to obstruct an investigation or civil audit. The attempt does not actually need to be successful. Croteau, 819 F.3d01293 at 1308.

For example, CI agents have visited John Doe, and he knows that they are looking into his tax records. John Doe, concerned about the outcome, offers up the incorrect records in an attempt to throw them off the trail. The CI agents realize these are the wrong

records, and request the correct ones. John Doe could still be charged with an attempt to interfere with the internal revenue laws.

How does the Government Prove an Attempt to Interfere with Internal Revenue Laws?

In order to successfully prove that the Defendant violated the Omnibus Clause under this statute, the Government has to prove each of an essential set of facts, called elements, beyond a reasonable doubt. See supra. How are Charges Selected? United States v. Marashi, 913 F.2d 724, 735-36 (9th Cir. 1990); United States v. Williams, 875 F.2d 846, 849 (11th Cir. 1989).

The three elements for this clause are that the Defendant:

1. corruptly;
2. endeavored; and
3. to obstruct or impede the due administration of the Internal Revenue Code.

United States v. Williams, 644 F.2d 696, 699 (8th Cir. 1981); United States v. Marek, 548 F.3d 147, 150 (1st Cir. 2008).

Corruptly

For the other tax crimes we've looked at, the Defendant's actions have to be willful. In the case of attempting to interfere with internal revenue laws under the Omnibus Clause, the specific intent of "corruptly" takes the place of willful. See United States v. Floyd, 740 F.3d 22, 31 (1st Cir. 2014). To prove that the defendant acted corruptly under this statute, the Government has to show that he or she intended to obtain some type of unlawful advantage or benefit. United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991). The benefit does not have to be for the defendant himself. The defendant can still act corruptly if the intended benefit is for another person. See id.

There is no requirement that the action taken is unlawful, it only matters that the defendant hoped to obtain an unlawful benefit through the action. See id. The defendant may corruptly endeavor to impede an IRS action by threatening to do something, such as filing lawsuits without merit. See United States v. Miner, 774 F.3d 336, 347-48 (6th Cir. 2014). If the actions taken are only to harass or annoy the IRS agent, this may not rise to the level of "corrupt" under the statute. United States v. Reeves, 752 F.2d 995, 999 (5th Cir. 1985).

Endeavored

The Omnibus Clause refers to a crime of attempt. This means the defendant doesn't have to be successful in actually completing the act- it is enough that he or she attempted to do it. The element of endeavored is officially defined as, "any effort . . . to do or accomplish the evil purpose that section was intended to prevent." Osborn v. United States, 385 U.S. 323 (1966).

While the courts have not specifically answered the question of whether a failure to do something, such as in the crimes of omission, could be could be considered an endeavor, the Tax Division's policy is that

the Omnibus Clause should generally not be based upon an omission, including a failure to file a tax return. CTM 17.03.

Obstruct or Impede the Due Administration of the Internal Revenue Code

The Supreme Court broke down this third element further, and held that essentially, the Government has to prove two sub-elements. These sub-elements were taken from the words "due administration of the Internal Revenue Code." See Marinello v. United States, 138 S. Ct. 1101 (2018). The Supreme Court found that this language referred only to "specific, targeted acts of administration," rather than a general routine procedure done with all taxpayers, such as a review of tax returns. Id.

Following this decision, the Government must also prove that:

4. there was a targeted administrative IRS action which the Defendant either knew of or could reasonably see coming; and

5. there was some relationship connecting acts- a "nexus"- between the defendant's attempt to interfere with IRS action and the targeted action that was occurring or reasonably foreseeable. Id.

In other words, a conviction under the Omnibus Clause will only hold up if the Defendant's attempt was related to his knowledge or awareness of the possibility of some specific IRS administrative proceeding, such as the administrative investigation we discussed previously. Civil audits will also count as the required specific administrative proceeding. on and the targeted action that was occurring or reasonably foreseeable. See Id. The Supreme Court didn't provide a list of what actions would not count as specific administrative proceeding, but "routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns" would not meet the standard. See Id. at 1110.

In the legal world, a nexus is defined as a relationship in time, causation, or logical relationship connecting acts. In the case of the Omnibus Clause, the nexus requirement is defined as having the "'natural and probable effect' of interfering with the due administration of justice." United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993). The idea behind this requirement is if the defendant was unaware of the fact that there was any proceeding to obstruct, or that his or her actions could obstruct an IRS administrative proceeding, the defendant would not have the intent required.

Venue

The Government also has to show that the case was charged and will be tried in the right place. See supra For an Omnibus Clause offense, the proper venue is in the judicial district where the defendant committed the corrupt endeavor to interfere with an IRS administrative proceeding. However, the Government should not bring charges in the place where the IRS was carrying out the proceeding if this is not the same place where the attempt to gain an unlawful advantage was made. United States v. Marsh, 144 F.3d 1229 (9th Cir. 1998).

Statute of Limitations

The statute of limitations for interference with the administration of the Internal Revenue Laws is six years. The six years begins on the date of the last action the defendant took that can be considered a corrupt endeavor to impede and impair the due administration of the tax code. 26 U.S.C. § 6531(6); United States v. Adams, 955 F.3d 238, 251 (2d Cir. 2020).

The general rule is that tax crimes have a three-year statute of limitations, but there is an exception for the "the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States)." 26 U.S.C. § 6531. While the exception only specifically mentions the Officer Clause, the courts have stated that the example given in the parenthesis is meant to explain the exception rather than limit it to the first clause, making the six-year statute of limitations applicable to the Omnibus Clause as well. See United States v. Workinger, 90 F.3d 1409 (9th Cir. 1996).

What is the Punishment for Interfering with Internal Revenue Laws?

Punishment for a crime varies based on the specific facts of the case as well as the Defendant's criminal history. However, the law allows defendants convicted of interfering with internal revenue laws to be given up to three years in prison and a $5,000.00 fine. 26 U.S.C. § 7212(a). If the defendant committed the crime by only *threatening* to use force, the maximum penalty is one year in a prison and a $3,000.00 fine. See id.

CONCLUSION

If you are charged with a violation of the Omnibus Clause, it is extremely important to contact a defense lawyer who knows tax law. Once the Omnibus Clause is laid down, it has gone beyond the taxpayer paying only a financial restitution – a prison sentence is now on the table.

The IRS does not go easy on people who violate the tax code, and they especially don't go easy on people who corruptly interfere with their investigation.

If you are in this position or want more information, call me. With my resources and experience, I can help make a case that will defend you.

19 What are Tax Crimes of Omission?

Death. Taxes. The words added together give us the well-known slogan about the two certainties of life: death and taxes. Is it unfair to pair "taxes" with "death"? Maybe, but only because taxes are treated so (pardon the pun) gravely.

The tax crime of omission is in fact very serious, and can lead to severe punishment if not handled correctly. The following includes its definition, factors the government must prove, and how my firm can help someone who has been charged with it.

The Crime of Omission

Under 26 U.S.C. § 7203, it is a crime to intentionally fail to file a return, pay a tax, keep necessary records, or provide information that is required by the IRS. Any of these four separate offenses, on their own, is a violation of this section.

Unlike tax evasion, these four crimes can be established without affirmative action. See, e.g., Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Mal, 942 F.2d 682, 684 (9th Cir. 1991). ("What distinguishes [the felony offense of evasion] from the misdemeanor offense of willful failure to file a return, supply information, or pay taxes, which is set out in 26 U.S.C. § 7203, is the requirement of an affirmative act."). Under this statute, the simple fact that you intentionally and knowingly didn't do the thing you were required to do by the law could be enough to support a charge.

A failure to file a tax return is one of the most commonly charged tax crimes. A failure to file happens when a taxpayer who was required to file a return failed to do so. However, just because you sent in a tax form, doesn't necessarily mean you successfully filed a tax return. United States v. Porth, 426 F.2d 519, 522-23 (10th Cir.), cert. denied, 400 U.S. 824(1970). If the tax form doesn't have sufficient information about your income, you could still be charged with a failure to file. See id.

Failure to pay a tax is the second most commonly charged offense under this section of the IRC. Simply put, a failure to pay a tax occurs when the taxpayer knows they were legally required to pay a tax, but didn't. In most failure to pay cases, the taxpayer already filed a tax return, but failed to pay the associated tax.

How Does the Government Prove Failure to File, Pay Tax, Keep Records, or Supply Information?

In order to successfully prove the tax crimes of omission, the Government must prove each of an essential set of facts, called elements, beyond a reasonable doubt. See supra. *How are Charges Selected?* United States v. Marashi, 913 F.2d 724, 735-36 (9th Cir. 1990); United States v. Williams, 875 F.2d 846, 849 (11th Cir. 1989). If the Government fails to prove any one of these elements, the defendant should not be found guilty.

The elements for failure to file, pay tax, keep records, or supply information are:

[a] A duty under the Internal Revenue Code to pay a tax, file a return, keep records or supply information.

[b] A failure to perform that duty.

[c] Willfulness.

United States v. Marinello, 2015 WL 13158491, *5 (W.D.N.Y. 2015); see also United States v. Hassebrock, 663 F.3d 906, 919 (7th Cir. 2011); United States v. McBride, 2014 WL 4699126 (D.Utah) (2014).

Willfulness

Willfulness for the misdemeanor offenses under this statute has the same meaning as it does for the felony crime of tax evasion. See supra. *How Does the Government Prove Tax Evasion*, Willfulness. It is also the same for each of the four offenses, so we'll discuss this element before breaking down any special considerations by offense.

The four offenses outlined in section 7203 specifically require that the taxpayer **knew** and **was aware** of the duty under the law to do one of those actions, but **deliberately** chose not to. Therefore, a good faith misunderstanding of the law is a defense to willfulness, even if the belief isn't that reasonable. See Cheek v. United States, 498 U.S. 192, 201-02 (1991); United States v. Willie, 941 F.2d 1384, 1395 (10th Cir. 1991), cert. denied, 502 U.S. 1106 (1992); United States v. Gaumer, 972 F.2d 723,724 (6th Cir. 1992).

For example, John Doe falls within the category of individuals who has to file a tax return for the year, but John Doe moved to London. John Doe believes that because he now lives in London he doesn't have to file a tax return for the prior year when he was working and living in the United States. Whether or not this is a reasonable belief, John Doe wouldn't *necessarily* be guilty of a failure to file. We say necessarily because the Government could still prove John Doe knew he had a duty to file a return.

For a failure to file, the Government can show that the choice not to file a return was willful through the fact that the taxpayer failed to file tax returns for many years in a row. United States v. McCaffrey, 181 F.3d 854, 857 (7th Cir. 1999).

In our example, if John Doe didn't file any tax returns for the ten years before he moved to London, the Government could point to this fact to show that he willfully failed to file this year. On the other hand, the Government can also use the fact that the taxpayer did consistently file tax returns in prior years to show that the taxpayer knew they were supposed to file their tax return for the year charged. United States v. Poschwatta, 829 F.2d 1477, 1481 (9th Cir. 1987); United States v.Shivers, 788 F.2d 1046, 1049-50 (5th Cir. 1986); United States v. McCabe, 416 F.2d 957,c957-58 (7th Cir. 1969), cert. denied, 396 U.S. 1058 (1970).

In our John Doe example, the Government may have a harder time with this angle, but they could still say that John Doe was aware of his duty to file a return this year because every year like clockwork, John Doe filed a tax return for the prior year.

Special Considerations for Failure to File

Generally, the duty to file a return, which is the first element that the Government has to prove for a failure to file charge, is created by meeting a certain level of total income. 26 U.S.C. § 6012; See United States v. Middleton, 246 F.3d 825, 841 (6th Cir. 2001); see also United States v. McKee, 506 F.3d 225, 245 (3d Cir. 2007). This level of income changes from year to year. See United States v. Clayton, 506 F.3d 405, 409 & nn.1 & 2 (5th Cir. 2007) (noting that the requirement to file taxes is correlated to the "exemption amount").

A failure to perform that duty is a little more complicated. If a tax form is deficient to the point that it does not provide information from which the IRS can calculate your tax liability, it does not count as a return. See e.g., United States v. Mosel, 738 F.2d 157, 158 (6th Cir. 1984); United States v. Rickman, 638 F.2d 182, 184 (10th Cir. 1980); United States v. Moore, 627 F.2d 830, 835 (7th Cir. 1980); United States v. Smith, 618 F.2d 280, 281 (5th Cir.1980), but see United States v. Long, 618 F.2d 74, 75 (9th Cir. 1980) (holding a tax form containing zeros on all of the lines is still a return because tax liability can be computed from zeros.)

Individual taxpayers are required to file a return on or before April 15th of the following year, or the "fourth month following the close of the fiscal year". 26 U.S.C.§ 6072(a). A corporation generally must file by March 15th or the "third month following the close of the fiscal year". 26 U.S.C. § 6072(b). If the date for filing falls on a weekend or holiday, you must file by the next business day (i.e., if April 15th falls on a Saturday you would have to file on Monday. If that Monday happens to be a holiday, you would file on Tuesday). 26 U.S.C. § 7503. Even one day late could be enough for a failure to file charge, but you can legally request an extension.

However, extensions can't be used continuously as a tool to avoid filing your taxes. See, United States v. Goldstein, 502 F.2d 526, 528 (3d Cir. 1974) (filing extension request was not intended as an attempt to comply with the legal requirement to file an income tax return, but solely in an attempt to postpone any possible day of reckoning). If you do file your tax return late, this won't get rid of a prior failure to file. See United States v. Houser, 754 U.S. 1335, 1351 (11th Cir. 2014).

Having a "good reason" that you didn't file your taxes is generally not a defense to the failure to file altogether. See United States v. Dillon, 566 F.2d 702, 703-04 (10th Cir. 1977). For example, it is not enough that the Defendant didn't have the funds to pay taxes. See United States v. Pomponio, 429 U.S. 10, 12 (1976). The Fifth Amendment protection against incriminating yourself is generally not a defense to a failure to file either. See e.g., United States v. Turk, 722 F.2d 1439, 1440-41 (9th Cir. 1983); United States v. Moore, 692 F.2d 95, 97 (10th Cir. 1982). The Fifth Amendment can, however, be claimed for certain questions, such as the source of income, on a filed tax return. United States v. Sullivan, 274 U.S. 259, 263-64 (1927); United States v. Leindendeker, 779 F.2d 1417, 1418 (9th Cir. 1986); United States v. Bulkley, 56 A.F.T.R.2d 85-6205 (10th Cir. 1984).

Special Considerations for Failure to Pay

In order to prove a failure to pay the Government doesn't need to prove that there was a formal assessment of the tax due. 26 U.S.C. § 6151(a); see United States v. Drefke, 707 F.2d 978, 981 (8th Cir. 1983). This means that there doesn't need to be any official record on the IRS books that the individual has a tax debt. Essentially, if you know you need to pay a tax, you need to pay it. The Government can prove a failure to pay using a certified transcript of a taxpayer's account. See, Fed. R. Evid. 803(10); United States v. Neff, 615 F.2d 1235, 1241-42 (9th Cir. 1980).

Just like a failure a file charge, the Government doesn't need to show that you had the money to pay the tax at the time it was due. United States v. Easterday 539 F.3d 1176, 1182 (9th Cir. 2008); United States v. Ausmus, 774 F.2d 772, 725 (6th Cir. 1985); United States v. Tucker, 686 F.2d 230, 233 (5th Cir. 1982).

Venue

For these crimes, the Government can bring the charges in the place where the taxpayer could have performed their duty to file a return, pay a tax, keep records, or provide information (i.e., their district's Internal Revenue Service Center, or where the defendant lives.) 26 U.S.C § 6091.

Statute of Limitations

The statute of limitations, or maximum time in which the Government can bring charges after the crime occurred, for a failure to file a return or pay a tax is six (6) years. 26 U.S.C. § 6531(4). The prosecutor has six (6) years from the date that the tax return or payment in question was due to bring charges. Phillips v. United States, 843 F.2d 438, 443 (11th Cir. 1988).

For a failure to provide information or keep records required by law, the statute of limitations is three (3) years. I.R.C. § 6531(4).

What is the Punishment for a Failure to File, Pay Tax, Keep Records, or Supply Information?

A failure to file, pay a tax, keep records, or supply information is a misdemeanor. It is punishable by up to a year in jail or year of probation and a $25,000 fine (a corporation may pay up to a $100,000 fine). 26 U.S.C. § 7203.

The Tax Division specifically requires that this misdemeanor offense is only used for a failure to comply with a duty. The prosecutor is instructed to upgrade to a felony tax evasion or obstruction charge if the taxpayer "…commit[ed] any act or omission as part of an attempt to evade taxes or obstruct the IRS." Criminal Tax Manual, § 10.02 (2015).

CONCLUSION

The example above with John Doe shows the many ways that the Government can approach an omissions case. The crime is serious and the punishment reflects that. If you are charged with the crime of omission, it is no laughing matter. If you are reading this, you may be looking to avoid a $25,000 fine. If that is the case, we can help.

There are two certainties in life: death and taxes. Let us help make the taxes part seem less like death.

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