

Steve Leimberg's Income Tax Planning Email Newsletter Archive Message #182

Date:18-Jul-19

Subject: Mary Vandenack's Notes from the NYU 11th Annual Tax Controversy Forum

The **11th Annual NYU Tax Controversy Forum** was held June 20 and 21 at the Crowne Plaza New York. Members should click this link to review the meeting agenda: [Agenda](#). **Mary E. Vandenack** attended the Forum and agreed to share her notes with **LISI** members.

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary's practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax-exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, Co-Chair of the Law Practice Group and on the Planning Committee. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Editor-in-Chief of Law Practice Magazine. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering in 2015, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law and process automation.

Here is her commentary:

COMMENT:

KEYNOTE ADDRESS – Charles P. Rettig, Esq., Commissioner Internal Revenue Service

Mr. Rettig spoke about his intention to improve the service quality of the Internal Revenue Service. He acknowledged the challenges of contacting the Internal Revenue Service and being put on long holds and then told to call a different number.

Mr. Rettig spoke about some of the challenges and questioning of the IRS over the last few years and expressed appreciation for the dedication of IRS employees who worked through obstacles such a government shutdown and implementation of the TCJA Act. The IRS set a record in processing 15 million returns by April 15, 2019.

Among Mr. Rettig's goals are focusing on low income taxpayers and those with English as a second language and providing respect to such taxpayers. He noted that the IRS is a service business and needs to function as one.

Mr. Rettig indicates he is driven by being active "in every neighborhood" and stated that most people want to be in compliance, and he wants the IRS to assist with everyone being in compliance.

Rettig spoke about Revenue Procedure 64-22. "It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he is "protecting the revenue." In illustrating application of this Rev. Proc., Mr. Rettig used examples of penalties and compliance programs.

"A tax return is not an offer to negotiate." A tax return is signed under the penalty of perjury and those involved should be accountable for what is reported. Tax professionals should ask questions of their clients and seek confirmation.

TAX COMPLIANCE AND ENFORCEMENT UPDATE PART I

IRS Office of the Chief Counsel Update – Michael J. Desmond, Esq., Chief Counsel, Internal Revenue Service.

The organizational structure of the counsel's office. IRS has two parts: Technical and Operations. Technical writes regulations. Operations deals with litigation functions and internal operations. Technical also provides field guidance. Field guidance involves guiding IRS agents with handling of audits and disputes.

Mr. Desmond has established various priorities for the general counsel office. One priority includes connecting with as many IRS attorneys as possible to understand the current climate. Legacy planning is also important. There has been a pause in hiring for many years, which has created some gap as there are retirements and other attrition. As a result, recruitment is one priority.

Taxpayer First Act was recently passed (although awaiting signature by the president's office). The act creates an independent office of appeals. Mr. Desmond indicated that the concern addressed by the act is that historically, the counsel's office has been involved at the exam level and can then be involved at the appeals level. The final bill acknowledges that there are some situations where a limited number of experts exist and makes a complete limitation impractical.

Legislation requires a detailed explanation of any taxpayer not eligible for appeals and an annual report to Congress. Mr. Desmond noted that the IRS does push some cases to court to create precedent. The legislation does seek to provide taxpayers some solutions.

General Counsel's office has a role in developing the rules related to the new partnership audit rules. An increased number of audits is expected and general counsel's office has a role in educating those within the IRS about the rules written by the technical division.

Mr. Desmond's advice to those in private practice regarding dealing with the IRS is to get in to have a constructive conversation at the earliest point possible. He noted that the longer a case goes on with communication, the more likely there may be some negative perspective related to the case. Practitioners should seek to resolve issues early in the process and have counsel office engaged in the process early on.

IRS Large Business & International Division Update – Douglas W. O'Donnell, CPA, Commissioner, Large Business & International Division, Internal Revenue Service

LB&I is anything over \$10 million in assets. One of the LB&I initiatives is a program involving two steps: (1) Apply various criteria to determine risk and taxpayers that should be in LB&I. (2) Use expertise of subject matter experts and data from closed examinations of somewhat similar taxpayers to identify the variables on tax returns that suggest a closer look may be in order.

LB&I is down about forty percent, which limits what they can do. LB&I has been given authority to hire but they have been losing about 7% of its workforce each year. LB&I is seeking to hire thoughtfully in a manner that can support LB&I by bringing in specialists in various areas that are being addressed.

The first step resulted in identifying a larger number of taxpayers that belong in the LB&I arena.

In the international arena, a lot more information is being shared among countries so that risk areas can be identified. The interest level in joint audits involving the US and other countries is increasing. There is a growing interest by other countries in joint audits and compliance.

IRS Small Business/Self-Employed Division Update – Mary Beth Murphy, Commissioner, Small Business/Self Employed Division, Internal Revenue Service and Lisa Beard-Niemann, CPA, Acting Deputy Commissioner, Small Business/Self Employed Division, Internal Revenue Service

SB/SE Mission and Vision is to help small business and self-employed taxpayers understand and meet their tax obligations. Customer base is taxpayer segment, examination, collection and online payment agreements. SB/SE is divided among campus and field organizations. SB/SE is trying to touch as many taxpayers as possible and using data to help achieve that goal.

SB/SE is doing sweeps. A team goes to an area to do examinations, education and outreach.

SB/SE is ending people out in pairs to handle employment tax issues. SB/SE continues passport program.

SB/SE is hiring about 3200 people. About 950 will be in examination. SB/SE has 450 offices around the country. Training is being concentrated. Attrition rates had been exceeding hiring rate.

Various non-filer initiatives are ending. Non-filing is a significant aspect of the tax gap. IRS is building various different programs based on data that is now available. In developing programs, the IRS is looking at how taxpayers are responding to notices and will use the information to support future compliance efforts. The IRS is increasing efforts to identify and target fraud.

The IRS is working with CI, DOJ to develop guidance regarding virtual currency. Exam operations are beginning to identify and work on virtual currency cases.

SB/SE is responsible for a significant number of the provisions of TCJA. Training is being provided online.

IRS Collection Operations Update – Paul J. Mamo, Director, Collection, Internal Revenue Service

The passport program was discussed. Mr. Mamo indicated that the program is having the effect that was intended in terms of improving collections but noted that The Department of State has sole authority to grant or revoke passports. Collections is working on a project to notify and seek to change collection status of delinquent taxpayers. If compliance is not achieved, passport revocation will be sought.

Collection of employment taxes is a high priority for the IRS. Mr. Mamo indicated that almost two thirds of the cases assigned are in the employment tax arena and that efforts to improve compliance are being continued. Data is being used to determine where sweeps should occur.

Mr. Mamo talked about the “egregious” cases and indicated that the IRS is targeting this area and working with the criminal division.

The IRS is engaging in a modernization program. There is some implementation of robotics to address staffing issues. Such programs, such as offer in compromise, are being involved. Authenticated chat has recently been implemented to assist taxpayers in resolving issues with the IRS.

Notices are being re-designed based on behavioral insights. IRS is using data regarding how taxpayers respond to notices. People want to know what to do, where to go and how to do it. IRS is seeking to redesign notices and processes so that taxpayers have better self-service options. Customer callback is also being implemented.

Tax Court Update – The Honorable Maurice B. Foley, Chief Judge, United States Tax Court

ABA made proposal to Tax Court to improve access to the under-served. Response was not immediate, but efforts are being made to improve service to those who don't have representation.

Tax Court has implemented a "limited entry of appearance" program. The program can help attorneys seeking experience to gain the same helping pro se petitioners. Pro se litigants often make arguments based on intuition whereas the Internal Revenue Code is not particularly intuitive.

The Tax Court is seeking to implement technology and is hiring a Chief Information Officer. A goal is to be able to provide a platform that is friendly to professionals and taxpayers. The current platform is from the 1980s. The Tax Court is moving to a modern web-based case management system.

As efforts are made to improve technology, protection of documents and personal information is a priority and requires a balance between availability and protection of personally identifiable information.

The Tax Court is a true circuit court and the judges travel around the country. As judges travel, they engage in outreach efforts and typically meet with local bar associations. The outreach is being expanded beyond visiting law school students to visit colleges, high schools and middle schools to raise awareness of the role and function of tax courts.

ROCK-PARTNERSHIP-HARD PLACE

**Diana L. Wollman, Esq., Partner, Cleary Gottlieb Steen & Hamilton, New York, NY; Guinevere M. Moore, Esq., Partner, Johnson Moore, Chicago, IL; Christopher S. Rizek, Esq., Member, Caplin & Drysdale, Chartered, Washington, DC; Drita Tonuzi, Esq., Deputy Chief Counsel (Operations), Internal Revenue Service, Washington, DC
Clifford M. Warren, Esq., Senior Level Counsel, Office of the Associate Chief Counsel, Internal Revenue Service.**

The BBA changed the partnership examination procedures under the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”). A new regime has been created under which examination and collection occur at the partnership level. The BBA applies to all partnerships for tax years beginning on or after January 1, 2018. Some partnerships can opt out. A challenging change relates to the requirement of having a Partnership Representative (“PR”) to replace the Tax Matters Partner. A Partnership Representative binds the partnership and all of the partners. A Partnership Representative has the sole authority to participate in the audit and to receive notice. Other partners do not have a right to participate and do not receive notice. The Partnership Representative has obligations to the IRS but not to the other partners.

A significant issue in selecting the PR is that the IRS rules prohibit the partnership from changing the PR until after the IRS contacts the partnership regarding an examination. If a person is designated as PR on the partnership return, it is possible that such person could still be the PR even following a termination of that partner with the partnership. It is possible to change a PR by filing an amended return in the form of an administrative adjustment request; however, such request cannot be filed for the sole purpose of changing the PR.

The panel provided some examples of where this can be problematic. A partnership elected a person to be PR for a tax year. The partnership later finds out that such individual is embezzling from the partnership and removes him as a partner. The partnership cannot notify the IRS and change the PR until it receives a notice of audit. Reg. 301-6223-1(e).

There is a similar result if a partner is diagnosed with stage 4 cancer. The partner with cancer cannot resign with respect to the year for which he was appointed as PR until after the IRS issues a notice of administrative

proceeding. Reg. 301-6223-1(d)(2). While it seems problematic that Tom cannot resign, if there is nothing happening in the form of an audit, there is technically no need for him to resign.

Many partnerships are seeking to resolve these issues by appointing entities and having the entity PR name a Designated Individual, which can be changed.

If the IRS determines that a PR is not valid (PR refused to meet, refuses to make books and records available, etc.), then Treas. Reg. 301.6223-1(f) provides for designation of a PR by the IRS. IRS will provide notice to the partnership and 30 days to designate a replacement. After that, the IRS may designate the replacement.

Partnerships should not simply replace the term “Tax Matters Partner” with the term Partnership Representative. The PR generally does not have duties to other partners and other partners do not have rights to participate with the IRS. Partnerships should give consideration to who is designated as PR and design provisions in its partnership agreement or agreement with the PR that creates accountability among partners.

ADVISING NON-COMPLIANT TAXPAYERS: WHEN IS THE UPDATED VOLUNTARY DISCLOSURE PRACTICE THE BEST CHOICE?

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Offshore Voluntary Disclosure Program closed on September 28, 2018; however, unreported offshore accounts remain a target and are on the IRS’s annual “Dirty Dozen” list for 2019.

IRS is using “John Doe: summonses to pursue investigation of certain classes of taxpayers. Such summonses are authorized under IRC §7609(f) and IRM 25.5.7. Summons issued have been fairly sweeping around the

globe and include Switzerland, India, the Bahamas, Barbados, Belize, the Cayman Islands, Guernsey, Hong Kong, the United Kingdom and the U.S.

Some summons that have been issued include one seeking information about Finnish residents using Bank of America, Charles Schwab, and TD Bank Payment Cards linked to Non-Finnish Bank Accounts and one concerning bitcoin users.

IRS LB&I is targeting a group of approximately 6000 taxpayers who were rejected from OVDP before the program closed or who failed to complete the program after acceptance.

Recently announced campaigns include virtual currency compliance; offshore service providers; offshore private banking and campus assessed penalties.

There are increased criminal fraud referrals in the employment tax area.

Voluntary Disclosure Practice is generally available for domestic or offshore issues, including income, excise, employment, estate and gift taxes or virtual currency. Preclearance is required. There is guaranteed civil examination upon acceptance of preclearance request. Disclosure period is generally the most recent 6 years, but IRS reserves the right to reach back further in “egregious” situations. Protection is provided from criminal prosecution if taxpayer is fully cooperative. Closing agreement is still issued.

TAX COMPLIANCE AND ENFORCEMENT UPDATE PART II

IRS Criminal Investigation Division Update – Dan Fort, CPA, Chief, Criminal Investigation Division, Internal Revenue Service

About 1/3 of criminal division referrals are fraud referrals through the IRS. Most of the referrals come from DOJ and other agencies. With the new Commissioner’s priorities and increased staffing, there is an expectation that more fraud referrals will increase.

IRS is seeking to shift to effective use of data to help identify cases that have a criminal. Data has been useful in the employment taxes realm and enforcement has increased and improved.

Department looks at broad spectrum of cases in various jurisdictions to ensure that different types of cases are being pursued as part of the objective is to have a deterrent effect.

There is a focus on developing relationships to international counterparts to support enforcement in the international areas.

Department of Justice Update – Richard E. Zuckerman, Esq., Principal Deputy Assistant Attorney General, Tax Division, US Department of Justice.

Priorities are similar to that of IRS criminal division. Cases are being pursued at all demographic groups to ensure there isn't a perception that if one is in a certain class they won't be pursued.

Cryptocurrency is a growing area. Because the area is complex, training is occurring at the IRS and IRS provides information and training to DOJ.

The primary current benefit of data mining is in employment tax cases and foreign bank cases.

IRS Whistleblower Office Update – Lee D. Martin, PMP, Director, Whistleblower Office, Internal Revenue Service

A group in Ogden, Utah reviews referrals and makes a determination where the referral should go.

Historically, award process would commence after the taxpayer had exhausted all resources. Preliminary Award Recommendation Letters are now issued at the beginning of the process. Thus, whistleblowers know well in advance what potential award is.

Award is based on proceeds collected. Proceeds refers to any revenue that the IRS is authorized to collect.

The Taxpayer First Act is improving the protections for whistleblowers. Additionally, it adds notice requirements so that whistleblowers will receive more information.

AREAS OF CONTROVERSY UNDER THE TCJA

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The TCJA includes 119 tax provisions. Since the date of enactment, IRS has issued 110 formal guidance items, developed resources for taxpayer education and developed in excess of 500 forms.

199A Rental Real Estate Safe Harbor

Rental real estate enterprise safe harbor was provided in Notice 2019-07. Solely for the purposes of 199A, a safe harbor is available to individuals and owners of passthrough entities. Under the safe harbor a rental real estate enterprise will be treated as a trade or business for purposes of the QBI deduction. “Failure to satisfy the requirements of this safe harbor does not preclude a taxpayer from otherwise establishing that a rental real estate enterprise is a trade or business for purposes of section 199A.”

Safe harbor requires that (A) Separate books and records are maintained to reflect income and expenses for each rental real estate enterprise; (B) For taxable years beginning prior to January 1, 2023, 250 or more hours of rental services are performed (as described in this revenue procedure) per year with respect to the rental enterprise. For taxable years beginning after December 31, 2022, in any three of the five consecutive taxable years that end with the taxable year (or in each year for an enterprise held for less than five years), 250 or more hours of rental services are performed (as described in this revenue procedure) per year with respect to the rental real estate enterprise; and (C) The taxpayer maintains contemporaneous records, including time reports, logs, or similar documents, regarding the following: (i) hours of all services performed; (ii) description of all services performed; (iii) dates on which such services were performed; and (iv) who performed the services. Such 8 records are to be made available for inspection at the request of the IRS. The contemporaneous records

requirement will not apply to taxable years beginning prior to January 1, 2019.

Other 199A Issues

Because of lateness of guidance on 199A issues, there were constant updates to the treatment of specific items on returns. Most tax software could not keep up with the pace of change. There may be a high rate of mistakes in returns for 2018 on 199A issues. Amendment could be appropriate for many taxpayers.

Aggregation Rules under 199A

Aggregation rules are likely to result in a significant area in tax controversy.

More Observations on 199A

Nothing was required with 2018 returns reflecting the 199A calculation. Form 8995 has been developed for 2019. 21 FAQs were added to IRS website on April 11. It is unlikely anyone had a chance to review and incorporate those items by April 15. FAQs cannot be relied on; however IRS must have good basis to issue an FAQ before it can be posted on IRS website.

SALT

SALT workarounds are likely to be a significant area of controversy.

IRS Notice 2018-172. A donation to a charity is a charitable donation.

Under the final regulations, a taxpayer making payments to an entity eligible to receive tax-deductible contributions must reduce the federal charitable contribution deduction by the amount of any state or local tax credit that the taxpayer receives or expects to receive in return. The regulations also apply to payments made by trusts or decedents' estates in determining the amount of their charitable contribution deductions.

Increased Tax Risk

There is increased tax risk for all taxpayers given the rapid legislative and regulatory changes. Areas requiring technical correction have been identified but it is difficult to see how necessary corrections will be achieved.

The changes have a significant impact related to international taxation and controversy in the international arena is likely to increase.

Interest Expense Limitation

Limit is not too onerous initially (30% of EBITDA) but has more bite in 2022 when limitation is 30% of EBIT. This is a key change of international payments of interest.

Regulations

Regulations can be used to support work for clients. Regulations are interpreted with canons of construction that include plain meaning, undefined terms, presumption of same meaning, absurd results, specific governs general, surplusage, and strict construction.

Deference standards are provided in *Chevron*, *Skidmore*, *Auer*. *Chevron* applies to regulations. If Congress has spoken and IRS interpretation is reasonable, the regulation is controlling. *Skidmore* applies to sub-regulatory guidance. Guidance is not binding but courts may defer to it if it is persuasive. *Auer* applies to IRS interpretations of ambiguous regulations. IRS interpretation will apply as long as not clearly erroneous or inconsistent with the regulation. Supreme Court has been limiting *Auer* and appears to be on a path to abolish this rule.

If you are going to challenge a regulation, you need to be prepared to litigate. Methods to challenge include “contrary to plain meaning”, APA violations, “new rules being created by regulations”, and unreasonable and unsupported policy positions lacking legislative support. IRS has potential to assert penalties for positions contrary to regulations.

KEYNOTE ADDRESS: OFFICE OF THE TAXPAYER ADVOCATE

Nina E. Olson, Chief Taxpayer Advocate

Nina Olson is retiring on July 31, 2019. Her final report to Congress can be found at: <https://taxpayeradvocate.irs.gov/2020ObjectivesReport>

Nina's presentation at the Tax Controversy Forum was her last public speech as Chief Taxpayer Advocate. Nina is pleased to be going out on passage of the Taxpayer First Act. Her office recommended many of the provisions.

Nina spoke about the false dichotomy between enforcement and service. Enforcement really comes from the criminal division. There needs to be a focus on building trust with taxpayers so that taxpayers will file and comply. Building trust is the path to future voluntary compliance.

Procedural due process means that the IRS gives guidance so that taxpayers know what to do. The late guidance given related to TCJA is a violation of the trust of taxpayers. For example, FAQs were published on April 11 for an April 15 tax return filing date.

The Taxpayer Advocate Office should look at the tax system through the eyes of the taxpayer. Nina expressed concern that the system still does not work for millions of taxpayers.

The Administrative Procedures Act applies to tax law. Thus, tax practitioners should educate themselves about the APA.

The Taxpayer Advocate Office is unique both in the US and around the world. The Taxpayer Advocate Office reports go directly to Congress before they are provided to anyone in the IRS. As a result, the reports are uncensored.

The Taxpayer Advocate service is being drowned in cases. Since 2010, front line employees have declined by 31%. Cases have declined by only 17%. IRS can limit the number of cases based on their resources. Taxpayer Advocate Office does not do that. Those who come to the office are experiencing hardship and the office does not turn them away.

Filters to prevent fraud are keeping taxpayers from getting their refunds; however the filters have a very high error rate. Taxpayers not getting their refunds are often those in desperate need of their refunds.

Filing season always creates spikes in the work of the Taxpayer Advocate Office.

Nina encouraged tax professionals to support funding for TAS.

PRACTICAL TIPS FROM THE TRENCHES: DEALING WITH OVERBROAD INFORMATION DOCUMENT REQUESTS AND DEMANDS TO INTERVIEW THE TAXPAYER

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IRC §7601(a) provides for Informal Requests. “The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax and all persons owing or having care and management of any objects with respect to which any tax is imposed”.

IRC §7602(a) – Formal Requests. “For the purpose of ascertaining the corrections of any return, making a return where none has been made ... the Secretary is authorized (1) To summons the person liable for tax ... or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for the tax ...or any other person the Secretary may deem proper, to appear before the Secretary at the time and place named in the Summons and to produce such books, papers, records and other data and to give such testimony, under oath as may be relevant or material to such inquiry; and(2) To take such testimony of the person concerned, under oath, as may be material to such inquiry.

IRC §7601 authorizes IRS agents to informally make relevant inquiries as part of their official duties, §7602 provides the agents with the power to compel responses to those inquiries if information is not provided voluntarily.

There are statutory limitations on IRS authority under 7601 and 7602.

IRS Summonses are not self-enforcing. IRS must seek an Order to enforce the summons if someone does not comply. There are limited defenses to enforcement of a summons. Privilege is one defense.

IRS must establish that it has met the "Powell Test" for summons to be enforceable. Summons must be issued for proper purpose. (See § 7602(a)). The information sought must be relevant to that purpose. The information sought is not already in possession of IRS. Administrative steps necessary for issuance to be valid must have been taken.

Taxpayer has a privilege against self-incrimination which also will apply equally to testimony and producing documents to the extent the documents are "testimonial". This privilege and other privilege claims (work-product, IRC §7525 privilege, and the Kovel privilege are the most likely basis for a Taxpayer successfully opposing enforcement of an IRS Summons if the IRS has satisfied the "Powell Tests".

In reviewing an IDR, ask whether IRS would be entitled to the information. If the answer is yes, provide it. If the answer is no, determine whether it would be strategically advantageous to provide it.

WOULD RATHER PAY LESS PLEASE: HOW TO MAKE EFFECTIVE OFFERS IN COMPROMISE

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Three types of offers: Doubt as to Collectability; Doubt as to the Actual Liability; Promote Effective Tax Administration or Exceptional Circumstances.

Doubt as to collectability is about a taxpayer's inability to pay. The taxpayer may have no assets, no income and little likelihood of that changing.

Doubt as to liability uses a different form. You don't have to provide a down payment. If you succeed on this approach, you don't have to pay but you will get liability corrected. Once liability is corrected (if it is a matter of just needing a correction), you would then withdraw the offer. Financial information is not required with doubt as to liability.

File all required returns before submitting the offer. Taxpayer loses non-operating losses if offer is accepted. Taxpayer will also lose refund for future years. If taxpayer house value is upside down (loan exceeds value), the home will be valued at zero but not a negative number.

You can submit an offer through Central OIC Unit or in connection with a collection due process appeal. If submitted through OIC Unit, only an administrative appeal is available if offer is denied. If submitted through appeal process, appeals officer can help facilitate. In addition, a denial can be appealed to Tax Court.

An Offer in Compromise based on collectability will typically be accepted if the amount offered equals or exceeds reasonable collection potential.

In submitting an Offer, be aware of expenses that are permitted. For example, private school is not considered an expense.

Reduce any retirement accounts by early withdrawal penalties and taxes. There is an exemption for tools of trade. Tax return representation can be included as a monthly expense. When looking at future income, student loan payments are treated as an expense.

A payment must be made with submission of an offer in compromise based on doubt as to collectability.

BLURRING THE LINES: WHEN IS TAX ADVICE SUBJECT TO THE ATTORNEY CLIENT PRIVILEGE?

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The elements of privilege are as follows:

- Legal advice is sought;
- From a professional legal advisor in his capacity as such;
- The communication relates to that purpose;
- Made in confidence;
- By the client;
- Are at his instance permanently protected;
- From disclosure by himself or by the legal adviser;
- Unless the protection be waived.

United States v. Richey, 632 F.3d 559 (9th Cir. 2011).

Attorney Client privilege does not apply to business or investment advice. *MSF Holdings, Ltd. v. Fiduciary Trust Co. Int'l*, No. 03 Civ. 1818, S.D.N.Y., 2005 WL 3338510 (2005). Underlying facts are not privileged. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981). Privilege does not prevent disclosure of communications between a client and attorney made for the purpose of committing a future crime or fraud (discussed more in depth below).

Tax planning communications are typically privileged. Communications related to tax preparation are typically not privileged. Certain communications in tax preparation, such as whether or not to report an item, will typically be privileged. Preparers should exercise care to protect privilege where it is likely to apply.

The attorney-client privilege can extend to accountants and other specialized agents who are hired to aid the attorney in providing legal advice to the client. *United States v. Kovel*, 296 F.2d 918.

Care should be given to avoiding dual purpose communications. Some courts hold dual communications are per se not privileged. Other courts are less restrictive and will look to such factors as the primary purpose of the communication.

Privilege is waived when communication is provided by the client to a third party. There are various ways to argue non-waiver of privilege. For

example, while providing information to a third party will typically result in waiver, in certain cases, ‘common interest’ or “joint defense” can be asserted as an exception. There is also a crime fraud exception.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Mary Vandenack

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