

Unauthorized Disclosure of Return Information: A Look at Damages.

Tax returns and the information that they contain are confidential under Section 6103 of the Internal Revenue Code. Improper disclosure of return information has serious consequences: it can result in criminal prosecution under Section 7213 of the Code, and there is also a civil damage remedy under Section 7431, which authorizes either statutory or actual damages, attorneys' fees, and, for cases that involve gross negligence, punitive damages. I.R.C. § 7431(c).

A recent case arising from the IRS non-profit scandal provides an interesting look at the civil damage remedy. *Citizens Awareness Project, Inc. v. IRS*, 2015 U.S. Dist. LEXIS 59355 (D. Colo. May 6, 2015). The taxpayer, Citizens Awareness Project ("CAP") had filed an application on Form 1024 to be recognized as a Section 501(c)(4) social welfare organization in October 2012. *Citizens Awareness Project*, 2015 U.S. Dist. LEXIS 59355, slip op. at *4. One month later, a reporter requested publicly available Forms 1024 on a large number of organizations, including CAP. *Id.*, slip op. at *5.

The request arrived at a time when the IRS was in the process of shifting the handling of media requests to its office in Washington, D.C., but this particular request was handled by a technician in Cincinnati, who wound up turning over eight applications that had not been approved (and were therefore confidential) in response to the request. *Id.*, slip op. at *5-*7. The improper disclosures included the CAP application. The parties stipulated that the disclosure was improper, but unintentional, and the case boiled down to an analysis of what damages were properly recoverable.

The reporter who had sought the files had issued a series of articles. The first made no mention of CAP but was sufficient to alert the IRS to the problem; it telephoned the chairman of CAP, a lawyer named Charles Smith, and advised him of the issue. *Id.*, slip op. at *6-*7. Later, the IRS sent a request for additional information that it required to process CAP's application. *Id.*, slip op. at *8. On May 13, 2013, an additional article was published based upon the improper disclosure. It referenced CAP as one of three conservative groups that had advised the IRS that they intended to spend at least some money on politics.

In terms of actual damages, one pivotal issue was the extent to which attorneys' fees could be recouped as damages, rather than as a prevailing party fee. The court concluded that attorney time expended in fielding phone calls from the IRS qualified as actual damages, recoverable under Section 7431(c) as they involved efforts to mitigate harm and prevent further harm from the improper disclosure. *Id.*, slip op. at *13-*18. In contrast, the court rejected CAP's attempt to recoup its attorneys' fees related to the request by the IRS for additional information to evaluate its Form 1024. In the court's view, this claim failed because there was no evidence to support CAP's claim that the IRS asked for the additional information as a result of the improper disclosure. *Id.*, slip op. at *21.

Time expended by CAP's chairman on damage control efforts was viewed more favorably, as the court held that a reasonable fact finder could conclude that these efforts were reasonable to prevent further perceived harm to CAP. *Id.*, slip op. at *23-*27. These efforts included a trip to Washington and associated expenses that the government contended were unreasonable. *Id.*, slip op. at *27-*30.

Turning to punitive damages, the court rejected CAP's assertion that the technician who released its application had been grossly negligent. In the court's view the case involved simple carelessness, making punitive damages unavailable. *Id.*, slip op. at *31-*36.

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