

WEDNESDAY THURSDAY FRIDAY MONDAY **TODAY**

TODAY'S COLUMNS LIBRARY

Bookmark Reprints

This is the property of the Daily Journal Corporation and fully protected by copyright. It is made available only to Daily Journal subscribers for personal or collaborative purposes and may not be distributed, reproduced, modified, stored or transferred without written permission. Please click "Reprint" to order presentation-ready copies to distribute to clients or use in commercial marketing materials or for permission to post on a website. Thursday, July 26, 2012

Your IRS income tax audit: know when to say "no"

Bruce Givner is a partner at Givner & Kaye in Los Angeles. He can be reached at bruce@givnerkaye.com.



Owen Kaye is a partner at Givner & Kaye in Los Angeles. He can be reached at owen@givnerkaye.com.



Very few people enjoy getting a notice of an Internal Revenue Service audit. IRS Form 4564 - Information Document Request - labeled "Request Number 0001" - may be the first of several requests that will require you and your accountant to gather records for review by the IRS revenue agent. The accompanying statement of "Your Rights as a Taxpayer" is not likely to calm your nerves.

First, your return may have been selected for audit on a random basis, so you should not be concerned. Second, even if your return was selected for a reason, e.g., you are part of an industry the IRS is targeting or

one of your deductions was judged by the IRS's computers this year to be "too big," competent representation will probably minimize both your anguish and the financial problem. Third, the negative image of the IRS portrayed by so-called "tax relief" agencies - the IRS is "the most aggressive" collection agency - has nothing to do with the audit process. The average IRS examiner is a thoughtful, courteous college graduate with five years' of experience. Fourth, if you understand the auditor's goals and job, you will know when you need to "just say `no.'" And that can make a big difference in the result of your audit.

The IRS agent's goal is to gather facts. The agent will (i) send out one or more IDRs; (ii) try to interview the taxpayer; (iii) subpoena records from the taxpayer and, if necessary, third parties; and (iv) question the taxpayer's representative. Once the agent has the facts, the agent's job is to ascertain the law and apply it to the facts. Then the auditor will articulate a position, usually in a phone conversation with the taxpayer's representative. Once that occurs, the taxpayer and the representative must determine whether the IRS's position has merit and, if so, to what extent. That analysis determines how the taxpayer should proceed.

Assume that the IRS agent's position (a) is wrong; (b) is against the taxpayer; and (c) involves significant dollars. The goal is to get to the IRS Appeals Division because IRS appeals officers are the "best of the best." Most of them are lawyers; most have 20 years' experience; their job is to settle cases; and they have the power to consider the "hazards of litigation." However, there are two different ways to get to the Appeals Division, and the difference is important to the outcome of your case.

If the IRS position is adverse, most taxpayers and representatives reflexively want to try to *persuade* the IRS agent to take a more favorable position. That is not a good idea. It is not the IRS agent's job to *negotiate* with the taxpayer. If your attempt at persuasion includes providing additional facts and arguments to the IRS agent, there will be two bad results. First, the IRS agent will include in the file that will be forwarded to the IRS Appeals Division arguments that will anticipate and counter your additional facts and arguments. Second, you will be unable to provide the IRS Appeals Division new facts and new arguments, without which it is more difficult for the IRS appeals officer to rule in your favor.

Even if your return was selected for a reason ... competent representation will

Questions and Comments

NEWS RULINGS VERDICTS

Tuesday, August 28, 2012

Bar Associations

Supreme Court returns 18 more discipline cases to State Bar -- but not 24

The Supreme Court sent 18 more discipline plea bargains back to the State Bar but rejected the bar's motion to remand 24.

Government

Judicial Council committee urges slower approach to AOC reforms

Recommendations to the state Judicial Council on how to adopt proposed reforms of the Administrative Office of the Courts were made public Monday.

U.S. Court of Appeals for the 9th Circuit Appeals court allows state, utilities to seek refunds from power providers

A federal appellate court on Monday opened the door for the state of California, Pacific Gas & Electric Co. and others to get refunds for money they spent buying power during the energy crisis a decade ago.

California Supreme Court

Santa Clara judge withheld evidence as a prosecutor

A Santa Clara County deputy district attorney who is now a judge had a key role in willful prosecutorial misconduct, the state Supreme Court held Monday in granting a San Quentin death row inmate a new shot at life.

Law Practice

Sidley taps new tech transactions leader

Sidley Austin LLP has hired Glenn G. Nash, a former Latham & Watkins LLP partner, to serve as the new global co-leader of the firm's technology transactions practice.

Judges and Judiciary

9th Circuit reverses Wright for the third time this year

U.S. District Judge Otis D. Wright II of Los Angeles was wrong to admit evidence at a chief executive's securities fraud trial that the SEC filed a prior civil complaint against him, a 9th U.S. Circuit Court of Appeals panel held Monday.

Personal Injury & Torts

Grave matters: morgue discovery leads to legal battle

A plaintiffs' claim of medical negligence in a case of a woman who may have been sent to the morgue alive cannot proceed after a Los Angeles Superior Court judge ruled earlier this month attorneys did not meet the statute of limitations.

Bar Associations

Pasternak named to State Bar Board of Trustees

The California Supreme Court named David J. Pasternak, a former Judicial Council member from Los Angeles, to the State Bar Board of Trustees, the first appointment by the court under the bar's new governance rules.

Criminal

probably minimize both your anguish and the financial problem.

When the IRS agent sees the impasse, the agent will make one or both of the following offers. First: "sign this extension of the statute of limitations. Give me another year (or two) and we should be able to get you a better result." Or: "since we have not been able to agree, let's send your file to the IRS Appeals Division. The IRS Appeals Division is separate from the Audit Division, and appeals officers can settle matters based on the hazards of litigation."

As to the first offer - signing an extension - the answer is "no." Under any circumstances. Giving the agent an extension only provides the agent time to supplement the file which is already going to be negative to the taxpayer. Instead, agree that you will promptly provide all requested information so that the agent can complete the audit within the time remaining under the statute of limitations.

As to the second offer, the praise of the IRS Appeals Division is warranted. However, if you go to the Appeals Division *directly* from Audit, and you do not reach a good result, then the "90 Day Letter" (Notice of Deficiency - Letter 531-T) you ultimately receive will be prepared by the appeals officer. If you turn down the IRS agent's offer, then an IRS agent will write the letter. You would you rather have the "Income Tax Discrepancy Adjustments" (IRS Form 4549-A) and "Explanation of Items" (IRS Form 886-A) that accompany the letter written by a five-year IRS agent with a college education, not by an IRS lawyer with 20 years' experience.

Once you receive a "90 Day Letter" written by the IRS agent, you file a petition in the U.S. Tax Court (the U.S. Court of Claims is also a possibility). IRS district counsel will respond within 60 days. Then your file will be sent (automatically) to the IRS Appeals Division. You and your representative will now have the opportunity to present new facts and new arguments to the highly skilled IRS Appeals Officer assigned to your matter. If your case has any strength, you are likely to get an offer that reflects some of that strength. In other words, the IRS Appeals Officer may offer you as little as a 20 percent concession. If your case is truly strong, the IRS Appeals Officer may offer an 80 percent concession - and may concede the case entirely.

So, resist the impulse to persuade, and resist the impulse to accept the offers made by the IRS agent. Be courteous. Be cooperative. And just say "no."

OC lawyer gets 6-month sentence for tax offenses

An Orange County attorney who failed to file multiple income tax returns and helped create an offshore corporation later investigated by federal authorities now owes the government more than \$225,000 - plus prison time.

Judges and Judiciary

Two judges vie to be second-in-command of San Francisco County Superior Court

Two judges are about to face off in a race for San Francisco County Superior Court's assistant presiding judge seat.

Litigation

Saudi prince wins round in mansion battle against LA

State court judge rules in favor of Prince Abdul-Aziz ibn Abdul-Aziz al Saud, the third son of Saudi King Abdullah and Saudi Arabia's deputy foreign minister, in real estate spat.

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and financing transactions and the lawyers involved.

Criminal

In the spotlight: what is the legal definition of rape?

Examining the legal definition of rape - and how it differs from the public's concept of rape. By

Wendy Patrick

Law Practice

Listening practice

Better listening is the key to being heard. By **Timothy Tosta** of McKenna Long Aldridge LLP

Public Interest

Lawyers' critical role in the war on poverty

Access to the judicial branch ensures that the government, in the person of a judge, will hear grievances and respond. By **David A. Lash** of O'Melveny & Myers LLP

Law Practice

Who can enforce mortgages sold in the secondary market?

Courts and litigants are often confused about just who can enforce a mortgage that has been transferred in the secondary market. Here's the law. By **Mark Didak**

Judicial Profile

Tim P. Kam

Superior Court Judge Solano County (Vallejo)

Intellectual Property

Apple's patent win puts company on the offensive

Apple Inc.'s \$1 billion verdict from a San Jose federal jury for patent and trade dress infringement Friday is only likely to whet the company's appetite for more aggressive action in the worldwide smartphone wars, legal observers say.

