



TAX LITIGATION ISSUES

BY JOHN J. TIGUE JR. AND JEREMY H. TEMKIN

Accountant's Obligation to Maintain Client Confidences

When the government conducts a criminal tax investigation, it is inevitable that federal prosecutors will reach out to the accountants who worked for the targeted individual or entity or prepared the tax returns at issue.

There is no question that in certain situations, such as receipt of a grand jury subpoena, Internal Revenue Service (IRS) summons or court order, an accountant is compelled to disclose client information, including information about the individual's tax returns.

Outside of such compulsion, however, an accountant's obligation is not so clear. Defense counsel consistently have taken the position that an accountant is not permitted, legally or ethically, to participate in an interview with the government regarding the accountant's client's affairs without the client's consent. There are a number of statutes and ethics rules supporting this position.

Federal and New York State Statutes

Section 7216 of the Internal Revenue Code (IRC) prohibits anyone "engaged in the business of preparing, or providing services in connection with the preparation of, [tax] returns [from] knowingly or recklessly (1) disclos[ing] any information furnished to him for, or in connection with, the preparation of any such return, or (2) us[ing] any such information for any purpose other than to prepare, or assist in preparing, any such return." Those who violate this provision are guilty of a misdemeanor. There is an exception, however, for proceedings involving the accountant. In those situations, an accountant properly may disclose tax return information to his attorney or any officer of a court in order to properly defend himself.¹

Section 6509 of the New York State Education Law defines professional misconduct, in part, as conduct that violates rules established by the Board of Regents, the body that governs the licenses of professionals in the state of New York, including



John J. Tigue Jr.

Jeremy H. Temkin

accountants.² The Board of Regents, in turn, has adopted rules defining "unprofessional conduct" as the "[r]evealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the...client, except as authorized or required by law."³ Furthermore, specific to public accountants, the rules provide that "[u]nprofessional conduct shall also include revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the client, except such information may be disclosed as necessary to other licensees of the profession conducting professional standards or ethics reviews, or as otherwise authorized by law."⁴

These provisions make clear that unless required by law, an accountant should not disclose confidential information he received from a client through their professional relationship. A violation of the federal statute may result in prosecution for a federal misdemeanor, while violation of the New York regulations may result in proceedings that might lead to the revocation of the accountant's license.

Accountancy Organizations

Organizations established to represent and serve public accountants have taken a similar stance. For instance, both the American Institute of Certified Public Accountants (AICPA) and the New York State Society of Certified Public Accountants (NYSSCPA) have adopted ethics rules prohibiting their "members in public practice [from disclosing] confidential client information without the specific consent of the client."⁵ In response to the government's prosecution of Leona Helmsley and others for tax evasion in the late-1980s, the NYSSCPA issued an opinion interpreting its rule as

prohibiting its members from voluntarily disclosing client confidences to the government in an informal interview.⁶

Rudolph Giuliani, then serving as the U.S. Attorney for the Southern District of New York, objected strongly to the NYSSCPA's interpretation, arguing that it "conflict[ed] seriously with legitimate and necessary law enforcement functions and actually would help insulate those accused of serious crimes by impeding the proper and logical presentation of evidence at trial."⁷ Maintaining its position, the NYSSCPA stated that it was not the organization's intention to require its members to act in any way that would violate federal law, but that if a member "elects to meet with the prosecutor and voluntarily divulge client confidences and that conduct is not required by law, [the Society] must...take appropriate action."⁸

The cumulative effect of the statutes, regulations, and ethical rules set forth above should prevent accountants from disclosing confidential client information to government attorneys unless their client consents or they are compelled to do so by law. A client being investigated by the government can refuse to consent to stop his accountant's revealing client confidences in an informal setting. Namely, an accountant's failure to abide by his client's wishes may result in the client reporting him to prosecutors, a licensing authority or other organization to which the accountant may belong, resulting in disciplinary procedures or even the revocation of his license.

The impact of an accountant's cooperation with the government is demonstrated in the U.S. Court of Appeals for the Second Circuit case, *United States v. Schwimmer*.⁹ The defendant, Mr. Schwimmer, was convicted of a racketeering conspiracy, conspiracy to defraud the United States and tax evasion. On appeal, Mr. Schwimmer sought a reversal based in part on the fact that the government had obtained information, including work papers, from his accountant before trial. The accountant had been hired by Mr. Schwimmer and his codefendant, Mr. Renda, to assist in the preparation of their defense. After Mr. Renda pleaded guilty, the government met with the accountant, purportedly to determine a reasonable forfeiture amount for Mr. Renda. While prosecutors instructed the accountant not to reveal any confidential communications during the course of their interview, they nonetheless obtained a copy of the accountant's workpapers which detailed the allocation of commissions between the

John J. Tigue Jr. is a principal in Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer and a fellow of the American College of Trial Lawyers.

Jeremy H. Temkin is a principal in Morvillo Abramowitz. **Gretchan R. Ohlig**, an attorney, assisted in the preparation of this article.

