INTERESTING TAX NOTES

by

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A
PATENTAX® PRESENTATION

FOR

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I. Privilege & Confidentiality

(1) Attorney-client (confidentiality) privilege & (2) attorney work-product privilege.

The attorney-client (confidentiality) privilege protects what the content that the client confidentially communicated **TO** the attorney to obtain legal advice or assistance.

The attorney work-product privilege “work- product” doctrine provides protection from discovery of materials prepared in anticipation of adversarial litigation, and not for preparation for disclosure to government (such as tax returns and bankruptcy filings)

Information or work-product information are prepared specifically for voluntary disclosure to

government, the privilege can be thought of as non-existent ab initio.

Tax Returns & **Applications for Offer in Compromise** & **bankruptcy filings** are initial submissions to the government in order to obtain a benefit.

Gen Suggestions:
(a) Citizens should prepare and file their own bankruptcy petitions and tax returns.
(b) If help is needed, consult someone but don't involve them in the filing.
(c) Minimize Damage: If you must hire someone to do these things, hire a single-use professional that is NOT familiar with you or other transactions you have had. Anything you tell the single-use

Atty Suggestions:
(a) include or exclude recitations of communication from the client where it is desired to make documents more privileged or less privileged.
(b) keep sensitive documents together and notify the client and obtain the client's permission with a warning on loss of privilege before making such sensitive documents available.
(c) take pains to identify, keep and treat separate matters separately so as to minimize the probability that others can have a basis to urge they "ought in fairness to be considered together" should one set of documents lose privilege.
(d) sharing any information with the government is the same as sharing it with the public. An agency assurance of confidentiality is a promise it cannot keep.

II. GAMBLING

IRC 3402(q)(3)(C)(i) requires casinos to withhold 25% on proceeds of more than $5,000 from a sweepstakes, wagering pool or lottery, after deduction of the wager. IRS is so worried about poker tournaments in which you can build your wager by multiple replenishment, they made an advice stating that replenishment wagers are not additions to the subtracted wager, but define separate games and won't subtract from winnings.

III. GIFTS FROM THE EXPATRIATED

People give up U.S. Citizenship every day and leave. Tina Turner did it. To help isolate the ones left behind, there is a tax under IRC § 2801 that taxes U.S. Residents that receive an inheritance from anyone that expatriated after June 17, 2008. Regs have just been published. This seems like a huge deal over not much. How many people will give up their citizenship in order to avoid gains during their expatriate lives, only to leave the money when they die to someone in the United States? There are so many clever ways, such as by setting up a foreign trust, to pay money back into the United States. There are other ways to get money to those you want to have it in a manner that is not related to gifting or inheritance. There is no rule on investment in the United States and nothing much to inhibit many transactions that benefit U.S. Residents without triggering § 2801. The fact that it has taken 6 years to write regulations shows how important this is to IRS. Oh yeah, you get the $10,000 per year exclusion for money coming back in.

IV. Keurig is moving to Switzerland without admitting its tax reasons

Do you remember greedy Keurig Green Mountain Inc, the company whose patent ran out on its coffee pods and that created a second generation of coffee makers set to deny competitors use of the pods by putting a bar code on the pods of the second generation coffee maker? It was a joke to clever folks that cut out the bar code and taped it to their 2nd generation makers so that the device reads the same bar code forever, no matter what you put in it. Now, hated, greedy Keurig will switch trading operations to Switzerland where the tax

rate is 10%. Keurig leaves behind the top federal corporate rate of 35% and the Vermont State Tax of 8.5% (Of course if they had been located in California with its 13.3%, the would have an additional 4.8% incentive to have left for Switzerland even earlier). Highly marked-up coffee can be sold to the U.S. to create losses so that further taxes may never need to be paid in the U.S. again. (and maybe a bankruptcy too as everyone still hates Keurig). Or, maybe it was smart to leave after trying to take advantage of their customers by forcing them to buy expensive pods, and leaving was the smart thing to do -- much like fleeing to another country after having just murdered someone.

IV. ACA $100 per month Penalty for helping employees is ON.

You may recall the ACA, also known as "Obama Care". This confusing legislation with very little thought to rules and regulations has been with us for one reporting tax season. A popularly little known provision makes small employers (0-50 employees in 2015 and expanding to 0-100 employers in 2016) subject to a $100 per day fine if they help their employees pay for their employee's heath insurance. A transition period blocking the imposition of this tax which mounts to $36,500 yearly, ended June 30, 2015. The governments position is that it will give a break to small employers, but those employers have a choice to provide health care to everyone in their employ, or providing zero help to their employees. Anything in between will result in a huge punishment, with small employers either losing employees and adding to the rolls of the unemployed, or perhaps with the small business going out of business where they cannot afford to completely pay for all their employees health care insurance.

V. FBAR Keeps Rolling, and without the 5th Amendment.

The Third Circuit Court of Appeals has joined the 2nd, 4th, 5th, 7th, 9th & 11th circuits in holding that the requirement to produce overseas records of account is not subject to a 5th Amendment Challenge. Chabot, (CA 3 7/17/2015). FBAR, which has traditionally been filed at the end of June each year, is moving to April 15 starting in 2017 for reporting on the foreign bank account data for 2016.

VI. Marijuana Stays the Same, and split business deductions denied

It is well known that an illegal business cannot take deductions (usually under IRC §162) for ordinary and necessary expenses. Cost of goods sold however is generally allowed under IRC §60 to compute gross profit. It is also known that one of the most favorite techniques to "get around" this has been to set up a non-illegal business (like patient care) and to use it to deduct expenses while the marijuana business occupies the same space, but is not charged for its burden on the premises. At the other end of the spectrum an owner treats them as separate businesses where the marijuana operation charges the legitimate business the Cost of Goods it sells, makes no profit, and the legitimate business makes all the profit. Its like a transfer price problem, except that both businesses are owned by the same entity. The recent case of Olive v. Comm., (CA 9th 7/09/2015) held that the split technique won't work, because they are one business.

The prime example can be illustrated by a person that spends $80 to grow and process an amount marijuana and sold it for $100. Assume a 40% tax and the person is losing the $20 profit plus another $20 contribution from other sources and thus loses $20 for every amount sold. Conversely, if the seller contracts with someone to grow and process it and then sell it to the retailer for $80, the seller makes his $20 profit and is taxed on it. However, the grower is now liable for $32 tax out of grower's own pocket. For grower and buyer to operate one or both has to collude, AND one or both probably goes without paying his proper taxes or doesn't file taxes at all. Being in the marijuana business is like having a big sign that says "TAX CHEAT". The only solution is for the feds to make marijuana completely legal.

VI. Extended Dates can cause Trouble

Under Code Sec. 7508A, IRS gives "affected" taxpayers until an extended date to file most tax returns. These extensions can be several months. The extensions are important because they effect the limitations dates for audit, and more importantly the limitation dates of the three statutes for discharging taxes in bankruptcy. I know of one instance where someone observed the 240 day, 2 year and 3 year dates, but was rejected because of on of the federal extension dates. They eventually prevailed after much trouble, but if it was to be done over, either checking or waiting several months to file bankruptcy could have avoided the trouble.

VII. Failing to Settle in Tax Court merits a Trial, not a Motion for Judgement

In the case of Shah, (CA 7th Cir 6/24/2015) a "Non-settlement agreement" that the Tax Court turned into a judgement based upon taxpayer non-cooperation was vacated. On the trial date, IRS submitted to the Tax Court a "Stipulation of Settled Issues" with no mention of agreement concerning the fact or amount of a deficiency for any of the relevant tax years. 30 day continuance was granted, but the IRS could not reach nor reach agreement with the taxpayers. Taxpayers submitted a unilateral status report stating that (a) had tried to resolve by negotiating with IRS and that Mr. Shah had become "sick and mentally distressed" and could no longer "understand mathematical calculations." The Tax Court did not give the parties more time to reach a settlement, nor did the court set a new trial date so that the taxpayers' liability could be determined. Instead, the Tax Court ordered the couple to show cause why the Court should not enter a decision based on IRS's deficiency computations. The Tax Court then granted IRS's motion for entry of decision. REVERSED. Tax Court should have set the matter for trial.

VIII. E-Filing, another reason to do your own taxes.

IRS has forced increase the electronic filing rates by tax preparers and has reached the 80% e-file goal. What's wrong with e-filing?

(a) There is no capability to file any information, exceptions, exclusions and the like on the majority of forms filed.

(b) Even for forms where the IRS asks for you to explain yourself, these are not available for e-filing.

(c) Most erroneously filed 1099's for which an easy explanation with documentation can be made are impossible to do on e-filing.

(d) Where non-e-filing is necessary, there has to be an excuse the preparer must make to show an exception / deviation from not e-filing using form 8948.

(e) The actual returns will not be submitted to government and only the taxpayer and preparer will have such document. So, in Future, after the tax preparer tosses theirs and after the taxpayer tosses theirs, you might need one to see what was actually filed.

(f) You may get a preparer that encourages you to be overly aggressive and perhaps "make things up" When the preparer is caught, either (a) they get a penalty and you get a huge tax bill, or (b) the preparer will say "that's what the taxpayer told me" and try and blame you. Further, where the taxpayer is "bad", the government might charge both taxpayer and tax preparer with conspiracy to defraud the government, and thus some time off for the tax payer in club fed.

(g) A good preparer will play very conservative with your tax positions on a return. Good preparers don't want even a scintilla of problems with preparer penalties. Of course, the

taxpayer is paying for this in terms of failure to press a position that really is in the taxpayer's favor.

(h) The explosive effect of pressing a point somewhat doubles when a tax preparer is involved. Lets say that taxpayer wants a home office deduction. In my opinion the danger of this is much grater than its value due to (a) time in audit, (b) going to tax court, (c) saving significant amounts of data to prove your point. When a tax preparer involves themselves in this, the resulting audit will earn the preparer more money, assuming that the taxpayer doesn't blame and sue them. When a taxpayer does this on his own, he might be audited, then represent himself and either lose or win. Likewise, the taxpayer could do the return on his own and then hire an audit defense and either lose or win. Maybe the point is that the taxpayer needs to be able to tell his or her story. Maybe its not cost effective in any case, but even where a taxpayer, if you look into their mind and find a desire to "go for that deduction", a good preparer is not going to let them do it because of the independent preparer penalty, and the additional questions and details that need to be developed by the preparer to make a defense. Might cost the preparer 3-4 hours to write up a memo and file it with the return (it can't be e-filed). So, if you do your own returns, you are master of your selective fate. Also, you might research the issue down to the gnat's foot level and really make a good case an prevail.

IX. Understated Revenue now made equal to Overstated Basis

H.R. 3236, "Surface Transportation and Veterans Health Care Choice Improvement Act of 2015." amends IRC § 6501(e) to make "omitted to effectively overrule a long standing rule in the U.S. that was most recently recognized in the Supreme Court's U.S. v. Home Concrete & Supply, LLC decision. Home Concrete held that an overstatement of basis that reduces gross income is not the same as an understatement of revenue having the effect of reducing gross income. There are two main reasons that this is significant:

(1) There is a fraud section that states that omission of more the 25% of gross income is presumptive fraud and opens the statute of limitations from 3 years to 6 years. Now, the 25% threshold can be achieved by overstating basis or understating income. Fraud penalties may apply to both taxpayer and tax preparer. It may also result in a referral to the criminal division; and

(2) The element of fraud can help support a criminal conviction in almost all of the criminal tax statutes:
   (a) 26 U.S.C. §7201: Tax Evasion
   (b) 26 U.S.C. §7202: Willful Failure to Collect or Pay Tax
   (c) 26 U.S.C. §7203: Willful Failure to File
   (d) 26 U.S.C. §7206: False Returns
   (e) 26 U.S.C. §7207: Willful Submission of False Documents
   (f) 26 U.S.C. §7212(a): Attempts to Interfere with Administration of the Internal Revenue Law

Thus, the fraud penalty results when something is not right and once the IRS digs in on the civil side, they might find enough reason to pass the case over to criminal investigation division.

X. Two Tax Evasion cases from 2014 if there is time. (The facts of these cases & a further discussion are found at: http://patentax.com/library/tax-evas1.pdf

(a) USA v. WILLENA STARGELL No. 11-50392 (1st opinion w/drawn) Filed August 2, 2013

(b) USA v. David Kahre, Donna Kahre & Alexander Loglia Dist. Nevada Filed December 5, 2013, No. 09-10471, No. 09-10528, No. 09-10529

Employer ➢ (Coins) ➢ ➢ Employee ➢ ➢ Employee; then ➢ (Coins) ➢ ➢ ➢ ➢
Employee < ➢ ➢ (Cash) ➢ ➢ ➢ ➢ ➢

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