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Publicizing Closing Agreements?

IRS Notice CC-2008-014 tells IRS agents how to obtain taxpayers' consents and otherwise describes the procedure for publicizing closing agreements with taxpayers concerning their federal income tax liabilities. The procedures are pretty straightforward, and relate mostly to ensuring that the taxpayer's consent is as clear as possible, and well informed. But why would a taxpayer consent?

Tit-for-Tat

Presumably, the taxpayer won't consent because of his interest in good tax administration. He should bargain with IRS to get something in exchange for his consent to public disclosure of the closing agreement.

The taxpayer might get penalty relief, or a better settlement on an issue other than the one IRS wants to publicize. What's in it for IRS? As has been increasingly common of late, IRS likes to brag about "winning" so-called "tax shelter" cases. IRS evidently wants to seize opportunities to release confidential taxpayer information in the context of showing how it "beat" a certain taxpayer on a certain type of issue.

> *Example:* Bigco is audited and the auditor sets up deficiencies based on what IRS considers a "tax shelter," as well as on some fouled-up inventory accounting issue. Heavy penalties are asserted. The parties want to settle and IRS wants to make public the fact that Bigco lost all of the tax benefits it had sought from the "tax shelter." The accounting issue could go either way. In exchange for a supposedly better settlement on the accounting issue—and some penalty relief—Bigco agrees that IRS can publicize the settlement agreement. In other words, Bigco waives its statutory right to confidentiality. Bigco reasons that the astute observers already knew that it had a substantial reserved tax liability on its books, and does not feel nearly as bashful about having engaged in a "tax shelter," as IRS feels feisty about winning.

The Flip Side: Taxpayer Disclosure

To the credit of IRS, it apparently does not have a standardized procedure for trying to keep a taxpayer from telling other similarly situated taxpayers how it settled with the agency. It is possible that IRS might ask or strongly urge a corporate taxpayer

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not to issue a press release about a settlement, but IRS knows that public corporations have to make a certain level of public disclosure about their tax disputes; generally, muzzling taxpayers would be difficult.

Whether it would be illegal or not for IRS to try to muzzle taxpayers is a murky question. The confidentiality statutes apply only to prevent government disclosure of taxpayer information. Could the government prevent taxpayer disclosure of what IRS did with the taxpayer? It's probably a question that will not be answered because no taxpayer would have much interest in resisting a non-disclosure agreement if the IRS asked for it (so long as it permits the corporate taxpayer to meet its SEC disclosure obligations).

State Settlements

The landscape, however, is entirely different in the state tax area. Some state revenue departments ask for—and get from taxpayers—confidentiality agreements with regularity, and the taxpayers don't complain.

The contrast with IRS practice might be explained by guessing that state revenue departments are more accustomed to making different deals with different, but similarly situated, taxpayers. Alternatively, these settlements may be run through a narrower funnel in much smaller revenue departments, so that the same officials are more likely to be involved in most settlements. Another difference is that there tends to be a narrower range of issues between corporations and states, in contrast with the wide range of federal issues.

Conclusion

At the federal level, taxpayers should think about waiving confidentiality of closing agreements when they can use it as a bargaining chip in the negotiations with the IRS. At the state level, taxpayers will probably go on agreeing to imposed confidentiality agreements, and will probably go on finding ways to reveal their settlements when it suits them.

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