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WHAT TO DO WHEN THE SPECIAL AGENT ARRIVES

by
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I. FIRST MEETING WITH THE SPECIAL AGENT

A. Learning of the Investigation

1. A taxpayer usually learns that he is under criminal investigation when Special Agents from the Criminal Investigation Division ("CID") of the IRS appear at his home or place of business. (Although this outline uses the term "taxpayer" to refer to the individual under investigation, Special Agents may visit return preparers, legal advisors, or any other person they suspect participated in criminal wrongdoing with regard to a tax return.)
2. If the taxpayer has the presence of mind to telephone his advisor before he answers any questions posed by the Agents, then he will be in a much better position in the investigation than if he speaks with the agents at all.

B. Advice to the Client

1. A practitioner whose client is visited by IRS Special Agents should, if he is an accountant, immediately advise the client to retain counsel. There is no privilege protecting communications from a taxpayer to his accountant from compelled disclosure, Couch v. United States, 409 U.S. 322

(1973), and thus anything the taxpayer says to his accountant would be discoverable by the IRS investigators when they interview the accountant.

2. The practitioner should impress on the client the seriousness of this sudden appearance by the Special Agents. Special Agents generally do not make random visits. A criminal investigation most often begins when an IRS agent suspects fraud and prepares a report referring the matter to the Criminal Investigation Division (CID). The taxpayer's returns are analyzed and reports are written without the taxpayer's knowledge. The taxpayer should understand that the Agent's appearance means that the IRS already suspects that he has engaged in fraud.
3. Rule #1: Silence Is Golden
 - a. No matter how much a taxpayer believes he is in control of his initial meeting with the Special Agents, he should say nothing and answer no questions.
 - b. Often, the taxpayer is educated and/or a successful businessman who believes he is skillful at handling difficult situations. He may be confident he can explain everything to the Agents satisfactorily, but he is wrong.
 - c. The taxpayer is not required to talk to the Agents, and he can only do more harm than good

at this stage by saying anything. Everything he says can be used against him. Even "I don't know" and "I don't recall" are responsive answers which the Agents will carefully note in their memorandum to the case file and which are subject to later impeachment. Moreover, if the taxpayer attempts to mislead the Agent, lies or tells half-truths, he has committed additional federal crimes.

- d. Nothing the taxpayer would say will change the agents' perspective. They have allegations that the taxpayer has engaged in serious criminal wrongdoing, and they are seeking evidence to prove the government's case. If the taxpayer denies any wrongdoing, the Agents will seek to prove that he lied to them. If the taxpayer admits any fact, the Agents will use that admission in their investigation. Much later in the investigation, after an assessment of the evidence, there will be time to consider whether, and with what protection, the taxpayer might want to tell his story.

4. Rule #2: Identify The Agents And Accept Service.

- a. A taxpayer contacted by Special Agents should ask for pertinent identifying information, including names, titles, addresses, and telephone numbers of any Agents present.

- b. More than one Agent is likely to appear so there will more than one witness to any statements the taxpayer might make. If one of the two Agents is a Revenue Agent, it is likely that the investigation involves complex tax issues and is being conducted jointly by the CID and the Examination Divisions. The Revenue Agent will assist the Special Agent in gathering the evidence to be used in the criminal case, with the additional benefit of keeping in mind the IRS' interest in collecting any tax eventually due.
- c. Special Agents who contact a taxpayer under investigation are supposed to warn the taxpayer that they are conducting a criminal investigation, that the taxpayer has the right not to cooperate with the Agents and the right to contact counsel, and that anything the taxpayer says in the interview may be used against him. Special Agents Manual § 342.13. If warnings are not given, then statements made by the taxpayer may be subject to a motion to suppress, even though no "custodial interrogation" has occurred. See United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Heffner, 420

F.2d 809 (4th Cir. 1969). But see United States v. Cacares, 440 U.S. 741 (1979) (suppression not required where failure to warn was not deliberate; rejects rigid rule of suppression in favor of more flexible approach.)

- d. The taxpayer should accept service of any subpoena or summons the Agents may serve and acknowledge receipt if asked to do so.
- e. The taxpayer may express concern that the Special Agents will draw an adverse inference from his refusal to talk to them, but Agents are used to dealing with taxpayers who are represented by lawyers and this procedure is plainly in the taxpayer's interest.

II. FIRST MEETING WITH THE CLIENT

A. Preliminary Information

If the taxpayer is a new client, the practitioner should conduct a full background interview into the taxpayer's business and personal relationships and any prior contacts with the governmental investigatory authorities. The practitioner, obviously, should also ensure that he has no conflict of interest.

B. Nature of the Investigation

- 1. The taxpayer probably knows how he came to be subpoenaed and about the general nature of the investigation. Counsel should inquire into the identity of other people who may have knowledge of

the transactions or events under investigation. Counsel may at a later date seek to interview these individuals, who are also likely to be contacted by the government investigators.

2. Counsel should ascertain the relationship between the taxpayer and the investigation, i.e., whether the taxpayer is the prime focus of the investigation; a minor player whose greatest asset may be information; or in the middle, sufficiently involved to be a focus, yet also a potentially valuable source of information to the government should he decide to cooperate.
3. From a review of the papers served by the Special Agent, counsel will be able to learn the type of investigation. If the taxpayer is served with a grand jury subpoena, there is obviously a grand jury investigation being conducted by the Justice Department, usually with the assistance of IRS Special Agents. If the taxpayer receives an administrative summons, then there is an ongoing administrative investigation being conducted by the CID.
4. As a general rule, there are greater procedural protections in an administrative investigation than in a grand jury investigation.
 - a. The client is entitled to appear before the IRS accompanied by counsel. 5 U.S.C. §

555(b); IRM 4022.41(3) (February 23, 1981).

If the subject is technical, he is also entitled to consult with his accountant during the examination. IRM 9352(3) (July 13, 1981). There is no right to an attorney in the grand jury room. United States v. Mandujano, 425 U.S. 564, 581 (1976).

- b. In an administrative proceeding, the client is entitled to receive a transcript of his testimony, or to bring his own court reporter, provided he allows the IRS to obtain a copy of the transcript at its expense. 5 U.S.C. § 555(c); 26 C.F.R. § 601.107(d)(1) (criminal investigation functions); IRM 9353(3) (June 7, 1983); IRM 9781, Special Agent's Handbook, § 341.4(1) (September 12, 1983). Grand jury proceedings are secret and while the witness may disclose the content of his testimony to others, he will rarely receive a copy of his transcript.

C. Counseling Against Mistakes

1. When a taxpayer learns he is under investigation, he may undertake to destroy, backdate or create evidence in order to support any defense he may believe that he has to potential charges. He also may contact other persons with knowledge of the transactions under investigation and attempt to

persuade them to testify in a manner helpful to his defense or to assert their Fifth Amendment privilege.

2. A taxpayer who undertakes any such activity commits independent federal crimes, often much easier to prove than criminal tax fraud and other substantive offenses. For example, to prove a document has been backdated, the government is often able to prove the age of the ink used to sign the document, the model typewriter on which it was prepared, or, by comparing the watermark with the records of paper manufacturers, the date on which the paper was made. Moreover, these crimes often translate into a quicker indictment and a more severe sentence.
3. Thus, the most important thing a practitioner can do during the initial meeting with the client is to advise in the strongest possible terms that the taxpayer should not tamper with the evidence and not talk to other potential witnesses. Counsel should continually remind the taxpayer throughout the investigation not to engage in such conduct.

D. Explaining the Investigation

1. Counsel should explain to the client that he is embroiled in a process which will or will not produce an indictment.

2. The investigation likely will affect the client's ability to work and maintain professional and personal relationships. He is likely to pressure his attorney to act quickly to end the investigation. He may question why counsel will have to spend so much time (and so much of his money) pouring over documents, talking to witnesses and doing legal research, yet remains unable to bring the investigation to a prompt conclusion.
3. The client must be made to understand that, in general, unless there is litigation over issues presented by a subpoena or summons and until the Special Agents conclude their investigation, counsel's role is limited to learning the facts and to monitoring the investigation.

III. EARLY STAGES OF THE DEFENSE REPRESENTATION

A. Learning From The Subpoena

The subpoena or summons is a source of information about the investigation. It should catalog the offenses being investigated. (See Attachment 1.) The types of documents demanded in a subpoena duces tecum or an administrative summons will also provide clues concerning the scope, substance, and time frame of the investigation.

B. The Prosecutor Or Agent As A Source Of Information

1. The prosecutor or Special Agent is also a source of information. Counsel should contact the prosecutor

whose name appears on the subpoena and open lines of communication. Similarly, if the client has received a summons, counsel should contact the Special Agent.

2. Counsel should request that all future contacts with the client be through his representative, including the service of future subpoenas or summonses. In an administrative investigation, counsel will likely need to file a power of attorney. (Form 2848).
3. Counsel should ask the prosecutor or Agent to specify the taxpayer's status in the investigation, i.e., target, subject or witness?
 - a. A grand jury "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking that person to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. U. S. Attorneys Manual § 9-11.260.
 - b. A "subject" of a grand jury investigation is a person whose conduct is within the scope of the grand jury's investigation. Id.
 - c. A "witness" is anyone else who in the judgment of the prosecutor may be able to provide information which will aid the grand jury in its investigation.

- d. It is an internal policy of the Justice Department that an "Advice of Rights" form (see Attachment 1) be appended to all grand jury subpoenas served on targets and subjects.
Id.
 - e. There are special guidelines in the U. S. Attorney's Manual for issuing subpoenas to targets. See id. at § 9-261.
4. Counsel should discuss with the prosecutor or Agent any problems that may be presented in producing documents by the return date. If needed, counsel should request an extension of time to comply or a phased production where some documents are produced by the return date and others will be produced later. Confirm all understandings immediately in a follow-up letter to the prosecutor or Agent. If the government does not accommodate these requests, consider litigating the summons or subpoena on the ground that compliance by the return date would be excessively burdensome.
5. Counsel should promptly prepare and send appropriate requests for conferences. In an administrative investigation, conferences are available on request at the conclusion of the Special Agent's investigation and at District Counsel as the case is reviewed. In both administrative and grand jury investigations, conferences are available on

request with the Tax Division of the Department of Justice. Many U. S. Attorney's offices will also provide pre-indictment conferences on request. (A sample request for a Justice Department Conference follows this outline as Attachment 2.)

C. Counsel's Own Investigation

1. Reviewing Documents--Counsel should keep copies of any documents produced to the government in response to a summons or subpoena. It is helpful to "Bates stamp" the documents prior to production and then to produce an inventory of documents in the possession of the government. Most criminal tax cases involve a great deal of documentary evidence, and understanding this evidence may be the most important aspect of representing a taxpayer in a criminal investigation. A thorough understanding of the documents is also essential for counsel to prepare to interview potential witnesses.
2. Interviewing Potential Witnesses
 - a. Counsel should attempt to interview persons who may have knowledge of the transactions or events under investigation. They can provide valuable facts that will aid counsel in evaluating the case.
 - b. Such persons should be considered potential government witnesses, and interviews must be

handled with care. Counsel should assume in talking to any potential witness that everything counsel states may be disclosed to the government. When contacting a witness not known to be represented by a lawyer, the practitioner should identify himself clearly and ask whether the witness has representation. If so, all further contacts should be through the witness's lawyer. If the witness is not represented and is willing to discuss the case, counsel should interview the witness in the presence of someone else assisting him in the investigation who could testify if needed as to what was said in the interview.

- c. If the potential witness has already been interviewed by the government or has testified before the grand jury, he may have been instructed by the Special Agent or prosecutor not to talk about his contacts with the government or his testimony. This instruction has no force of law but is merely a request. The witness may disclose any information about his communications with the government, including the substance of his grand jury testimony. See Rule 6(e)(2); In re Grand Jury Proceedings, 558 F. Supp. 532, 535 (W.D. Va.

1983); In re Grand Jury Summoned October 12, 1970, 321 F. Supp. 238, 240 (N.D. Ohio 1970).

- d. Some lawyers refuse to interview witnesses who are at the time under subpoena because of the possibility, however remote, that the government may allege that the lawyer has engaged in witness intimidation. See 18 U.S.C. §§ 1512, 1515(a)(3). If counsel chooses to interview a potential witness under subpoena (and especially when the witness is not represented), counsel should be particularly careful to establish that he is not providing legal advice and to remind the witness that he should tell the government the truth.
- e. At the conclusion of each interview, a memorandum should be prepared documenting who was present and what was said. Counsel should note that if a witness signs or acknowledges a statement, it may have to be produced to the government at trial as "reverse Jencks" material. 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2.

3. Hiring Investigative Accountants

- a. In most criminal tax cases it is helpful to retain an accountant to review the taxpayer's financial records, assist in the building of a defense, and possibly testify at trial as an

expert. Such an accountant should be engaged by counsel, because the attorney client privilege will therefore extend to his work. See United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961). (For an example of a letter retaining an accountant in this capacity, see Attachment 3).

- b. The client may wish to have counsel hire his return preparer as the investigative accountant to save money. This would be a mistake because the preparer is a potential fact witness, and the factfinder undoubtedly will not consider him an objective expert witness.

IV. CONCLUSION

Quite obviously, there is much work to be done by a practitioner retained after a Special Agent appears. Above all, the practitioner should remember in the early stages of a criminal tax investigation that (1) there is rarely any benefit in having the client talk with the Agents and (2) the client should be warned in the strongest possible terms (and more than once) not to make matters worse by tampering with the evidence, obstructing justice, or improperly contacting any potential witnesses.

Attachments

1. Subpoena duces tecum (with advice of rights form)
2. Sample letter requesting DOJ conference (with copy to local U.S. Attorney)
3. Sample letter retaining an investigative accountant.

United States District Court
FOR THE

To

You are hereby commanded to appear in the United States District Court for the

District of _____ at _____ in the city of _____

on the _____ day of _____ 19 _____ at _____ o'clock _____ M. to

testify before the Grand Jury and bring with you¹

This subpoena is issued on application of the

Clerk.

Date _____ 19_____

By _____
Deputy Clerk

1. Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at _____ on _____
and on _____ at _____ I served it on the
within named _____
by delivering a copy to _____ and tendering² to _____
allowed by law. _____ the fee for one day's attendance and the mileage

Date _____ 19_____

By _____

Service Fees

Travel _____ \$
Services _____
Total _____ \$

ADVICE OF RIGHTS

In accordance with Department of Justice regulations, this form is attached to all federal grand jury subpoenas, regardless of the status, culpability, or involvement of the person who receives a subpoena.

1. The grand jury is conducting an investigation of possible violations of federal criminal law involving:

[INSERT TWO OR THREE WORD DESCRIPTION OF SUBJECT MATTER OF INVESTIGATION, e.g. "ZONING IN BALTIMORE COUNTY, MARYLAND" OR "TAX OFFENSES"] and related matters.

2. A witness before the grand jury may refuse to answer any question if a truthful answer to the question would tend to incriminate the witness.

3. Anything said by a witness before the grand jury may be used against the witness by the grand jury or in a subsequent legal proceedings.

4. If a witness has retained counsel, the grand jury will permit the witness a reasonable opportunity to step outside the grand jury to consult with counsel if the witness so desires.

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Stanley F. Krysa, Esquire
Director, Criminal Tax Enforcement
Tax Division
U.S. Department of Justice
Washington, DC 20530

Re: (Name and Address of Taxpayer)

Dear Mr. Krysa:

We represent the above-named taxpayer who is the subject of an investigation by the Criminal Investigation Division of the Internal Revenue Service in _____ . In the event a case concerning Mr. _____ is forwarded to you with a recommendation for prosecution, we respectfully request an opportunity to have a conference with a member of your section prior to your taking any action.

Please acknowledge the receipt of this letter. Thank you for your consideration of this matter.

Sincerely,

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* ADMITTED IN D.C. & N.Y.
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Dear _____:

This will confirm the arrangement whereby you will undertake to work for us in conjunction with our representation of _____ along the lines outlined below.

In connection with the retainer of our firm to render legal services to _____, we have express authority to retain an accountant to work under our direction and report directly to us. This work contemplates services of character and quality which will be a necessary adjunct to our services as attorneys.

In connection with your employment, all communications between you and any attorney from this firm or our client shall be regarded as confidential and made solely for the purpose of assisting counsel in giving legal advice. You will not disclose to anyone, without written permission, the nature or content of any oral or written communication, nor any information gained from the inspection of any record or document submitted to you, and you will not permit inspection of any papers or documents without our permission in advance.

You will hold all workpapers, records or other documents that you prepare or obtain pursuant to this arrangement solely for our convenience and subject to our unqualified right to instruct you with respect to possession and control. Any workpapers prepared by you, or under your direction, belong to Caplin & Drysdale.

As part of the agreement to provide accounting services in this matter, you will immediately notify us of the happening of any one of the following events:

- a. the exhibition or surrender of any documents or records covered by this arrangement, in a manner not expressly authorized;
- b. a request by anyone to examine, inspect or copy such documents or records covered by this arrangement;
- c. any attempt to serve, or the actual service, of any court order, subpoena or summons upon you which requires the production of any documents or records covered by this arrangement.

You will immediately return all documents, records and workpapers covered by this arrangement to us at our request.

Please confirm your acceptance of the foregoing terms and conditions by signing the attached copies of this letter and return them to us.

Sincerely,

Cono R. Namorato

Confirmed:

By _____