**J. Edgar Murdock Inn of Court**

**January 14, 2020**

**Sources and Selection of Criminal Tax Cases**

**The Birth of a Criminal Tax Case: Who are the players?**

The criminal tax enforcement process involves the collaborative efforts of (1) IRS Criminal Investigation (“CI”) special agents; (2) attorneys with the IRS’s Office of Chief Counsel Criminal Tax Division (“CT”); (3) TIGTA special agents; and (4) Assistant United States Attorneys. Each plays a key role in the investigation, evaluation, and prosecution of tax crimes. Criminal Tax Manual ¶ 1.01[4][b].

**A. Role of CI**

The IRS derives its investigations from many sources, including but not limited to Whistleblowers and Criminal Fraud Referrals. IRM 9.4.1.5.1.

*1. Whistleblowers*

CI’s role in whistleblower cases is to evaluate allegations by interviewing the whistleblower using normal procedures and memorializing the contact. If the information has criminal potential, CI must initiate a Primary Investigation (“PI”) within 90 days. IRM 9.4.1.5.1.1. PI is an evaluation of an allegation that an individual or entity is in noncompliance with the laws enforced by the IRS and the viability of criminal prosecution. IRM 9.4.1.5.

*2. Criminal Fraud Referrals from Exam*

CI receives criminal fraud referrals from compliance employees via the Form 2797, *Referral Report of Potential Criminal Fraud Cases*. A criminal fraud referral is information acquired during a civil examination or a collection proceeding that is provided to CI from another operating division after firm indications of fraud are established and criminal criteria are met. IRM 9.4.1.5.1.3.

A Special Agent (“SA”) will arrange an initial conference within the referring exam employee to discuss the merits of the criminal fraud. The initial conference must be scheduled to occur within 10 business days from the receipt of the referral. The conference attendees should include the SA, the Supervisory Special Agent (“SSA”), referring compliance employee, and his or her immediate supervisor and the Fraud Technical Advisor (“FTA”). During the 10-day conference, the exam employee will discuss the referral and related tax returns, evidence gathered in support of the alleged offense, criminal tax computations, etc. IRM 9.4.1.5.1.3.2

CI must decide whether to elevate this referral to an investigation or decline the referral within 30 business days of receipt of a domestic referral or 60 business days of an international referral. This period can be extended. IRM 9.4.1.5.1.3.3

If CI accepts the referral, the SA will meet with the referring compliance employee to devise a plan of action and to determine the need for a cooperating compliance employee, which tax returns are to be transferred to CI, and whether detailed memoranda are required from exam concerning contacts with the taxpayers and their representatives. IRM 9.4.1.5.1.3.4

**B. Role of DOJ**

In most criminal tax cases, tax information is disclosed to the Department of Justice by the IRS under the “referral” authority of 26 U.S.C. § 6103(h). Before a case is referred to the Department of Justice, the IRS has authority to investigate using its administrative summons power. That power terminates when the Secretary of the Treasury has recommended that the Attorney General prosecute or conduct a grand jury investigation of a person for an offense connected with the administration of the internal revenue laws. 26 U.S.C. § 7602(d)(A)(I).

Under appropriate circumstances, the IRS can consult with Department of Justice prosecutors for “pre-referral advice,” that is, without making a referral for a grand jury investigation or prosecution that deprives the IRS of the power to use its summons authority.

A criminal tax case may also be referred to the Department of Justice by TIGTA for grand jury investigation or prosecution. These investigations typically involve non-forcible interference with an officer or employee acting under the Internal Revenue laws (26 U.S.C. 7212(a)); tax preparer refund schemes; or perjury, conspiracy, false statements, obstruction or fraud related to a tax matter before the IRS. Other criminal matters are referred directly to a United States Attorney’s Office. Criminal Tax Manual ¶ 1.03

**C. Role of the United States Attorney**

Although the general rule is that the Tax Division must specifically approve criminal tax investigations and prosecutions before United States Attorneys initiate any proceeding, an exception to this review process exists in matters that the IRS and the TIGTA may "directly" refer to the United States Attorney. *Justice Manual* § 6-4.243. The United States Attorney may initiate or decline prosecution of direct referral matters without prior approval from the Tax Division. Nevertheless, once prosecution has been initiated, the indictment, information, or complaint may not be dismissed without the prior approval of the Tax Division. *Justice Manual* § 6-4.246.

The IRS may directly refer the following categories of tax cases to a United States Attorney without prior Tax Division approval: (1) all Title 26 and Title 18 offenses involving certain designated excise taxes; (2) 18 U.S.C. §§ 286 and 287, multiple filings of false and fictitious returns claiming refunds, when the target files multiple returns in a single year claiming false refunds in the names of non-existent or unknowing taxpayers; (3) 26 U.S.C. §§ 7215 and 7512, violations of the trust fund laws; (4) “ten percenter” matters involving the failure to report gambling income pursuant to 26 U.S.C. § 7206(2), but only if there is an arrest that occurs at the time of the offense; (5) prosecutions pursuant to 26 U.S.C. §§ 7203 and 7206 regarding IRS Forms 8300, relating to cash received in a trade or business pursuant to 26 U.S.C. § 6050I, provided that the prosecution involves solely cash received in a trade or business as required by 26 U.S.C. § 6050I and the matter does not involve the prosecution of accountants, physicians, or attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly held corporations and/or their officers. *Justice Manual* § 6-4.243.

The Assistant Attorney General, Tax Division, has delegated to the United States Attorney and other specified supervisory offices in the US Attorneys’ Offices, the authority to approve search warrants in many matters arising under internal revenue laws: a warrant directed at an office or premises of a target or subject of an investigation; a warrant directed to a provider of electronic communication services or remote computing services and related to a subject or target of a criminal investigation; and a warrant directed to a disinterested third party owning a storage space or similar business and relating to a subject or target of a criminal investigation. The US Attorneys’ Office must submit a written request and obtain the approval of the Tax Division in certain circumstances, for example when the target or subject is believed to be an accountant or lawyer, or a third party who is not a target or subject of an investigation. *Justice Manual* § 6-4.130.