

Welcome!

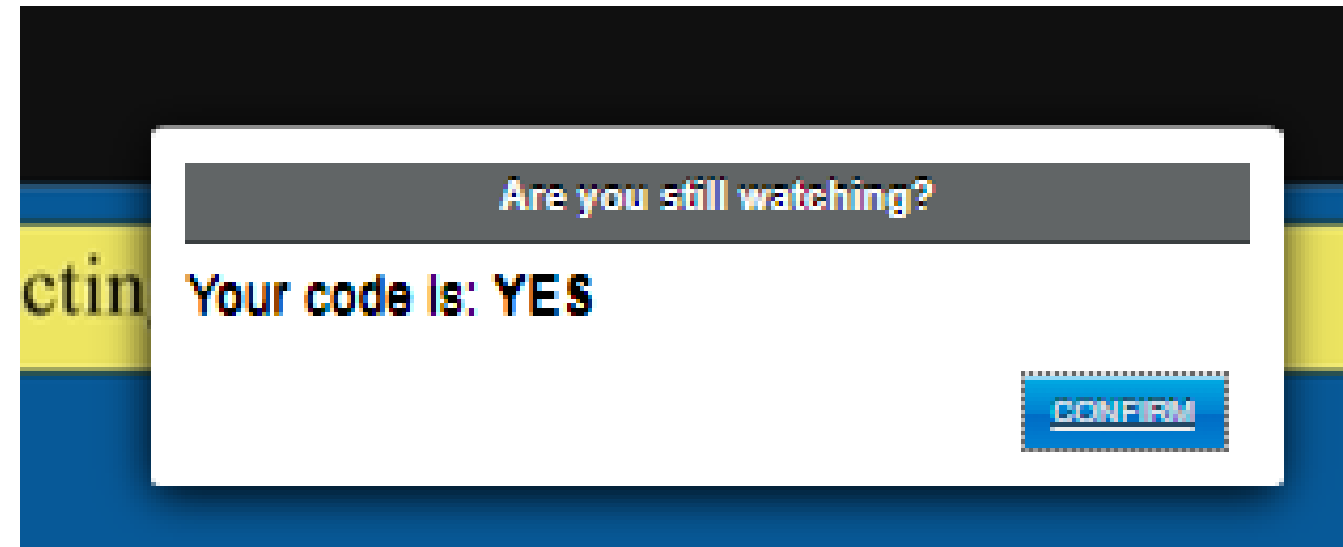
**The 11th Annual IRS
Representation
Conference**

Housekeeping Items

- ▶ CPE Certificates – will be handed out at the end of the program. Online Audience will receive a link if they do the online attendance checks
- ▶ Questions during the program? Please walk up to the Mic stands so the on-line audience can hear you. Online, please use the chat box
- ▶ Government Speakers – will be providing their own opinion and not the formal opinion of the government
- ▶ Facilities immediately outside, online stick to schedule

Housekeeping Items - Webcast

- ▶ On-Screen attendance checks
- ▶ Please keep to our schedule
- ▶ Use the chat room for questions
- ▶ Link for certificate will be emailed to you after the on-screen attendance checks are tallied on Monday or Tuesday



Webcast – Having Issues?

Customer Care email: Registration@mylawcle.com

Customer Care Phone numbers :
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Next Year's Conference...



Today's Agenda

- ▶ We have given you in your handouts
- ▶ Webcast Audience: please try and take your break when we do so you do not miss the onscreen attendance checks

Time	Topic
7:30 - 8:30	Registration & Breakfast
8:30 - 8:35	Opening Remarks/Housekeeping Items
8:35 - 10:00	IRS Update
10:00 - 10:15	Break
10:15 - 11:05	Enforcement Trends: What's Hot and What's Not
11:05 - 12:00	How to File a Refund Claim?
12:00 - 12:45	Lunch
12:45 - 1:45	Creative Collection Alternatives
1:45 - 2:45	Ethics: Handling Employee retention Credit Audits and Investigations
2:45 - 3:00	Break
3:00 - 4:00	Out of the Frying Pan and Into the Fire: What Makes a Case Move from the Civil Function to IRS Criminal Investigation
4:00 - 5:00	High Net Worth Taxpayer Audits: The Tax Man Cometh

IRS Update: SB/SE

IRS REPRESENTATION
Conference

Mary Beth Murphy, Director of Collections, North Atlantic Territory, Boston, MA

Interviewer: Eric L. Green, Esq., Green & Sklarz, LLC

Criminal Investigation

IRS REPRESENTATION
Conference

Shea Jones, Deputy Chief, Criminal Investigation

Interviewer: Kathy Enstrom, Moore Tax Law Group, LLC

Independent Office of Appeals

IRS REPRESENTATION
Conference

Elizabeth Askey, Chief, Independent Office of Appeals

Interviewer: Jeffrey Sklarz, Esq., Green & Sklarz LLC



Independent Office of Appeals Update

November 8, 2024



Agenda

- **Appeals Staffing and Cycle Time**
- **Appeals Organizational Changes**
- **Alternative Dispute Resolution**
- **Technology/Modernization**
- **Issue Coordination**
- **Syndicated Conservation Easement Settlement Initiative**
- **Employee Retention Credit**



Appeals Staffing and Cycle Time

WORKSTREAM	FY 2022	FY 2023	FY 2024
Total Staffing	1,509	1,543	1,746*
Total Receipts	74,408	60,036	51,990
Total Closures	72,189	67,793	65,573
Non-Docketed Cycle Time	365	292	309

- Significant hiring efforts continue for technical employees, including Appeals Officers, Settlement Officers, etc., including “direct hire” authority.
- Appeals has had an annual attrition rate of 13% each year since FY2019.
- Appeals authorized to increase headcount to 2,227 by end of FY2025.

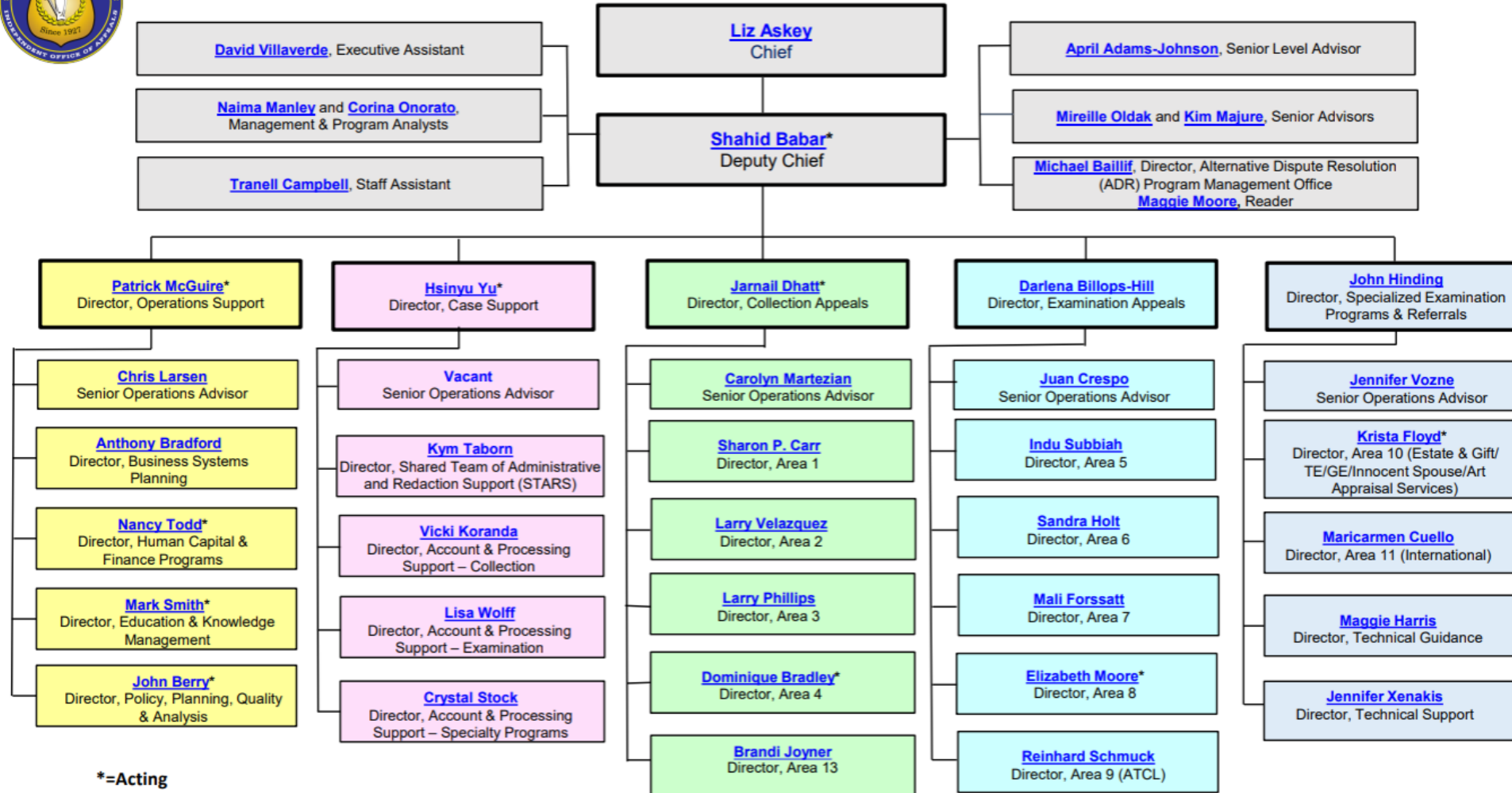


Current Appeals Organization Chart



Independent Office of Appeals

October 2024



Break!



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IRS ENFORCEMENT TRENDS: WHAT'S HOT AND WHAT'S NOT

New England Tax Representation Conference-November 8, 2024

Speakers



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Topics

Employee Retention Credits

High Net Worth Taxpayers

Partnership Audits and BBA

Virtual Currency

Employment Tax Audits

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EMPLOYEE RETENTION CREDITS



What is the Employee Retention Credit?

- The Coronavirus Aid, Relief, and Economic Security Act (C.A.R.E.S. Act) was enacted in March of 2020 and later amended 3 times
 - Intended for companies to retain employees on their payroll
 - Provide payroll tax relief to help sustain businesses during the pandemic
 - Fully refundable credit available to certain eligible employers against employment taxes for wages paid between March 13, 2020 and December 31, 2021
 - Applies to Forms 941, 943, 944, & CT1
 - According to the IRS, it has become subject to rampant abuse and illegitimate claims.



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Which Employers Are Eligible for ERC?

- Notice 2021-20- Employer was fully or partially unable to carry on operations due to government orders
- Notice 2021-20 and Notice 2021-23- Employer had a measurable and required decline in gross receipts
- Notice 2021-49-Met the requirements of a Recovery Start Up Business for quarters 3 and 4 of 2020

ERC Chronology

- **March 2020** – ERC passed as part of CARES Act
- **2021** – Congress amends the ERC to make it easier to claim
- **March 2023** – ERC tops IRS's list of 2023 "dirty dozen" transactions
- **Sept. 14, 2023** – IRS issues moratorium on processing ERC claims
- **Oct. 19, 2024** – IRS announces withdrawal program
- **Mar. 22, 2024** – First ERC voluntary disclosure program terminates
- **June 20, 2024** – IRS begins processing some ERC claims
 - Announces that most claims (60 – 70%) present "unacceptable level of risk"
- **August 15, 2024** – IRS Re-Opens Voluntary Disclosure Program
 - Terminates 11/22/24

ERC Notices, Moratoriums

IR-2024-203 (Aug. 8, 2024) – IRS issued an update of its failure to process ERC claims

- IRS sent 28,000 letters disallowing 90% of ERC claims
 - 50,000 claims processed, extending the moratorium to Jan. 31, 2024
 - Hundreds of criminal cases involving ERC claims initiated
 - Office of Promoter Investigations (OPI) working cases of suspected abusive promoters and preparers
- **IR-2024-212** (Aug. 15, 2024)-IRS stated it intended to send 30,000 letters to recapture incorrectly processed ERC payments
 - **IR-2024-263** (Oct. 10, 2024)- IRS states it began evaluating and issuing ~400,000 claims, representing ~\$10 billion of claims



ERC Hot Topics – Audits and Investigations

Audits / Disallowances

- IRS taking very aggressive positions in audits
- Narrow interpretation of Notice 2021-20
- Supplier disruption issues = outright rejection
- IRS disallowing claims it deems clearly erroneous through Letter 105-C

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Investigations

- Per IRS, over 460 criminal investigations underway
- Investigations focused on advisors and promoters
- *US v Haynes*, 24-cr-00232 (DNJ)
 - Defendant, a tax preparer, sought over \$124 million in fraudulent ERC claims, telling clients that they qualified solely for owning a business
- *US v. Bassett*, 23-cr-0039 (D Utah)
 - First acquittal in criminal ERC prosecution

ERC Hot Topics – Voluntary Compliance

Withdrawal Program

- For claimants whose refunds have not been issued (or check hasn't been cashed)
- Employers under audit can still participate
- Per IRS, over \$675m has been recovered

Voluntary Disclosure Program

- Reinstated on August 15, 2024 – ends November 22, 2024
- For Claimants who have received a refund
- Claimants can keep 15% of refund (down from 20%)
- Only available for 2021 period
- Participants must identify advisors / promoters
- Prior iteration recovered \$1.1b in refunds per IRS

NB: Neither the withdrawal nor the voluntary disclosure program provides protection from criminal investigation / prosecution for willfully false ERC claims

ERC Hot Topics – Litigation

Refund Litigation

- Can bring refund suit once claim has been pending more than 6 months (or receipt of Letter 105-C) + ●
- IRS delays in processing claims resulting in proliferation of refund suits ○
- District Court or Court of Federal Claims

Other Litigation

- *SoCal Emergency Medicine v. Werfel*, (CD Cal.)
 - Medical corporation sued the IRS, seeking to invalidate Notice 2021-20
 - Plaintiff claims the IRS violated the APA by including “material changes” to the ERC regime through sub regulatory guidance and without following the APA’s notice and comment procedures

HIGH NET WORTH TAXPAYER AUDIT AND COLLECTION ISSUES

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Collection Efforts: Non-Filers, Outstanding Tax Debt

- **IRS Collection Efforts:**

- Fall 2023: IRS announced it would be using agency funding from the Inflation Reduction Act to focus collection efforts on high-wealth individuals (more than \$1M of income and more than \$250,000 in outstanding tax debt)
 - *2023*: \$38M was collected from 175 high income, high net worth taxpayers
 - *As of Sept. 6, 2024*: an additional \$1.1B was collected from another 1,600 high income, high net worth taxpayers (80% of whom made at least one payment)
- Fall 2024: IRS pursuing 125,000 high income, high wealth non-filers (100,000 taxpayers with income between \$400K and \$1M and 25,000 taxpayers with more than \$1M) since 2017.
- IRS is also initiating criminal prosecutions in some cases under IRC § 7203 (willful failure to file) and IRC § 7210 (tax evasion)

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Real Estate Professional Status

Real Estate Professional

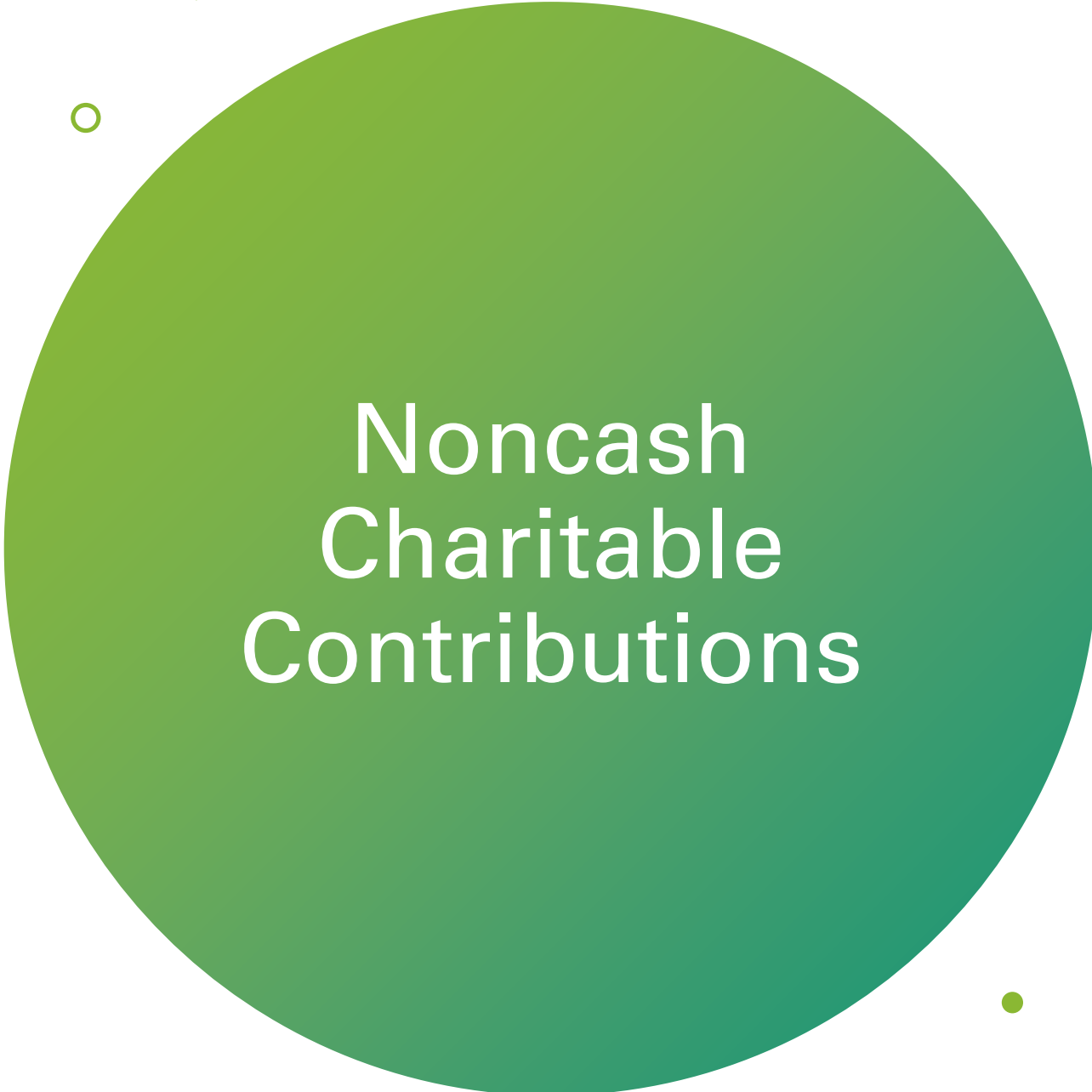
- Must meet the 50% test or 750 hours test
- Must materially participate

Material Participation

- Must meet 1 of the 7 tests of Treasury Regulation 1.469-5T(a)

Aggregation Election

- Made pursuant to Treasury Regulation Section 1.469-9(g) to aggregate all real estate activities into one
- Requirements for election
- How and when to terminate the election



Noncash Charitable Contributions

- **IR-2023-18:** IRS warns of promoter schemes involving exaggerated art donation values
- **Form 8283 Substantiation Requirements**
 - Publicly traded securities
 - Effect of short-term and long-term holding periods
 - Number of shares
 - Valuation methodology
 - Privately held business interests
 - Description
 - Acquisition information
 - Qualified Appraisal
 - Contemporaneous Written Acknowledgement

Business Aircraft



In late February 2024, the IRS announced an LB&I campaign to focus on corporate jet usage



Focus: whether jet use is properly allocated between business and personal reasons by large corporations, large partnerships, and high-income taxpayers; resulting impacts on fringe benefit inclusion and business deductions



Business Aircraft Continued

- *Exam requests:*
 - Flight logs (including departure/arrival cities, trip hours/miles, passengers, and trip purpose);
 - Classification of passengers' purposes (business non-entertainment, business entertainment, personal non-entertainment, personal entertainment, and commuting)
 - Substantiation for proper depreciation (including date the aircraft was placed into service, qualification for bonus or accelerated depreciation, whether there was sufficient qualified business use for depreciation in a given year)

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PARTNERSHIP AUDITS AND BBA

Partnership Audits Under BBA

- Four major issues to be aware of in BBA audits:

1. **Statutory deadlines to make certain choices**

- Request modification of the imputed underpayment (IU) (can be extended)
- Make a push out election (cannot be extended)

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2. **Understand the partnership's choices so the partnership can make the best choice based on its own facts and circumstances**

- There is no one "right" answer
- Modifying the IU, pushing out the adjustments, paying the IU (can be mixed and matched)

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3. **Verify the IRS is properly computing the IU**

- Is the IRS correctly treating some adjustments as zero in the calculation of the IU
 - Treas. Reg. § 301.6225-1(b)(4)
- Understand that the IU is not calculated the same way as partner tax

4. **Follow the proper procedures to make elections/requests**

- Modification requests must be electronically filed through a portal. You cannot paper file!

BBA Deadlines



IRS must issue the Notice of Proposed Partnership Adjustment (NOPPA) within 3 years of when the partnership return (or an AAR) was filed.

- Plus any extensions or special rules (e.g., substantial omission)
- Letter 5892/5892-A, Form 14792, Form 886-A

When the IRS issues the NOPPA, the partnership has 270 days to request to modify the IU if it wants to

- This can be extended but do not wait until the last minute
- Requests for modification can only be submitted electronically

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BBA Deadlines Cont'd

- The partnership has 45 days from when the notice of final partnership adjustment (FPA) is mailed to make an election to push out the adjustments instead of paying the IU
 - Cannot be extended
 - If the partnership does not get an FPA, it cannot push out. Keep this in mind if settling during the audit
 - But can still do modification which, if the partners cooperate, could create the same end result

BBA – What are Adjustments?



Under BBA, the partnership-level liability (the imputed underpayment (IU)) is calculated on adjustments to partnership-related items (PRIs)

- The IU is not a collection of partner tax and has nothing to do with partner tax

PRIs are any items or amounts which are:

- On the Form 1065/required to be on the Form 1065 or required to be maintained in the partnership's books/records, and
- Which are relevant in determining chapter 1 liability under the Code
 - Is it possible to affect chapter 1 under the Code, not whether it does in any particular case

BBA –What Are Adjustments? (Continued)



PRIs include
balance sheet items
(assets, liabilities,
etc.)

Adjustments to
PRIs go into the
calculation of the IU

All adjustments are
treated the same under
BBA. An adjustment to
ordinary income is
treated the same as an
adjustment to a liability



VIRTUAL CURRENCY

IRS Enforcement Efforts

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John Doe Summonses by the IRS on Coinbase, Kraken Poloniex

IRS chainanalysis research and increased technical IRS employees hired to investigate virtual currency

10,000 IRS “educational letters” sent in August, 2019 to crypto owners

Required reporting of transfers over \$10,000 on Forms 8300

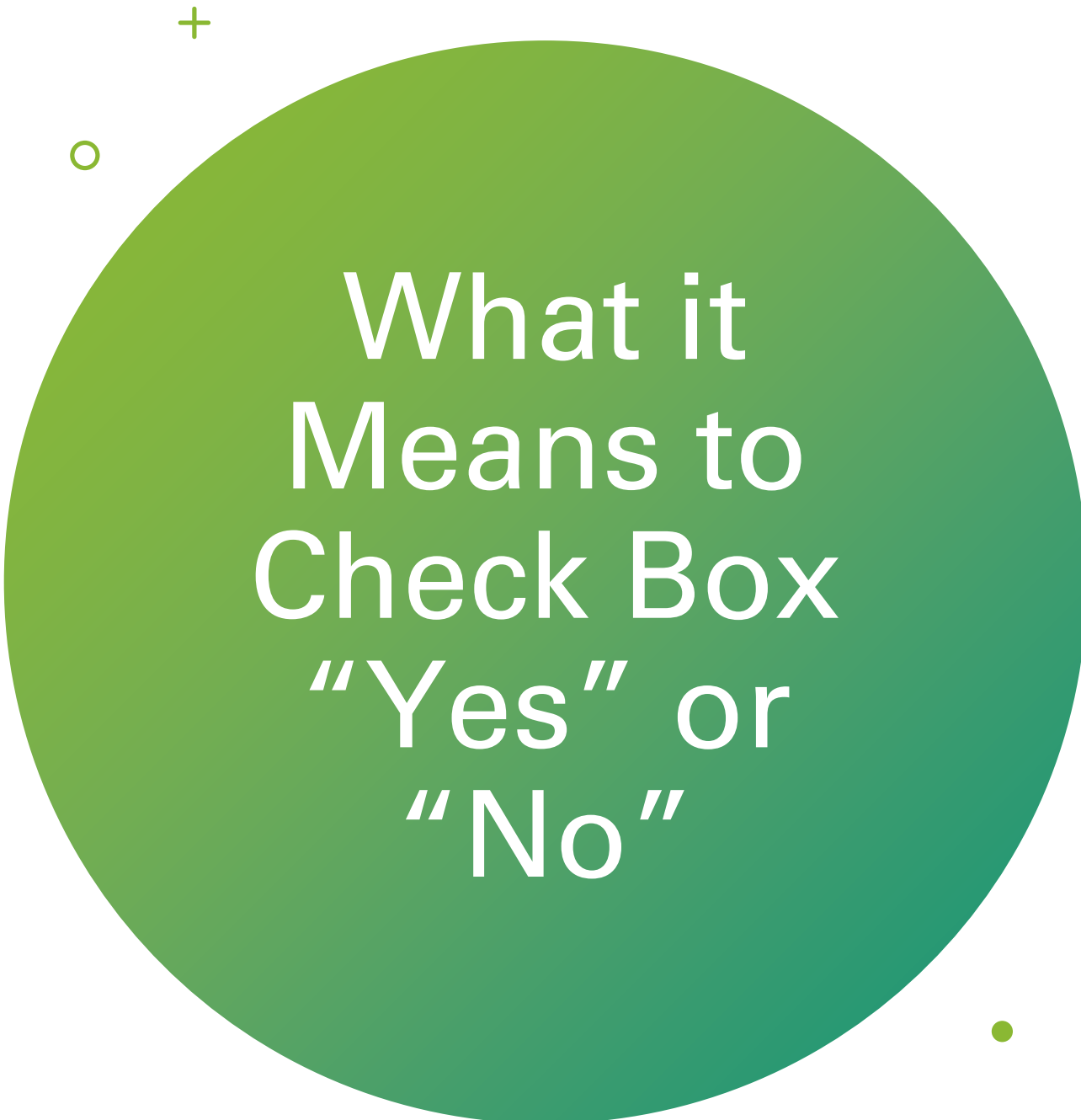
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Question on Tax Returns Regarding Taxpayer's Digital Assets

- Required question on Forms 1040
 - In 2020: “At any time during 2020, did you receive, sell, send, exchange or otherwise acquire any financial interest in any virtual currency?”
 - In 2021: “At any time during 2021, did you receive, sell, exchange or otherwise dispose of any financial interest in any virtual currency?”
 - In 2023: “At any time during 2023 did you (a) receive (as a reward, award or payment for property or services) or (b) sell, exchange or otherwise dispose of a digital asset (or financial interest in a digital asset)?”



What it Means to Check Box "Yes" or "No"

- Normally, a taxpayer must check the "Yes" box if they:
 - Received digital assets as payment for property or services provided;
 - Received digital assets resulting from a reward or award;
 - Received new digital assets resulting from mining, staking and similar activities;
 - Received digital assets resulting from a hard fork (a branching of a cryptocurrency's blockchain that splits a single cryptocurrency into two);
 - Disposed of digital assets in exchange for property or services;
 - Disposed of a digital asset in exchange or trade for another digital asset;
 - Sold a digital asset; or
 - Otherwise disposed of any other financial interest in a digital asset.

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Audits of Virtual Currency Transactions

- Detailed IDRs
- Interviews of witnesses and the taxpayer
- Vast disparity in agents' level of knowledge / familiarity with crypto
- Third party summonses
 - Accountants
 - Financial Institutions
 - Crypto exchanges
 - Credit cards
 - Persons the taxpayer conducted crypto transactions with
- Increased penalties, statutes of limitations, criminal and fraud investigations

Legal Authority

Publication 544, Sales and Other Dispositions Assets


IRS FAQ's on Virtual Currency

Notice 2014-21 (IRS Virtual Currency Guidance)

Revenue Ruling 2019-24 (Taxation of gross income as a result of a hard fork if the taxpayer does or does not receive units of crypto)

News Release IR 2024-178- (Final regulations requiring custodial brokers to report sales and exchanges of digital assets, including Crypto)

Fact Sheet 2024-23- (Final regulations and related IRS guidance for reporting by brokers on sales and exchanges of digital assets)



The background features a green-tinted image of a calculator, a pen, and a document with a table of numbers. The text 'EMPLOYMENT TAX AUDITS' is overlaid in white.

EMPLOYMENT TAX AUDITS

114811
114811
114922
114922
114940
114940
115029
115029
183912
211550
180708
091349

How Much Are We Talking About?

In Fiscal Year 2023, \$1.56 trillion in tax receipts were employment taxes and \$1.73 trillion were Federal income tax withholding, accounting for \$3.29 trillion (about 70 percent) of the \$4.7 trillion total tax receipts (per FY2023 IRS Data Book).

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- TIGTA
Report
April
2024

- TIGTA reviewed the IRS's efforts for identifying "Ghost Employers"
 - Ghost Employers = Employers who issue Forms W-2 to their employees but do not file W-2s or deposit withholdings with IRS
- From June 2018 to May 2023, CID identified 354 Ghost Employer leads.
 - A/o May 2023, 33 cases led to a successful prosecution with an average restitution amount of \$1.3 million.
- Using data analytics, RAAS identified over 162,000 potential Ghost Employers with an estimated liability of \$1.7 billion.

CIVIL AND CRIMINAL EMPLOYMENT TAX ENFORCEMENT

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Employment Tax Exams

Worker classification

Equity compensation and timing of tax deposits

Fringe benefits and Awards/Prizes

Travel expense reimbursements and remote workers (tax home)

International (NRA inbound or US outbound)

ACA Reporting (Forms 1094-C and 1095-C)

- ERC and payroll tax deferral
- Supplemental wage withholding
- FUTA / SUI mismatches
- Settlements
- Exempt Forms W-4 or excessive allowances
- Employee loans
- Trust fund recovery penalties



Trust Fund Recovery Penalties – § 6672

- TRFP is assessed against any “responsible persons” in their individual capacity
 - Responsible for withholding, accounting for, or depositing or paying employment taxes and willfully failing to do so
 - Knowing and intentional disregard, not negligence
 - Ex: Corporate officer, partner, sole proprietor, agent, employee
 - Failure to make a reasonable attempt to comply with the tax law
 - The penalty is the taxes that have been withheld from employees (i.e., federal income tax and FICA taxes) plus interest.
- Liability is joint and several**

Worker Classification Issues

Significant Employment Tax Implications

Benefits of classifying workers as independent contractors (“IC’s”) are:

1. No obligation to withhold, deposit, and report the following: (1) FICA taxes; (2) Unemployment insurance taxes and (3) Federal income taxes.
 2. Payors do not have to adhere to minimum wage and overtime laws.
 3. May not have to provide health care, retirement, or fringe benefits.
- IRS scrutiny – the IRS uses several different programs to detect worker misclassification (e.g., 1099 Matching Program, agreements to share info with DOL, state unemployment agencies, etc.).



Employee v. Independent Contractor

Examiners directed to focus on three categories:

- Behavioral Control
- Financial Control
- Relationship of the Parties

Form SS-8

- Worker completes if believes he/she is misclassified
- Employer may also use to determine correct classification
- Tracks the factors agents will consider under the three categories above

Criminal Employment Tax Schemes

- **Ghost employees**
- **Criminal Misclassification**
 - Sham companies / No 1099s / Check cashers
- **Pyramiding**
 - Serially opening companies and defaulting on payroll
- **Labor Broker Schemes**
 - Area of increased IRS focus
 - Common in construction industry

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Employment Taxes - §7202

- Three ways to violate 26 U.S.C. § 7202:
 - (1) a willful failure to collect;
 - (2) a willful failure to truthfully account for; and/or
 - (3) a willful failure to pay over.
- Withhold, Account For, Pay Over – Breach of any one is an offense.
- Each quarter is a count!
- There is no bad businessman defense:

“A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. (...) If a defendant has made discretionary purchases in lieu of meeting his tax obligations, this is probative of his guilt.” - U.S. v. Blanchard, 618 F.3d 562, 569-572 (6th Cir. 2010)

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QUESTIONS

How to File a Refund Claim

SOL and Other Procedural Issues

Dave Shuster 11-08-2024

Generally

◆ IRC 6402(a)

- ◆ Within applicable period of limitations, IRS may
 - ◆ Credit the amount of any overpayment against any tax liability of the taxpayer, and
 - ◆ Subject to certain debts and other obligations
 - ◆ Refund any balance

◆ IRC 6511(b)(1)

- ◆ No credit or refund allowed after expiration of SOL, unless
- ◆ Taxpayer files claim for credit or refund within SOL

Generally

- ◆ IRC 7422 – no suit for credit or refund shall be allowed until a claim for refund or credit has been filed
- ◆ IRC 6514(a)
 - ◆ Refund erroneous/credit void, if made
 - ◆ After expiration of SOL for filing claim therefor, unless claim was filed within SOL
 - ◆ After expiration of SOL for filing suit, unless suit begun within SOL (where claim timely filed but disallowed)

SOL Issues – Generally

- ◆ Time for filing refund claim [IRC 6511(a)]:
 - ◆ Whichever expires later:
 - ◆ 3 years from when return was filed, or
 - ◆ 2 years from when tax was paid

SOL Issues – Generally

- ◆ Limit on amount of refund [IRC 6511(b)(2)]:
 - ◆ Claim filed within 3-year period:
 - ◆ Look back at what amount was paid within 3 years, plus any extension for filing return, preceding filing of claim
 - ◆ Claim not filed within 3-year period:
 - ◆ Look back at what amount was paid within 2 years preceding filing of claim

SOL Issues – Special Rules

- ◇ Extension of ASED [IRC 6511(c)]:
 - ◇ SOL for making claim for credit or refund extended to 6 months after extended ASED
 - ◇ Amount of refund – lookback similarly extended

SOL Issues – Special Rules

◆ Other situations

- ◆ Bad debts, worthless securities -- 7 years, from due date of return [IRC 6511(d)(1)]:
- ◆ FTC
 - ◆ 10 years, from due date of return [IRC 6511(d)(3)]
 - ◆ *Christensen v US* (Ct Fed Cl --2023) – NIIT, US/France Income Tax Treaty
- ◆ Carrybacks: NOL, capital loss, certain credits [IRC 6511(d)(2), (4)]:
 - ◆ 3 years from due date (including extensions) of loss or unused credit year return
 - ◆ Eg:
 - ◆ 2020 Form 1040, filed on extension 9/30/2021
 - ◆ Refund claim for NOL c/b from 2020 to any other year, SOL ran out 10/15/2024
- ◆ Amount – lookback rules n/a

Return Deemed Filed, Tax Considered Paid

- ◆ Generally [IRC 6513(a)]:
 - ◆ Return filed before due date (without regard to extensions)
 - ◆ Deemed filed on due date
 - ◆ Eg:
 - ◆ 2022 Form 1040, on extension, filed 4/1/23 – deemed filed 4/15/23
 - ◆ 2022 Form 1040 filed on extension after 4/15/23 – actual filing date controls
 - ◆ Tax paid before due date (without regard to extensions)
 - ◆ Deemed paid on due date

Return Deemed Filed, Tax Considered Paid

- ◆ Payroll taxes, returns [IRC 6513(c)]:
 - ◆ Returns and taxes for periods ending with or within calendar year filed before 4/15 of succeeding calendar year – deemed filed/paid on 4/15 of such succeeding year
 - ◆ Eg: 2021 Forms 941 timely filed, taxes timely paid -- ERC claims due 4/15/25

Tax Considered Paid – Other Situations

- ◆ Income Tax Withholding [IRC 6513(b)(1)]:
 - ◆ Deemed paid on 15th day of 4th month after close of taxable year
 - ◆ Eg: wage withholding for 2023 -- deemed paid 4/15/24

Tax Considered Paid – Other Situations

- ◆ Estimated tax payments [IRC 6513(b)(2)]:
 - ◆ Deemed paid on last day for filing return (without regard to extensions)
 - ◆ Eg:
 - ◆ Individual's estimated tax payments for 2023 -- deemed paid on 4/15/24
 - ◆ Overpayment on 2022 Form 1040, election to apply to 2023 estimated taxes -- deemed paid 4/15/24

Tax Considered Paid – Other Situations

- ◆ FDAP/FATCA Withholding [IRC 6513(b)(3)]:
 - ◆ Deemed paid on due date of return (without regard to extensions)
 - ◆ Eg:
 - ◆ NRA not receiving wages s/t US income tax withholding, but receiving dividends s/t 30% FDAP withholding for 2022
 - ◆ Deemed paid 6/15/23

Tax Considered Paid – Other Situations

- ◆ Overpayment used to pay other liability
 - ◆ Date on which overpayment is used to pay liability is date of payment [See *Republic Petroleum Corp. v US*, 613 F2d 518, 525 n.19 (5th Cir. 1980)]
 - ◆ Eg:
 - ◆ 2018 Form 1040 filed late on 11/15/2019, late filing penalty imposed
 - ◆ 2021 Form 1040 showing overpayment filed 10/15/22; processed on 12/15/22, with overpayment applied to satisfy 2018 Form 1040 penalty
 - ◆ Refund claim for 2018, seeking to recover 2021 overpayment applied to 2018 late filing penalty, must be filed by 12/15/24 (2 years from payment)

Special Situations

- ◆ Return on extension timely mailed, received at IRS after extended due date
 - ◆ Deemed filed on postmark date [IRC 7502; *see* CCA 200645019 (11/10/06)]
 - ◆ Refund claim must therefore be filed within 3 years of postmark date (if relying 3-year rule and not 2-year rule)
 - ◆ Eg:
 - ◆ Year 1 Form 1040, on extension, mailed 10/14/Year 2, received at IRS on 10/18/Year 2
 - ◆ Refund claim mailed on 10/17/Year 5 won't be timely if relying on 3-year rule [*See Hotel Equities Corp. v CIR*, 546 F2d 725, 728 (7th Cir. 1976)]

Special Situations

- ◇ Refund claim filed on late-filed original return
 - ◇ Claim is timely (claim is filed within 3 years of return, indeed, filed with return)
 - ◇ IRC 7502 issues (timely mailing, timely filing)
 - ◇ If IRC 7502 would not otherwise apply to the return, it can still apply to the refund claim (and, if it does, applies to the return as well) [Reg. 301.7502-1(f)]
 - ◇ Eg [Reg. 301.7502-1(f)(3)]:
 - ◇ Year 1 Form 1040 due 4/15/Year 2; original return claiming refund mailed 4/15/Year 5; received at IRS 4/19/Year 5
 - ◇ Refund claim (and return) deemed filed 4/15/Year 5
 - ◇ Lookback would thus reach payments made or deemed made on or after 4/15/Year 2
 - ◇ If return didn't show overpayment/didn't claim credit or refund, would be considered filed when received, 4/19/Year 5

SOL – Refund Suits [IRC 6532]

- ◇ No suit or proceeding [IRC 6532(a)(1)]:
 - ◇ Prior to 6 months after filing of refund claim
 - ◇ More than 2 years after mailing by certified or registered mail of disallowance
- ◇ Can extend time for filing suit for refund [IRC 6532(a)(2)]:
 - ◇ Must be in writing – Form 907
 - ◇ Executed before expiration of 2-year period for filing suit??
 - ◇ *See Kaffenberger v US*, 314 F3d 944 (8th Cir. 2003) [doesn't have to be]
 - ◇ *Cf.* IRC 6501(c)(4) [ASED extension must be executed on or before ASED]

Other Procedural Issues

- ◇ Subsequent returns:
 - ◇ Amended return (filed after due date, including extensions) -- has no effect on SOL [*Badaracco v. CIR*, 464 US 386, 393 n.8 (1984); CCA 202026002 (6/26/20)]
 - ◇ Superseding return (filed before due date, including extensions) -- also has no effect on SOL [CCA 202026002; *but see* CCA 200645019]
- ◇ Protective claims
 - ◇ Contingent on future event
 - ◇ Eg:
 - ◇ ACA/NIIT
 - ◇ ERC, amending income tax returns to reduce wage expense by ERC claim before claim granted, not yet granted 2 years after payment, subsequently denied
- ◇ Form 843 claims

Exception to *Flora* – Divisible Taxes

- Divisible taxes are those that “may be divided into separate portions or transactions.” IRS Chief Counsel Memo No. 200646016. When a tax is divisible, only a portion of the tax must be paid before a claim (and subsequent refund suit) is filed. *See id.*; *Steele v. United States*, 280 F.2d 89, 91 (8th Cir. 1960).
- Government will counterclaim for the remaining balance.
 - Classic example is the § 6672 penalty. Only need to pay the unpaid withholding tax for one employee. IRM states that the taxpayer needs to pay the unpaid tax for one employee per disputed quarter (IRM 8.25.1.7.4.1).

Other *Flora* Exceptions

- Statutory exceptions for certain assessable penalties.
 - E.g. I.R.C. § 6694 – Penalty against tax return preparer for understatement of tax liability on a return when understatement is due to unreasonable position or willful or reckless conduct. Statute permits the return preparer to pay 15% of the penalty and seek a claim for refund. However, also subject to unique time limitations.
- Recent developments?
 - FBAR Penalties? *See Bedrosian v. United States*, 912 F.3d 144 (3d Cir. 2018) (partial payment of FBAR penalty does not provide district court with jurisdiction; jurisdiction cannot be based on Little Tucker Act).
 - Large Assessable Penalties? *See Larson v. United States*, 888 F.3d 578 (2d Cir. 2018) (Section 6707 penalty for \$67 million must be fully paid before district court has jurisdiction to hear refund claim).

Informal Claim Doctrine

- Allows a claim for refund that does not meet the requirements under the IRS's regulations to be "treated as adequate where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period." *United States v. Kales*, 314 U.S. 186 (1941).
- It would be unwise to rely on this doctrine – it applies only to procedural defects. For instance "suppose that on the last date [before the statute of limitations runs], the taxpayer files a claim for refund complete except for the omission of his signature." The taxpayer later fixes this error. The doctrine can be applied so that the taxpayer is not deemed to have forfeited his claim. *BCS Fin. Corp. v. United States*, 118 F.3d 522 (7th Cir. 1997).
- Does not cure more major defects, such as failure to provide grounds for refund or facts sufficient to apprise the commissioner of the claim's basis.

Lunch



Creative IRS Collection Alternatives

Presented by:

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**GREEN &
SKLARZ** LLC

Collection Alternatives

- Uncollectible Status
- Installment Agreements
- Offers-in-Compromise
- Bankruptcy

Initial Considerations

- CSED
- Compliance
- RCP Calculation
- Voluntary Payments (Rev. Proc 2002-26)

Uncollectible Status

- Allowable expenses missed
- If CNC, IRS cannot levy – burden on the TP to submit a CIS
 - ~ IRC 6343
 - ~ *Vinatieri v. Commissioner*, 133 T.C. No. 16, 2009

Installment Agreements

- Short-Term Agreement is now 180 days
- Non-Streamlined with the campuses is \$250,000 or less over the CSED (IRM 5.19.1.2.6.4.3)
- One Year Rule – IRM 5.14.1.4.1
- Six Year Rule – IRM 5.14.1.4.1
- Creating a two step IA to buy time to adjust expenses
- Partial-Pay Agreements

Streamlined \$250,000 over CSED

5.19.1.2.6.4.3 (02-02-2021)

Financial Analysis, Verification and Substantiation - CSCO Employees

1. The tables below provide guidance to CSCO employees for when financial analysis is needed and when it is necessary to verify and obtain substantiation, by account balance and disposition type
2. **SIA over \$25,000 - IMF and OOB Sole Proprietors:**

Dollar Criteria:	Financial Analysis needed?
AAB (CC SUMRY) between \$25,001 and \$50,000,	No

3. **Expanded IAs:** (Expanded IAs are no longer applicable per changes to NSIAs.)
4. **NSIAs - IMF & OOB Sole Proprietors:**

Dollar Criteria:	Financial Analysis needed?
AAB (CC SUMRY) is \$250,000 or less,	No, but: <ul style="list-style-type: none">• AMS history must contain the Compliance Suite Payment Calculator calculation showing the IA will be fully paid by the CSED, and• A history item must be input on CC ENMOD indicating "NOCIS" .

Note:

See *IRM 5.19.1.6.4(12)*, Installment Agreements, for specific guidance.

Tax Liens

- NFTL per IRM if over 10K
- Negotiate when setting up an IA
- Written requirement to not have a NFTL or impact employment
- Collateral Agreements: Bond/Mortgage/Line of Credit in lieu of a lien

Innocent Spouse

- Protect the client
- Buys time while collection moves against the former spouse 😊
- Relief may not be complete relief – (b and f relief liability is allocated)

Innocent Spouse

- NRS will be notified of the filing and allowed to intervene
- 25% success, when the spouse intervenes increases to 33%

Offers-in-Compromise

- Use of an ETA Offer for victims of fraud
- Utilizing Periodic/Deferred Offers with low payments for 23 months with a lump sum
- Utilizing assets to get into compliance and pay our fees, reducing RCP 😊

Bankruptcy

- Use of the automatic stay to prevent collection
- Forcing an IA on an otherwise unwilling IRS
 - ~ Chapter 11 or Chapter 13
 - ~ Discharging income taxes (Chapter 7 plus a Chapter 13, or a “Chapter 20”)
- Lien stripping in a Chapter 13
- Utilizing Chapter 7 for a personal discharge even with an NFTL on property, and then negotiation with Insolvency for resolution

Questions

Thank You.



Ethics: Handling ERC Audits and Investigations - Coloring in the Lines

Moderator:

- Damon Rowe, Esq, LL.M., Meadows Collier Reed Cousins Crouch & Ungerman, L.L.P., Dallas, TX

Panelists:

- Eric Hylton, National Director, alliantgroup, Washington, DC
- Daniel Mayo, Esq., Withum, Smith & Brown, PC, Red Bank, NJ
- Frank Agostino, Esq., Agostino & Associates, Hackensack, NJ

Agenda

Overview of Employee Retention Credit (ERC)

Timeline of Events

What Can Businesses Do If They Have Not Been Paid Yet?

IRS Audits of ERC

Overview of ERC

Overview

Qualified Wages Paid	Mar. 13, 2020 - Dec. 31, 2020	Jan. 1, 2021 - June 30, 2021	July 1, 2021 - Dec. 31, 2021	Oct. 1, 2021 - Dec. 31, 2021
	Coronavirus Aid, Relief, and Economic Security Act	Taxpayer Certainty and Disaster Tax Relief Act	American Rescue Plan Act of 2021	Infrastructure Investment and Jobs Act
Legislation Date	Mar. 27, 2020	Dec. 27, 2020	Mar. 11, 2021	Nov. 15, 2021
Eligible Employers	Employers operating a trade, business, or tax-exempt org.	Expanded to certain gov't. employers, such as 501(c)(1) and colleges, universities, or entities with principal purpose to provide medical or hospital care.		
Eligibility Requirements	Employer must have either fully/partially suspended operations during:		Employer must have either:	Employer must be a Recovery Startup Business only.
	Any quarter in 2020 due to Pandemic govt. order.	First two quarters in 2021 due to Pandemic govt. order.	Met Relief Act eligibility requirements.	
	OR	OR	OR	
	Experienced more than 50 percent decline in gross receipts compared to same quarter in 2019.	Experienced more than 20 percent decline in gross receipts compared to same quarter in 2019.	Met "Recovery Startup Business" eligibility requirements.	
% of Qualified Wages	50%	70%	70%	70%
Max Credit	\$5K	\$7K	\$7K	\$7K
	Per employee, per year	Per employee, per quarter	Per employee, per quarter. Recovery Startup Businesses limited to \$50,000 total credit per quarter.	

Source: Treasury Inspector General for Tax Administration (TIGTA) summary of the legislation referenced

Statute of Limitations

- IRS generally has 3 years to assess under §6501, and 941s are deemed filed on 4/15 of following tax year under §6501(b)(2)
 - 941s for 2020 are deemed filed on April 15, 2021, which means the 3-year SOL expired on April 15, 2024
 - 941s for Q1 & Q2 2021 are deemed filed on April 15, 2022, which means the 3-year SOL expires on April 15, 2025
- Congress extended SOL for Q3 & Q4 2021 to 5 years in §3134(I)
 - 941s for Q3 & Q4 2021 (including for RSUBs) are deemed filed on April 15, 2022, which means the 5-year SOL expires on April 15, 2027
- SOL does not restart when an amended return is filed

Statute of Limitations (cont'd)

- Civil Actions for Erroneous Refunds – §7405(b) & §6532(b)
 - IRS can bring a civil action within 2 years of payment on an ERC claim – and 5 years in cases of fraud or misrepresentation of a material fact
 - Need DOJ involvement and it is unclear how widely this procedure will be used
 - Similarly, taxpayers have 6 months to bring suit after a refund claim is filed and ending 2 years from IRS disallowance of the claim – §6532(a)
- Implications – SOL on 2020 ERC claims has expired; IRS & DOJ can sue, but unlikely to be used except in the most egregious cases
- If a claim is disallowed, and the taxpayer challenges it, the IRS must pay or allow the claim within 2 years or §6514(a)(2) prohibits the IRS from paying or allowing
 - Taxpayers can extend this time by requesting the IRS sign Form 907, Agreement to Extend Time to Bring Suit
 - This form should be requested even if the taxpayer is in Appeals; it allows additional time for the case to be worked administratively
 - IRS may agree to sign the form when, among other things, an extension will prevent possible inequity (see [IRM 8.7.7.3.3\(1\)](#); [taxpayer advocate discussion](#) of Form 907 in regard to disallowed ERC claims)

ERC Compliance Work Continues

The IRS continues analyzing ERC claims, intensifying audits and pursuing promoter and criminal investigations. Beyond the disallowance letters, current initiatives results include:

- **ERC Claim Withdrawal Program:** The claim withdrawal process for unprocessed ERC claims has led to more than 7,300 entities withdrawing \$677 million.
- **ERC Voluntary Disclosure Program:** During the VDP, which ended in March, the IRS received more than 2,600 applications from ERC recipients that disclosed \$1.09 billion worth of credits.
- **Criminal investigations:** As of July 1, 2024, IRS Criminal Investigation has initiated 460 criminal cases, with potentially fraudulent claims worth nearly \$7 billion. In all, 37 investigations have resulted in federal charges so far, with 17 investigations resulting in convictions and nine sentencings with an average sentence of 20 months.
- **Promoter investigations:** The IRS is gathering information about suspected abusive tax promoters and preparers improperly promoting the ability to claim the ERC. The IRS's Office of Promoter Investigations has received hundreds of referrals from internal and external sources. The IRS will continue civil and criminal enforcement efforts of these unscrupulous promoters and preparers.
- **Audits:** The IRS has thousands of ERC claims currently under audit.



Timeline of Events

IRS Recent Guidance

- Historical ERC guidance published by IRS includes the following:
 - March 1, 2021 – IRS issued [Notice 2021-20](#) (102 pages) (replaces the IRS [FAQs](#))
 - April 2, 2021 – IRS issued [Notice 2021-23](#) (17 pages)
 - August 4, 2021 – IRS issued [Notice 2021-49](#) (34 pages)
 - August 10, 2021 – IRS issued [Rev. Proc 2021-33](#) (12 pages)
- March 2023 –
 - IRS issues OPR Memo (2023-02) discussing tax return preparers’ responsibilities under Circular 230
 - Practitioners must make reasonable inquiries of their clients regarding eligibility before filing amended income tax returns
 - Tax positions must have at least a reasonable basis; must advise clients to withdrawal claims if improper
 - Practitioners cannot rely on opinions and reports of third parties if there is a conflict of interest, such as contingent fees
 - ERC added to top of the 2023 Dirty Dozen list of tax scams (IR-2023-49)
- May 2023 – IRS warning (IR-2023-105) – “The IRS has stepped up audit and criminal investigation work involving these claims”

IRS Recent Guidance (cont'd)

■ July 2023 –

- IRS issues [AM 2023-005 \(6/30/2023\)](#) limiting supply chain disruptions; 5 scenarios discussed and none of them qualify. Severely limited qualification under the exception which was provided by previous IRS guidance
- To qualify under this exception, taxpayers need to show that a supplier was suspended due to a governmental order, the taxpayer could not obtain critical goods/materials, the taxpayer's business was suspended as a result of the inability to get goods/materials, and the taxpayer could not find an alternative source for the goods/materials
- Bottlenecks at the US border are not enough; need to identify a specific governmental order that suspended the supplier's business and demonstrate that the supplier's disruption was caused by the governmental order

■ September 2023 –

- IRS issued notice of moratorium on filing of claims after 9/14/2023 until at least 12/31/2023, processing times expected to increase from 90 to 180 days (though most businesses had been waiting much longer than 90 days)
- Indications of more than 600,000 claims still unprocessed as of September 2023; weekly claim filings after the moratorium dropped to approximately 17,000
- IRS announced creation of withdrawal and voluntary disclosure programs to be created and issued later in 2023

IRS Recent Guidance (cont'd)

- October 2023 – IRS announces withdrawal option

- Helps taxpayers avoid penalties/interest, but does not eliminate criminal liability if that is present
- Taxpayers qualify for this program if they meet all of the following: (i) filed an ERC claim via an amended employment tax return (e.g., Form 941-X), (ii) the Form 941-X was filed only to claim the ERC and no other adjustments were made on such return, (iii) taxpayer withdraws the entire amount of the ERC claim, and (iv) IRS has not yet paid the claim, or if it has been paid, the check has not been cashed/deposited
- IRS will treat the claim as if it never had been filed; thus, no penalties or interest would apply
- Option not new – taxpayers could previously have withdrawn their ERC claims by filing corrected 941-Xs

- November 2023 –

- IRS issues AM 2023-007 (11/3/2023) indicating OSHA guidelines do not apply unless such guidance was incorporated into governmental orders enforceable to businesses
- IRS interprets that OSHA guidance did not create additional legal obligations, did not fulfill the criteria of being established with an intention to restrict commerce, travel or group meetings as a response to COVID-19; IRS also stated that OSHA standards were in effect prior to the pandemic, so could not give rise to a partial suspension

IRS Recent Guidance (cont'd)

■ December 2023 –

- IRS announced it rejected more than 20,000 fraudulent ERC claims - disallowed for one of two reasons: (i) the entity was not in existence during the eligibility period or (ii) the entity did not have employees during the eligibility period
- IRS releases Voluntary Disclosure Program, available through 3/22/2024
 - Taxpayers that receive the checks and cashed them could take advantage of this program
 - Allows taxpayers to keep the interest paid on the claim, plus 20% of the claim (also would be tax-free).
 - IRS would waive all penalties and interest, but taxpayers must repay 80%
- IRS announced the following activity:
 - Disallowed more than 20,000 claims that were facially defective (no wage / no existence businesses); IRS sent more than 12,000 letters disallowing claims worth \$572 million
 - IRS began correspondence audits centralized through Austin, TX; requires faxed response to a single fax number
 - IRS Criminal Investigation announced educational sections on ERC and qualifications, invited practitioners and 220 businesses that filed substantial claims

IRS Recent Guidance (cont'd)

- January 2024–

- House of Representatives passed Tax Relief for American Families and Workers Act of 2024
- Bill generally would have (i) prevented new ERC filings after January 31, 2024, (ii) extended the SOL to 6 years, and (iii) enhanced penalties for promoters
- Bill stalled in Congress and does not appear to have any chance of passage until after the election, if at all
- Effect of Bill was to encourage practitioners and ERC providers to file all remaining ERC claims by 1/31/2024
- IRS data shows that approximately 12,000 claims are being filed weekly even after this date

IRS Statistics – May 2024

- Information from Deputy Commissioner Doug O’Donnell made public via lawsuit filed by StenTam Tamaddon, LLC seeking injunction to end the moratorium:
 - IRS has processed 3.6 million claims totaling around \$230 billion
 - Backlog as of May 2024 was approximately 1.4 million claims (1.1 million claims as of 12/31/2023); 880,000 of the claims were filed pre-moratorium, 520,000 were filed post-moratorium
 - IRS is processing claims on a FIFO basis and processing will occur over summer of 2024; IRS will move slowly / judiciously as it refines analytical tools to evaluate risk; IRS reports that 60-70% of the claims analyzed show an “unacceptable level of risk” and cannot be processed without further analysis

Moratorium Update – June 2024

- IRS has digitized more than 1 million ERC claims which represents more than \$86 billion
- IRS will deny tens of thousands of these claims (representing billions of dollars) which are clearly wrong
- Claim risk thresholds:
 - 10-20% of the digitized claims are considered “high risk” – meaning they show signs of being clearly wrong
 - 60-70% of the claims show an “unacceptable level of risk” – risk indicators exist, and IRS will conduct additional analysis
 - 10-20% of the claims that show “low risk” with no warning signs will be processed – some will be paid later this summer, but IRS will be processing these claims at a much slower rate
- Payments will begin to go out this summer, but IRS will not yet pay post-moratorium claims
- IRS continues to seek an extension of the SOL and to prevent the filing of new claims

IRS Warning Signs of Improper Claims

- July 26, 2024 – IRS issued a press release relating to ERC abuse ([IR-2024-198](#))
 - Short-term reopening of VDP coming soon
 - Update on processing of low-risk claims coming soon
 - 7 Warning Signs Previously Issued
 - (i) claiming the ERC for 6 quarters; (ii) governmental orders that don't qualify or don't affect operations; (iii) too many employees and ignoring wage dollar limits; (iv) citing supply chain issues; (v) claiming partial suspension for too much of a calendar quarter; (vi) business didn't pay wages or didn't exist during the eligibility period; and (vii) promoter says there's nothing to lose
 - 5 New Warning Signs
 - Essential businesses that were fully operational and did not have a decline in gross receipts
 - Businesses unable to support how governmental orders fully or partially suspended a more than nominal portion of their operations
 - Businesses reporting family members' wages as qualified wages
 - Businesses using wages already used to obtain a PPP
 - Large employers claiming wages for employees who provided services (as opposed to employees who were not providing services, which is permitted)

IRS Stats as of July 2024

- July 26, 2024 – IRS released [CCA 202430007 \(June 17, 2024\)](#) applying the aggregation rules to tax-exempt entities using a greater than 50% board overlap test (rather than the 80% test in Reg. §1.414(c)-5(b))
- IRS began sending out ERC denial letters. Reasons include:
 - No active trade or business (presumably because no tax returns were filed, or business had a history of losses)
 - No governmental orders in effect (presumably for Q3 2021 claims)
 - No decline in gross receipts (presumably from a review of filed tax returns showing annual income)
 - No W-2s on file
 - No payroll tax deposits made
- Some denial letters allow for the taxpayer to file a protest and go to Appeals; others do not include that option
 - Tax journalist spoke to IRS and letters without Appeal rights reportedly were sent in error; all taxpayers can go to Appeals and do not need to file lawsuits to obtain a review of their claims
- IRS estimates these letters will prevent up to \$5 billion in improper payments

IRS Stats as of August 2024

■ IR 2024-203 (August 8, 2024)

- IRS sent out 28,000 disallowance notices on claims that “showed a high risk of being incorrect” – based solely on IRS red flags – no audits were conducted
 - Not t/b, no governmental orders or gross receipts decline, no W-2s filed, no RSUB box checked, and taxpayer is an instrumentality of the government
 - Represents up to \$5 billion of improper claims
 - This is the “first significant wave” of disallowances in 2024 – so more are likely coming
 - IRS believes more than 90% of these disallowance notices are valid and that “errors are relatively isolated”
 - IRS will adjust its “processes and filters for determining invalid claims” to minimize burdens on businesses and their representatives
- Some letters inadvertently omitted a paragraph discussing administrative appeal rights; all disallowance notices have administrative appeal rights and new letters will be mailed to reflect that
- IRS will process 50,000 low-risk claims, with payments starting in September, and another large block of valid claims will be processed in the Fall

IRS Stats as of August 2024 (cont'd)

■ IR 2024-203 (August 8, 2024) (cont'd)

- IRS will now judiciously process claims filed between 9/13/2023 and 1/31/2024 (perhaps IRS thinks the proposed legislation cutting off the ERC still has a chance?)
 - Will focus on high-risk and low-risk claims first
 - Reviewing claims on a quarterly basis, not per taxpayer, so some quarters may be paid but not others
- IRS working on thousands of civil audits (both field and correspondence audits)
- IRS working numerous promotor audits (IRS has received hundreds of referrals from internal and external sources)
- IRS – CI initiated 460 criminal cases worth more than \$7 billion; 37 federal charges filed to date, 17 convictions, 9 sentencings with an average sentence of 20 months in prison
- Impacts of Withdrawal and Voluntary Disclosure Program:
 - Withdrawal program – 7,300 businesses withdrew claims totaling \$677 million
 - Voluntary disclosure program – more than 2,600 businesses applied for the program, totaling \$1.09 billion of credits

August 2024 – IRS Announces Limited Reopening of VDP

- Aug. 15, 2024 – IRS announces 3-month reopening of VDP ([Announcement 2024-30](#); [IR 2024-212](#))
 - Open to taxpayers who received 2021 ERC funds before 8/15/2024 and file an application on Form 15434 before November 22, 2024
 - Intended for non-willful ERC claims; resolves civil issues only, not potential criminal liability
 - Terms: Taxpayer repays 85% of ERC for the calendar quarter; retains 15%; retains the interest payment received; pays no tax on the ERC; does not need to amend 2021 income tax return; does not need to pay interest on the underpayment if 85% timely paid; must disclose the identity/services of ERC provider; no civil penalties
 - Eligibility: Taxpayer not under criminal investigation; not under employment tax exam; did not receive a recapture letter; IRS does not have information about taxpayer's noncompliance; and did not receive notice or demand for repayment

August 2024 – IRS to Issue 30,000 Recapture Letters

- Aug. 15, 2024 – IRS announces it will send 30,000 letters to clawback ERC funds already paid ([IR 2024-212](#))
 - This is in addition to the 28,000 letters already sent to reject ERC claims before they were paid
 - IRS did not announce its filters for the 30,000 letters, but presumably they are similar to the ones used for the prior rejection letters (why reinvent the wheel)
 - Letters will be mailed in the Fall to clawback more than \$1 billion in improper ERC claims
 - Taxpayers that receive the letter are ineligible for the second VDP
 - IRS also will issue in the Fall “thousands more mailings” on additional questionable payments

IRS ACCELERATES WORK ON EMPLOYEE RETENTION CREDIT CLAIMS; AGENCY CURRENTLY PROCESSING 400,000 CLAIMS WORTH ABOUT \$10 BILLION

IR-2024-263,
Oct. 10, 2024

- The Internal Revenue Service announced today continued progress on Employee Retention Credit claims, with processing underway on about 400,000 claims, representing about \$10 billion of eligible claims.
- Work on the claims for small businesses and others is ongoing as the agency continues to navigate a large volume of claims from the complex pandemic-era credit. A significant number of the Employee Retention Credit (ERC) claims came in during a period of aggressive marketing by promoters, leading to a large percentage of improper, ineligible claims.

IRS Extends Time to Contest Disallowance Letters

- September 2024 – IRS announces that it will extend the 30-day period to contest disallowance letters 105-C to 2 years
 - Exam will review the protests before forwarding them to Appeals
- Taxpayer response to the IRS denial letter (Letter 105-C) must include:
 - An explanation and documentation addressing the reason for the denial
 - An explanation and documentation addressing 1 of the 3 eligibility factors (GR, PS, or RSUB) for each quarter denied
 - If a PS claim, then the response must include the governmental orders (with the relevant portions highlighted), an explanation of how they impacted business operations, and documentation of the full or partial suspension (such as Board minutes, letters to clients, or letters to employees or customers)
 - If a GR claim, then the response must include an explanation of how the GR test was performed, an explanation of whether aggregation is required, and business records showing the decline in GR (summary records are not acceptable)
 - If an RSUB claim, then the response must include documentation that the business began operations after 2/15/2020 and that its average GRs were less than \$1M
 - A description of the business, an explanation of why it is entitled to the ERC, copies of worksheets showing the ERC calculation, and a statement that the Taxpayer did not include in the calculation (i) wages paid to related individuals, (ii) wages used for the PPP, or (iii) amounts paid to employees providing services if a large eligible employer

What Can Businesses Do If They Have Not Been Paid Yet?

Options Available to Businesses

- Call the IRS – likely to result in a short discussion where an agent indicates (a) that the IRS has received the claim, (b) that the claim is in processing, and (c) that there is no further information it can provide at this time. This option is not likely to be productive.
- Request a transcript – this would show the activity on a taxpayer’s account. Sometimes reviewing the transcript is unhelpful and other times it shows why the claim is not being paid – for example, the claim is under review.
- Contact the Taxpayer Advocate Service (TAS) – taxpayers can start the process by completing Form 911, Request for Taxpayer Advocate Service Assistance. Taking this path may yield results, but in our experience its hit or miss, and has not yielded significant results.
- File a refund lawsuit against the IRS – if more than six months have passed since a business filed its ERC claim, the business can file a refund lawsuit against the IRS within 2 years of a disallowance. Upside is potential to speed things up and force review, downside is additional costs, and that litigation is public, which may reveal private information.

IRS Audits of ERC

Lessons Learned Over 30+ Audits

- Essential businesses face an uphill battle on audit because they remained open
- Partial suspension (PS) cases require taxpayers to point to specific governmental orders, and to specific impacts on the business
- Generalized claims of a PS will no longer work on audit (even if they did early on)
- Taxpayers that prevail in PS audits usually have a clear story to tell (for example, a nail salon that could only use every other station, restaurant that could only use every other table)
 - Generalized claims of supply chain disruptions, staffing shortages, and social distancing do not work
 - Agents also want proof of the “more than nominal” impact – the 10% tests
 - Agents typically want to see an impact on gross receipts, even if relying on the PS test

IRS Audits: Summary

- IRS is aggressively auditing ERC claims – we have seen a significant uptick in the number of ERC audits and in the experience level of the IRS agents performing the audits
- When an audit is initiated, IRS reviews each and every issue that relates to the ERC, including aggregation, eligibility, number of 2019 FTEs, qualified wages, double dipping with PPP and other credits, and other aspects of calculating the credit
- IRS is asking for governmental orders and for an explanation of the specific effect they had on business operations
- IRS asks for taxpayer interviews in every audit and in some cases site visits
- First question the IRS usually asks is who prepared the ERC claim, and who prepared and filed the 941-Xs

Full or Partial Suspension of Business Operations

- Did the taxpayer identify a U.S. governmental order that limited its commerce, travel, or group meetings due to Covid-19?
- Were the taxpayer's employees able to work comparably through telework?
- Did the full or partial suspension of business operations have more than a nominal effect on the taxpayer's business? Recall there are two 10% safe harbors in Notice 2021-20, Q&As #11 & 18.
- Did the suspension of operations result from a reduction in Company demand? See Notice 2021-20, Q&A #13.
- Did the suspension result from a supply chain disruption? See AM 2023-005, confirming the supply chain disruption is interpreted narrowly by the IRS

Gross Receipts Test

- Gross receipts is a top-line revenue number, net of returns and allowances (§448(c), or §6033 for tax-exempt entities)
 - Make sure you review the general ledger and note that it agrees to the schedules, because the IRS will request this data
 - Remember that the aggregation rules apply for this purpose
- Must use the method of tax accounting, *i.e.*, cash or accrual, that the taxpayer used for the tax year in question, even if a different method is used for book purposes
- Business combinations – remember there is a safe harbor for business combinations in 2020 and in 2021
- If you didn't prepare the ERC claim, check that the preparer properly applied the recovery rule in 2020 and the alternate quarter rule in 2021

Small or Large Eligible Employer

- 2019 monthly average number of full-time employees (FTEs)
 - For 2020 ERC, need 100 or fewer in 2019 to be a small eligible employer
 - For 2021 ERC, need 500 or fewer in 2019 to be a small eligible employer
 - Remember that the aggregation rules apply for this purpose
- How to calculate?
 - FTE means 30 hours/week or 130 hours/month
 - Determine the number of FTEs each month, and then divide by 12
 - Different from PPP where there was a full-time equivalency test
- IDRs request documentation on this issue, and auditors are flexible in terms of the documentation provided as long as the taxpayer is not close to one of the thresholds

Substantiation and Taxation

- Make sure you maintain adequate records to substantiate eligibility and the ERC calculation – Notice 2021-20, Q&As #71-71
 - Generally requires taxpayers to maintain documents on eligibility and the ERC calculation for at least 4 years
- Make sure you amend your 2020 and/or 2021 income tax returns to pay tax on the ERC
 - Reduce the wage/health plan expenses that were used for the ERC – Notice 2021-20, Q&A #60-61
 - Reductions must be made on the tax return for the tax year in which they were paid, not the year in which the ERC was applied for or received
 - IRS view is that amended returns must be filed when the ERC claim is filed, not when it is received

Professionals as Gatekeepers

- OPR Alert Issue No. 2023-02, Professional Responsibility and the Employee Retention Credit (March 7, 2023)
 - Issued as “guidance” for tax professionals handling ERC claims
 - Identifies three areas of Circular 230 implicated by making or assisting in making an ERC
 - Section 10.22: Diligence as to Accuracy
 - Section 10.34: Standards with respect to tax returns and documents, affidavits and other papers
 - Section 10.35: Competence
 - Section 10.37: Written Advice Provided to Client (including considerations of Section 10.29 Conflicting Interests)

§10.22 Due Diligence: Reliance on Client or Third-Party

- A practitioner must exercise due diligence in:
 - Preparing, approving, or filing tax returns, documents, affidavits, etc., relating to IRS matters.
 - Determining the correctness of oral/written representations made to the client or Treasury personnel.
- Generally, a practitioner may rely:
 - In good faith without verification upon information furnished by the client.
 - On other professionals' work product with reasonable care.
- A practitioner cannot ignore the implications of information furnished to or known by the practitioner.
- A practitioner has a duty to make reasonable inquiries if the information furnished appears incorrect, incomplete, or inconsistent with other facts or assumptions.
 - Cannot be willfully blind!

§10.34 Standards for Tax Returns / Documents

- A practitioner may not sign a tax return or advise a position on a tax return that willfully, recklessly, or through gross incompetence:
 - Lacks reasonable basis,
 - Has or is an unreasonable position
 - Is a willful attempt to understate liability or
 - Sets forth a reckless, intentional disregard of rules and regulations.
- A practitioner may not advise taking frivolous positions nor advise submissions made to delay or impede tax administration, are frivolous, or containing or omitting information that demonstrates an intentional disregard of rules or regulations.

§10.34 Penalties and Client Reliance

- A practitioner must advise a client of potential penalty exposure regarding:
 - A position taken on the return if the practitioner advised the client regarding the position or the practitioner prepared or signed the return.
 - Any document, affidavit, or other paper submitted to the IRS.
- A practitioner must also advise the client of the opportunity for penalty avoidance through disclosure.
 - A disclosure can be made by attaching a Form 8275, *Disclosure Statement*, or Form 8275-R, *Regulation Disclosure Statement*, to the return.

§10.35 — Competence

- Practitioners must have the knowledge, skill, thoroughness, and preparation necessary for the matter for which they have been engaged.
- Practitioners can provide competent representation by researching and educating themselves on the issue or by consulting with other tax professionals who have established competence in the field in question.

§10.37 — Written Advice

- Section 10.37 elaborates on a practitioner's due diligence obligation when providing written advice, requiring the practitioner to:
 - Identify and ascertain the material facts and reasonably consider material facts and circumstances;
 - Not *unreasonably* rely on representations, statements, findings, or agreements;
 - Relate applicable law to the material facts;
 - Make reasonable factual and legal assumptions; and
 - Not consider the likelihood of an audit in making your determinations.



Questions?



R. Damon Rowe, J.D., LL.M., Partner



Damon Rowe joins Meadows Collier after two decades of service at the IRS. His practice focus is White-Collar Crime, Tax Controversy and Government Regulatory Litigation. He has expertise in many areas including cryptocurrency, financial crimes, civil and criminal tax, money laundering, fraud, internal investigations and the Bank Secrecy Act.

Mr. Rowe began his career at the IRS in 1998 as a Special Agent and held numerous leadership positions for the agency. He served as the Special Agent in Charge for both the Los Angeles and Dallas Field Offices in the Criminal Investigation Division. This office investigates a diverse mix of financial investigations, including cybercrime, international tax fraud, identity theft, public corruption and Bank Secrecy Act. His next leadership position was Executive Director of International Operations in the Criminal Investigation Division. He successfully designed and implemented novel strategies to detect and mitigate international financial crimes, devised an international financial crime strategy used to train and educate thousands of global investigators in over 50 countries. His most recent position was Executive Director of the Office of Fraud Enforcement. While in this position, International and Domestic fraud threat mitigation strategies were developed and implemented for all IRS business operating divisions. This office implemented a four-pillar intelligence model which aided in fraud detection. He led the COVID Relief Fraud Project and the Joint International Task Force.

Damon Rowe is currently an Adjunct Professor at Texas A&M University School of Law, where he teaches a course in international white-collar crime.

Mr. Rowe received his LL.M. in Tax from SMU Dedman School of Law and his J.D. from Texas Southern University Thurgood Marshall School of Law. He graduated from the University of Houston with a B.S. in Accounting.

Mr. Rowe was admitted to the Texas Bar in 1992.

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Eric Hylton

Former IRS Commissioner of the SB/SE Division; alliantgroup National Director

Hylton held several prominent positions at the IRS, including serving as Deputy of the Criminal Investigation Division and as CI's Executive Director of International Operations.

As National Director, Eric employs his years of experience at the IRS to assist alliantgroup's clients as an ambassador for U.S. small and medium sized businesses (SMBs) and in helping others become tax compliant.

Select Career Accomplishments

- **Civil Investigation:** Directed the Internal Revenue Service's Audit and Collection tax operations with a \$2.2 billion yearly budget and 20,000 nationwide employees, with oversight for 800,000 audits and billions of tax dollars assessed and collected.
- **Criminal Investigation:** Oversaw the sixth-largest US Federal law enforcement agency, with a worldwide staff of approximately 3,000 employees that resulted in over 6,000 investigations recommended for prosecution, leading to thousands of individuals convicted and sentenced.
- **Fraud Investigation:** Revolutionized the IRS' National Fraud Program, including establishing emerging threat teams, revamping organizational structure, revising metrics, and streamlining processes that resulted in multimillion-dollar fraud schemes referred for criminal purposes.
- **International Partnership:** Led a multilateral commission of 40 international criminal tax organizations to establish global methodologies on emerging financial fraud threats that resulted in significant legislative changes, billions in revenue, and the establishment of joint international investigative teams.

Daniel Mayo, JD, LLM

Partner and Lead, National Tax Services



Professional Experience

- More than 20 years of professional tax experience
- Leader of Withum's National Tax Services Group
- Oversee U.S. federal income tax policy, planning and review
- Experienced in federal income tax and financial products taxation
- Experienced in capital markets and M&A transactions
- Adjunct Tax Professor, Georgetown University Law Center
- Contributing Author, Forbes Magazine
- Frequent author and speaker on U.S. federal income tax topics

Credentials/Education

- Member of the New York and New Jersey Bars
- LLM in Tax, New York University School of Law
- JD, cum laude, Seton Hall University School of Law
- BS, Accounting, Rutgers College
- Approved Arbitrator for FINRA
- Attended Executive MBA program at INSEAD, Fontainebleau, France

Recently Published: [Top 10 Things To Preserve Qualified Small Business Stock Treatment](#), [IRS Stops Processing New ERC Claims](#), [Can I Replace My Tax Advisor With ChatGPT?](#)

Industries

- Financial Services
- Professional Services
- Real Estate
- Technology

Services

- Employee Retention Credit
- Qualified Small Business Stock
- Expert Witness
- IRS Audits
- Financial Products Taxation

Memberships

- American Bar Association
- Past Chair of the Banking and Savings Institutions Tax Committee
- New York Bar Association

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Frank Agostino is the president of Agostino & Associates, P.C., a law firm in Hackensack, New Jersey concentrating in civil criminal tax controversies.

Prior to entering private practice, Mr. Agostino was an attorney with the Internal Revenue Service's District Counsel in Springfield, Illinois and Newark, New Jersey. He also served as a Special Assistant United States Attorney, where he prosecuted primarily criminal tax cases.

Mr. Agostino has taught tax controversy at the Stillman School of Business at Seton Hall and served as the co-director of the Rutgers Federal Tax Law Clinic.

Mr. Agostino is a frequent speaker and author on tax controversy and litigation matters. He serves on the Advisory Board of the Journal of Tax Practice and Procedure. Mr. Agostino is actively involved with the American Bar Association and the New York County Lawyers' Association.

Mr. Agostino is also the President of the Taxpayers Assistance Corp., which provides tax and legal advice to low-income taxpayers in the NY/NJ area.

Disclaimer

This presentation is intended for general educational and/or informational purposes only and does not replace specific, independent professional advice. This presentation is based on our current interpretations of the law. These Interpretations may ultimately, after further IRS or other guidance be changed.

Statements and opinions expressed are those of the presenter or participants individually and, unless expressly stated to the contrary, are not the opinion or position of WithumSmith+Brown, PC assumes no responsibility for the content, accuracy or completeness of the information presented. Attendees should note that sessions may be audio-recorded and published in various media, including print, audio, and video formats without further notice.

Break!



Out of the Frying Pan and Into the Fire: What Makes a Case Move from the Civil Function to IRS Criminal Investigation

Moderator: Lisa E. Perkins, Green & Sklarz LLC

Panelists:

Carolyn Schenck, National Fraud Counsel, IRS

Damon Rowe, Esq., Meadows Collier et al, Dallas, TX

Shea Jones, Deputy Chief, IRS Criminal Investigation

**GREEN &
SKLARZ** LLC

Disclaimer

This presentation and the views expressed herein reflect the unofficial, individual views of the government speakers and do not necessarily represent IRS policy.

These slides are designed as shorthand aids to an oral or panel presentation and are not to be used or cited as precedent.

How Do Criminal Tax Cases Begin?

- Many begin as non-tax federal grand jury or other criminal investigations – tax fraud is the add-on and sometimes the easiest to prove
 - Examples: Department of Labor, State Revenue Cases, Mortgage Fraud, etc
- Investigations on Structuring- filing of CTRs and SARs triggers investigation; IRS is charged with investigating financial crimes under titles 26 and 31
- Civil Exams
- Civil Collection

How Do Criminal Tax Cases Begin?

- Fraud referrals from
 - Examination
 - Collection Cases
 - Whistleblowers/Ex-Spouses
 - Disgruntled ex-employees
- Bank Secrecy Act (BSA) Exams
 - IRM Section 4.26.6 – IRS is tasked with reviewing bank compliance with anti-money laundering laws
- Other Agencies

Common Tax Crimes

- 26 U.S.C. 7201 (tax evasion – evasion of assessment/payment)
- 26 U.S.C. 7202 (failure to collect and pay over - e.g. payroll taxes)
- 26 U.S.C. 7203 (failure to file)
- 26 U.S.C. 7206(1) (false return)
- 26 U.S.C. 7206(2) (aiding in the prep of a false return)
- 26 U.S.C. 7212(a) (corruptly endeavoring to interfere with IRS)
- 18 U.S.C. 371 (Klein conspiracy)
- 18 U.S.C. 286/287 (false claims for refund)

Payroll Tax Cases

- 80% of businesses fail
- Usually with significant payroll tax debt
- How do cases move from payroll tax collection to criminal?

Burdens of Proof

Burdens of Proof


- Civil Fraud: clear and convincing
- Criminal Fraud: beyond a reasonable doubt
 - Willfulness means a voluntary, intentional violation of a known legal duty. *Cheek v. United States*, 498 US 192 (1991), citing *United States v. Pomponio*, 429 US 10, 13 (1976)

Indicators of Fraud to Support Willfulness

- Understatement of income (or wages paid for employment tax purposes)
- Maintenance of inadequate records
- Failure to file tax returns
- Implausible or inconsistent explanations of behavior
- Concealment of assets
- Failure to cooperate with tax authorities
- Failing to make estimated tax payments (or payroll tax deposits for employment tax purposes)
- Engaging in illegal activity
- Dealing in cash
- Taxpayer's sophistication, education, business background, intelligence, prior history of filing proper returns

Criminal Referrals from Civil

- Civil Exam where examiner believes they have “firm indications of fraud”
- Examples include:
 - Significant unexplained differences in deposits vs. reported revenue, increases in net worth
 - Taxpayer is performing actions that would lead the examiner to believe there is criminal activity – check cashing, structuring deposits, 2nd set of books, dealing only in cash, affirmative misrepresentations



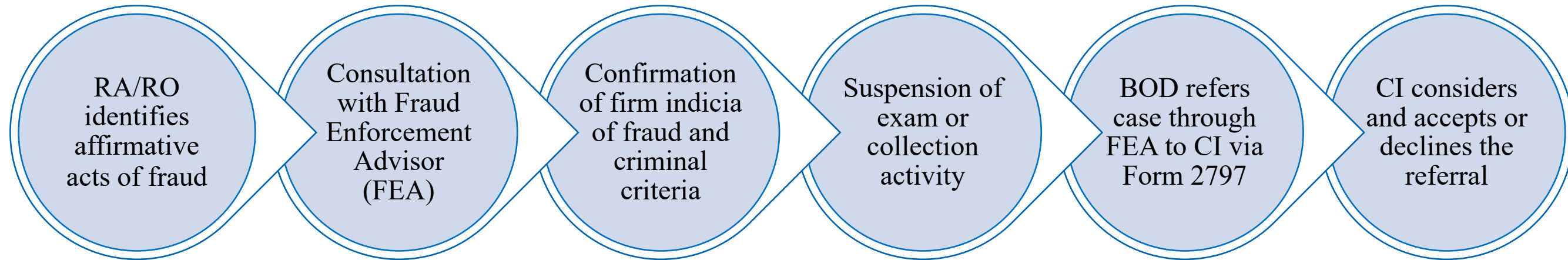
Indicia of Fraud

Civil Fraud

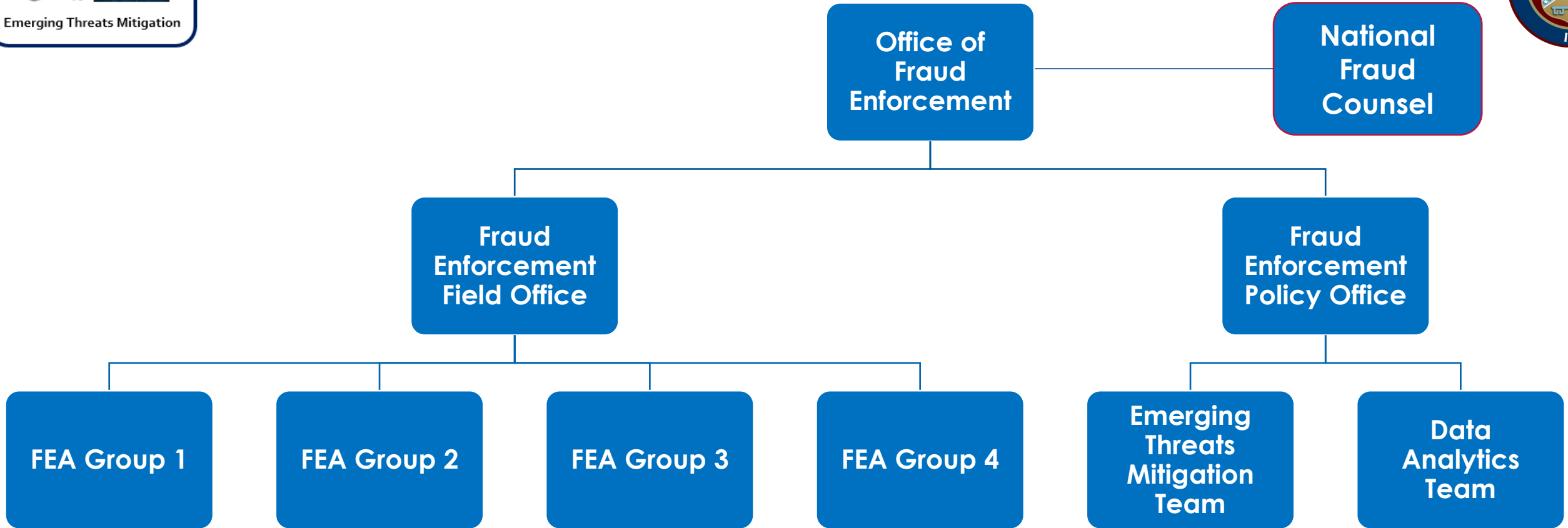
Criminal Fraud
Referral

Criminal Referrals from Civil

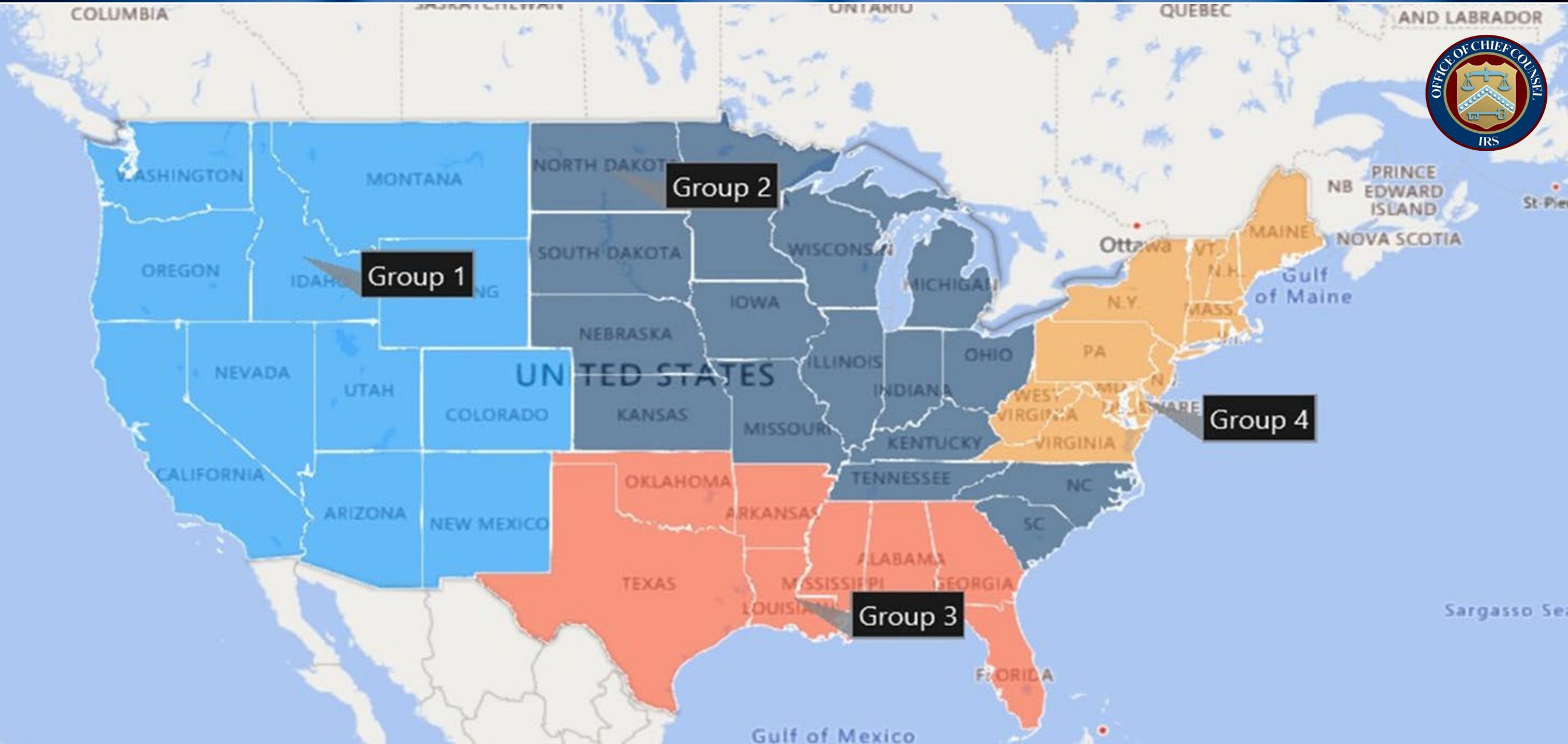
Life Cycle of a Civil Referral to Criminal Investigation



Office of Fraud Enforcement and National Fraud Counsel

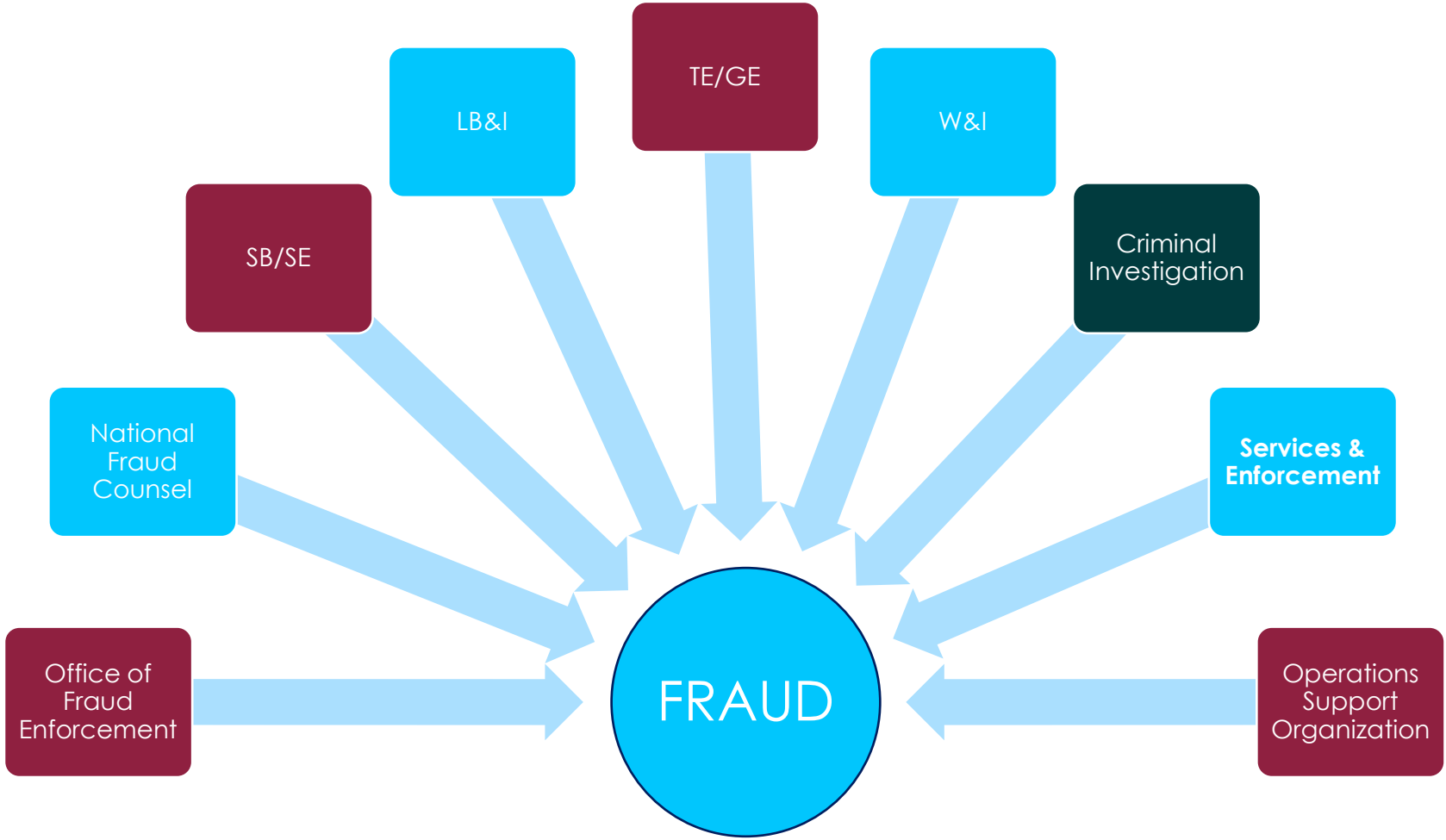


Office of Fraud Enforcement

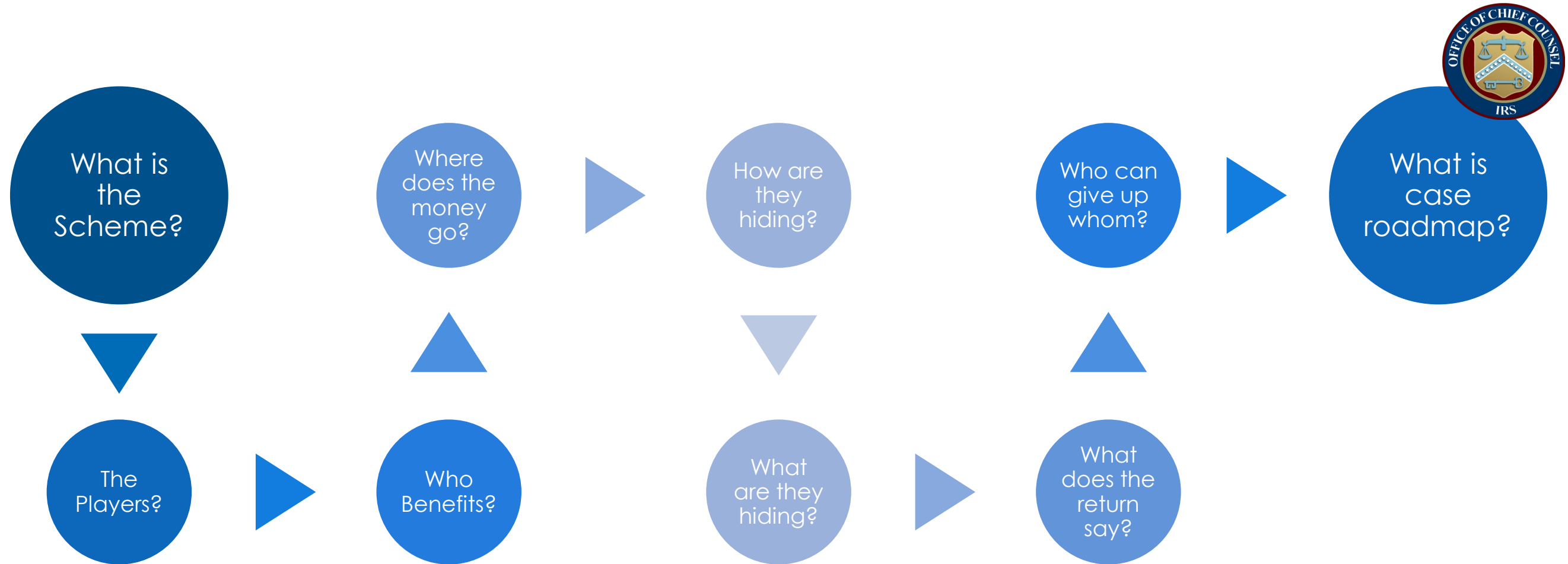


Office of Fraud Enforcement

Collaboration and The Fraud Development Plan



IRS Investigations: Understanding the Scheme



Office of Fraud Enforcement

Criminal and Civil Applications for Digital Asset Analysis Techniques



Taxpayer Digital Asset Behaviors

Civil Non-Compliance

Errors
Omissions
Misunderstanding

Civil Non-Compliance

Aggressive Tax Planning
Gray Area Exploitation
First Fraud Indicators

Criminal Non-Compliance

Concealment
Deception
Firm Fraud Indicators

Pre - IRS Engagement Behaviors

Behaviors During IRS Engagement

The civil niche addresses behaviors and post-analytic evidence that manifest during IRS engagement

Coming Into Compliance



**Voluntary Disclosure
Practice**



**Amending Returns /
Quiet Disclosures**



Do Nothing?

Questions ?

Lisa Perkins: (203) 285-8545

Damon Rowe: (214) 744-3700

IRS Representation Conference

High Net Worth Taxpayer Audit: The Tax Man Cometh

Moderator: Robert Day, Esq., Green & Sklarz LLC, New Haven, CT

Panelists:

Michael D'Addio, Esq, CBIZ, New Haven, CT

Paul Hamann, President, RC Reports

Barbara Kaplan, Esq., Greenberg Traurig LLC, New York, NY

Overview

1. Historically, IRS has been challenged in auditing high net worth individuals and their businesses due to inadequate funding, inadequate staffing and auditors ill-equipped to examine complex returns and transactions. The audit rate was low, and the audits were often closed with no change.
2. This is changing with Inflation Reduction Act funding for:
 - Hiring more revenue agents, especially those with experience.
 - Deploying technology to perform better risk assessments of returns.
 - Initiating campaigns focused on high net worth individuals.
 - Reorganizing divisions and cross-assigning personnel to conduct the audits.

CHARACTERISTICS OF AUDITS OF HIGH NET WORTH INDIVIDUALS

- Higher income returns are more complex and audits take longer than for lower income taxpayers.
- These audits use the most highly trained and experienced IRS agents and teams.
- They use the most sophisticated tools and techniques, including AI, data analytics and mathematical modelling.

GLOBAL HIGH WEALTH (“GHW”) INDUSTRY EXAMINATIONS

- Auditing high wealth individuals is a core priority of IRS
 - Audit rates of millionaires fell by more than 80% between 2010 and 2018.
 - IRS also prioritizing high income non-filers.
- Funding for enforcement (\$45.6 billion) under the Inflation Reduction Act came with a clear expectation from Congress that the IRS transform how it approaches tax non-compliance by high-income taxpayers.
- Treasury Inspector General issued a report recommending IRS allocate more resources to global wealth exams.
- In September, 2023, the IRS announced a “sweeping effort” to shift enforcement to high-income earners. IR-2023-166.

GLOBAL HIGH WEALTH (“GHW”) INDUSTRY EXAMINATIONS

- IRS hiring 3700 new revenue agents
- LB&I is tripling the size of its Global High Wealth Industry Group
- Expanding from 2 to 6 offices
- GHW personnel also will work with other business operating divisions.
- Some criminal agents are being placed in IRS civil divisions to identify tax cheating.
- Attorneys are involved in earlier stages of examinations and investigations.

HIGH NET WORTH INDIVIDUALS PROJECT

- “The objective of this project is to increase audit coverage of taxpayers where Total Positive Income (TPI) is greater than \$10 million. The coverage of this taxpayer segment has historically been lower than other taxpayer populations. In addition to utilizing this project to learn more about this taxpayer population and impact tax compliance, this project also will provide insight into the effectiveness of utilizing DIF scores to identify non-compliance in this taxpayer segment.”

GHW TOOLS FOR IDENTIFYING AUDIT TARGETS

- GHW Industry Group uses mathematical modeling tools, data and analytics to identify examination candidates, to discern patterns and to observe trends.
- Computations are used to risk assess the level of compliance by the enterprises controlled by the high wealth individual.
- Additional sources used to identify high risk taxpayers:
 - referrals from the field and other business units
 - whistleblower claims
 - issue screening

DATA ANALYTICS AND OTHER SOURCES OF INFORMATION USED IN AUDIT SELECTION AND EXAMINATION

- Public and non-public data
- Self-reporting
 - Tax returns: 1120, 1040, 1065, etc.
 - Information returns
 - FACTA filing from financial institutions
 - Forms 8300
- FINCEN filings -- SAR's and FBAR's
- Newspaper reports
- Litigation pleadings
- State + local public filings
- Third-party sources
- Tax treaties and information exchange
- Corporate Transparency Act beneficial ownership data

A HOLISTIC APPROACH TO AUDITS

- GHW was formed to take a holistic approach to the high wealth taxpayer population
- Will look at the complete financial picture of the high wealth individuals and the “enterprises” they control
 - “Enterprises” are related cases to the individual “key case”.
 - Include related income tax returns where the individual has a controlling interest.
 - Significant compliance risk is deemed to exist

A HOLISTIC APPROACH TO AUDITS

- The enterprise cases may include:
 - Limited liability companies
 - Partnerships
 - Trusts
 - S corporations
 - C corporations
 - Gift tax returns
 - Estate tax returns
 - Private foundations
 - Foreign assets
- The Internal Revenue Manual has a dedicated section on global high wealth.

GHW FOCUS ON PARTNERSHIPS

- More than 50% of high wealth audits involve passthrough partnerships.
- In February 2022, IRS announced a campaign concerning Partnership Losses in Excess of Basis.
- IRS establishing a special area of LB&I to focus on large or complex pass-through entities. IR-2023-176.
- By December, 2023 as part of the Large Partnership Compliance program launched in 2021, IRS had opened 76 exams of the largest partnerships with more than \$10 billion in assets, including hedge funds, real estate investment partnerships, publicly traded partnerships, and large law firms.
- Approximately 500 compliance letters were sent to partnerships with more than \$10 million in assets with balance sheet inconsistencies.
- Newly hired employees will focus on assessing the compliance of complex partnerships, high-income individuals and corporations.

ADDITIONAL FOCUS ON GHW NON-FILERS and TAX DELINQUENTS

- In its March 2021 Report, TIGTA said: “Collection from high-income taxpayers who owe delinquent taxes is another inventory priority that demands ... attention”.
- In response to the TIGTA report, in October 2022, the IRS undertook a compliance sweep prioritizing 1600 individual millionaires with total incomes above \$1 million who have recognized tax debt exceeding \$250,000.
- The IRS has collected nearly \$1.1 billion from these 1600 millionaires.
- In February 2024, the IRS launched a further initiative to pursue 125,000 high income taxpayers who have not filed since 2017.
- In the first 6 months of this initiative nearly 21,000 of these taxpayers filed returns leading to collection of \$172 million.

IR-2024-284

- IRS announced the selection of Jeffrey Erickson as the first Associate Chief Counsel for the newly created Passthroughs, Trusts and Estates office which will focus exclusively on these entities.
 - Staffing for this office will be drawn from the current Passthroughs and Special Industries Group.
 - He will join IRS in January 2025
 - He was most recently a Principal in Ernst & Young's National Tax Passthroughs Transaction Group
- Holly Porter will be the Associate Chief Counsel for the Energy, Credits and Excise Tax office

Impact of Loper Bright case

- There may be increases in aggressive positions after repeal of the Chevron doctrine by the U.S. Supreme Court.
- Potential increase to uses of Form 8275 and 8275-R to avoid certain penalties if there is a reasonable basis for the tax position.
- Does inclusion of a disclosure increase the risk of an audit?

IRS FORM 1040 CLARIFICATION CHECKLIST

- Identifies case selection for examination
- Identifies type of exam – usually a field, rather than office, exam

Areas of Inquiry for High Net Worth Exams – S Corporations

- Stock and Debt Basis
 - Documentation Issues
 - Recovery of Debt Basis
 - Single vs Multiple Debt
 - Open Account v Note
 - Determination of AAA v Other Adjustment Account
- Reasonable Compensation
- Carryover of Unused Losses
- Net Investment Income Tax characterization

S Corporation – Reasonable Comp

- Example 1: 2022 exam year with \$30M Top Line Revenue; \$3M Adjusted Gross Profit. Company makes high distributions and pays low compensation to shareholder of \$70k. Company has no supporting documentation for reasonable compensation.
- Example 2: 2020 exam year of S corporation with a single shareholder; zero reasonable compensation paid and distributions of \$45,000 paid.
- Potential preparer penalty issues.

S Corporation – Reasonable Comp Example 1

- RC Reports concluded reasonable compensation was about \$63K

Anticipated Outcome

- Should produce a No Change Letter
- Since the Service did not get a change for the examination year, it is likely that a reasonable compensation will not be challenged for the following year.

S Corporation – Reasonable Comp Example 2

- Reasonable Compensation set at \$45,000

Cost of Getting Caught

- $\$45,000 \times 15.3\% = \$6,885$
- Plus Penalties & Interest
- 2.5 times tax owed = \$17,000

S Corporation – Reasonable Comp Example

- Reasonable Compensation set at \$90,000

Cost of Getting Caught

- $\$45,000 \times 15.3\% = \$6,885$
- $\$90,000 \times 15.3\% = \$13,770 \times 2 \text{ Years} = \$27,540$
- Plus Penalties & Interest
- 2.5 times tax owed = \$85,000

Areas of Inquiry for High Net Worth Exams - Partnership Issues

- Deducting Losses in excess of partnership basis or at risk amount
 - Allocation of Partnership Liabilities on Partner K-1s (with additional detail required for 2023 and future years)
 - Allocation of income pursuant to partnership agreement (sec 704(b) language)
- Matching income or loss reported on tax return to K-1s
 - Utilization of Form 8202 for inconsistent treatment
- Multi-tier partnership structure creating complexity
- Self-employment tax on members of LLCs and LLPs and limited partners of an LP
 - Soroban case

Areas of Inquiry for High Net Worth Exams - Individuals

- Unreported Income
 - Matching reported items to W-2s, Forms 1099 and other documents submitted to IRS.
 - Utilization of Gross Receipts Test
- Charitable Contributions
 - Promoters advocating aggressive positions involving CRATs, complex trusts, syndicated conservation easements
 - IRS issued final regulations in 2024 addressing denial of deductions for certain conservation easements and treatment of syndicated conservation easements and substantially similar transfers as listed transactions.
 - Documentation Issues and Form 8283.

Areas of Inquiry for High Net Worth Exams - Individuals

- Hobby Losses (activities not entered into for profit)
 - Impact on ability to deduct allowable deductions under the TCJA.
- Private Jets and Yachts used for business
 - Documentation issues
- Personal v Business Expenses
- Passive activity losses and income
 - Impact on NIIT analysis
- Home Office Expenses
- Private Placement Life Insurance
- Entertainment Expenses, including club memberships
- Gifts (especially to children) and inheritances

Areas of Inquiry for High Net Worth Exams

- Discharge of Indebtedness
 - Lender and Borrower consequences
 - Bad debt (business v non-business)
 - COD consequences
- Net Operating Losses and Carryovers
- Micro-captive insurance companies
- Digital Assets/Virtual Currency
- Offshore structures
- Financial products
- Sport franchises (new IRS sports industry loss campaign 1/16/24)

EXAMINATION TECHNIQUES

- Techniques specific to an industry or issues are provided in Technical Guidance to the examiners.
- The guides include:
 - examples of documents to request
 - key interview questions
 - things to look for during tours of the business
 - unique indirect methods of proof (like bank deposit analyses and net worth and expenditures)
 - what to look for in the books and records
 - other known sources of information pertaining to the market segment.

Final Instructions

- ▶ Pick up your CPE Certificates on the way out
- ▶ For the online audience, look for a link to do your evaluation and get your certificate by Wednesday
- ▶ Get us the registration for next year and grab your seat while you can!