



cutting through complexity

The Road Not Taken: Ethical Dilemmas for State Tax Professionals

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The Road not Taken: Ethical Dilemmas For State Tax Professionals

2018 FTA Annual Meeting

Renaissance Hotel

Nashville, Tennessee

June 3-6, 2018

Agenda

- **Review of IPT Canons of Ethics, select ABA Rules of Professional Conduct, and, and select sections of Circular 230 applicable to the Tax Profession**
- **Analysis of Ethical Issues in analytical framework**
- **Application of IPT Canons, ABA Rules, and AICPA SSTS's to practical real-life examples**

Culture of Greed Still Exists

Survey of 250 financial industry insiders:*

23% had observed or had firsthand knowledge of wrongdoing at work

26% believed compensation structure created an incentive on compromising ethic standards

**24% would engage in insider trading to make \$10 million
(increased to 38% for those with under 10 years of experience)**

Groucho Marx – *“There’s one way to find out if a man is honest – ask him. If he says ‘yes,’ he is a crook.”*

*** Andrew Ross Sorkin, *On Wall St., A Culture of Greed Won’t Let Go*, New York Times (July 16, 2013).**

Introduction

Relativity applies to physics, not ethics. Albert Schweitzer

Even the most rational approach to ethics is defenseless, if there isn't the will to do what is right. Alexander Solzhenitsyn

There is no such thing as a minor lapse of integrity. Tom Peters

The internal revenue code has made more liars out of the American public than golf. Will Rogers

Always do right. This will gratify some people and astonish the rest. Mark Twain

Sources of Guidance

Rules of Professional Organizations

Government-Imposed Rules

Corporate Policies

Personal Convictions

Rules of Professional Organizations

American Bar Association

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

American Institute of CPAs

<http://www.aicpa.org/Research/Standards/Tax/Pages/default.aspx>

Professional Oaths - e.g., California Attorney's Oath

http://www.calbarxan.com/applications/CalBar/PDFs/code_section_6068.pdf

Institute for Professionals in Taxation

<http://www.ipt.org/learncenter.asp?id=178410&page=29>

Tax Executives Institute

<http://www.tei.org/membership/Pages/StandardsofConduct.aspx>

Government-Imposed Rules

Circular 230

http://www.irs.gov/pub/irs-utl/circular_230.pdf

State-specific rules of professional conduct

Rules within tax laws

Sarbanes-Oxley

<http://www.sec.gov/about/laws.shtml#sox2002>

Corporate Policies

Company's own ethics policies or codes

E.g., Coca Cola Code of Business Conduct-- http://www.thecoca-colacompany.com/ourcompany/pdf/COBC_English.pdf

Association of Corporate Counsel

<http://www.acc.com/advocacy/keyissues/legalethics.cfm>

Personal Convictions

Individual Moral Code

Often the first level of scrutiny of a potential action

Individual Character

Internal moral barometers

Only the starting point; must navigate the whole framework

Disincentive of Public Disclosure

“What-would-your-mother-say” test

“Wall Street Journal” Test

Definitions of “Ethics”

**A principle of right or good behavior or a system of moral principles or values;
the rules or standards of conduct governing the members of a profession**

Webster’s II New College Dictionary Definition

The principles of conduct governing an individual or a group <professional ethics>

Merriam-Webster Online

Purpose and Function of Ethics Codes

- **Reflect organizational values**
- **Articulate principles and standards**
- **Advise members of acceptable/unacceptable conduct**
- **Protect clients, members of the public, and the integrity/reputation of the organization or profession**
- **Assist members in identifying ethical issues and provide framework for resolution**

IPT Code of Ethics

PREAMBLE

- **The Institute for Professionals in Taxation® has established this Code of Ethics to govern the conduct of members in connection with the performance of their professional duties as tax professionals and as members of IPT.**
- **As tax professionals, the members of IPT have an obligation for the competence and integrity of their work and conduct.**
- **Each member of IPT is bound by this Code of Ethics and agrees to report to the Committee on Professional Ethics any violation of the Code known to such member.**
- **An IPT member having supervisory responsibility for other tax professionals should make those subordinates aware of this Code of Ethics and instruct them to adhere to its provisions.**
- **The Committee on Professional Ethics, and in the event of an appeal, the Board of Governors, interprets the provisions of this Code in rendering opinions and in conducting investigations and hearings pursuant to regulations and procedures established by the Board.**

IPT Canons

- 1. IT IS UNETHICAL to engage in any conduct that discredits IPT, its membership, or the tax profession.**
- 2. IT IS UNETHICAL to engage in any activity that results in a conviction of any crime committed in connection with the member's involvement in a tax matter.**
- 3. IT IS UNETHICAL to operate beyond the boundaries of an agreed relationship with an employer or client.**
- 4. IT IS UNETHICAL for a member of IPT to state or imply that such member represents a person that the member does not represent, or to file any document on behalf of such person without authorization.**
- 5. IT IS UNETHICAL to disclose confidential employer or client documents or information except with the consent of the employer or client or as required by law.**

IPT Canons

6. IT IS UNETHICAL to offer or give anything of value to a public official to induce that official to take any action with respect to a tax matter.

7. IT IS UNETHICAL to offer or give anything of material value to an individual in an employment, advisory or representative relationship with a business to induce that individual to recommend the purchase of goods or services by the business, and IT IS UNETHICAL for such individuals to receive such value.

8. IT IS UNETHICAL to pay, retain, or accept a share of a fee or other monetary compensation for the referral of a person to another for the provision of tax services in which the recipient of such compensation does not participate, unless advance notice is given to the person for whom such services are to be performed. The amount of the compensation for the referral need not be disclosed unless requested by the person for whom the services are to be performed.

IPT Canons

9. IT IS UNETHICAL to solicit a tax assignment by assuring a specific result or to solicit, assign, accept or perform a tax assignment that is conditioned upon producing a preconceived opinion or conclusion.

10. IT IS UNETHICAL to initiate or pursue an appeal, protest, refund claim or other action on behalf of a taxpayer for which there is known to be no basis in fact or law. When the basis is unknown, the determination of whether a basis in fact or law exists must be made as soon as reasonably possible.

11. IT IS UNETHICAL for a member, in the performance of a tax assignment, to fail to exercise independent judgment in advising and representing a client.

12. IT IS UNETHICAL in the performance of a tax assignment to knowingly furnish or knowingly rely upon inaccurate, deceitful or misleading information, or to knowingly withhold information which lawfully should be revealed.

IPT Canons

13. IT IS UNETHICAL to prepare or use in any manner, for any purpose, a resume or statement of professional qualifications that is misleading or false.

14. IT IS UNETHICAL in promoting a tax practice or soliciting tax assignments to make misleading or false representations.

15. IT IS UNETHICAL to use client listings or references without specific authorization.

16. IT IS UNETHICAL to state or imply IPT authorization, endorsement or approval of any business, product or service.

IPT Canons

17. IT IS UNETHICAL in any representation of fact to IPT, in a membership application, renewal form, or otherwise, to knowingly furnish inaccurate, deceitful, or misleading information, or to knowingly withhold material information.

18. IT IS UNETHICAL for a member having supervisory responsibility for another tax professional to knowingly authorize, direct, permit or ratify any subordinate's act or omission that is declared unethical by this Code, regardless whether the subordinate is a member of IPT.

19. IT IS UNETHICAL to represent a client if such representation would be, or would risk being, adverse to the interests of another client unless each affected client gives informed written consent to such representation.

20. IT IS UNETHICAL to have, acquire, or seek a personal interest in a matter that is adverse to the interests of a client or employer

Who is subject to Circular 230 jurisdiction?

- **State licensed Attorneys and Certified Public Accountants** authorized and in good standing with their state licensing authority who interact with tax administrative at any level and in any capacity.
- Persons enrolled to practice before the IRS- **Enrolled Agents, Enrolled Retirement Plan Agents, and Enrolled Actuaries.**
- **Persons providing appraisals used in connection with tax matters** (e.g., charitable contributions; estate and gift assets; fair market value for sales gain, etc.).
- **Unlicensed individuals who represent taxpayers before the examination, customer service and the Taxpayer Advocate Service** in connection with returns they prepared and signed.
- **Licensed and unlicensed individuals who give written advice with respect to any entity, transaction, plan or arrangement; or other plan or arrangement**, which is of a type the IRS determines as having a potential for tax avoidance or evasion. For this purposes “written advice” contemplates all forms of written material, including the content of an email, given in connection with any law or regulation administered by the IRS.
- **Any person submitting a power of attorney** in connection with limited representation or special authorization to represent before the IRS with respect to a specific matter before the Agency.

What does “practice before the IRS” entail?

“Practice before the IRS” comprehends all matters connected with a presentation to the IRS, or any of its officers or employees, relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the IRS. Such presentations include, but are not limited to, **preparing** documents; **filing** documents; **corresponding** and **communicating** with the IRS; **rendering** oral and written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and **representing** a client at conferences, hearings and meetings.

Non standardization of Rules

While the various rules of ethical tax conduct are all, in general, designed to prohibit “bad conduct” and, in general, address similar issues that tend to overlap, they are not uniform by any means. As a result, the action taken to resolve a conflict may differ depending on the governing authority. **Consequently, the tax practitioner should determine which ethical rules are applicable and in what particular capacity the tax practitioner is acting.**

Example: A, an attorney, determines that an ethical conflict may require his withdrawal from a client matter. A’s conduct will be dictated by his particular state bar association rules of conduct and Circular 230. Contrast this with B, a tax return preparer, who is asked by a client to take a potentially unreasonable tax position. B’s conduct will be governed by Circular 230 and IRC§ 6694.

Circular 230 Select Provisions

§ 10.21 Knowledge of client's omission. A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, **knows that the client has not complied** with the revenue laws of the United States or has **made an error in or omission from any return**, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, **must advise the client promptly** of the fact of such noncompliance, error, or omission. The practitioner **must advise the client of the consequences** as provided under the Code and regulations of such noncompliance, error, or omission.

Circular 230 Select Provisions

§ 10.22 Diligence as to accuracy.

(a) **In general.** A practitioner **must exercise due diligence** —

(1) In **preparing** or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In **determining the correctness of oral or written representations** made by the practitioner to the Department of the Treasury; and

(3) In **determining the correctness of oral or written representations made by the practitioner to clients** with reference to any matter administered by the Internal Revenue Service.

(b) **Reliance on others.** Except as modified by §§10.34 and 10.37, a practitioner will be **presumed to have exercised due diligence** for purposes of this section if the practitioner **relies** on the work product of another person and the practitioner **used reasonable care** in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person

Circular 230 Select Provisions

§ 10.23 Prompt disposition of pending matters. A practitioner **may not** unreasonably delay the prompt disposition of any matter before the Internal Revenue Service

§ 10.32 Practice of law. Nothing in the regulations in this part may be construed as authorizing persons not members of the bar to practice law.

§ 10.35 Competence.

(a) A practitioner **must possess the necessary competence** to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.

Circular 230 Select Provisions

§ 10.29 Conflicting interests.

(a) Except as provided by paragraph (b) of this section, a practitioner **shall not** represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if —

(1) The representation of one client will be **directly adverse to another client**; or

(2) There is a **significant risk that the representation of one or more clients will be materially limited by the practitioner’s responsibilities** to another client, a former client or a third person, or by a personal interest of the practitioner.

Circular 230 Select Provisions

§ 10.29 Conflicting interests. (cont.)

- (b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner **may** represent a client if —
- (1) The practitioner **reasonably believes** that the practitioner will be able to provide **competent and diligent representation to each affected client**;
 - (2) The representation is **not prohibited by law**; and
 - (3) **Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner.** The confirmation may be made within a reasonable period of time after the informed consent, but **in no event later than 30 days**
- (c) Copies of the written consents must be retained by the practitioner **for at least 36 months** from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the Internal Revenue Service on request

Circular 230 Select Provisions

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns

(1) A practitioner may not **willfully, recklessly, or through gross incompetence** —

(i) **Sign** a tax return or claim for refund that the practitioner **knows or reasonably should know** contains a position that —

(A) **Lacks a reasonable basis**;

(B) **Is an unreasonable position** as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance);

(C) Is a **willful** attempt by the practitioner to understate the liability for tax or a **reckless or intentional disregard of rules** or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

Circular 230 Select Provisions

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers. (cont.)

(a) Tax returns

(1) A practitioner may not **willfully, recklessly, or through gross incompetence** —

(ii) **Advise** a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) **Lacks a reasonable basis;**

(B) **Is an unreasonable position** as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a **willful** attempt by the practitioner to understate the liability for tax or a **reckless or intentional disregard of rules** or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance). (2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence

Circular 230 Select Provisions

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(b) Documents, affidavits and other papers —

(1) A practitioner **may not** advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner **may not** advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is **to delay or impede** the administration of the Federal tax laws;

(ii) That is **frivolous**; or

(iii) That contains or **omits information** in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

Circular 230 Select Provisions

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(c) Advising clients on potential penalties —

(1) A practitioner must inform a client of **any penalties** that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also **must inform** the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

Circular 230 Select Provisions

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(d) **Relying on information furnished by clients.** A practitioner **advising** a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or **preparing** or **signing** a tax return as a preparer, generally **may rely in good faith without verification** upon information furnished by the client. The practitioner **may not**, however, **ignore the implications of information furnished to, or actually known by, the practitioner**, and must make **reasonable inquiries** if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

Select ABA Model Rules Applicable to Tax

Rule	Topic
1.3	Due Diligence
1.6	Confidentiality of Information
1.8	Conflict of Interest: Current Clients Specific Rules
3.3	Candor toward the tribunal
4.1	Truthfulness in Statements to Others

Select ABA Model Rules Applicable to Tax

Due Diligence

Rule 1.3 A lawyer shall act with reasonable diligence and promptness in representing a client.

Confidentiality of Information

Rule 1.6 (a) A lawyer *shall not* reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

Select ABA Model Rules Applicable to Tax

Confidentiality of Information

Rule 1.6 (b) A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

Select ABA Model Rules Applicable to Tax

Confidentiality of Information

Rule 1.6 (c) A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

Select ABA Model Rules Applicable to Tax Professionals

Conflicts of Interest: Specific Rules

Rule 1.8

- (a) A lawyer **shall not** enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

Select ABA Model Rules Applicable to Tax Professionals

Conflicts of Interest: Specific Rules

Rule 1.8 (cont.)

(a) (3) the client gives **informed consent, in a writing signed by the client**, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer **shall not** use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Select ABA Model Rules Applicable to Tax

Candor Toward the Tribunal

Rule 3.3 (a) A lawyer *shall not* knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Select ABA Model Rules Applicable to Tax

Candor Toward the Tribunal

Rule 3.3

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding *shall take* reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Select ABA Model Rules Applicable to Tax

Candor Toward the Tribunal

Rule 3.3

Rule 1.0 (m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter

Select ABA Model Rules Applicable to Tax

Truthfulness in Statements to Others

Rule 4.1 In the course of representing a client a lawyer *shall not* knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

A lawyer is required to be truthful when dealing with others on a client's behalf, **but generally has no affirmative duty to inform an opposing party of relevant facts.** A misrepresentation can occur if the lawyer **incorporates or affirms a statement of another person that the lawyer knows is false.** Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

This Rule refers to statements of fact as well as law. Whether a particular statement should be regarded as one of fact can depend on the circumstances.

Applying Ethics

Unless otherwise stated, the following scenarios will be analyzed under the IPT Code of Ethics.

Reference will also be made to AICPA Code of Ethics, the ABA Model Rules of Professional Conduct, or other state codes.

Example IDR Response

The IRS gives you an IDR which is poorly worded. You are able to respond to the IDR and respond in a technically correct manner. You suspect, however, that the IRS is looking for something else which, had the IDR been drafted properly, would have required substantial documentation and provided evidence of a potential audit adjustment. Are you **required** to request a change in the wording of the IDR?

What is the practical aspect of this ethical issue?

Reference: 230 § 10.22, ABA § 3.3(a), SSTS no. 6

Example IDR Response

You have responded to numerous IDR requests related to a particular topic. The IRS has issued follow up requests and in the course of document gathering you discover that one or more responses to a previous IDR is not accurate.

Are you **required** to supplement your response to correct your previous IDR response?

Reference: 230 §§10.51, 10.52, ABA § 3.3(a), IPT Canon 12

Example Conflict of Interest

You represent H and W in an audit before the IRS. H and W have filed a joint return for the past several years. H has been your main contact for information as many of the audit issues have revolved around H's solely owned business. The Agent has finally finished the audit and there are large adjustments that need to be discussed with H and W. W fails to show for your conference and you are advised by H that they have separated after W recently filed for divorce, the proceedings of which have only just begun.

- 1) Do you have a conflict of interest?
- 2) Can you continue to represent both parties?

Reference:

- 1) 230 §10.29(a), ABA 1.7, 1.8, IPT Canon 19

Example Discovery of Client Error

Your client, A Corp., has just completed a three year audit cycle with the IRS for prior years. The statute of limitations on these years is about to expire. While gathering necessary information to prepare the current years tax return, you review the client's work papers and tax returns from that same audit cycle and discover an error that would have resulted in several million dollars of additional income in one of those years.

Questions

- 1) Are you **required** to file an amended return?
- 2) Are you **required** to bring the error to the client's attention?
- 3) Does the answer change if you are an "in house" tax return preparer?
- 4) If you bring the error to the attention of the client and they elect to "sit tight," are you required to disclose the error?
- 5) Does the answer in 4 change if you are a lawyer v. CPA v. tax return preparer?

Reference

- 1) Tr. Regs. 1.451-1(a), 1.461-1(a)(3)
- 2) 230 §10.21, ABA 4.1, 1.2(d), 3.3(a), SSTS No. 6 §4, IPT Canon 12
- 3) Note Tr. Regs directed toward the "taxpayer"
- 4) ABA 1.6, SSTS No.6 §5
- 5) Compare ABA 4.1, 3.3(a), 230 §10.21, SSTS No. 6

Example Discovery of Client Error

Same facts as before but the client has discovered a potential benefit in one of those years and now instructs you to quickly file an amended return prior to the expiration of the statute of limitations. The client says nothing about correcting previously discovered error.

Questions:

- 1) Can you file the amended return without correcting the previously discovered error?
- 2) If the client insists on filing the return without correction can you continue to represent the client if you are a lawyer? A CPA?

Reference:

- 1) 230 §§ 10.34, 10.51(d), ABA §§4.1(a), 8.4, SSTS no. 6, §6663(a), IPT Canon 12
- 2) ABA 3.3(a), SSTS No 6.

Example Reasonable Return Position

A is a tax professional who works for Familiar Franchisee Corp. The franchise agreement requires the franchisee to deposit, monthly, a specified percentage of revenue with the franchisor for marketing and advertising. Once Familiar's advertising and marketing plans are approved by the Franchisor, the funds are paid directly to the advertising company by Franchisor. Due to the time lag in placing the marketing programs, the delay can often exceed one year. Franchisor does not include the payments in income at any time.

Familiar instructs A to take a return position to deduct the payments currently.

- 1) Does A have any ethical issue?
- 2) Does the answer change if A finds a U.S. Tax Court case upholding the **Franchisor's exclusion** from income under a similar fact pattern?
- 3) Is the answer affected if the IRS has not acquiesced in the decisions?
- 4) How about if A is aware that the IRS has challenged Franchisor's exclusion in an audit?
- 5) How about a split in the judicial circuits?
- 6) What if Familiar was previously deferring the deductions until paid in the subsequent year and now seeks to deduct currently? Does SSTS No 5 allow you to recommend a change in the position?

References:

Compare 230 §§ 10.34(a)(1)(i) and (ii) with IRC §6702, with SSTS No 1§ 5, IPT Canons 10, 11

Also: 230 §§ 10.34(a)(1)(i) and (ii) and SSTS No. 3 §4.

See *Affiliated Foods v. Commissioner* 154 F.3d 327 (5th Cir. 1998) rev'g TC Memo 1996-505

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