



AVOIDING THE EVOLVING WEB OF THE INTERNAL REVENUE SPIDER—PROTECT YOUR COMPANY FROM TAX AND LITIGATION RISKS

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PANELISTS:

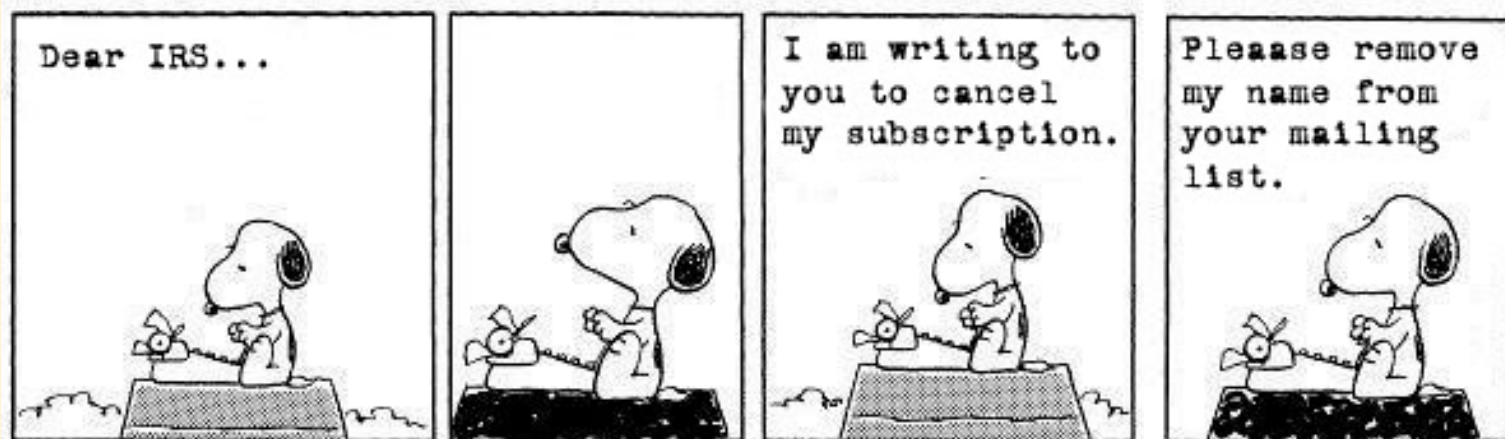
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Corresponding with the IRS



Talking with the IRS



Making the IRS Pay

Awards for Costs and Fees Under IRC § 7430

Limitations

- The prevailing party exhausted all available administrative remedies. See Reg. § 301.7430-1;
- The costs are allocable to the U.S. and not to any other party;
- No award may be made with respect to any portion of the proceeding during which the prevailing party unreasonably protracted the proceeding;
- The application for administrative costs must be filed before the 91st day after the date on which the IRS mailed its final decision as to the determination of the tax, interest, or penalty.

Proceedings - § 7430 (c)(5) and (6)

- Administrative = any tax proceeding or action before the IRS.
- Judicial = any civil action brought by or against the United States in a court of the United States.

Prevailing Party § 7430(c)(4)(A)

- A party who substantially prevails re:
 - the amount in controversy; or
 - the most significant issue or set of issues presented.

- Determination of prevailing party may be made by:
 - Agreement of the parties;
 - The agency, if the final determination with respect to the tax, interest, or penalty is made at the administrative level;
 - Or, the court, if the court entered a final decision.
§ 7430(c)(4)(C).

Time for Claiming Fees and Costs

- Administrative – file application with IRS before the 91st day of final decision
- Judicial – In agreed cases the amount to be awarded must be submitted as part of the Stipulation of Decision; and in disputed cases, a motion for litigation costs must be filed within 30 days of the opinion.

Substantial Justification Exception § 7430(c)(4)(B)

- A party will not be treated as a prevailing party if the United States establishes that its position was substantially justified, i.e., it had a reasonable basis in **both law and fact**.

- A **rebuttable presumption** arises that the United States' position was not substantially justified if the IRS did not follow its own applicable published guidance in the proceeding.

Reasonable Litigation Costs

§ 7430(c)(1)

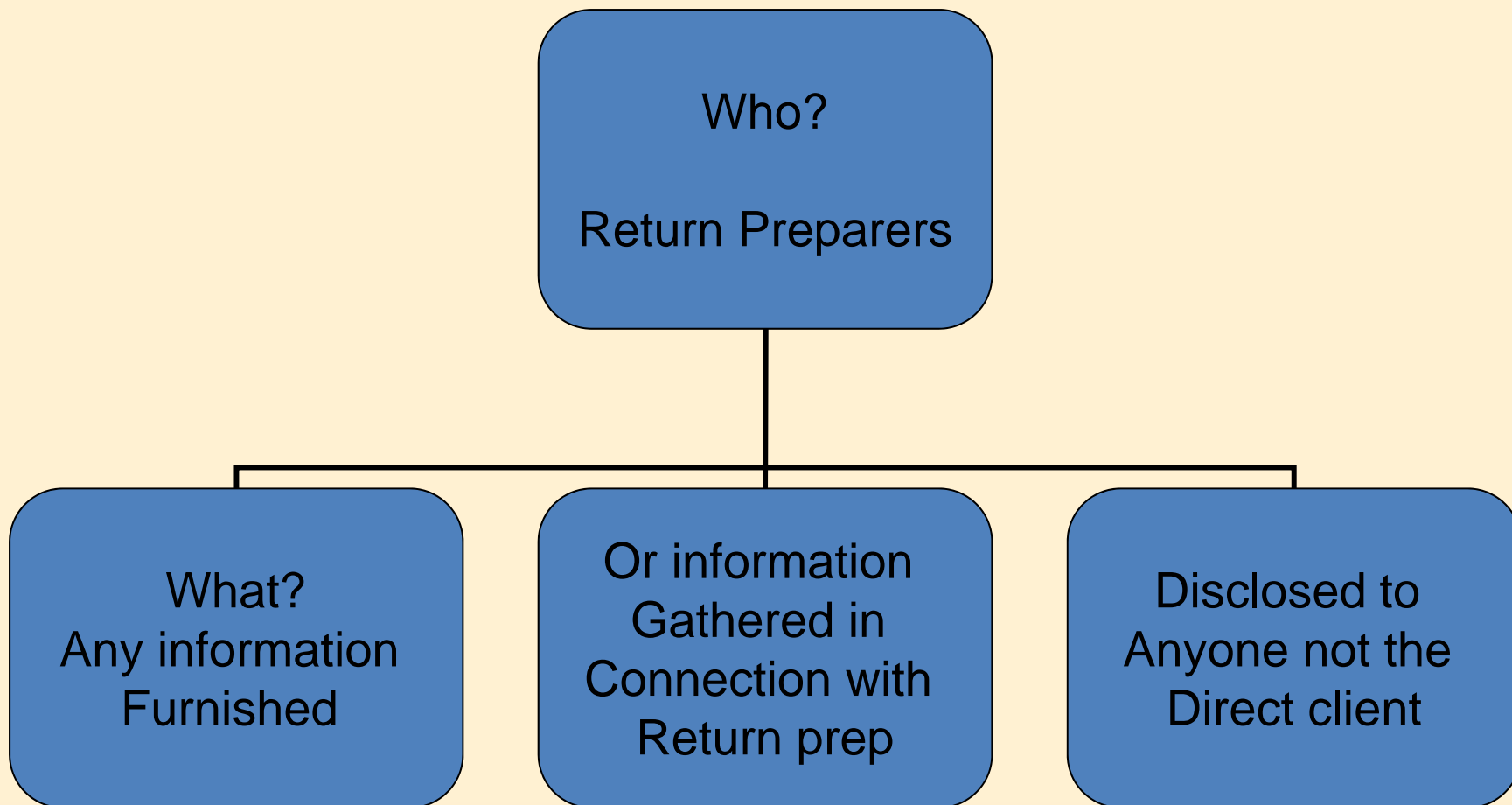
Fairy Tales and Taxes



Tax Return Disclosure

A Trap for the Unwary

Internal Revenue Code Sections 6713 & 7216



Who is a return preparer?

- The actual persons preparing the return (whether in house or outside)
- Or, anyone providing services in connection with the return preparation (such as payroll services, attorneys, appraisers, etc.)
- Very BROAD definition of return preparer

Penalties under Section 6713

- Penalty of \$250 per disclosure
- Maximum of \$10,000 per year per person
- Applies to wrongful disclosure of tax return information, OR
- Use of information for any purpose other than tax return preparation (such as marketing, due diligence, etc. unless an exception applies)

Section 7216

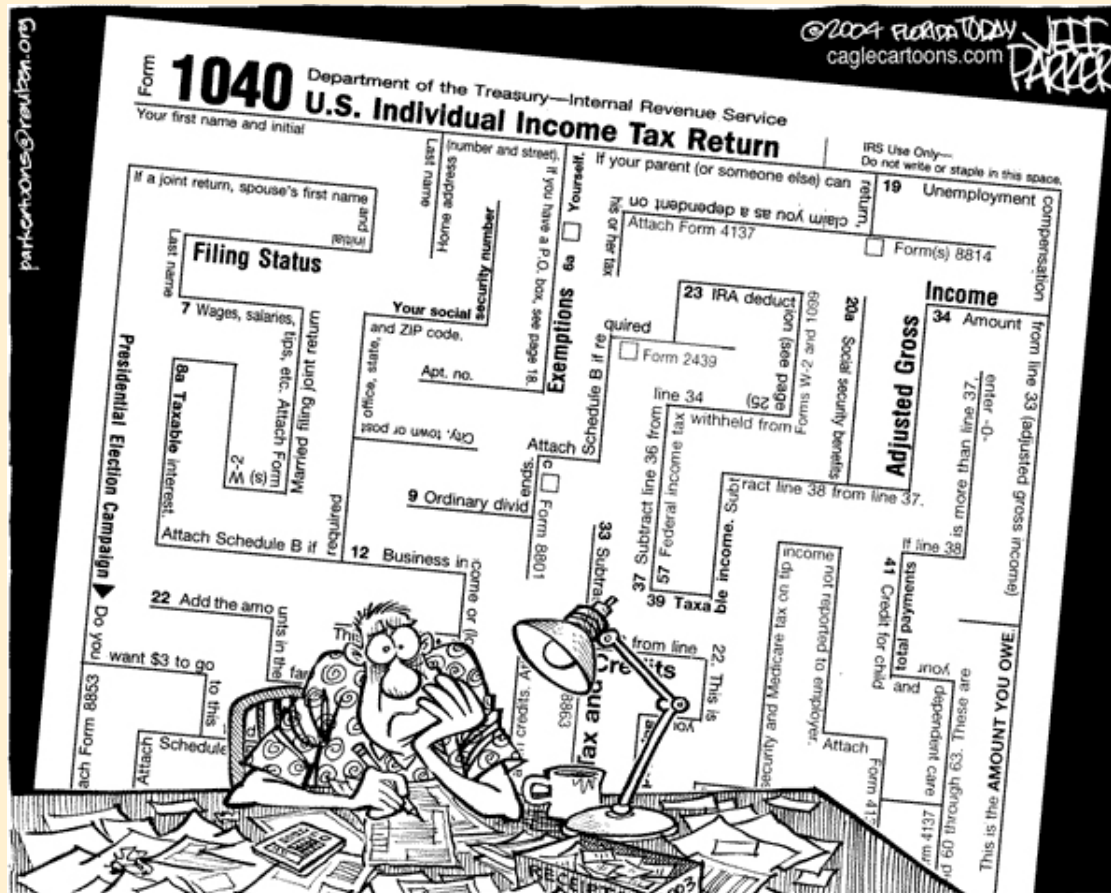
is a Criminal Code Section

- Violating Section 7216 is a misdemeanor
- Fine or imprisonment
- Impact on other disciplinary matters
- Do not get your accountants into trouble

Recommendations

- Draft an internal policy on control of tax info
- Keep good written records on disclosures
- Require outside consultants to sign consent forms to adhere to policy
- Ensure that HR department understands the rules, especially if confronted by the “tax protestor employee.”

The Life of a Tax Preparer



PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010 (PPACA)

CONSIDERATIONS FOR EMPLOYERS

HEALTH CARE DEVELOPMENTS

- **Overview of Provisions and Timelines**
- **Date of Enactment – March 23, 2010**
- **Insurance Market Reforms – 2011**
- **Exchange – 2014**
- **Individual Mandate – 2014**
- **Employer Mandate – 2014**
- **Excise Tax (Cadillac Plan Tax) – 2018**

HEALTH CARE DEVELOPMENTS

Immediate Changes For All Plans:

- **Must provide benefits to customers for plan years starting September 23, 2010 including:**
 - ✓ **No lifetime limits on coverage for all plans (phased in)**
 - ✓ **No rescission of coverage**
 - ✓ **Coverage to young adults under age 26**

HEALTH CARE DEVELOPMENTS

Immediate Changes For All Plans: (*continued*)

- ✓ **No exclusions for children with pre-existing conditions**
- ✓ **No “restricted” annual limits (phased in)**
- ✓ **Early retiree reinsurance with subsidies:**
 - **If not Medicare-eligible, temporary retiree reinsurance program for retirees age 55+; also will pay dependent claims**

HEALTH CARE DEVELOPMENTS

A grandfathered plan must have been in effect on March 23, 2010, and to avoid application of PPACA, can make very limited changes

HEALTH CARE DEVELOPMENTS

Impact of Affordable Care Act on Self Funded Group Health Plans: *(continued)*

- ✓ **Limitations on cost-sharing**
- ✓ **Notification of "material" modifications must be made 60 days before the effective date**
- ✓ **Fees: Patient-Centered Outcomes Research Fund**
- ✓ **Coverage of emergency services**

HEALTH CARE DEVELOPMENTS

Impact of Affordable Care Act on Self Funded Group Health Plans: *(continued)*

- **No lifetime annual limits on essential benefits (phased in through 2014)**
- **Prohibition on rescission**
- **Preventive health services**
- **Access to pediatric care**
- **Patient access to OB/GYN Care**

HEALTH CARE DEVELOPMENTS

Impact of Affordable Care Act on Self Funded Group Health Plans: *(continued)*

- **Coverage for approved clinical trials**
- **Extension of dependent coverage until age 26**
- **Ensuring quality of care reporting**
- **External review**

HEALTH CARE DEVELOPMENTS

Impact of Affordable Care Act on Self Funded Group Health Plans: *(continued)*

- **Reinsurance for early retirees (public subsidy)**
- **Prohibition of discrimination based on preexisting condition or other discrimination**
- **No discrimination based on health status**

HEALTH CARE DEVELOPMENTS

Self Funded Group Health Plans – Do not have to comply with these new rules:

- **Comprehensive coverage for health benefits package applicable to insurers**
- **Essential health benefits requirements applicable to insurers**
- **Prohibition of discrimination based on salary**

HEALTH CARE DEVELOPMENTS

Self Funded Group Health Plans – Do not have to comply with these new rules: (*continued*)

- **Annual deductible limitation for employer plans**
- **Guaranteed issue of coverage**
- **Exemption from prohibition of discrimination in favor of highly compensated individuals**

Lessons from *Textron*

- Holding: Textron prepared the work papers in the course of business and to comply with federal law—not for use in future litigation, making them discoverable by the IRS.
- Dissent: The majority creates a new rule that rejects the “because of” future litigation test and imposes a “prepared for” use in litigation test. Under the proper test, work papers should have been protected because they would not have been prepared except for potential litigation.

Lessons from *Textron*

- Appeal to U.S. Supreme Court:
 - Certiorari denied on May 24, 2010
 - Decision is binding on courts in the First Circuit

Lessons from *Textron*

- General Implications:
 - Tax accrual workpapers may not be protected from the IRS under work product
 - Reasoning of the court may extend beyond tax accrual workpapers to subject other material to discovery that may have previously been considered privileged

New Simplified IRS Form “1040-Really-EZ”

Line 1. Enter your name.

Line 2. Enter the amount of money you earned last year.

Line 3. Send it in.

OFFSHORE BANKING BUSINESS

- The IRS is very focused on offshore reporting compliance and finding underreported income from offshore.
- Penalties are steep for non-compliance
- IRS has lots of information on offshore accounts and amnesty deadlines have passed.

Report of Foreign Bank and Financial Accounts (FBAR)

- Not part of Internal Revenue Code
- Part of Title 31 (anti money-laundering)
- 31 USC Section 5321 and criminal penalties in 18 USC 1001 and 31 CFR 103.59.
- Detroit Computing Center gathers the data from FBARs and other reports such as currency transaction reports
- IRS has a unit coordinating and investigating offshore transactions

FBAR Requirements

- Must file annual forms for each offshore account. Does not matter whether it generates taxable income. Form is a TD F 90-22.1.
- Deadline is June 30th.
- Must file if aggregate balances in foreign accounts exceeds \$10,000 at any point during a calendar year.
- Penalty for filing late can range from \$500 to \$500,000, plus there are potential criminal penalties.

FATCA Requirements

- HIRE (Hiring Incentives to Restore Employment) Act of 2010 enacted March 18, 2010 created a new set of rules: the Foreign Account Tax Compliance Act (FATCA).
- IRS has issued preliminary guidance under FATCA.
- Generally, FATCA imposes 30% withholding tax unless foreign financial institution discloses information on US persons.

New Era of IRS Enforcement Internationally

- First, IRS obtained credit card info from VISA, MasterCard, Amex
- IRS reached agreement with UBS (and others) to obtain account info
- IRS conducted voluntary disclosure initiative that ended Oct 15th, 2009.
- Many came forward, many did not
- IRS has worked with OECD on increasing transparency.

Information Sharing

- Joint International Tax Shelter Information Centre (2004)
- IRS Tax Treaties, Tax Information Exchange Agreements
- Joint Audits
- Global Forum on Transparency and Exchange of Information

Recommendations

- Make sure that company and executives are aware of international reporting issues.
- If necessary, consider voluntary disclosure programs. Even though amnesty is over, general voluntary disclosure program still viable.
- Make sure inside and outside accounting folks are aware of cross-border transactions so that compliance issues can be addressed up front.

New Tax Preparer Penalty

1. Penalty Increases:

- Unreasonable Positions – raised from \$250 per return to greater of \$1,000 or 50 percent of income derived from return
- Willful or Reckless Conduct – raised from \$1,000 per return to greater of \$5,000 or 50 percent of income derived from return

New Tax Preparer Penalty

2. Support Standards:

- Standard required to avoid disclosure of tax positions raised from “realistic possibility of success” to “more likely than not” to be sustained on the merits
- Standard for disclosed positions raised from “not frivolous” standard to “reasonable basis” standard