

Payroll Tax Collection Audits Are Dangerous Ground Now

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Any trust fund recovery penalty or general collection civil investigation should now be treated as an “eggshell audit” that can quickly become a criminal case, according to practitioners.

“There are no standard, ordinary trust fund recovery cases or IRS collection cases anymore. They are all eggshell, so you really need to watch what your advice and what you are doing,” Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP said December 14.

Loren Washburn of Smith Washburn LLP, speaking alongside Ungerman at the American Bar Association’s National Institutes on Criminal Tax Fraud and Tax Controversy in Las Vegas, said that employment tax cases seem to have displaced voluntary disclosures as the IRS’s top enforcement priority.

Washburn noted that the \$60 billion portion of the tax gap attributable to employment taxes comes only from businesses that report but fail to pay their employment tax liabilities. That figure excludes all of the employers who fail to report or underreport, such as cash-heavy businesses or those that pay employees under the table, Washburn said. “That means the employment tax gap is truly multiples of that,” he said.

In the last few years, it has been noted several times that the line between the civil trust fund recovery penalty under section 6672 and the crime of failure to pay over under section 7202 is very thin.

Case Selection

Michelle F. Schwerin of Capes, Sokol, Goodman & Sarachan PC said during the event that practitioners need to be cautious of the eggshell audit during the process surrounding the Form 4180, “Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes.”

Tara Sullivan, special agent in charge (Las Vegas) IRS Criminal Investigation division, noted that if CI receives a fraud referral arising from of an employment tax audit, that referral will include “all of the documentation that the referring [revenue] officer came up with, and that’s going to be what is the basis of the criminal referral.”

Sullivan said that CI’s new nationally coordinated investigations unit has helped special agents generate their own employment tax cases, even without fraud referrals. She said the new unit consolidates data in a way that saves special agents the time it would otherwise take to query multiple different systems for the pieces of a puzzle.

The IRS has also moved beyond focusing on only filing mismatch cases, in which an employee’s filing doesn’t match the employer’s filing, Sullivan said. Whereas the IRS hadn’t been spending much time on nonfiling cases, it is now more interested in that space, she said.

Ungerma n said that when working on an employment tax case, he will often have the taxpayer start to voluntarily make payments toward the liability, even outside of a formal installment agreement or offer in compromise. The point is to demonstrate the taxpayer's good faith in the hope of influencing CI's case selection decision, he said.

Sullivan noted that CI always keeps jury appeal in mind when selecting which cases to pursue, adding that there is a lot less appeal in a case involving a taxpayer trying to get back into compliance.

DOCUMENT ATTRIBUTES

CODE SECTIONS

SEC. 7202 WILLFUL FAILURE TO COLLECT OR PAY OVER TAX
SEC. 6672 FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX

JURISDICTIONS

UNITED STATES

SUBJECT AREAS / TAX TOPICS

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