Representing Taxpayers During Summons and other IRS Interviews
ABA May Meeting
Grand Hyatt, Washington, DC
May 10, 2019
3:45pm-4:45pm
Panelists

• Moderator:
  – Frank Agostino, Agostino & Associates, P.C.

• Panelists:
  – Guinevere Moore, Johnson Moore
  – Lindsey Stellwagen, IRS Office of Chief Counsel
Potted Plant

- **Senator Inouye**: And I’m certain you realize that the rules of evidence do not apply in this inquiry.

- **Brendan Sullivan**: That I know as well. I’m just asking for fairness. Fairness. I know the rules don’t apply. I know that Congress doesn’t recognize attorney-client privilege. Husband and wife privilege. Priest penitent privilege. I know those things are all out the window. And we rely on just fairness, Mr. Chairman, fairness.

- **Senator Inouye**: We have attempted to be as fair as we can. Let the witness object if he wishes to.

- **Brendan Sullivan**: *Well sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.*
Rambo

“Rambo is the last name of a fictional United States Green Beret veteran characterized in a novel by John Morrell and later portrayed by Sylvester Stallone in several recent films. See First Blood (Orion 1982); Rambo: First Blood Part II (Orion 1985); Rambo III (Tristar 1988). The character is the ultimate military warrior, always willing and able to fight to the death.” Thomas Reavley, Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics, 17 Pepperdine Law Review, Issue 3, 637 n. 4. (April 15, 1990).
Potted Plant v. Rambo

• Potted Plant: sit idly by, do not object, be seen and not heard.

• Rambo: zealous advocacy, objecting whenever possible, directing client not to answer questions, and leaving interview, if necessary.
IRS Summons Power

• I.R.C. § 7602: for the purposes of ascertaining the correctness of any return, the Secretary is authorized:
  – To examine any books, papers, records, or other data that may be relevant or material;
  – Summon the person liable for tax or required to perform the act, or any officer or employee of such person, to give testimony, as may be material and relevant; and
  – To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.
IRS Cannot Issue Summons

• IRS cannot issue a summons:
  – of a third party without giving the taxpayer reasonable notice (I.R.C. § 7602(c)); and
  – if a Justice Department referral is in effect (I.R.C. § 7602(d)).
Summons Requirements

• For a summons to be proper it must request information, and it must not be vague, overbroad, or overly burdensome. See United States v. Powell, 379 U.S. 48 (1964).
Validity of Summons

• **Powell** requirements:
  – there is a legitimate purpose for the examination;
  – the information summoned may (not must) be relevant to that purpose;
  – the information is not already in the possession of the IRS; and
  – the IRS has complied with all administrative steps required by the Code and relevant Treasury Regulations.
Time and Place of Exam

• I.R.M., pt. 25.5.3.4, provides that the date of the examination must be 10 full days after service and that the date set for appearance should not be on a Saturday, Sunday, or legal holiday.

• In the case of a summons served on a third party, the taxpayer must be given notice of that summons within 3 days of the date on which the summons was served on the third party, and at least 23 days prior to the return date of the summons. I.R.C. § 7609(a).

• The time and place of examination shall be at such time and place as may be reasonable under the circumstances. I.R.C. § 7605(a).
Summons Interview

• Summons are not self-executing;
• I.R.C. § 7521(b) allows the taxpayer to terminate the interview at any time or consult with his professional at any time, which is not allowed during depositions;
• Taxpayer has right to exercise self-help, see Reineman v. United States, 301 F.2d 267 (7th Cir. 1962); to refuse unreasonable requests, I.R.M., pt. 25.5.5.4.6; and to suspend the summons interview. I.R.C. § 7521(b)(2); I.R.M., pt. 25.5.5.4.2(1),(2).
Scope of Summons Interview

• The IRS has authority to inquire about any information or data which may relate to ascertaining the correctness of any return. The language "any return" suggests that even if the particular return or particular tax year was not mentioned directly in the summons itself, the IRS may ask questions at the interview about it. I.R.C. § 7602; United States v. Turner, 480 F.2d 272, 278-9 (7th Cir. 1973).

• Inquisitorial and very broad.
Participants

- I.R.C. § 7521 and 5 U.S.C. § 555(b) provide that the taxpayer may be represented by tax counsel or by a tax professional at an IRS interview.
- If the tax professional has caused "unreasonable delay or hindrance" to the IRS in its investigation, the IRS agent is permitted to notify the taxpayer of that determination and potentially exclude the professional, if necessary. I.R.C. § 7521(c).
Present at Third-Party Interview

• A third party who receives an IRS Summons is similarly entitled to have a tax professional accompany him to the IRS interview. However, the taxpayer does not have a right to be present (or to have his tax professional present) unless the third party consents. United States v. Newman, 441 F.2d 165 (5th Cir. 1971).
Observers

• I.R.M., pt. 25.5.5.5.7, provides that the summoned witness may consent to have observers present, including the taxpayer and his tax professional, provided that:
  – the observers are silent and do not participate in or disrupt the interview;
  – the taxpayer being investigated provides written consent allowing the disclosure of return information to all attending the interview; and
  – the disclosure of that return information will not seriously impair federal tax administration.

• What about asserting Privilege?
No Delay Tactics

• Model Rule 4.4(a):
  – In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
Transcribing Interview TP

- I.R.C. § 7521(a) allows for the taxpayer to request a transcribed interview but a summons interview is not automatically transcribed;
  - Need to give 10 calendar days notice. See Notice 89-51; Keene v. Commissioner, 121 T.C. 8 (2003).
Transcribing Interview IRS

- I.R.C. § 7521(b) IRS may record interview if:
  - The taxpayer is informed prior to the interview; and
  - Upon request of taxpayer, provides the taxpayer with a transcript so long as taxpayer reimburses for the cost of copy.
Transcripts and Recording

• For non-criminal investigations, the taxpayer is entitled to make an audio recording of the interview, at his own expense, provided he gives the IRS advance notice. I.R.C. § 7521(a)(1).
  – 10 days advanced notice is required. I.R.M., pt. 25.5.5.4.4 (Dec. 18, 2015).

• Film and video recordings are not allowed. See I.R.M., pt. 5.1.12.3.2, Deny Requests for Video or Film Interviews (Sep. 20, 2012).
Audio Recordings

• Cannot audio record over telephone.
• IRS Notice 89-51 provides requirements for making an audio recording:
  – The taxpayer or authorized representative supplies the recording equipment;
  – The Service may produce its own recording of the proceedings;
  – The recording takes place in a suitable location; and
  – All participants in the proceeding other than Service personnel must consent to making the audio recording and all participants must identify themselves and their roles in the proceeding.
Objecting During Interview

• All objections are permitted until the IRS gets an enforcement judgment from the court denying the objections. *Alphin v. United States*, 809 F.2d 236, 238 (4th Cir. 1987).
Objections (cont’d)

- If objections are deemed to hinder and/or delay the proceedings, the tax professional may be excluded from the interview. I.R.M., pt. 25.5.5.5.2(3), provides that the obstruction must be "active" before disqualification will be sought, and that the facts must "clearly indicate that [the attorney] has actively impeded the investigation."
Privileges

• Must consider privileges during summons interview process, including:
  – Fifth Amendment privilege;
  – attorney-client privilege;
  – the tax practitioner privilege;
  – the joint-defense/common interest privilege;
  – and the marital privileges.
Tax Practitioner Privilege

• I.R.C. § 7525(a)(1) entitles tax practitioner to the same common law protections that would be recognized between an attorney and a client.

• Recognized when:
  – the person is a tax professional as defined by I.R.C. § 7525;
  – the client came to the tax professional for tax advice unrelated to a tax shelter; and
  – the matter is not criminal.
Fifth Amendment Privilege

• The Fifth Amendment privilege states that “no person shall be...compelled in any criminal case to be a witness against himself.” United States Const. Am. V.

• The IRS may deem a witness who fails to invoke his Fifth Amendment privilege as waiving it regarding further questioning on the same subject.
Fifth Amendment (cont’d)

• The Fifth Amendment privilege is only validly invoked when the witness has a reasonable and good faith belief that answering a question would create a "substantial hazard" of incriminating himself.

• The Fifth Amendment privilege does not extend to testimony or production of documents by third parties. However, third-party testimony or production of documents may be protected by another privilege. *Couch v. United States*, 409 U.S. 322 (1973).
Fifth Amendment (cont’d)

• Fifth Amendment privilege must be asserted on a question-by-question basis during the interview or on a document-by-document basis prior to the interview.
Fifth Amendment (cont’d)

• The Fifth Amendment privilege does not apply when the compelled testimony could subject the witness to prosecution in a foreign country, as opposed to the United States. However, if the witness was compelled to give testimony to a foreign government in violation of the witness’ Fifth Amendment rights, the compelled foreign testimony cannot be used in U.S. courts.
Attorney-Client Privilege

Attorney-Client (cont’d)

• A taxpayer or attorney may invoke the attorney-client privilege if:
  – The taxpayer was a client of the attorney, or sought to become the attorney’s client;
  – The attorney was offering counsel in his capacity as an attorney and was admitted to practice law in the jurisdiction where counsel was given; and
Attorney-Client (cont’d)

• The attorney may also assert the attorney client privilege to protect himself during questioning. Fisher v. United States, 425 U.S. 391 (1976)
Kovel Extension of Attorney-Client Privilege

• Under United States. v. Kovel, 296 F.2d 918 (2d Cir. 1961), the attorney-client privilege may extend to communications made by an attorney’s client to an accountant the attorney employs as part of obtaining legal advice from the attorney.
Kovel Agreement

• A Kovel Agreement is where an attorney hires an accountant to assist the attorney in counseling the client. Accountants who perform work subject to a "Kovel Agreement" are also protected by the attorney-client privilege.
Common Interest/Joint Defense Privilege

• This privilege extends the attorney-client privilege to allow attorneys representing different parties with a common interest to collaborate without waiving privilege.

• To establish the existence of a joint defense privilege, the party asserting the privilege must show that:
  – the communications were made in a joint defense effort;
  – the statements furthered the effort; and
  – the privilege has not been waived. Matter of Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986).
Marital Privilege

• Two different privileges:
  – spousal communications privilege;
  – the spousal immunity, or spousal adverse testimonial, privilege.
Spousal Communications Privilege

• The Spousal Communications Privilege protects information privately disclosed between husband and wife in the confidence of the marital relationship.
  – Either spouse may invoke this privilege to prevent the other from testifying about confidential and private communications between the spouses;
  – The spousal communications privilege survives divorce;
  – This privilege applies only to communications between the spouses and does not protect observations or other nonverbal Conduct; and
  – The spousal communications privilege is waived if the communication is made in the presence of a third party.
Spousal Immunity Privilege

- The Spousal Immunity, or Spousal Adverse Testimonial, privilege protects a witness spouse from giving compelled testimony against the other spouse in a criminal proceeding.
  - The privilege may only be asserted by the spouse being compelled to testify;
  - This privilege does not survive if the marriage ends, but it protects all facts – not just communications;
  - If an ex-spouse is not friendly toward the tax professional's client, outreach should still be made to see if the spouse would invoke the privilege because one spouse’s wrongdoings tend to affect the other spouse in unexpected ways.
I.R.C. § 7491

• Allows taxpayer, after presenting credible evidence, to shift the burden to IRS, if:
  – Taxpayer complied with requirements under Title 26 to substantiate any item; and
  – Maintained all required records and cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews.
I.R.C. § 982

• If the taxpayer fails to substantially comply with any formal document request arising out of the examination of the tax treatment of any item . . . any court having jurisdiction of a civil proceeding in which the tax treatment of the examined item is an issue shall prohibit the introduction by the taxpayer of any foreign-based documentation covered by such request. I.R.C. § 982(a).
Greenberg’s Express

• Tax Court will, generally, not look behind Notice of Deficiency;
• Do I.R.C. §§ 982(a) and 7491 conflict with Greenberg?