Low Income Taxpayer Representation Workshop

2017 ABA Tax Section May Meeting
Pro Bono and Tax Clinics Committee

OPERATION OF A SMALL BUSINESS

May 11, 2017
Panel

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Overview

1. Keeping up with Compliance Requirements for Small Business

2. Payroll Service Provider Issues and Remedies

3. Business Identity Theft

4. Worker Misclassification and SS-8 Determinations

5. Questions and Answers
Compliance Overload Issues

Small business owners wear many hats, and most who qualify for pro bono or low bono help cannot afford accountants or experienced bookkeepers.

Language barriers and lack of financial reporting expertise can cause issues for those who self-prepare filings.

Many are motivated to get through the initial paperwork of forming and starting the business, but struggle to keep up with compliance until they either grow and hire or fail.
Basic Tax Compliance

• Preparation of quarterly financials

• Quarterly federal and state estimated tax payments

• Annual federal, state, and local income tax returns

• Monthly sales and use tax returns

• Bi-weekly federal and state withholding and FICA reporting

• Annual 1099 and W-2 information reporting

• Quarterly payroll reports (941)

• Annual federal employment tax return (944)

• Quarterly FUTA reporting (8109)

• Annual FUTA return (940)

• Quarterly state unemployment insurance reports

• Bi-annual property tax reporting
Regulatory Compliance

- Liquor License and other specialty licenses
- Annual attorney general registrations
- Annual reports for secretary of state
- Food service regulatory compliance
- Labor law compliance
- Immigration law compliance (I-9)
- Worker’s compensation reporting
- OSHA compliance
- Benefits compliance
- Insurance payments and compliance
Ongoing Legal Compliance

- Lease agreements and related disputes
- Employment agreements and related disputes
- Intellectual property protection and related disputes
- Vendor agreements and related disputes
- Customer contracts and related disputes
- Lender contracts and related disputes
Compliance Overload Leads to Penalties and Organizational Paralysis

- Penalties and interest can compound and create a spiral of non-compliance for lack of ability to pay.
- Fear of government interactions.
- Compliance is on top of all other aspects of growing and achieving business goals (hiring, marketing, product development, transportation, etc.) Do not underestimate small business and personal financial stress issues.
- Help your clients to have a plan and direct them to other pro bono and low bono resources.
Two Small Business Calamities

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Susan Morgenstern,
Local Taxpayer Advocate
Payroll Service Providers

Issue arises where a business contracts with a third party to manage payroll matters.

For example:

-- file 941 returns

-- pay 941 taxes
PSP, continued

• How does this work?

• PSP and employer contract for services

• Employer provides access to bank account so that PSP can pay taxes
What can go wrong?

- PSP can abscond with the tax funds!

- Even if employer sees the funds debited from its 941 account, the employer may not know the tax hasn’t been paid.
How do taxpayers learn about PSP actions?

- Balance due notices from IRS
- Field calls from Revenue Officers
- Enforced collection

TIP: Register for EFTPS on www.irs.gov to obtain current account status information.
Remedies – account paid

- Seek abatement of penalties

- Use Form 843 Claim for Refund and Request for Abatement

- Specify the penalties: Failure to File? Failure to Deposit? Failure to Pay?
Remedies – account paid, con’t

- The Internal Revenue Manual contains a Penalty Handbook at IRM 20.1

- But – IRM 5.1.24.5.5 addresses PSP penalty abatement issues specifically
Remedies – account paid, con’t

• IRM 5.1.24.5.5 (08-15-2012) sets forth five questions outlining the facts and circumstances inquiry

• Essentially, the query is:
  • What did the taxpayer know?
  • When did the taxpayer know it?
  • What did the taxpayer do about it?
Remedies – account unpaid

- Consider an offer in compromise (OIC)

- IRS has established OIC guidelines for Effective Tax Administration (ETA)

- Review IRM Sections 5.1.24.5.7 (11-06-2015) and 5.8.1.2.2.1(4) (08-05-2015)
Remedies – account unpaid, con’t

• Issues to consider include:
  • The equities of holding a taxpayer responsible for payment of the tax
  • How they taxpayer became aware of the delinquency
  • Steps the taxpayer took to remediate the delinquency
  • The ability of the taxpayer to continue its business
Remedies – account unpaid, con’t

• Congress has directed that IRS “shall give special consideration to an offer-in-compromise from a taxpayer who has been the victim of fraud by a third party payroll tax preparer.” See Section 106 of the FY 2016 Appropriations Act.
Identity Theft

• Identity theft can affect businesses as well as individuals

• IRM 25.23.9 addresses IRS’s handling business Identity Theft cases
Consequences of Business IDT

- IRS will be looking for return and payment information from the business

- No returns? No payments?

- IRS will request returns and payments

- No response? IRS will make assessments
Business IDT, con’t

• How does business IDT arise?

• Individual may file Form SS-4, Application for Employer Identification Number (EIN)

• IRS issues EIN, but the entity may not exist
Business IDT, con’t

- Individuals may appear to be employed by the entity
- Entity may seek refundable business credits
- IRS makes tax and penalty assessments against the EIN related to non-payment and/or non-filing
Business IDT, con’t

- IRS may also make Combined Annual Wage Reporting (CAWR) assessments related to non-filing of annually filed wage reporting statements

- Information on CAWR processing and assessments can be found in in IRM 4.19.4
Business IDT, con’t

• Businesses file Form 14039-B, Business Identity Theft Affidavit

• But – Business ID theft cases can be very complex because they may involve many quarters

• And …
Business IDT, con’t

• IRS may pursue assessments against individual who applied for the EIN, or whose SSN is on the EIN application

• Need to unravel both the business IDT and consequent assessments against the individual
Parting Words from IRM

- “... BMF [business account] identity theft cases are extremely complex in nature and may require the research and analysis of both the business account and any individual accounts associated with the EIN.” IRM 25.23.9.1 (09-04-2015)
Finally

- Questions?
- Need Help? Call TAS 1-877-777-4778
Operation of a Small Business: Worker Misclassification and SS-8 Determinations

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Jacqueline Lainez
UDC David A. Clarke School of Law
Worker Misclassification

• Independent Contractor (1099) v. W-2 EE
• How Prevalent is Misclassification?
• Department of Labor/Fair Labor Standards
• SS-8 Determinations and Best Practices
• Cost of Misclassification – Employee and Employer Impacts
• Examples and Questions
Independent Contractor v. W-2 EE

LITC/IRS Grant Entity Restriction Small Business Record-Keeping, Bookkeeping, Payroll Fraud Less Common

MOST COMMON: Employer Misclassification of Workers to Avoid:

- Payroll Taxes
- Workers’ Compensation
- Unemployment Insurance
How Prevalent is Worker Misclassification?

• 9th Circuit Court of Appeals Case (2014)

• Alexander v. FedEx - Class Action, 2300 Fed Ex drivers in CA classified as IC in Operating Agreement. $226.5 million settlement ($37.2 million attorneys fees, $10k incentive awards to named plaintiffs)

• Drivers in 20 other states, multidistrict litigation, $240M settlement
Worker Not Considered Independent Contractor Solely Because the Following Factors Exist:

- 1099 Issued
- EIN or LLC
- Paid by Cash/Check, or “Off the Books”
- “Common Industry Practice”
- Work from Home/IC Agreement
- “Gig” or Shared Economy: http://uberlawsuit.com/
SS-8 Determinations

- Correcting Employee Misclassification
- Filing Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
- Downsides and Limitations?
- Length of Time (3yrs not uncommon)
- Best Practices: File Form 911 (TAS)
- When? 6 months, 12 months?
- NTA 2013 Report to Congress, 2013 TIGTA Report
Cost of Misclassification – Employee and Employer Impacts

- July 2015 NELP Report:
- Annual Losses Due to Independent Contractor Misclassification: Summary of Leading State Studies
- 10%-62% of audited employers misclassified workers
- Unpaid state income taxes from $2.6M to $248M
- “Misclassification of employees as independent contractors exacts an enormous toll on workers, law-abiding employers, and our economy.”
- http://www.nelp.org/campaign/stopping-misclassification/
Examples

Types of Cases Our Tax Clinic Has Handled Involving Worker Misclassification:

• Home Healthcare Worker (Employer Indicted on Medicare Fraud)
• Catering Company Worker (Nearly 20yrs of Service)
• Bus Driver (Tax Court)
• Construction and Cleaning Company Workers
Questions?

• Comments?

Thank you.