"Klatsch" Advice for CPAs and EAs in a Recessionary Economy

By Steven L. Jager

Steven L. Jager examines how to work with the IRS today and how to be the best advocate for your client.

Life at the IRS Today

Compared to the agency that existed in the "good ole days" before "reorganization" (seems like just yesterday, doesn't it?), today we are dealing with a centralized, computerized and somewhat mechanized IRS. In many cases, we find ourselves working with IRS employees who are often far away from us (geographically). Or, if local to us, often their group managers may be in other states or other time zones. Additionally, now that many processes and procedures have been centralized. Cases that would have previously been worked locally, must first be sent to their central processing site, and only if they meet exceptional criteria, might they be sent back to our "neighborhood."

So what type of culture is the result? What is the impact? Both practitioners and IRS employees are frustrated! It is becoming harder and harder to get cases resolved, more time and effort is going into managing these cases (at least on our part as practitioners) and more of our hair is turning gray (*i.e.*, if we still even have our hair!). We are spending more time documenting IRS employee names, "badge numbers," telephone numbers and other contact information. Whereas in the past, we may have only dealt mainly with one "service center," today we must deal with several "campuses"; each case could involve dealing with IRS personnel all across the country, and we are likely having to pay attention to timezones in different parts of the country, and we most certainly must learn to live with voicemail.

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Documentation is now our best friend. At a bare minimum, we need to be copious notetakers. Even better, is to become a "memo-maniac." It would be so much easier if the IRS would permit us to communicate via e-mail, but, unfortunately, that is not yet a tool that is permitted.

We can lament, we can reminisce about the "good ole days," and we can complain amongst ourselves, but we must accept the reality that the IRS has changed. For better or worse, welcome to the wonderful world of tax controversy.

Becoming the Best Advocate for Our Clients

Here is the "secret" key to success: be (or become) proactive, not reactive. What do I mean by this—communicate and document. For those of us who are tax return preparers, we can begin by using our clients' tax return. Use notes, footnotes and statements (what I often refer to as "white paper" disclosures) for situations that are not "routine." First of all, I do understand that this may pre-empt electronic filing, but it sure works well when you can point to a "white paper" footnote or schedule to explain a transaction or a position taken on the tax return. This has the added advantage of helping to mitigate any problems that may rear themselves with potential preparer penalties (perish the thought), as well as documenting your clients' facts, circumstances and analysis in the (increasingly more probable) event of an audit. They must be thoughtfully and intelligently written, which means more work and more research and more time and greater cost (does this mean greater fees for us?).

Beyond the preparation of the "proactively prepared" tax return, we must be able to respond to sometimes confusing correspondence from our

government. Even when the IRS letter is not confusing, just receiving any letter with the return address from the IRS is enough to truly frighten even the most macho of our clients.

Opening the Lines of Communication–Writing Effective (and Persuasive) Letters and Memos

In the light of all of the changes to Circular 230 and its "best practices," one could not possibly disagree with the importance of writing letters and memos. The key, however, is to write letters and memos which are effective. The truth is, there are undoubtedly some instances where your finest letter will not be read, or if it is read, it will not be understood, or even if it is understood, it may still be ignored. Therefore, some of the cynics among us may ask, why put too much effort into these writings? The answer is because it is important, and more importantly, because it is smart.

Writing effectively to the government taxing authorities will make you look professional to both the government and to your client, and is the ideal way of documenting how you are keeping your client informed, as well as establishing a "paper trail" of your efforts. Although you may not always be successful at receiving a response from the addressee, your letter will help you to get help from the Taxpayer Advocate, should it become necessary.

Some practical advice, then, for writing effective letters and memos:

- Avoid addressing letters to P.O. Box addresses. Wherever possible, obtain the most direct street address (with the correct "mail stop").
- If you do use certified mail, understand that it is a waste of money unless you reference the receipt number on the letter or memo (or other enclosure) in the envelope.
- If you fax your letter, maintain a master log and all transmission receipts.
- Write in the style of an expository essay with a respectful tone. Try never to be condescending and never personally attack or try to insult the addressee. Keep it professional.
- Be succinct. I try to keep my letters to one page.
- Write plainly without using too many "$5 words," unless you are writing to an Appeals Officer or District Counsel lawyer (in which case, invest in a good thesaurus and bring out the "$50 words").
- When trying to persuade, use legal arguments wherever possible. Emotional arguments should be your very last resort. Use citations and references to the law, regulations, revenue rulings, revenue procedures and court decisions freely;
- Always copy your client on each letter and consider who else should be receiving a "cc" and who should be receiving a "bcc" (but be careful to preserve client confidentiality on disclosure to third parties).
- Present the fact that you are writing letters on your billings to clients. There will be some letters which will undoubtedly be billable and your diligence should be appreciated by your clients.
- Find the time to take a class in tax research and legal analytical writing and/or ask a lawyer friend to "train you" in writing simple briefs. It is an enormously powerful technique for communicating with the people in Appeals!

Managing the Client's Expectations

In countries where bullfighting is popular, they will tell you that sometimes the bull wins the bullfight. This is certainly true and it can happen for a variety of reasons, including simple bad luck.

Especially in our current recessionary economy, desperate clients may be more inclined to sue a practitioner that they view as incompetent or negligent, regardless of whatever oral warnings, admonitions or disclaimers we may have given. Therefore, be careful to manage the expectations of the client and never ever give a client a guarantee as to any specific result. I recommend using a disclaimer document for this purpose and have the client sign off on it before you begin the work.

Check Your "Attitude" at the Door

Before we get too far into the discussion of the functional areas, I think it is critical to remember that, as with all conflict resolution, we must be sensitive to understanding the human interactions that will still occur. We will be working with other humans and we should try and make these relationships—however brief they may be—as pleasant and as personal as possible. In the past, I have sometimes used the metaphor of a "dance" to describe this phenomenon, and I continue to extol its virtue. The dance should be choreographed with great sensitivity to our own attitudes and to engaging our partner to dance with

us as gracefully as possible. I believe that we must balance our responsibility to zealously represent our clients against our responsibility to the "tax system" and always behave with each IRS Revenue Agent, Tax Compliance Officer, Revenue Officer, Appeals Officer, Technician and all other Service employees, with the greatest integrity. Our individual reputations as well as our "collective reputation" (as a profession) will be our greatest legacy.

Finding Harmony–The Yin and Yang of Working Successfully with the IRS

In our recessionary economy, it is all about money—more funding for the IRS so that they can focus on increasing compliance, enforcement and collections. This translates into more audits, greater intensity of collections and the enforcement programs that accompany each of these.

The mandate of the current IRS Commissioner, Douglas Shulman, has proved to be quite consistent with Former IRS Commissioner, Mark Everson, whose mantra (in his own words) was: "At the IRS our working equation is service plus enforcement equals compliance. Not service or enforcement; we have to do both."[1]

The Appeals Function of the IRS

There are some people who will tell you that going to IRS Appeals is like having Santa Claus come down your chimney with Christmas "goodies." While I can never claim to have met Santa himself, it is true that the mission of Appeals is to expedite the settlement of tax disputes without a formal trial. Appeals is the last administrative "stop" before one proceeds to litigation, so when working through a case, the Appeals Officer will constantly be evaluating your client's case based upon the "hazards of litigation." This provides great incentive to both sides to reach an amicable resolution without protracted (and expensive) litigation. Appeals boasts that a settlement is reached in 85 percent of its cases.

Getting Your Case Before the Appeals Division

With odds of an amicable settlement at 85 percent, Appeals is a great place to advocate for our clients. However, one must elevate one's case after reaching an impasse with the examination and/or collections function. Cases that progress from revenue agents and auditors, as well as those that progress from revenue officers and other collection personnel, are eligible for Appeals consideration.

When the Case Originates in Exam Division

When a case arises through the examination division, the usual "ticket" for entrance is to write a protest letter in which such a request is made within 30 days of the date that the revenue agent issues the 30-day letter, with an exception for cases involving less than $2,500 in tax, which may be requested orally. Nonetheless, a written request is always a good idea. When the amount in dispute is more than $2,500, but less than $25,000, Form 12203 may be used to document the disagreements, the arguments upon which you are relying and to make the request for a conference with an Appeals Officer. When the amount in dispute is at least $25,000, you must write a formal protest letter to bring your examination case into Appeals. What must you do (procedurally) to have a valid protest? While there is no one correct format, every valid protest must contain the following information:

- The name, address, Social Security number and daytime phone number of the taxpayer
- A statement the taxpayer wishes to appeal the determinations of the examination division to the Appeals Office
- The date and symbols on the 30-day letter
- The tax periods or years involved (note: a single protest is sufficient to cover all years and matters if they are covered in one 30-day letter)
- An itemized listing of the adjustments with which the taxpayer disagrees
- A statement of facts supporting the taxpayer's position in any contested factual issue
- A statement outlining the law or other authority on which the taxpayer relies
- A declaration under penalties of perjury that the statement of facts is true to the best knowledge of the taxpayer. The following language is acceptable for this purpose:

> Under penalties of perjury, I declare that the facts presented in my written protest, which are set out in the accompanying statement of facts, schedules and attached statements, are to the best of my knowledge and belief, true correct and complete.

As alluded to earlier, the mission of Appeals is to reach a "fair and impartial" resolution, which considers the hazards of litigation. Such an analysis involves consideration of how an issue would be resolved if litigated and the making or seeking of concessions, taking into account the strength of the parties' positions. The Appeals Officer, therefore, will review the entire file to determine what a court might find, given the proof available and the effect of testimony. Additionally, the Appeals Officer will take into account judicial interpretation of relevant Code provisions in light of similar cases already decided.

Therefore, the taxpayer who wishes to settle his case must show there is substantial uncertainty as to how the law would be applied to their case as a whole. Your failure to make this showing of substantial uncertainty prevents the Appeals Officer from considering the relative merits of the opposing positions and the attendant hazards that would face them if those positions were litigated.

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In preparing for the conference, you, as the CPA representing the taxpayer, must realize that you will be dealing with the "best and the brightest" that the IRS has to offer. Appeals officers are often attorneys or CPAs. My very best advice to colleagues is to do your homework and be prepared:

- Interview your client again, searching hard for all details. Facts revealed should be corroborated wherever possible, as complete reliance on the client is not advisable.
- Obtain whatever records or other evidence the client has.
- Research—after researching the relevant legal standards which may apply, the argument or arguments can be formulated. All the elements which the taxpayer must prove should be outlined and the supporting documents and witnesses lined up.
- Be prepared—both sides of the case should be prepared, so that surprise is not an element at the conference and so that it can be determined if more evidence is needed.
- The evidence and exhibits should then be organized for presentation and the file should be reviewed before the conference.
- You and your client should discuss settlement proposals and the client should give you specific settlement authority. As the professional here, it is our job to point out the merits and the weaknesses of the case and to encourage the client to be realistic.

Once the conference begins, it is important that you, as the taxpayer's representative, first make your strongest arguments or your credibility will be lessened. Pointing out authority or facts that the examining agent failed to disclose or consider is important. Only by presenting the strongest case for the taxpayer, both factually and legally, will the relative merits of the parties' positions emerge. This is necessary as it will provide the Appeals Officer with a basis upon which to evaluate settlement offers. The Appeals Officer must justify his decision in writing and you must give him the information with which to do so.

When the Case Originates in Collection Division

When a case arises through the Collection Division, your entrance to Appeals is through the process of Collection Due Process (CDP).

How to Identify a CDP Notice. The process begins when the IRS issues their Letter 1058, which includes the words, "Final notice of intent to levy and notice of your right to a hearing." Seeing these magical words should send you scurrying to your Forms service to pull out Form 12153.

CDP Hearing vs. Equivalency Hearing. I tell my clients that the CDP notice is an invitation. If I can find out about the Notice within the first 30 days of its issuance, then the taxpayer will be invited to a CDP hearing. If, however, I only find out about the Notice after the first 30 days of its issuance, then the client will be invited to an Equivalency hearing.

The differences are fairly significant:

- CDP—The "choo-choo" train stops. Collection activity stops, an Appeals Officer (or a Settlement Officer) will eventually be assigned the case, there will be Tax Court jurisdiction for further appeals, should they be necessary

and there will very likely be a lengthy delay. The statute of limitations for collections will be suspended during the pendency of the CDP hearing.

- Equivalency hearing—Taxpayer will still get a hearing, but no right to Tax Court jurisdiction and collection is not suspended. Since collection activity is not suspended, neither is the collection statute of limitations.

Should We Always File a CDP Request? Yes! In fact, some lawyers would argue that it would be malpractice to miss it. The only time I can imagine that you might purposely not file a request would be only if you were at the tail end of the collection statute of limitations and you did not want to unwittingly extend the statute.

> **Practice Tip:** Put language into all engagement letters advising clients to notify you immediately of any correspondence received from the IRS, and that their failure to do so promptly will relieve you of any professional liability for failure to file a CDP request within the statutory 30-day period.

Ticket to Paradise

There is no more effective way to represent your client than in a CDP hearing. You can do just about anything for a client in a CDP and make the Appeals Officer your co-partner in accomplishing it. You can submit Offers-in-Compromise (and usually have them "worked" locally instead of in Memphis), Installment Agreements, Penalty Abatement requests, initiate Innocent Spouse requests, discuss statutes of limitations that you believe may have expired, initiate Claims for Refund on Form 843 and have them processed through Appeals, do short-term monitored *de-facto* installment agreements with designated payments, initiate requests for audit reconsideration, etc.

Face-to-Face Conference or by Telephone?

Preserving the rights of taxpayers is, no doubt, expensive. While the law guarantees a hearing, the government understands "hearing" to mean one that is held either telephonically or face-to-face, and they prefer that the hearing be held by telephone. It is far less costly and efficient for the IRS. When the telephone is used, the IRS Settlement Officer can be virtually anywhere. A face-to-face conference, on the other hand, when granted, is held at the IRS office closest to where the taxpayer resides. A face-to-face hearing is significantly more effective than a hearing held by telephone and this request for a face-to-face hearing is made in writing in the body of Form 12153.

The IRS "pushes back" and resists the face-to-face hearing. While they will usually grant the request for a face-to-face hearing, the Office of Chief Counsel stated in a Program Manager Technical Advice Memorandum, that the IRS may "require a taxpayer to submit financial information as a condition to granting a request for a face-to-face collection due process conference."[2]

Practically speaking, the IRS employees at the Campus Service Centers have interpreted this to mean that the current IRS policy is to require that the Collection Information Statement, Form 433, be submitted before the case will even be forwarded to an Appeals Office in the field. It is interesting to note, however, that there is some "wiggle-room" for exceptions, as the same Program Manager Technical Advice Memorandum also states:

> Conditioning the grant of a face-to-face CDP conference on submission of financial data will not be reasonable in all cases where the taxpayer seeks consideration of a collection alternative, such as where the taxpayer wishes to discuss collection alternatives and one or more other relevant issues at the conference. Also, the settlement officer should not deny a taxpayer's request for a face-to-face CDP conference if Appeals determines that such a conference is necessary to explain the requirements for becoming eligible for a collection alternative.

Prepare to Say, "No"

While I certainly aspire to being cooperative with Revenue Officers, if there is any exception at all, this is it. If a Revenue Officer is already assigned to the case and happens to have issued the CDP Letter 1058, file the Form 12153 and prepare to say "no." In my experience, the Revenue Officer will likely call and ask you very sweetly or gently if you wouldn't mind withdrawing your request so that the two of you can "continue to work the case together and work everything out." Just say

"no" (or "no thanks"). He/she will assure you not to worry, that your client will "still have appeal rights." Just say "no" again. The Revenue Officer wants you to feel pressured to cooperate. Resist, be strong and do not withdraw the CDP request. If you do, your Revenue Officer may continue with enforced collection activity. And those "appeal rights" that the Revenue Officer promised you will come in the form of another Form 12153, which would now only give you an equivalency hearing, which does not require the immediate suspension of collection activity. And it can take a pretty long time before you get to the Equivalency hearing.

Conclusion

Measuring success when handling a tax controversy will not always be easy or even possible, but when a CPA or an EA is able to manage the client's expectations and is able to leave his/her client better off than they were before, that may well be the very best that anyone could do. The IRS is not likely to disappear, so there will be many opportunities to hone these skills.

Endnotes

[1] Remarks of Commissioner Mark Everson before the National Press Club, Washington, D.C, IR-2004-34, March 15, 2004.

[2] PMTA 2010-006, dated March 23, 2010, released May 11, 2010.