

OPR: Avoid possible suspension based on client returns

See what can trigger an OPR investigation and what tax practitioners must do to make the process go smoothly.

By Dennis Brager, Esq.
Guest Contributor

Tax practitioners¹ want to avoid the attention of the IRS's Office of Professional Responsibility (OPR) at all costs; sometimes, however, OPR turns up uninvited. A basic understanding of OPR's processes and procedures can help in preventing a bad situation from becoming worse.

Disciplinary actions

OPR administers and enforces the regulations governing practice before the IRS. The regulations governing practice are set out in Title 31, Code of Federal Regulations, Part 10, and are published in pamphlet form as Treasury Department Circular No. 230.

The current Director of OPR is Karen Hawkins, who previously was a partner at the tax controversy firm of Taggart and Hawkins in Oakland, California.

OPR may discipline practitioners in several ways including censure, suspension, monetary fines, or even disbarment from practice before the IRS.² Practitioners who are suspended or disbarred may not, among other things:³

- Prepare tax returns;
- Prepare or file other documents or correspond or communicate with the IRS;
- Render written advice with respect to any entity, transaction, plan, or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion;
- Represent a client at conferences, hearings, and meetings;

- Execute waivers, consents, or closing agreements;
- Receive a taxpayer's refund check or sign a tax return on behalf of a taxpayer;
- File powers of attorney with the IRS; or
- Accept assistance from another person (or request assistance) or assist another person (or offer assistance) if the assistance relates to a matter constituting practice before the IRS, or enlist another person for the purpose of aiding and abetting practice before the IRS.

This last provision is particularly problematic because it means that a suspended practitioner will be very limited in the functions he can perform for his employer, and may well be asked to leave his firm.

OPR is cracking down

The way that the majority of practitioners got in trouble with OPR in the past was by failing to take care of their own tax obligations. Practitioners are often shocked to discover that extended late filing, sometimes coupled with non-payment, can result in suspension or even disbarment from practice before the IRS.

Hawkins has publicly pledged to move beyond simply going after delinquent practitioners, and intends to crack down on practitioners who ignore their duty of due diligence in preparing client returns. She pointed out that "[p]ractitioners may not ignore the implications of information already known, and must make reasonable inquiries if the information furnished by a client appears to be incorrect, inconsistent, or incomplete."⁴

If a penalty under Internal Revenue Code (IRC) §6694(b) is imposed for willful, intentional, or reckless conduct in connection with the preparation of

a tax return, the examining agent is required to refer the case to OPR for further investigation.⁵ For that reason, it is critical that the imposition of the IRC §6694(b) be fought tooth and nail.

The investigation process

An attorney within OPR reviews allegations set forth in any referral to OPR. OPR's first contact with a practitioner is a "pre-allegation notice letter," which notifies the practitioner of the investigation and invites the practitioner to submit any relevant information.

If the practitioner's information does not resolve the matter, OPR sends an allegation letter specifying suspected violations of Circular 230. The practitioner may submit an additional response and may request a conference to be conducted in OPR's Washington, D.C., office or by telephone.⁶

If the practitioner's response does not fully resolve the issue, the practitioner's case file is presented to a panel of OPR attorneys for review and discussion, and to propose a disciplinary sanction.⁷

There are many reported cases of practitioners who have failed to respond at the initial stages of an OPR investigation, or have responded inadequately, and without an appreciation for the seriousness of the issues, generally with disastrous results.

Like most tax problems, OPR problems are not like fine wine. They do not get better with age. A vigorous defense needs to be mounted early on for the best possible chance of getting out unscathed.

The hearing process

If the case is not resolved within OPR, the next step is that OPR will refer the matter to the attorneys within General Legal Services (GLS), a division of the Office of Chief Counsel.⁸

The GLS attorney will contact the practitioner to see if the case can be resolved, and if not, will file a complaint.⁹ In due course if things are still not resolved, there will be a hearing before an Administrative Law Judge (ALJ) who is not an employee of the IRS.

The ALJ is selected from other federal agencies, and generally has no tax experience.¹⁰ As a result, if the alleged infraction relates to an improper position taken on a tax return or other substantive tax issue, it may be best to obtain the testimony of an expert witness who can acquaint the ALJ with both the tax law, and more importantly with the standard in the community.

After the hearing, there is a legal briefing process, and the ALJ will enter a decision with his findings, conclusions, and reasoning, and either a dismissal of the complaint or an order for punishment.¹¹

Either OPR or the practitioner may appeal the ALJ's decision within 30 days.¹² The appeal is to the "Appellate Authority," an individual who has been delegated this authority by the Secretary of the Treasury. A practitioner can appeal the final decision by the Appellate Authority to the federal district court.¹³

Generally, judicial review is limited to determining whether the decision by the Appellate Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or not supported by substantial evidence.¹⁴

Conclusion

The rules are:

1. File and pay all of your tax returns on time;
2. Make sure that the positions you take on tax returns you prepare have a reasonable basis; and
3. If you do get contacted by OPR, or are threatened with an IRC §6694 penalty, take it seriously. Consider engaging counsel to represent you. It's your livelihood at stake. ☹

About the author

Dennis Brager, Esq. is a former IRS senior trial attorney, a California State Bar Certified Tax Specialist, and founder of Brager Tax Law Group, A P.C.— a nationally recognized tax controversy firm in Los Angeles, California. He may be reached at dbrager@bragertaxlaw.com.

¹ Practitioners include CPAs, Attorneys, Enrolled Agents, and now Registered Tax Return Preparers. Circular 230 §10.2. All section references herein are to Circular 230, except as otherwise stated

² §10.50

³ See Guidance on Restrictions During Suspension or Disbarment. Available at: www.irs.gov/taxpros/agents/article/0,,id=228588,00.html

⁴ IR-2010-82 (July 6, 2010)

⁵ Internal Revenue Manual (IRM) Section 4.11.55.4.2.2.1 (April 20, 2010)

⁶ www.irs.gov/taxpros/agents/article/0,,id=228679,00.html

⁷ IRS Publication 4693, Office of Professional Responsibility Brochure (June 2008)

⁸ IRM 39.4.1.3 (May 18, 2009)

⁹ IRM 39.4.1.3(10)-(11) (May 18, 2009)

¹⁰ See *Decision on Appeal, Director, OPR v. Francis* (February 4, 2008) No. 2004-9 at 17

¹¹ §10.76(d)

¹² §10.77

¹³ See Administrative Procedures Act §§702 and 704

¹⁴ Administrative Procedures Act §706

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Dennis N. Brager is a State Bar Certified Tax Specialist in Los Angeles and a former IRS senior trial attorney. His practice focuses on the litigation of tax controversies in federal and state courts. He also represents clients in audits, appeals, criminal tax matters, and on offshore bank account problems.



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Tax
Law
Group

Tax Controversy Law
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Brager Tax Law Group, A P.C.
10880 Wilshire Blvd., Suite 880
Los Angeles, CA 90024
Tel: (310) 208-6200
(800) 380-TAX LITIGATOR
Fax: (310) 478-8030