



Nuts and Bolts of a Partnership Tax Controversy

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Introduction

I. Introduction.

- A. On March 26, 2012, IRS Deputy Commissioner Steve Miller gave the keynote speech at the Tax Executives Institute Midyear Conference in Washington.
- B. The focus of the speech was his “vision” of changing the traditional approach that the IRS has taken with respect to examinations of large corporate taxpayers.
- C. The good news is that he said that the IRS plans to streamline the audit/appeals process to reduce the resources devoted to auditing large corporate taxpayers. The bad news is that the IRS would refocus its efforts on flow-throughs, financial products, and businesses with international operations.

Introduction

- D. With this new IRS emphasis on past-through entities in mind,
1. What should you be doing to put your tax controversy case together?
 2. What strategies should you be thinking about at the IRS Examination and Appeals levels?

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

- II. The starting point is to ask yourself what is your goal?
At what level and for what amount can you dispose of your case?
- A. Examination.
 - B. Appeals.
 - C. Litigation.
- III. Then you need to think both strategically and tactically about your examination.
- A. Strategically – where do you want to end up?
 - B. Depending on that answer – tactically how do you get there?

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

- IV. First, identify the type(s) of issue(s) in the case.
 - A. Cross-border transactions.
 - B. Structured transactions.
 - C. Major transactions for the taxpayer.
 - D. Reporting positions where law unclear.
 - E. Judicial doctrines that might be relevant to case.
 - F. Factual questions.
 - G. Recurring issues vs. one-time issues.
 - H. Issues that would alter carrybacks/carryforwards.
 - I. Issues that may require expert testimony.
 - J. Industry-wide issues vs. issues unique to you.

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- IV. Then develop strategy for each type of issue.
 - A. Role of taxpayer's in-house tax controversy personnel.
 - B. Role of taxpayer's internal tax and/or litigation counsel.
 - C. Selecting outside advisors.
 - D. Role and "visibility" to IRS of outside advisors.
 - E. Use of alternative dispute resolution procedures.
 - F. Testifying and Non-Testifying Experts.

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IV. All the while attempt to exercise control over the tax controversy process.

- A. Think both strategically and tactically.
1. Develop a theme from the outset.
 2. Tell the story from the taxpayer's viewpoint.
 - a. Use your theme.
 - b. Move the issues onto the taxpayer's playing field.
 3. Simplify the issue.
 4. Try to resolve issues at earliest possible point in process.
 - a. Both factual and legal.
 - b. Trade off issues at Appeals.

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

- B. The Opening Conference.
 - 1. Refer to the LB&I Quality Examination Process Reference Guide.
 - 2. Work to set a reasonable examination timeline.
 - 3. Agree on the IDR process/ do not fall behind schedule.
 - 4. Agree on the issue resolution (NOPA) process.
 - 5. Schedule periodic meetings with the LB&I Senior Team Coordinator (weekly?) and Team Manager (monthly?).

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

- C. Consider a background briefing on significant issues. Could be at the outset or as soon as it becomes clear that the issue is an area of interest to the Examination Team.
 - 1. Orally try to get the Examination Team “to play on your field.”
 - 2. Or perhaps offer to provide a Statement of Facts “telling your story” in writing.
 - 3. “He who controls the pen, controls the deal.”
- D. Consider using the IDR process to “tell your story” rather than just providing the most limited amount of information.

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- E. Consider when “to go up the line” to higher IRS management, if that step seems appropriate.
- F. Keep in mind that it may be a Specialist and/or an Economist who will determine if a particular issue is to be set up.
 1. So try to engage them so you can figure out where they are going with the issue.
 2. Think about their management chain; it is different than your assigned Examination Team’s management chain.
 3. Also keep your eye on how involved the Chief Counsel lawyers are on this issue; listen carefully to figure out if lawyers from LB&I Field or the National Office are “taking over” the case.

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- G. On any particular issue, is it appropriate to use Experts at the examination level (or wait until the case is in IRS Appeals or litigation)?
- H. Also think about when is it appropriate to involve the U.S. and/or other Competent Authority?

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

VII. Facts, Facts, Facts.

- A. Develop a “rock solid” outline of a Statement of Facts as early as possible and use it as a guide in responding to IDRs, developing position papers, responding to the Notice of Proposed Adjustment and preparing the Protest.
- B. How to tell your story: develop a theme for your case and focus on the “key considerations.”
- C. Consider developing documentation to support your theme.

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

- D. When to tell your story (proactive vs. reactive).
 - 1. At the opening conference.
 - 2. During the IDR process.
 - 3. In a position paper before the NOPA is issued.
 - 4. After the NOPA is issued.
 - 5. In the Protest.

How Do You Put a Case Together/ Strategies for IRS Examination and Appeals

- VII. Recent Trends and Special Topics.
 - A. Generic IDRs and Chief Counsel prepared IDRs.
 - B. Interviews of taxpayer personnel.
 - C. Third party discovery.
 - D. IRS's use of penalties.
 - E. Issues taken out of IRS Field's hands by upper level LB&I management.
 - F. Impact of IRS Currency Initiative.
 - G. Use of IRS Summonses.

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- H. Special TEFRA rules and procedures.
 - 1. The start of the process.
 - a. Identifying a TEFRA partnership.
 - b. Identifying the TMP and partners subject to the TEFRA proceeding.
 - i. Disqualification of TMP.
 - c. Identifying partnership items and non-partnership items.
 - d. Identifying affected items.
 - 2. Determining, extending and tracking the statute of limitations.
 - 3. IRS notice obligations.
 - a. Notice partners.
 - b. Required IRS notices.
 - c. IRS failure to provide notice.

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4. Unique aspects of the TEFRA examination and appeals process.
 - a. TMP controls the examination.
 - b. Participation by other partners.
 - c. Consistent settlement process.
 - i. Can the TMP bind the partners?
 - ii. Rights of unidentified partners.
5. Judicial review of FPAAAs (Final Partnership Administrative Adjustments).
 - a. Contesting an FPAA in Tax Court.
 - i. TMP has 90 days to file.
 - ii. Other partners have the next 60 days to file.
 - iii. Partners must have an interest in the outcome.

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- b. Managing the multi-petitioner proceedings.
 - c. Final determination of the court concludes the proceeding for all partners (subject to appeal).
 - i. Getting the surprise tax bill.
 - ii. Interest accruals.
 - iii. IRS time limit for assessing partners.
 - iv. Computational affected item adjustments.
- ## 6. Collateral litigation.
- a. Factual affected items notices of deficiency. Examples:
 - i. Partner's basis in the partnership.
 - ii. At risk limitations.
 - iii. Carryforwards and carrybacks.
 - iv. Passive activity losses.

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7. Overpayments and refunds.
 - a. Administrative adjustment requests (AAR).
 - i. Filed by the TMP as an amended return or not?
 - ii. Filed by a partner other than the TMP.
 - iii. IRS's possible responses to the AAR.
 - b. Judicial review of a disallowed AAR in Tax Court, the district court, or the Court of Federal Claims.
 - i. Proceeding on behalf of the partnership brought by the TMP.
 - ii. Effect of the IRS's issuance of a FPAA.
 - iii. Proceeding brought by a partner (not the TMP) treated as nonpartnership items or not? Dictates where the refund suit may be commenced.

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VIII. Some Problems You Might Face.

- A. Lack of “real life” experience of LB&I revenue agents and specialists.
- B. Or worse, some recent LB&I hires come out of the business world and think they have experience to deal with issues like this, but in fact their experience is misapplied in your case.
- C. The LB&I Currency Initiative, which means that the Examination Team will run out of time to do the proper job and thus just move the issue on to the next level (i.e., IRS Appeals).

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- D. The LB&I managers lack of substantive tax experience (particularly issues which have not been a focus of the IRS examination function for some time).
- E. For all intents and purposes, totally unqualified internal IRS economists.

Alternatives to Trial

- I. Historical context.
- II. Alternative dispute resolution options.
 - A. Pre-return filing.
 - 1. Compliance Assurance Program (CAP).
 - 2. Private letter rulings (PLRs).
 - 3. Pre-filing agreements (PFAs).
 - 4. Advance pricing agreements (APAs).
 - 5. Industry issue resolution (IIR).

Alternatives to Trial

- B. During examination process (post-return filing).
 - 1. Joint audit planning process/ quality examination process.
 - 2. Accelerated issue resolution (AIR).
 - 3. Limited issue focus examination (LIFE).
 - 4. Technical advice memorandum (TAMs).
 - 5. Early referral to IRS Appeals.
 - 6. Fast track settlement process.

Alternatives to Trial

- C. Post-examination appeals.
 - 1. Competent authority.
 - 2. Fast track mediation
 - 3. Post-Appeals mediation.
 - 4. Post-Appeals arbitration.
 - 5. Tax Court arbitration/mediation.
 - 6. Tax treaty arbitration.

III. “Outside-the-box” alternatives.