UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

UT LAW CLE'S
67th ANNUAL TAXATION CONFERENCE
2019 TAXATION CONFERENCE

December 4-5, 2019
Austin, Texas

VOLUNTARY DISCLOSURE PITFALLS

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VOLUNTARY DISCLOSURE PITFALLS

by Charles J. Muller III

I. INTRODUCTION.

A practitioner should review the following cases and statutes when advising and assisting a client regarding a voluntary disclosure:

II. THE VOLUNTARY DISCLOSURE POLICY IS SOLELY A MATTER OF ADMINISTRATIVE DISCRETION.

A. In *Shotwell Mfg. Co. v. U.S.*, 371 U.S. 341 (1963), the Supreme Court considered Petitioners' contention that the trial court had violated their Fifth Amendment rights by admitting evidence of information obtained under the Treasury Department's voluntary disclosure policy. At the time (before 1952), the voluntary disclosure policy was considered by many to be an offer of immunity from prosecution.

Petitioners contended on appeal that the disclosure was fraudulently contrived. They argued that under controlling Supreme Court precedents "a confession in order to be admissible, must be free and voluntary; that is, not obtained by any direct or implied promises, however slight."

The Court of Appeals reversed the conviction, holding that the voluntary disclosure was valid and that the Government could not, consistent with the Fifth Amendment, use the disclosed material at the Petitioners' trial.

The Supreme Court reversed, holding that the voluntary disclosure policy…"was nothing more than part of a broad administrative policy designed to accomplish the expeditious and economical collection of revenue by enlisting taxpayer cooperation in clearing up as yet undetected underpayments of taxes, thereby avoiding the delays and expense of investigation and litigation."

The Court reasoned that: ["The Treasury's voluntary disclosure policy addressed to the public generally and not to particular individuals, was not an invitation aimed at extracting confessions of guilt from particular known or suspected delinquent taxpayers. Petitioners' position is not like that of a person, accused or suspected of crime, to whom a policeman, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement. In those circumstances an inculpatory statement would be the product of inducement, and thus not an act of free will."]

III. STRICT COMPLIANCE WITH THE TERMS OF THE VOLUNTARY DISCLOSURE POLICY IS REQUIRED.

A. In *United States v. Tenzer*, 127 F.3d 222, the Government appealed the dismissal of charges that Tenzer, a prominent tax attorney, had willfully failed to file his tax returns for the years 1987 through 1990. The district court ruled that prosecution where one had voluntarily disclosed his failure to file (prior to the commencement of a criminal investigation), constituted a denial of due process.

On appeal the Second Circuit considered both the voluntary disclosure policy and the "solicitation of returns" directive in the Chief Counsel's Directives Manual, CCDM, Section (31)360(2).[1] This directive provides in relevant part that "absent unusual circumstances prosecution should not be recommended when a return is solicited and received prior to the taxpayer being contacted by the Criminal Investigation Division."

The facts were set forth in some detail: by letter dated October 7, 1991, Tenzer was notified that he could avoid administrative enforcement actions by filing all delinquent returns. On February 10, 1992, Tenzer filed tax due returns for 1986 through 1989, without payment. The 1990 return was not filed. Subsequently, Tenzer's representative met with the Revenue Officer, who demanded full payment. The representative offered to full pay, if Tenzer was granted an installment payment arrangement. The agent required the filing of the 1990 and 1991 returns, before an installment arrangement would be considered. The 1990 and 1991 returns were subsequently filed without payment. Tenzer's representative then expressed a desire to make an offer in compromise for an amount the agent believed to be well below the taxpayer's ability to pay. At the time, Tenzer was not making any estimated tax payments. The formal offer was submitted, but not accepted. During all of these proceedings, Tenzer made no attempt to pay his past due liabilities, nor did he make any current estimated tax payments.

Unfortunately for Tenzer, in June 1993 his tax violations came to the attention of IRS Criminal Investigation agents involved in a collateral grand jury investigation. Whereupon, the United States Attorney requested a freeze on the civil enforcement actions against Tenzer; and in November 1995, Tenzer was charged with four criminal counts of willful failure to file. The district court dismissed the charges, and the Government appealed.

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[1] "Solicitation generally consists of an oral or written request for the filing of specific returns by a revenue agent and/or officer, or a summons for information by which a return can be prepared if the taxpayer understands that a return could be filed in lieu of specific compliance with the summons." IRM 38.3.1.6(1).

"DOJ considers the active solicitation of a return as detrimental to a criminal case in that the defense can be expected to argue that the prosecution was instituted because of the unsuccessful attempt to dispose of the matter civilly and as a substitute for unsuccessful collection. Solicitation of a return where no return is subsequently filed is not considered to detract from prosecution. When solicitation is present in a criminal case, the Criminal Tax attorney must discuss its possible impact on the successful prosecution of the case in the criminal evaluation memorandum." IRM 38.3.1.6(2).

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