Most people in the United States have a heightened level of sensitivity when matters involving the Internal Revenue Service come in to play. But one of the most frightening circumstances a taxpayer can face is when a "routine" audit becomes a criminal investigation. An improper application of the *Internal Revenue Code* may lead to additional tax assessments, interest and civil penalties, which is bad enough for most taxpayers. However, the willful intention to evade taxes is a violation of our criminal laws, and upon conviction a perpetrator can be sent to jail.

The likelihood that any individual tax return will be subject to the old style office audit has become statistically remote. However, the IRS today conducts a great many correspondence audits, that process via which the IRS' determination additional taxes are owed, and the taxpayer's, is handled completely by mail. This program has boosted the IRS' audit numbers. Nevertheless, regardless of the method of review, all taxpayers need to be cognizant of their responsibility to report all income and to keep sufficiently accurate records to allow the filing of a correct tax return. If the IRS thinks a taxpayer is intentionally and willfully disregarding these obligations, very serious consequences can ensue.

Most unfortunately, the consequences can come out of "left field." Take as an example the taxpayer who becomes subject to what started as a routine audit, with the IRS agent apparently concerned about little more than some of the taxpayer's non-deductible personal expenses showing up as business deductions. The agent probes a little and learns this treatment is actually part of a course of conduct to deduct all personal expenses. Another example is unreported income, always a sensitive area for the IRS. Assume third parties have informed the IRS that payments have been made to a taxpayer, yet that taxpayer fails to report them. Rather than being the product of simple oversight, upon questioning the agent learns the taxpayer intentionally didn't report the income because he "didn't have to." He states the payments came from overseas, or weren't made directly to him, or weren't made in US currency, or for some other insubstantial reason. The agent learns this has been going on for years. All of a sudden, in both of these cases, the matter could turn ugly.

At the very first indication that a tax examination might become the subject of a criminal investigation, the taxpayer should stop talking and hire a lawyer specializing in criminal tax matters. If there is any doubt in the taxpayer's mind what is going on, he should ask the IRS agent point blank: "Am I the subject of a criminal investigation?" Even if the answer is "no," I recommend the taxpayer end the meeting by telling the agent he wishes to consult with a lawyer.

I believe one of the errors taxpayers make in the audit environment is to take a non-lawyer tax preparer to the audit. Taxpayers think this is a smart move, because the preparer can explain how the return was prepared. However, no legal privilege exists between a taxpayer and a non-lawyer tax preparer, so anything the preparer says during the audit can become admissible evidence in a trial for criminal tax fraud. And, now that repercussions can ensue for tax preparers who participate in the filing of improper tax returns, it is not uncommon for the tax preparer to try to save his skin by turning on the taxpayer when it becomes apparent the IRS is contemplating a criminal proceeding.

The tax preparer, who your client thought would be useful at the audit, may become a witness for the IRS.

Tell your clients, if any concerns exist when a notice comes in the mail that a tax return has been selected for audit, then a lawyer familiar with IRS practices and procedures must be retained. The attorney-client privilege attaches to matters between the taxpayer and the lawyer, so, at the very least, the client need not be concerned about someone "spilling the beans."

Brian Doherty, J.D., LL.M., CFP® is a graduate of the Boston University School of Law Graduate Tax Program and a member of the Florida and New Hampshire Bar Associations. Visit his web site, www.dohertypa.com, for more information about his areas of practice.