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WHAT TO DO IF YOU FAILED TO FILE YOUR TAX RETURN AND PAY TAX?

Sometimes clients come to me with no problems...only guilt and worry for not filing their tax returns and paying their tax liabilities. Sometimes, the client has been contacted by the Internal Revenue Service (“IRS”) regarding unfiled tax returns. In either case there is a tremendous amount of anxiety, stress and potential problems that we, tax attorneys, must be aware of to assist the client. Our goal is to solve the client’s problem and to advise the client of the exposure of not resolving the problem. If the client has not filed and paid taxes for a long time he or she might be exposed to criminal conviction, monetary penalties, loss of assets, and sometimes even loss of family during the IRS dispute.

After practicing tax law for ten years I hit a record this fall. A client came to my office who has not filed his tax returns since 1979 (30 years of non-filing) and is currently worth millions. What can an experienced tax attorney do in this situation? The answer is simple minimize damage. Damages in the above scenario can be criminal or civil consequences.

First, we must examine the criminal aspects. [IRC § 7203](#) is the statute governing the willful failure to file tax return, supply information, or pay tax. Criminally we must (as the IRS will do) examine those important facts to determine if the government is likely to pursue criminal prosecution. The facts, age and health of the client, position in the community, along with the number of years, amount of tax, and actions (willfulness) taken by the client in the past to “drop out of the system” all have to be considered in order to determine the potential criminal consequences. Although there is no guarantee of non-prosecution, the IRS has a “voluntary disclosure” policy that may or may not avoid criminal prosecution depending on the facts.

Second, once we analyze the criminal aspects, we need to advise the client of his obligations to file his tax returns and to pay his tax obligations. Despite the non-filing there is an opportunity to advocate for the client with respect to the penalties. [IRC § 6651\(a\)\(3\)](#) provides that there will be a civil penalty of 5% per month, not to exceed 25% for the late filing of a tax return and .5% penalty per month not to exceed 25% for the late payment of the tax unless it is shown that such failure is due to reasonable cause and not due to willful neglect.

Third, now we need to focus on the IRS collection. Either the client

can pay or cannot pay. If a full payment is not possible (a term of art defined as (i) insufficient assets and (ii) insufficient income) to pay the tax, penalty and interest, then this becomes the least of your worries. There are collection alternatives that are offered by the IRS. The two most popular collection alternatives are (i) the “[offer in compromise](#)” program, and (ii) the “[installment agreement](#).” Both of these should be considered as possibilities in the analysis.

The penalties for filing and paying late may be abated if the client has reasonable cause. Generally, interest charges may not be abated; they continue to accrue until all assessed tax, penalties, and interest are paid in full. Furthermore, a reasonable cause exception to the penalty for failure to pay tax cannot be determined until the tax is first paid in full.

Finally, we need to advise the client to file the return and pay tax. An experienced tax attorney should be there, holding client’s hand, to get back into the IRS system with the least amount of damage. Know your options and plan accordingly to minimize criminal consequences.

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