

Unreported Gifts of Real Property: Time for a Voluntary Disclosure?

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The IRS is reviewing state real property tax records to find gratuitous transfers of property to non-spouse family members. It is then comparing those records to gift tax returns to find cases of noncompliance with reporting requirements.

The IRS has already examined property tax records in at least 15 states and, as of the end of 2010, it had opened more than 300 taxpayer examinations.

A taxpayer or fiduciary concerned about prior noncompliance should not wait for the IRS to make the first contact. Instead it should make a voluntary disclosure to correct non-compliance regarding unfiled gift tax returns or incorrect gift or estate tax returns arising from a previously unreported gift. The rules and options for voluntary disclosures have been refined in the recent offshore voluntary disclosure programs, the lessons of which would affect voluntary disclosures arising from previously unreported gifts. A timely and complete disclosure can help avoid possible criminal prosecution and may limit penalty exposure for taxpayers and fiduciaries.

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In late December 2010 the IRS filed an ex parte petition in the U.S. District Court for the Eastern District of California seeking judicial authorization to serve a John Doe summons on the California State Board of Equalization.¹ The summons sought to identify, from California state records, taxpayers who had made non-spousal transfers of real property to related parties for less than full consideration and then failed to report those transfers on a Form 709, the federal gift tax return.

On May 20 the district court denied without prejudice the IRS's application to serve the John Doe summons, finding that it had failed to make a sufficient ex parte showing as to one of the statutory criteria for service, namely that the records sought from the BOE could not be obtained from other sources.² The court also questioned whether a state agency constitutes a person under the tax code provisions authorizing administrative summonses.³ The IRS must now decide whether to resubmit the petition to provide a more detailed explanation of why it can obtain the records only from the BOE and to address the legal (if not constitutional) issue raised by the district court regarding the validity of serving an IRS summons on a state agency.

Irrespective of the IRS's initial failure to obtain authorization to serve the John Doe summons, documents submitted to the court by the Justice Department reveal a major IRS compliance initiative — apparently well underway — to find and then examine and potentially penalize donors who have not met the Form 709 filing requirement. The pleadings also describe the IRS's view that there is significant noncompliance in this area: The agency estimates that gift tax returns go unfiled in well over half the cases in which real property is transferred to a family member with little or no consideration paid by the recipient. The implication of this

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¹Ex Parte Petition for Leave to Serve "John Doe" Summons, *In the Matter of the Tax Liabilities of John Does*, No. 2:10-mc-00130 (E.D. Cal. Dec. 27, 2010), *Doc 2011-6407*, 2011 TNT 60-21.

²Memorandum and Order, *In the Matter of the Tax Liabilities of John Does*, No. 2:10-mc-00130 (E.D. Cal. May 20, 2011), *Doc 2011-11181*, 2011 TNT 101-11.

³Sections 7602(a) and 7609(f).

noncompliance is, of course, a material loss to the fisc, either in the form of gift tax payments or a reduction in the estate tax paid by the estate of a donor who made unreported lifetime gifts. It is unsurprising that this is an area in which the IRS is increasing scrutiny.

In light of this heightened enforcement climate, taxpayers who have transferred real property for less than full value to non-spousal family members and have failed to file Forms 709 are at risk of examination, assessment, and penalties. The same holds true for executors who have filed a federal estate tax return with inaccuracies resulting from previous unreported gifts. The risk of noncompliance is typically the assessment of taxes, interest, and penalties, but in the rare situation in which there are potential indicia of fraud, the IRS may seek to refer the case for criminal investigation and possible prosecution.

Indeed, the papers filed in the BOE summons action reveal that many civil examinations are already underway, with a few leading to assessments. Thus, anyone who has failed to comply with the gift tax reporting obligations, any executor who may have filed an inaccurate estate tax return because of unreported prior gifts, and any practitioner who may have been involved in those situations should consider whether to initiate a voluntary disclosure.

After reviewing the government's disclosures in the BOE case filings, this report will describe and analyze options for practitioners in the gift tax arena in advising noncompliant taxpayers while the IRS is apparently hot on their trail.

Legal Background

The transfer of property from one person to another for less than full consideration is treated as a gift.⁴ There is an annual exclusion under which the first \$13,000 of gifts made by a donor to each donee during a calendar year is excluded from the total amount of the donor's taxable gifts during that year.⁵ Taxpayers also have a lifetime unified credit that excludes from gift tax the first \$5 million of gifts beyond those that qualify for the annual exclusion.⁶

Most gifts must be reported on a Form 709.⁷ The primary exceptions to the reporting requirement are gifts that qualify for the annual exclusion, gifts that qualify for the marital deduction, and gifts that are

wholly charitable.⁸ Even a gift that is not taxed because it is sheltered by the unified credit must be reported on a Form 709 so the IRS can keep track of the taxpayer's remaining available unified credit.⁹ The statute of limitations never runs on an unreported gift.¹⁰

Similarly, property included in a decedent's estate at death may be subject to reporting on Form 706, the federal estate tax return, if the decedent's gross estate exceeds the applicable exclusion amount in the year of death.¹¹ All lifetime gifts (other than those that fall under the annual exclusion) are added back to a decedent's estate before the estate tax is computed. The gift tax on the gifts is then subtracted from the computed tentative estate tax to determine the estate tax due. Through this computation, any exemption used for lifetime gifts is effectively subtracted from the applicable exemption amount available at death. As a result, the \$5 million exemption amount is available at death only to the extent it was not used for gifts during the decedent's lifetime. Thus, if there are unreported taxable gifts from the decedent's lifetime, the estate tax computation will be flawed and will likely cause the filing of an inaccurate estate tax return.

Obviously, the failure to file a gift tax return when no tax is due will not result in the assessment of additional tax. Also, the penalties for failure to file and failure to pay tax are calculated as a percentage of the tax due and likewise will be zero if there is no gift tax due on the transfer. When applicable, the failure to file and failure to pay penalties can add up to 25 percent of the tax due.¹² When tax is due, the IRS can assess a penalty of 20 percent in cases of negligence¹³ and 75 percent in cases of fraud, plus interest.¹⁴ A similar penalty structure can apply to an incorrectly filed estate tax return. The IRS can institute a criminal investigation when there has been a willful failure to file a Form 709 or the filing of a false Form 709 or Form 706. In our experience, although these referrals are rare, the IRS will pursue criminal charges in gift or estate tax matters in egregious cases. Also, practitioners who

⁴Sections 2501 and 2512.

⁵Section 2503(b). The annual exclusion was \$10,000, but 1997 legislation indexed the exclusion amount for inflation. For 2011, the annual exclusion is \$13,000.

⁶Section 2505.

⁷Section 6019.

⁸*Id.*

⁹Until recently, the unified credit exempted \$1 million per taxpayer, but the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 raised the exemption to \$5 million. The period for which the IRS appears to now be reviewing gift and estate tax compliance is all in the era of the \$1 million gift tax exclusion and the gradually increasing exclusions from estate tax during the last decade.

¹⁰Section 6501(c)(9).

¹¹Section 6018(a).

¹²Section 6651.

¹³Section 6662.

¹⁴Section 6663.

advise taxpayers on filing in noncompliance cases can be considered to have aided or abetted the criminal conduct or even to have conspired with the taxpayer to violate the law.¹⁵ Noncompliant practitioners also risk a referral to the IRS Office of Professional Responsibility for a violation of Circular 230.

Thus, the revelation of a significant IRS compliance initiative in this area should cause practitioners to consider whether they or their clients may be at risk.

The IRS Compliance Initiative

Papers filed in the BOE John Doe summons action detail the ongoing and creative IRS compliance initiative. The declaration of an experienced attorney in the IRS estate and gift program who is also the first designated federal/state coordinator for the program¹⁶ reveals the following:

- For over 18 months the IRS has been engaged in a compliance initiative involving unfiled gift tax returns in cases of property transfers between related parties (non-spousal) for less than full consideration.
- Many states exempt donative transfers of real property among related parties from state transfer, excise, or stamp taxes, and thus the parties to the transaction usually complete a state filing to claim the pertinent exemption. These forms are, of course, maintained in state records.
- Fifteen states have voluntarily provided the IRS records of those exemption claims to assist it in detecting real property transfers between related parties for less than full consideration. Those states are Connecticut, Florida, Hawaii, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wisconsin.
- The IRS is checking to determine whether a federal gift tax return has been received that reflects a related-party transaction claimed as exempt on state records.
- As of December 2010 the IRS had opened 323 taxpayer examinations, 217 of which were pending in numerous states, including New York and Florida, and at least 50 cases were opened in Ohio alone. Also, as of the end of

2010, the IRS had found 97 instances of unfiled gift tax returns and had made 12 assessments when gifts exceeded the lifetime credit.

- Based on what it considers a representative sampling, the IRS estimates that there is a 60 to 90 percent noncompliance rate when property has been transferred intrafamily for less than full consideration.

The John Doe summons that the IRS sought in California requested information from the BOE on all related-party real property transfers from 2005 through 2010 to find transfers that occurred for little or no consideration. The need to issue a summons resulted from peculiar aspects of California tax law, including a confidentiality provision¹⁷ and issues arising from the enactment of propositions 58 and 193, which created a property tax exclusion for some transfers between non-spousal family members.

To obtain service of a John Doe summons in an ex parte action, the IRS must demonstrate to a federal district court that the inquiry relates to an ascertainable group of persons, that there is a reasonable basis to believe the designated class of taxpayers has been noncompliant, and that the information is not readily available from other sources.¹⁸ The federal district judge found that the IRS had not met the third component of this test: "It thus remains unclear why information pertaining to the specific property transactions critical to the IRS Compliance Initiative cannot be obtained directly from the counties without resort to a review of every property transaction conducted throughout the State of California."¹⁹ We suspect that despite the IRS's failure to prevail in the initial ex parte action, this may well have been a "friendly" summons, meaning that the IRS issued it at the BOE's request because the BOE believed it could not lawfully volunteer the information. If the IRS succeeds in a renewed action to serve the summons or if it can obtain the property records through other means, California would join the list of states cooperating with the IRS and enabling it to identify real property transfers for less than full consideration between non-spousal related parties.

The Question of Voluntary Disclosure

The IRS is likely correct that gift tax noncompliance is extensive in related-party transfers. The compliance failures can include the failure to file a gift tax return in the year of the transfer itself; the filing of an inaccurate gift tax return in a subsequent

¹⁵Section 7206(2), 18 U.S.C. section 371.

¹⁶Declaration of Josephine Bonaffini, *In the Matter of the Tax Liabilities of: John Does*, No. 2:10-mc-00130 (E.D. Cal. Dec. 21, 2010), *Doc 2011-6408*, 2011 TNT 60-24. Bonaffini describes part of her responsibilities as contacting IRS liaisons in various state governments to "help identify taxpayers who may have failed to file required Forms 709."

¹⁷Cal. Civ. Code section 1798.24.

¹⁸Section 7609(f).

¹⁹Memorandum and Order, *supra* note 2.

year if the prior unreported transfer is not shown as a reportable gift in reducing the lifetime unified credit; the failure to file a required estate tax return when the estate was incorrectly thought to be under the exemption level because the value of prior gifts was unreported; and the filing of an incorrect estate tax return when the Form 706 underreports the value of lifetime gifts by the decedent and thus claims either an excessive exemption or a smaller taxable estate than should have been reported. In any of those situations, compliance failures from years or even decades ago can affect more recent filings.

A practitioner who learns of client noncompliance in this area is obligated to advise the client of the option of correcting the error. Section 10.21 of Circular 230 provides that a practitioner who learns that the client has not complied with the tax laws must advise the client promptly of consequences of the noncompliance. CPAs are under an additional duty to consider withdrawing from the representation if the client decides not to correct the error.²⁰ Thus, any practitioner faced with a client who has failed to comply with the gift or estate tax provisions regarding a property transfer must at least advise the client to consider options to come into compliance.

At the outset, it is worth noting that while practitioners are under ethical obligations to advise clients about correcting prior tax noncompliance, there is no legal obligation imposed on the client to clean up the past. In cases of income tax noncompliance, such as the prior failure to report income from a foreign account, practitioners sometimes advise clients that in addition to considering a voluntary disclosure, they may also consider the option of not engaging in any remediation but simply begin to comply going forward, reporting the income on all future filings. This is perfectly legal. However, because of the operation of the gift tax and the relationship between the gift and estate taxes, it is likely that a prior compliance failure involving a gift tax matter will affect a subsequent gift or estate tax filing. The filing of a gift or estate tax return that fails to take into account a prior unreported gift would, in and of itself, constitute a false filing. So unlike income tax matters in which a taxpayer may disregard past errors and simply begin filing truthful and complete returns in the future, the failure to report a gift in one year may have lasting consequences if it goes uncorrected, and may place tax practitioners in difficult circumstances as they attempt to file a subsequent truthful

return that, in practical terms, would have to disclose the prior compliance failure.

Thus, what does a taxpayer do when there has been a gift or estate tax compliance failure in a prior year? The answer lies in the IRS voluntary disclosure program (VDP).

The VDP has been at the forefront of news in the tax world recently because of the government's crackdown on U.S. persons with undeclared foreign financial accounts. The IRS initiated a well-publicized voluntary disclosure initiative in March 2009, and a less publicized program in February 2011, to encourage Americans with undeclared financial assets abroad to come forward and avoid criminal prosecution while agreeing to file corrected tax forms and pay tax, interest, and penalties under a specified framework. But as many practitioners know, the underlying VDP has been in place for decades.

Under the VDP as set forth in the Internal Revenue Manual, the IRS will generally forgo criminal prosecution of a noncompliant taxpayer who comes forward before the IRS has started an examination or before it is in possession of information that reveals the taxpayer's noncompliance; files all relevant forms and either pays the tax and interest associated with the noncompliance or makes good-faith arrangements to pay; is truthful and complete in the process; and cooperates with any ensuing IRS inquiry.²¹ Until the recent offshore account initiatives, the VDP was not used in conjunction with a civil penalty framework, and in most non-offshore cases, a voluntary disclosure does not provide any protection regarding potential civil penalties.

For many years, practitioners have advised clients that there are two types of acceptable voluntary disclosures: a "noisy" disclosure, in which a taxpayer initiates contact with the IRS to determine whether it will deem the case acceptable under the VDP, and a "quiet" disclosure, in which a taxpayer simply corrects the filing or payment noncompliance through the preparation and submission of the relevant returns. In the past, quiet disclosures rarely resulted in an examination or the imposition of penalties. In the last three years or so, however, the IRS has expressed distaste for — if not outright hostility toward — quiet disclosures. That is because the IRS does not want anyone to slip through the cracks, and it wants to reserve the option of imposing civil penalties on any taxpayer coming forward.

The now-public gift tax reporting compliance initiative raises the question whether a given taxpayer will be eligible for the VDP, and if so, what

²⁰American Institute of Certified Public Accountants, Statement on Standards for Tax Services, No. 6.

²¹IRM section 9.5.11.9.

factors should come into play in considering the type of disclosure the taxpayer should make.

Eligibility

The key factor determining whether a taxpayer is eligible for the VDP is timeliness: Has the taxpayer come to the IRS before it has started an examination or obtained information regarding the taxpayer's noncompliance?

At the outset, the mere existence of the IRS compliance initiative — or, in California, the attempted service of a John Doe summons — would not itself disqualify the taxpayer from making an acceptable voluntary disclosure. The VDP provides that a taxpayer can make a voluntary disclosure even when “the IRS has begun a civil compliance project and already obtained information which might lead to an examination of the taxpayer” but it has not yet commenced an examination or notified the taxpayer of its intent to do.²² The IRS reinforced this view in the offshore programs, noting that the service of a John Doe summons seeking records of foreign bank accounts, by itself, would not be a disqualifying act.²³

Thus even in a state where the IRS has obtained related-party transfer information from property records — and in California, even if the IRS reinstates the action to serve the summons and succeeds a second time around — a taxpayer is still eligible to make a voluntary disclosure unless the IRS has opened an examination of the particular taxpayer or has obtained information on that specific taxpayer's noncompliance. The mere fact that information on the property transaction is conveyed to the IRS is not by itself a disqualifying event.

What Type of Voluntary Disclosure?

When faced with a noncompliance situation, a practitioner should decide what type of disclosure is appropriate. As mentioned earlier, practitioners are likely to consider two general types of disclosure to correct the prior noncompliance: a noisy disclosure with the IRS Criminal Investigation division, which administers the VDP; or a quiet disclosure, whereby the taxpayer simply files the relevant delinquent or amended gift or estate tax returns accompanied by payment.²⁴ The VDP provides for

both, noting that a practitioner can commence a voluntary disclosure by contacting the IRS regarding a particular taxpayer or by submitting the pertinent tax returns under a cover letter with an offer to pay all applicable taxes, interest, and penalties.²⁵ Some practitioners also advise that simply filing the delinquent returns with the appropriate service center suffices. In light of recent pronouncements by the IRS, it is unclear that such a step is considered a formal voluntary disclosure, but it may still be appropriate in some cases.

The question of how to come forward depends on the facts of each case. The practitioner must first determine whether the IRS might consider the case ripe for a criminal referral if no voluntary disclosure is made. Although fraud charges in a gift or estate tax return case are relatively rare, they do occur. Property transfers through nominees designed to conceal the nature of the transactions and appraisals that are doctored or obtained through pressure on the appraiser would raise concerns about fraud. There can be willful failure to file returns, even in the face of professional advice to do so. A fiduciary can file an estate tax return knowing it was false because of a prior unreported gift. If there are multiple compliance failures, the IRS may find a strong inference of willful misconduct. Gift transactions can be associated with other fraudulent conduct. In our experience, those facts can cause an IRS gift or estate tax examiner to consider referrals to CI.

Such cases warrant serious consideration of a noisy disclosure. Only through a noisy disclosure can a tax practitioner ensure that the client will not provide incriminating information to the IRS and later be deemed ineligible for the VDP because the disclosure, unknown to the taxpayer when made, was untimely. If a taxpayer files tax returns or makes substantive disclosures about potentially criminal conduct before learning whether the disclosure will be accepted as timely, the disclosures may effectively operate as a confession of the criminal conduct, usable by the IRS in any prosecution. This possibility is a particular concern when the IRS has publicized a compliance initiative and acknowledged obtaining extensive data from multiple state agencies.

There is a process under which a practitioner can determine, before submitting detailed factual information or tax returns, whether a taxpayer's voluntary disclosure would be considered timely. In the offshore voluntary disclosure programs, the IRS created a pre-clearance process through which the

²²IRM section 9.5.11.9.6.c.

²³FAQ 51, 2009 offshore program; FAQ 21, 2011 offshore program, *Doc 2011-2719*, 2011 TNT 27-19.

²⁴IRM section 9.5.11.9.6.a says an example of a voluntary disclosure would be “a letter from an attorney which encloses amended returns from a client which are complete and accurate . . . which offers to pay the tax, interest, and any penalties determined by the IRS to be applicable in full and which meets the timeliness standard set forth above.”

²⁵IRM section 9.5.11.9.6.a.

taxpayer submits his name, a taxpayer identification number, and date of birth, and the IRS runs a background check to determine if it already has evidence of the taxpayer's foreign assets.²⁶ An analogous strategy could be used for unreported gifts.

Although the IRS has not issued public guidance on this pre-clearance process in non-offshore account cases, practitioners have recently seen the Service use it in such matters. Thus, if asked, the IRS would likely be willing to check its databases and notify a particular taxpayer or taxpayer representative if a voluntary disclosure in the case of unfiled or inaccurate gift or estate tax returns would be considered timely. A favorable response should be given, so long as the IRS has not obtained information about the specific taxpayer's noncompliance or initiated an examination of the taxpayer (even on an unrelated issue).

In the offshore account area, pre-clearance requests are made to CI. Because CI administers the VDP for nearly all tax matters, absent guidance to the contrary, it would be reasonable to assume that the IRS would expect a pre-clearance request in the gift or estate tax area to start there as well, but local practice may differ.

Once pre-clearance is obtained, the taxpayer submits a general letter in an IRS-prescribed format that explains the nature of the case and some pertinent details. If pre-clearance is granted and CI accepts the taxpayer's general explanation as truthful and complete, then it is safe to assume that the case will be referred for civil examination and, if the IRS follows its practice in the offshore account area, an eventual closing agreement will follow. If pre-clearance is denied, then the taxpayer is ineligible to make a voluntary disclosure; no harm would be done by the disclosures in the pre-clearance letter, because the taxpayer was already in the IRS's sights.

Closure of the near-inevitable audit resulting from a noisy disclosure — through a closing agreement or other process — is a second reason some practitioners may favor the noisy approach. Executors face potential personal liability for distributing estate assets when there is any outstanding debt to the United States.²⁷ In some cases, the executor may have filed an inaccurate estate tax return because of a previously unfiled gift tax return, or she may have failed to file an estate tax return because of an inaccurate determination of available exemption. It

may well be in the executor's best interests to instigate a noisy disclosure simply to obtain finality without having to wait years before being certain that the IRS will not come forward to assess tax and then seek a payment from the executor's personal assets. Another option is for the executor to request a prompt assessment under reg. section 301.6501(d)-1.²⁸ In a quiet disclosure, if there is no audit, there is no formal resolution — the matter is not technically over until the last relevant statute of limitations expires, if ever. More broadly, some clients also want finality and do not want to have to wait, or have their families wait, until the clock runs on an examination years down the road.

However, in many cases of unfiled gift tax returns or inaccurate estate tax returns, there are no indicia of fraud and fiduciaries are not yet involved, so a noisy disclosure can seem like overkill. Some taxpayers are simply unaware that a transfer of property for less than full consideration can constitute a reportable gift. In other situations there can be significant questions about the value of the asset conveyed, or a professional may have advised in good faith but incorrectly said that the transfer was not a reportable gift, or the amounts at issue may be relatively modest. In all those instances, it is highly unlikely the IRS would consider a referral to CI. Thus, in those cases the practitioner's best course may be to have the relevant forms prepared and filed, accompanied by payment for any tax due. The IRS will automatically assess interest, which should then be paid as well. If an examination begins, the taxpayer must cooperate but is free to contest the imposition of penalties.

Assuming the taxpayer has not yet been contacted about an examination, the tactical question in non-fraud cases is whether it is in the taxpayer's best interest to simply file the relevant delinquent or amended returns. If the IRS has already selected the case for examination, which technically renders the disclosure untimely, the taxpayer is no worse off than if a noisy disclosure had been initiated. The case will be examined, and penalties may be imposed. Indeed, one would hope that the taxpayer's unprompted effort to come forward and correct a problem — saving an IRS examiner substantial work in reconstructing events from property records — would be a factor limiting the imposition of penalties.

One caveat to this analysis is the IRS's aforementioned hostility toward quiet disclosures in the

²⁶The IRS may be willing to discuss hypothetical facts, but it generally will not provide protection under the VDP on a no-name or hypothetical basis.

²⁷31 U.S.C. section 3713.

²⁸An executor can also request a release from personal liability for the decedent's income and gift taxes under section 6905.

offshore account area.²⁹ The Service views them as an attempt to avoid scrutiny and potential penalties in an area of noncompliance in which the IRS generally believes penalties are appropriate in nearly all cases. Yet, the IRS has not issued guidance on this question of voluntary disclosures in gift or estate tax cases, or more generally. And in the ordinary situation of an innocent compliance failure, the fact that a taxpayer simply files the relevant returns should not prejudice his position in an audit.

The next question is how many years of returns should be filed in the voluntary disclosure. In income tax cases, most practitioners recommend a lookback of six years if there is potential criminal wrongdoing, and fewer years in more benign cases. Of course, in the gift tax area, the only relevant years are those in which unreported gratuitous transfers were made, and later years in which gifts were reported if the unreported gifts cause them to become taxable. Moreover, the statute of limitations on assessment of tax or penalties never begins to run for an unfiled gift tax return, and all unreported post-1976 gifts made by a decedent would be relevant when an estate tax return is filed. However, the statute of limitations for most criminal tax offenses is six years,³⁰ and in the BOE John Doe summons action, the IRS said it was looking for transactions since 2005.³¹ So if a practitioner faces a compliance failure occurring more than six years ago that requires cleanup now, a quiet disclosure may be appropriate because the taxpayer needs no

protection from criminal prosecution. But, as noted above, in some cases a fiduciary or client will want formal closure, and a sure way of obtaining that is through a noisy disclosure, despite how far back one must look.

Finally, one should consider the role of a practitioner who may have advised on the underlying transfer at issue. In an extreme case of willful misconduct, that practitioner could be considered a co-conspirator in the failure to file the gift tax return or in the later filing of a false estate tax return. Or the IRS could assert that the practitioner has violated Circular 230 duties of due diligence and compliance with the law. This could lead to a referral to OPR and possible reprimand, or even suspension or termination of the practitioner's right to practice before the IRS. Importantly, OPR does not have a formal VDP, so if a taxpayer comes forward in a noisy disclosure and there is an eventual examination in which the IRS focuses on the practitioner's conduct or advice, there is no protection from disciplinary sanction. That said, OPR would likely view a practitioner's not-quite-voluntary disclosure more favorably than if the case were simply referred by the examiner. In either event, any practitioner involved in the underlying transaction may have a conflict of interest in advising on whether to make a voluntary disclosure and should consider seeking separate counsel for the taxpayer.

Conclusion

From the filings in the California John Doe summons case, it appears that the IRS compliance initiative in this area is well underway. In many states, the IRS already has information regarding taxpayer noncompliance, and it has opened hundreds of examinations. But if the IRS has not commenced an exam or obtained information about the specific taxpayer's noncompliance, the taxpayer may be able to make a timely voluntary disclosure. Whether and how to undertake a voluntary disclosure are important questions that turn on the facts of a particular case, the client's desire for closure, and the exercise of judgment. Persons who have engaged in property transfers to non-spousal related parties for less than full consideration and who have gift or estate tax compliance issues should consider their options for disclosure. This consideration is especially important for executors who could face personal liability if unpaid estate taxes are assessed later.

²⁹See FAQ 10, 2009 offshore program, and FAQ 16, 2011 offshore program, *supra* note 23. Indeed, the IRS recently charged a client of HSBC Bank Bermuda with failing to report a foreign bank account. *United States v. Schiavo* (D. Mass. May 19, 2011), *Doc 2011-10984*, 2011 TNT 99-21. The individual had attempted a quiet disclosure by filing amended tax returns to report the account during the pendency of the IRS special voluntary disclosure program on foreign bank accounts in 2009, but he filed a false amended return. He later tried to correct it after a visit from CI. In the charging document, the government said that a "silent disclosure does not constitute a voluntary disclosure." However, the IRM still provides for a quiet filing method of making a voluntary disclosure, and as noted in this report, not every case of an unfiled gift tax return involves fraud or is potentially worthy of criminal prosecution.

³⁰Section 6531. Note, however, that the criminal statute of limitations in conspiracy cases can be much longer than six years, so when multiple parties may be involved in a situation involving a willful compliance failure, a practitioner should not necessarily take comfort in the passage of time.

³¹Bonaffini declaration, *supra* note 16, at para. 31.