Procedural Considerations in Addressing Chapter 42 Excise Tax Consequences

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I. Chapter 42 Excise Taxes

Since 1969, private foundations have had to comply with the various requirements of Chapter 42 of the Internal Revenue Code, or face its quite draconian penalties. More recently, Congress has gradually added similar provisions applicable to disfavored activities by public charities, all charities, or (in the case of section 4958) section 501(c)(3) and 501(c)(4) organizations. Most of these provisions also include taxes on management for knowing violations, as well as second-tier taxes in case of failure to correct the transaction within the applicable "correction period."

The chart below summarizes these provisions:

Code Section	Topic	Tax	Frequency	Manager's Tax	Second-Tier Tax	Applies to
4941	Self-dealing *No abatement*	10% of amount involved (on the self-dealer)	Each year until correction; pyramiding for loans, leases, etc.	1st Tier: 5% 2nd Tier: 50% Each up to $20K	200%	Disqualified persons of PFs, and of some charitable or split-interest trusts.
4942	5% payout	30% of undistributed income	Each year income remains undistributed.	None	100%	Private Foundations
4943	Excess business holdings	10% of value of excess holdings	Each year in which the excess holdings continue	None	200%	PFs, some 509(a)(3)s, DAFs

Code Section	Topic	Tax	Frequency	Manager's Tax	Second-Tier Tax	Applies to
4944	Jeopardizing investments	10% per year of amount invested	Each year until amount "removed from jeopardy"	1st Tier: 10%, up to $10K 2nd Tier: 5%, up to $20K per investment	25%	Private Foundations
4945	Taxable expenditures	20% of expenditure	Once (but see *Mott* case[1])	1st Tier: 5%, up to $10K 2nd Tier: 50%, up to $20K per expenditure	100%	Private Foundations
4955	Political Expenditures	10% of expenditure	Once	1st Tier: 5%, up to $5K 2nd Tier: 50%, up to $10K per expenditure	10%	501(c)(3) organizations
4958	Excess benefit transactions	25% of excess benefit *on the DP* (or 25%vof whole amount for some DAF/SO grants, loans, compensation, or similar payments)	Once	1st Tier: 10%, up to $20K	200% (on DP)	Disqualified persons of 501(c)(3)s, 501(c)(4)s
4965	Prohibited tax shelters *No abatement*	Greater of 100% of net income from participation or 75% of	Once	$20,000	None	Many tax-exempt entities or entities eligible to receive tax-

[1] In *Charles Stewart Mott Foundation v. United States*, 938 F.2d 58 (6th Cir. 1991), the court upheld two section 4945 taxes on the same program related investment, because the organization failed to attach the required reports to its Form 990-PF in two consecutive years. Thus, appears that at least sometimes a single grant can result in multiple violations of section 4945.

Code Section	Topic	Tax	Frequency	Manager's Tax	Second-Tier Tax	Applies to
		proceeds (if it knows or has reason to); otherwise, the tax on that amount				deductible contributions
4966	DAF taxable distributions	20% of distribution	Once	5%, up to $10K	None	Sponsoring organizations
4967	Prohibited DAF benefits to donors/advisors	125% of benefit	Once	10%, up to $10K	None	Donors/advisors of DAFs and related parties

II. Assessing Chapter 42 Exposure and Options Short of Disclosing to the IRS

When a Chapter 42 violation comes to the attention of an organization, the first step is to try to determine exactly what occurred, as the details of the act or failure to act can often make a profound difference in the amount and type of tax assessed. At the same time, the lawyer needs to be prepared to spend a fair amount of time helping disqualified persons and foundation managers adjust to the reality that even innocently intended conduct may result in serious exposure.

What? Given the hefty taxes and potential audit exposure associated with reporting a Chapter 42 violation, an organization is well-served to thoroughly examine the facts and applicable authorities to make absolutely sure that a violation has occurred. While in some cases the question of whether a violation has occurred is a factual one, in many cases the precise scope of the excise tax is unclear, or depends on state law to determine whether the predicate act for the excise tax has occurred. For instance, in the case of section 4967 of the Code, there is not yet clear guidance on *whether* it would be an impermissible benefit for a donor advised fund to satisfy the enforceable pledge of a donor; even assuming that satisfying an enforceable pledge would be subject to tax under section 4967, difficult questions under state law can arise as to whether such a pledge is in fact enforceable.

When? Sometimes as crucial as *whether* a Chapter 42 violation has taken place is *when* it took place. Most of the excise taxes applicable to private foundations impose additional tax for each year or part of a year that the transaction continues uncorrected. Especially for investments made on fixed closing dates (for instance, investment or disinvestment in a fund that allows such changes only at the end of a calendar year or quarter), it is not uncommon for payment to be made in one taxable year and delivery of the investment in another taxable year. Total excise tax exposure could potentially double depending on when in that process the sale or investment in question occurred for Chapter 42 purposes. Also, determining in which taxable year a transaction occurred can affect when the statute of limitations will run. Determining the taxable year is crucial because it often dictates the

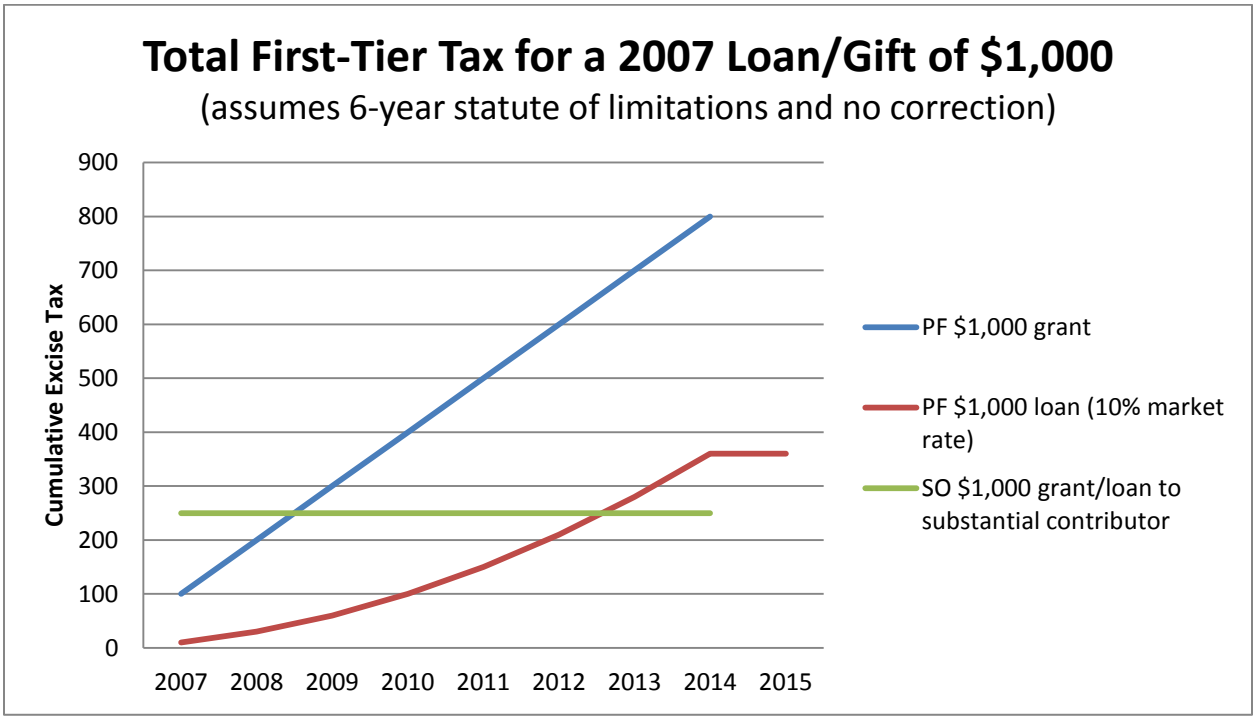
date by which any necessary correction must occur in order to avoid additional excise taxes—which can sometimes be soon in the future if the problem was discovered in the preparation of the previous year's extended return.

Who? For these purposes, it is important to distinguish which taxes apply and which parties are subject to them, as each party may have a different taxable year. Thus, for instance, self-dealing penalties are applied based on the tax year of the disqualified person subject to the tax, but the same action may also trigger liability for making a taxable expenditure for the private foundation.[2]

In many cases, it is clear who the party involved in a transaction is. However, the section 4941 regulations do also treat others participating in a transaction, including those who direct a transaction, as participants jointly and severally liable for the tax.[3] In some cases this provides needed flexibility, because the party most obviously "participating" in the transaction is not the most appropriate party to pay the tax (for instance, because it lacks the financial resources to do so, or it is a 35%-owned entity with outside shareholders who would be unfairly harmed if they had to share the tax burden with the ultimate disqualified persons).

Another important "Who?" question is who had sufficient knowledge that they might be subject to manager's tax. On audit, it is perfectly possible for the IRS to conduct interviews of board members or others to determine how much knowledge they have.

A. Pyramiding and Problems with Doing Nothing



[2] Rev. Rul. 75-391, 1975-2 C.B. 446.

[3] Treas. Reg. § 53.4941(a)-1(a)(3).

Normally, a given transaction generates a single act of self-dealing. However, where the transaction is the lending of money, lease of property, or other use of foundation property, it is treated as giving rise to an act of self-dealing on the day the transaction occurs plus an additional act on the first day of each subsequent year (or part year) until the transaction is corrected or the second tier tax is imposed.[4] Since each act of self-dealing attracts the 10 percent tax for each year until correction, there is a pyramiding effect. Thus, if the use of property commences in year 1 and is terminated in year 3, the use value for year 1 is subject to a total of 30% in tax for years 1, 2, and 3; the use value for year 2 is taxed a total of 20% for years 2 and 3; and the use value for year 3 is taxed at 10% for that year only.[5] Once the statute of limitations for a particular act of self-dealing ends, the Service cannot assert any 4941 tax for that transaction, even for subsequent uncorrected years. But for loans, each new year represents a new act of self-dealing, with its own separate statute of limitations.[6] This result is not as harsh as it may first appear, as the "amount involved" for loans and leases is only the value of using the borrowed money or property during the year (or the actual interest or rent paid, if higher).

While "pyramiding" under section 4941 is a striking instance of the problem, many other excise taxes—particularly those applicable to private foundations—give rise to similar problems if the issue is not confronted directly. For instance, in the case of a taxable expenditure resulting from a grantee's diversion of funds, future grants to that grantee will be taxable expenditures until such time as the diversion has been properly corrected.[7]

Furthermore, because Form 4720 is a tax return, failure to file it (or file it correctly) can result in failure to penalties under sections 6651(a)(1) and 6651(a)(2) that can ultimately reach up to 47.5% of the tax required to be shown on the return, as well as accuracy-related penalties on the taxpayer under section 6662, on the preparer under section 6694, and additional civil and criminal penalties for false or fraudulent filings. Needless to say, these penalties can significantly increase the total tax exposure associated with not addressing the issue head-on.

B. "Silent Correction" (For Good but Not Airtight Positions)

In some cases there are sufficient grounds to support filing a Form 990 or Form 990-PF indicating that there was no violation of Chapter 42, but there may still be doubt about that fact. Even if there was "more likely than not" no violation, it may be worth attempting to correct the transaction, so that even if the Service ultimately disagrees, the organization can still minimize first-tier taxes and avoid second-tier taxes because the transaction has already been corrected. However, in some cases this may be hard to do while consistently maintaining that no correction is necessary. For instance, under section 4942, it takes a specific election to apply excess qualifying distributions in the current year to the undistributed income of a prior year for which section 4942 tax is already due. Similarly, in the self-dealing context, reversing a possible act of self-dealing may itself be an act of self-dealing, especially if one cannot take advantage of the exception that allows such acts in the limited context of correcting a previous act of self-dealing. There may also be political difficulties: a manager who is told there is a fairly strong case that he or she has not been overcompensated under section 4958, for example, may not agree easily to return a portion of the compensation in question.

[4] Treas. Reg. § 53.4941(e)-1(e)(1).

[5] *See* Rev. Rul. 75-391, 1975-2 C.B. 446.

[6] *See* G.C.M. 38862 (May 21, 1982).

[7] Treas. Reg. § 53.4945-5(e).

In this context, statute of limitations questions must be resolved carefully, as the degree of disclosure of the transaction could easily affect whether the transaction is subject to a 3-year or 6-year statute of limitations, or (worse) no limitations period at all. For Chapter 42 taxes eligible for abatement on reasonable cause grounds, it is worth considering any previous professional advice the organization might have received, and worth considering whether your legal reassurances that, more likely than not, there has been no violation, might provide additional protection to the organization in the future. These questions are discussed in more detail below.

Finally, an additional basis for uncertainty is sometimes the correction process itself. While the Treasury Regulations provide fairly detailed guidance as to what will constitute adequate correction, applying that guidance often requires an organization to make various contestable determinations about what would constitute correction. In the section 4945 or 4966 context, for instance, it may be a real question how far the organization should go to recover funds that were arguably but not clearly devoted to lobbying, and if it cannot recover them, what additional measures it should take to prevent repeat diversions. Correction of transactions under sections 4941, 4958, and 4967 almost inevitably requires determinations about fair market values or reasonable compensation. And in some cases business realities (for instance, limited cash flow) mean that a correction transaction cannot be done in exactly the way the regulations provide. In all of these cases, it can be advantageous to obtain IRS approval of the proposed correction efforts. Correction without IRS involvement requires a greater degree of confidence in the correction method chosen or other assurance that the risk of tax is manageable.

C. Statute of Limitations

Generally, the IRS must assess any tax imposed by the Code within three years after the taxpayer files the relevant return.[8] For these purposes, the Form 990-PF or Form 990 will be treated as the relevant return for all who might have to file Form 4720—even if its answers to Form 990-PF are incorrect.[9] However, there are three important caveats. First, the questions regarding Chapter 42 violations and certain other portions must be answered, or the return will be considered so incomplete that it will not constitute a filed return starting the statute of limitations.[10] Second, if a return is fraudulent or false with the intent to evade tax, general principles prevent the statute of limitations from running.[11] Third, in the case of the excise taxes imposed by Chapter 42, a six-year statute of limitations applies instead if the taxpayer omits from the relevant return taxes equal to more than 25 percent of the tax reported on the return.[12] The statute suggests that the 25 percent is calculated on a per-tax basis, but the regulations seem to indicate that it should be considered on a per-transaction basis, so that if a foundation fails to report tax with respect to a given transaction then the six-year statute of limitations applies to that transaction.[13]

The only exception to this rule is that the six-year statute of limitations does not apply if the transaction giving rise to such tax is disclosed on the return (this can be the Form 990 or Form 990-PF) in a manner adequate to

[8] I.R.C. § 6501(a).

[9] Treas. Reg. § 301.6501(n)-1; I.R.C. § 6501(*l*).

[10] Rev. Rul. 77-162, 1977-1 CB 400; G.C.M. 36506 (Dec. 8, 1975).

[11] I.R.C. § 6501(c)(1)-(2).

[12] I.R.C. § 6501(e)(3).

[13] Treas. Reg. § 301.6501(e)-1(c)(3)(ii).

apprise the IRS of the nature of the transaction.[14] To be adequately disclosed, the fact that the organization had engaged in an activity or held an investment that violated the applicable provision of Chapter 42 would have to be evidenced on the face of the return. For example, the courts and the IRS have held that a transaction is not adequately disclosed if the taxability of the transaction results from the nature of the other party to the transaction, e.g., whether the other person is a disqualified person (as defined by section 4946(a)), and the nature of that other party is not disclosed on the return.[15] On the other hand, the taxpayer does not need to lay out all the details, so long as the disclosure is "adequate to apprise the Secretary of the existence and nature of such item."[16] For instance, in the compensation context, it is enough to note the amount of compensation and the fact that it is being paid to someone who is recognizably a disqualified person; the facts supporting or undercutting the reasonableness of that compensation need not be included.[17]

The applicable statute of limitations, whether three or six years long, begins to run from the filing date of the return for the year in which the foundation engaged in self-dealing, failed to make sufficient distributions, held excess business holdings or jeopardizing investments, or made a taxable expenditure.[18] With respect to self-dealing transactions of a continuing nature (e.g., a lease or a loan), the relevant Treasury regulations provide that an act of self-dealing occurs on the day the transaction first occurs and an additional act of self-dealing occurs on the first day of each subsequent year until the act is corrected.[19] The IRS' position is that each successive deemed act of self-dealing is subject to its own separate and independent limitations period under section 6501.[20] Hence, even if the year in which the initial act of self-dealing has closed, the self-dealer still would have exposure for the taxes flowing from the separate act of self dealing occurring in any open year in which the transaction had not been corrected.

III. Coming Forward to the IRS

There are various ways that an organization can engage with the IRS about potential violations. First, it is possible to simply file a Form 4720 paying the tax. Particularly where dollar amounts are small and the violation is an easily explained foot-fault, such an act may not lead to any IRS follow up, and may be less expensive than the attorney time necessary to develop a defense of the transaction. Still, most organizations are understandably nervous about taking this course. A second approach is to file the tax return but request abatement. This causes an agent to review the request, and can trigger an examination to gather the relevant facts. A third alternative is to try to reach a closing agreement with the IRS through its walk-in voluntary disclosure program.

[14] See I.R.C. § 6501(e)(3); Treas. Reg. § 301.6501(e)-1(c)(3)(ii).

[15] See, e.g., *Pearland Inv. Co. v. Commissioner*, 62 T.C.M. (CCH) 1221, 1228 (1991); TAM 8310002 (Dec. 17, 1982).

[16] I.R.C. § 6501(e)(3).

[17] Cline v. Comm'r, T.C. Memo 1988-14.

[18] See I.R.C. § 6501(l)(1); Treas. Reg. § 301.6501(n)-1(a).

[19] Treas. Reg. § 53.4941(e)-1(e)(1)(i).

[20] GCM 38279 (February 18, 1980); GCM 38846 (May 4, 1982).

A. Filing the Form 4720

To report the excise taxes discussed in this outline, a private foundation must file Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code. Managers, self-dealers, or disqualified persons who owe tax under Chapter 42 and have the same tax year as the foundation may report tax they owe on form 4720 filed by the entity. These individuals should include with the return their own check for the taxes they owe. Individuals who do not have the same tax year (or who do not sign the return of the entity) must file a separate Form 4720.[21] If the tax is due from a person other than the organization, care should be taken to make sure the tax is actually paid by that person; a check from the organization will (hopefully) be returned, but if accepted could constitute an additional violation.

Because many Chapter 42 excise taxes impose additional liability each year a violation continues uncorrected, a single transaction can make it necessary to file many Forms 4720, each of which indicate whether the transactions in question were corrected during the tax year, and thus inform the IRS of whether a Form 4720 for the following year should be expected. For example, in the case of a 2007 disqualified person loan of $1,000 paying interest of $100 per year and corrected in 2010, these would be the filings:

Form	Tax	Covers
2007 Form 4720:	$10	one act of self-dealing for 2007
2008 Form 4720:	$20	continued liability for 2007, one new act in 2008
2009 Form 4720:	$30	continued liability for 2007-2008, one new act in 2009
2010 Form 4720:	$40	continued liability for 2007-2009, one new act in 2010

Note that the Form 4720 is a distinct tax return from the Form 990-PF or Form 990. The Form 4720 is due on the same due date for filing the organization's Form 990-PF or Form 990. For organizations that have requested an extension to file their annual information return (on Form 8868), the extended deadline does not apply to the Form 4720 unless a separate extension request (on a separate Form 8868) was also filed by the initial return due date. When a foundation manager or disqualified person is required to file his or her own Form 4720 in addition to the foundation, the individual would also be required to file his or her own request to extend the due date for filing the Form 4720.[22] Until recently, the Form 8868 did not have a place for a disqualified person to put his or her name and EIN or social security number, but that was corrected in a revision to the form earlier this year.

As with the payment of estimated liability for section 4940 tax, a private foundation wishing to extend the due date for the Form 4720 must pay the estimated amount due and submit that amount with the completed Form 8868.

[21] 2011 Instructions for Form 4720 at 2-3.

[22] See 2011 Instructions for Form 4720 at 3.

B. Requesting Abatement

Under sections 4961 and 4962, most Chapter 42 first-tier excise taxes are eligible for abatement—or for refund if paid or for non-assessment if they have not yet been assessed. The conditions for this forgiveness are (1) that the transaction must be corrected, and (2) it must be established to the satisfaction of the Secretary that the activity giving rise to the excise tax was due to reasonable cause and not to willful neglect.[23] The two exceptions are that the first tier taxes on acts of self-dealing, and the taxes on prohibited tax shelter transactions under section 4965, may *not* be abated. [24] Regardless of whether the Service believes there is reasonable cause, the second tier tax *must* be abated if the prohibited act is corrected during the "correction period" (generally, 90 days after the mailing of a notice of deficiency with respect to the second tier tax, but lengthened to extend somewhat beyond any litigation over whether the first and second-tier taxes are in fact due).[25] The IRS believes that the abatement of first-tier taxes, on the other hand, is at the discretion of the IRS—although the statutory language is strong enough that on the right facts it seems possible that the IRS could not properly exercise its discretion otherwise.[26]

To request abatement, an organization or taxpayer must file Form 4720 for the transactions in question, writing "Request for Abatement under Section 4962" across the top. This triggers review of the abatement request by an examining agent, and in some cases may trigger an examination. During the examination process, an organization can request confirmation that a particular form of correction will be considered adequate.

If the amount to be abated is greater than $200,000, then the examining agent must request technical advice on whether to grant the abatement, and the Director of Exempt Organizations has final authority to approve the abatement.[27]

C. Closing Agreements

In some circumstances, it is obviously in the interests of tax administration to settle an issue. At the examinations level, the Exempt Organizations Closing Agreement Coordinator (EOCAC) has authority to reach closing agreements when doing so will not frustrate the purposes of the general excise tax regime and the normal abatement procedures. EOCAC is encouraged to consult with Rulings & Agreements – Technical branch, and permission from that branch to begin negotiations is necessary if the agreement is on a topic for which technical advice would be necessary (including an excise tax liability in excess of $200,000).

Alternatively, an organization can voluntarily approach the IRS. Internal Revenue Manual § 4.75.25.1(10) provides as follows:

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[23] I.R.C. § 4962(a). In the case of political expenditures under section 4955, the tax is to be abated so long as the political expenditures were not "willful and flagrant."

[24] I.R.C. § 4962(b).

[25] I.R.C. § 4961(a); I.R.C. § 4963(e).

[26] See Internal Revenue Manual Handbook No. 7.8.1. (Exempt Organizations Examination Guidelines Handbook), section 28.9.(1).

[27] I.R.M. § 4.75.36.3.

Any taxpayer having issues that might result in revocation or taxation, may voluntarily (Walk-in) contact the Area Office to resolve outstanding issues by way of a closing agreement.

a. Section 8.01 of Rev. Proc. 68-16, 1968-1 C.B. 770 provides that a closing agreement may be accepted with respect to a taxpayer not under examination. However, the Service must be furnished sufficient facts and documentation. (and may make sufficient examination or inquiry) to warrant acceptance of the agreement.

b. EO personnel may discuss a closing agreement with an anonymous taxpayer; however, discussions may not proceed beyond the draft closing agreement stage without identification of the taxpayer.

c. The taxpayer will provide a description of the non-compliant activities and the items listed in IRM 4.75.25.13.

d. The Service may consider more favorably a taxpayer voluntarily approaching the Service to resolve outstanding issues and agreeing to future voluntary compliance

In our experience, the IRS is fairly open to discussing such matters, and can be sympathetic to taxpayers whose slips do not suggest an intent to misuse charitable resources and who have been diligent in attempting to correct transactions. However, even in sympathetic cases, depending on the facts it may take a long time and sign-offs from multiple levels within the IRS to reach closure.

D. "Reasonable Cause" and the Role of Professional Advice

Although no regulations have been promulgated under Section 4962, and no other precedential guidance has been published that sets forth the meaning of "reasonable cause" or "willful neglect" for this purpose, guidance as to the meaning of these terms can be found under other provisions of the Code. Regulations under section 6664 confirm that "[r]eliance on an information return or on the advice of a professional tax advisor or an appraiser . . . [or] on facts that, unknown to the taxpayer, are incorrect" can all excuse the taxpayer from penalties "if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith."[28] Significantly, these regulations allow reliance on other kinds of professional help besides legal advice, including tax advisors other than lawyers, experts at determining the facts (like appraisers), and factual statements provided by third parties on information returns or otherwise. We see no clear reason why the standard under section 4962 should be interpreted any differently.

Indeed, the Service has recognized similar principles in the context of Chapter 42 violations, whether the advisor actively advised an incorrect course or merely failed to inform the private foundation of its obligations. For instance, in TAM 200347023 (Jun. 17, 2003), the IRS abated excise taxes including excess business holdings tax in connection with an investment in a subsidiary that counsel had advised would not run afoul of the private foundation rules. And in TAM 200452037 (Nov. 22, 2004), the IRS abated tax for failure to conduct expenditure responsibility comply with expenditure responsibility requirements under section 4945 correctly, noting that (a) the person on whom the foundation relied to identify and fulfill those requirements (its CFO) had formerly been president of a public accounting firm, and that (b) the private foundation's new tax advisor took steps to correct the

[28] Treas. Reg. § 1.6664-4(b)(1).

error once it was identified. Here, having put in place appropriate experts to manage the process was seen as sufficient, even though the former CFO had not provided a formal opinion on a tax issue.

However, it is important to stress that there are limitations on the ability of an organization to rely on professional advice. Regulations under section 6664 confirm that "[r]eliance on an information return or on the advice of a professional tax advisor or an appraiser . . . [or] on facts that, unknown to the taxpayer, are incorrect" can all excuse the taxpayer from penalties "if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith."[29] Significantly, these regulations allow reliance on other kinds of professional help besides legal advice, including tax advisors other than lawyers, experts at determining the facts (like appraisers), and factual statements provided by third parties on information returns or otherwise.

The IRS has also refused to abate first-tier taxes where an accountant provided an incorrect, after-the-fact opinion that a private foundation had qualified as a private operating foundation and thus was not subject to the tax on undistributed income, when at the time the organization's returns had shown that not enough was being distributed.[30] The IRS noted that the organization had not consistently treated itself as a private operating foundation in accordance with that advice, for instance by amending prior-year returns. Thus, counsel should recognize that after-the-fact opinions given for purposes of helping a client determine its *tax filing position* will not necessarily be respected as justifying the original violation. It seems at least possible, however, that some advice that past events did not constitute violations might at least excuse the organization's slowness in correcting those events.

[29] Treas. Reg. § 1.6664-4(b)(1).

[30] TAM 201129050 (July 22, 2011).

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