New OPR chief ready to get tough

Hawkins says she's ready to use Circular 230 penalties

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BY ROGER RUSSELL

Although the monetary penalty for Circular 230 has been on the books for a number of years, it has yet to be used. That, however, could char soon if Karen Hawkins, the new director at the Internal Revenue Service's Office of Professional Responsibility, has her way.

"The consciousness within OPR as well as outside needs to be raised a lot more about the availability of that penalty," she told practitioners a recent IRS symposium. "The thing that attracted me to it, even as a private practitioner, was that it is the only sanction that the OPR has that i can apply to firms and to organizations. And I think that's an area that needs to be looked at very carefully."

The Circular 230 monetary penalty is based on the amount of the tax liability involved in a particular case, and can go as high as 100 percent that liability. Since it can run in conjunction with the 50-percent-of-liability penalty under Code Sec. 6694, the penalty could theoretically be as high as 150 percent.

"I think that there are any number of opportunities that have been missed," said Hawkins. "Even in the three months that I've been there, I've seen some things come through where I think, 'Gee, why aren't we looking at the firm?' So we're going to start looking at the firm. And we hav the ability to apply those sanctions to the firm. We also have the ability to sanction monetarily an individual practitioner if we think it's appropriate."

In January 2003, the Office of Professional Responsibility replaced the former Director of Practice Organization within the IRS. Its mission is t administer the laws for the practice of attorneys, CPAs, enrolled agents, enrolled actuaries and appraisers before the IRS as prescribed in Circular 230.

"The authority for the monetary penalty came in 2004," said Christopher Rizek, a member of Washington-based law firm Caplin & Drysdale. "I fact, it's the only penalty that clearly can be applied to the firm as well as the individual."

If the prohibited conduct is a single part of a larger engagement, the maximum penalty will be the income derived from the entire engagement

"One of the questions is how you sort out the income that one practitioner receives from an engagement versus another practitioner in the sar firm, and also whether to use the same criteria in doing that," noted Rizek. "The rules in the preparer penalty regs were very cautious in their allocation formula."

Hawkins acknowledged that although monetary penalties are more likely to be used against firms, they are available for use against individua practitioners. "I can't say that we might not [use them against individuals] one day. But I do view it as more attractive to use with firms," she sa "One of the admonitions of the regulations now is that monetary sanctions should not be used in lieu of other kinds of discipline. So at the moment, our approach would be to look at an individual practitioner and see whether one of the other kinds of discipline would be more appropriate. And certainly, we won't entertain a practitioner attempting to buy their way out of that kind of discipline by the payment of a monetary sanction."

Hawkins sounded a similar approach in a speech before the American Law Institute-American Bar Association conference in June. "I intend to be a very soft speaker most of the time," she said. "But I want to whack people with monetary sanctions when I think they deserve them."

Historically, practitioners' noncompliance on their own tax liabilities has been the largest source of caseload for OPR, Rizek observed.

"It's a 'shoemakers' children have no shoes' mentality," said Beanna Whitlock, a San Antonio-based preparer and former director of national public liaison for the IRS. "People in a service business tend to take care of clients before they take care of their own matters. Your No. 1 clier had better be you if you're going to practice before the IRS."

A single act of noncompliance won't be fatal, according to Hawkins. "But I've started to realize as I look at these compliance cases that they ta an enormous amount of our resources for what, for me, is a pretty simplistic no-brainer. People are supposed to file tax returns. And particula people who think they want to practice before the Internal Revenue Service. It's just incongruous to me."

"So my goal is to get people compliant," she said. "And the reasons that practitioners fall out of compliance are no different than the general t paying public. Something's happened that gets in the way and then it just snowballs."

THREE APPROACHES

Under Hawkins, the OPR has instituted three approaches - the softest, the soft, and a modified approach. "The soft letter essentially goes to someone who has managed to self-correct after they've been referred to us," she explained. "And so we send them a letter that says, 'Congratulations, we're really happy to see that you self-corrected. Good for you. We're delighted to see it. Please don't let it happen again. B it does happen again, we're looking.'"

The second level is a "soft" 60-day letter, which goes to practitioners who are out of compliance from earlier years or have balances due but a currently compliant, said Hawkins. "So we'll send them a 60-day letter that essentially says you've got 60 days," she said. "Get the returns in; the payment in; make a deal to make the payment with the IRS that the IRS approves of and it will be a no-harm, no-foul - except this is a reprimand. So if we see your name come in again, it will be an aggravating circumstance for whatever additional discipline you might be up fo the next time around."

The third approach is called the deferred-discipline agreement. "That says the practitioner agrees that a certain amount of suspension is appropriate for the conduct. But the practitioner agrees to get compliant and stay compliant for five years. If they stay compliant for that perioc time, everything stays fine and there's no publicity; there's no sharing with state agencies; there's nothing."

"If the practitioner defaults at any time during that five-year period, the discipline that they'd agreed to kicks in," she continued. "It becomes public and we do it all through an expedited proceeding under the Circular 230 provisions, rather than having to again use a lot of resources unnecessarily to pursue something that's a no-brainer."

Said Whitlock, "For compliant taxpayer representatives, nothing has changed. But for those who have issues with their own compliance, or wi representation practices that are less than ethical, it's a new day."

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