Ethics, Who Knew?

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Heart of the Matter

We as humans created the terms of ethics and morals to attempt to quantify or rationalize other people's actions or inactions. At the end of the day only we can decide on what is right or what is wrong. Obviously, society and the courts will decide whether an action or inaction rose to the level of criminal activity or professional neglect. As we all know we can take an aggressive stance on a deduction on a tax return and be hit with a preparer penalty. Is this a matter of ethics or is this a matter of poor judgment on a professional level? The purpose of this course is to help bring to the surface a consensus based on everyday accounting situations which I feel bring ethics into question. This way an individual can look at his or her own decision on a certain situation and be able to make a more informed decision with the goal of getting it "right".

TAX HELP ASSOCIATES

Where do we look for Guidance?

Treasury Department
Circular No. 230
(Rev. 6-2014)

Catalog Number 16586R
www.irs.gov

Regulations Governing Practice before the Internal Revenue Service

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Department of the Treasury

Internal Revenue Service

Title 31 Code of Federal Regulations, Subtitle A, Part 10, published (June 12, 2014)

§ 10.20 Information to be furnished

§ 10.20 Information to be furnished. (a) To the Internal Revenue Service. (1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged….. (3) When a proper and lawful request is made by a duly authorized officer or employee of the Internal Revenue Service, concerning an inquiry into an alleged violation of the regulations in this part, a practitioner must provide any information the practitioner has concerning the alleged violation and testify regarding this information in any proceeding instituted under this part, unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

§ 10.21 Knowledge of client's omission

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or **has made an error in or omission** from any return, **document, affidavit, or other paper which the client submitted** or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy

§ 10.22 Diligence as to accuracy. (a) In general. A practitioner must exercise due diligence — (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service. (b) Reliance on others. Except as modified by §§10.34 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

§ 10.27 Fees

§ 10.27 Fees. (a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service. (b) Contingent fees — (1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

(2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to (AN AUDIT/CP2000/ADJUSTMENT)— (i) An original tax return; or (ii) An amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service. (PENALTY ABATEMENT)

(4) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code. (A COURT CASE)

Therefore, a contingency fee in an Offer in Compromise case would not be allowed. The presenter welcomes (sincerely) any interpretation which would allow a contingency fee in an OIC case.

§ 10.28 Return of client's records

§ 10.28 Return of client's records. (a) In general, a practitioner must, at the request of a client, promptly return any and all records of the client that are necessary for the client to comply with his or her Federal tax obligations. The practitioner may retain copies of the records returned to a client. The existence of a dispute over fees generally does not relieve the practitioner of his or her responsibility under this section. Nevertheless, if applicable state law allows or permits the retention of a client's records by a practitioner in the case of a dispute over fees for services rendered, the practitioner need only return those records that must be attached to the taxpayer's return. …(b) For purposes of this section — Records of the client include all documents or written or electronic materials provided to the practitioner, or obtained by the practitioner in the course of the practitioner's representation of the client, that preexisted the retention of the practitioner by the client. The term also includes materials that were prepared by the client or a third party (not including an employee or agent of the practitioner) at any time and provided to the practitioner with respect to the subject matter of the representation.

The term also includes any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner, or his or her employee or agent, that was presented to the client with respect to a prior representation if such document is necessary for the taxpayer to comply with his or her current Federal tax obligations. The term does not include any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner or the practitioner's firm, employees or agents if the practitioner is withholding such document pending the client's performance of its contractual obligation to pay fees with respect to such document.

§ 10.29 Conflicting interests

§ 10.29 Conflicting interests. (a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if —

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner. (b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if — (1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client; (2) The representation is not prohibited by law; and

(3) Each affected client waives the conflict of Page 22 — § 10.27 Treasury Department Circular No. 230 interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days. (c) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.

Case Study #1

The case of the Missing Signature Stamp

Great Lakes Manufacturing and its subsidiaries had been in business for two generations. The founder still led the company, he and his adult nephews all held leadership positions in the firm. The case was referred to your office from “EA Ted” a retired ACS (Automated Collections System) rep. Ted needed your help with a “long-term client, Great Lakes Manufacturing, with a payroll penalty I can’t abate.”

TED: It seems that the economy isn’t as kind to Great Lakes as it is to the rest of New York State. The guys got behind a bit on the bills, so to keep afloat; one of the subsidiaries missed a few federal employment tax payments….over the last year, about 30 weeks worth, $1,000,000, not including $150,000 in late payment penalties. I wrote a great abatement letter, since the CEO is terminally ill. The IRS refused to remove those Failure to Deposit and failure to Pay Penalties.

Your office inquired as to a written response from the IRS.

TED: Well, the Revenue Officer (RO) pointed out that the client has continued to be behind this year, about another $ 1million. And can you believe this? The RO wrote to the president and said ‘despite your illness, you still paid YOURSELF $700,000 this year, while increasing the debt to the IRS – He doesn’t say it, but the agent seems to be alluding that my request is almost frivolous.

Let us assume your office followed typical best practices. You called client and introduced yourself; agreed to a Fee Agreement, got their side of the story, got paid; secured a POA and pulled Account Transcripts. The client (of course) expanded the case by adding 3 more entities to the mix. Your office secured additional POA’s/Fees.

Case #1 (con't)

Your investigation showed these results:

All are Single Member LLC's

ABC LLC owes $1.2 million in payroll tax, last 8 quarters filed but unpaid *

* (other than a few account levies)

DEF LLC owes $2.8 million in payroll tax, last 8 quarters filed but unpaid. Each quarter is $450,000 in tax. Client paper files all 941's, so processing is a quarter behind.

HIJ LLC owes $200,000 in 941's for the last 10 quarters, last 2 quarters unfiled

KLM LLC owes $85,000 in 941's for the last 4 quarters, all filed.

Case #1 (con't)

You called the Bob (the founder and patriarch) to discuss the case. Essentially, he relayed the same story as Ted. They are in a dying industry but have 200 employees they feel obligated to keep working. They seem to be able to cover all the bills every month, except "the pesky payroll taxes..if the IRS would just give them a break."

Remember, employers have a legal obligation to pay over funds they withheld from the employee's pay regardless of excuses or 'which comes first', the employees entrusted the employer to turn the tax over to the IRS. Additionally, the US Treasury will honor the withholding credits on the W-2's each year. Depending on the facts and circumstances, these cases could end up with a Criminal Investigation. To be clear, these taxpayers are committing a crime. Many EA & CPA firms will work with an attorney's office, utilizing a Kovel Letter arrangement (the client hires an attorney who then hires you to do work on the representation case). The purpose of this arrangement is to allow the client to speak with the representative candidly under attorney client privilege. Absent this arrangement, the representative could be forced under subpoena to divulge the contents of the conversations. It is important to remember that you can't 'unring the bell'. Any statements made prior to the signing of the Koevl Letter are NOT privileged.

This is a tough spot for an enrolled agent. One needs to consider a number of things

Is the client committing a crime?

When do they need an attorney, or don't they?

Do you have an obligation to tell the client anything?

Best practices:

Tell client they are violating the law by not paying (Stealing?)

They need to start paying – now – while the IRS can work with you on past transgressions. The client cannot keep getting further behind, on all entities.

Case #1 (con't)

The case sat until (quite suddenly) the Sole Member of the LLC's-the man who built the entire empire, passed away. Accordingly, your office alerted the RO's and supplied them with Death Certificate(s).

You now have a rare opportunity to resolve the case, the nephews certainly would make every FTD; to the day….but still neither party seemed to be moving on the case. Following Circular 230, you have to urge the clients forward.

You arrange (force!) a meeting with nephews Andrew & Jack, the CEO (CPA Joe), in house counsel (Marv) and Julia, the Office Manager. You show them the weekly tax deposits are STILL not being made.

You explain the FTD process and the continued criminality, you explain the Trust Fund Recovery Penalty. You again state that we cannot get a plan in place with the IRS if they are not currently compliant. The FTD's must be made to-the-day!

During the meeting, you have an Ephany…and ask “So, right now, who is signing checks and authorized to make payments from the bank accounts? And by the way, after Bob’s death, who was named Owner? How about the Estate?”

Julia: well, none of us are authorized to make any payments at all.

You: OK – then how are the payments made?

Julia: Same as always – I just use Bob’s signature stamp. Its been on file with the bank for years, they don’t have a problem with it.

Jack – and really, NO ONE is in charge of the company at all. The Estate of Bob owns all the shares. The estate must be in charge.

Therefore, no one is running the companies and one is responsible (by their thinking).

Issue with signature stamp. Why doesn’t the IRS demand it is destroyed?

Issue with who is in charge.

Issue with TFRP.

Now, you have a potential conflict of interest. Circular 230 section 10.29 (2) states that “There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.”

Can we represent all the parties?

The EA Cannot lie….Can’t let them all point fingers….SOMEONE is responsible.

Case #2: The "D" Word

You have been preparing the 1040's for Mr. & Mrs. Perfect for the last 20 years. Their 3 young kids love the fish tank in your office. Mr. Perfect loves your female staff. You have put their 202X 1040 on extension because the Perfect's planned a long family/romantic cruise in April. Come October 1, Mr. Perfect sends you an e-mail asking you two things:

1. What happens to the return if he and Mrs. Perfect had in fact split up on September 1? (She stayed in Mexico)
2. Your receptionist's phone number

Given that they have a Schedule A, what are the Schedule A issues?

What are the dependency issues?

He wants to review the Married Filing Separate issues and a simple 50/50 on the Schedule A reveals that she would owe a lot of money but he would get a refund. Do you need to do anything with the Schedule A?

What do you say to:

A. Mr. Perfect

B. Mrs. Perfect

C. The receptionist

Case #3: Mr. Happy Ain't Smilin' No More

You love Mr. Happy. He is a great client. He is a retired person, cancer survivor, widower; he works for the local food pantry for the homeless, donates blood, always has a smile on his face and is an all-around swell guy. You wish your sister would date this guy (so she stops barging in for free meals) however he owes back income taxes of approximately $100,000 that his wife "left" him from her old sole proprietor business. He has been denied Innocent Spouse. You never thought he got a fair shake on anything that has happened to him so far in this case. He has nothing. He does have a local Revenue Officer who wants the 433-A on Tuesday.

You will do an IRS Offer in Compromise for him. However, as you are filling in the IRS Form 433-A, Collection Information Statement for Individuals, and going through the required 3 months of documentation you discover an interesting item in one of his bank statements. In your discussion with him, you ask him why his bank statement, period ending 5/31/2X, you discover a $160,000 deposit on 5/9/2X and an $80,000 withdrawal out of the account on 5/10/2X and another $80k withdrawal the next day.

Case #3 (con't)

He tells you that he really, really needs this money. It is all he has left. The money was from the sale of his recently deceased brother's Florida house in April 202X. The house was deeded to him many years ago, but during the heated discussions with his brother's two children he simply did not want to bring legal action against his brother's survivors. He in no way shape or form would want to sue his nephew or niece over it. He agreed to split the equity in the house so that he would not need to bring a lawyer into the situation. Additionally, since the kids had no money whatsoever he was required to dump about $20,000 to repair the house and pay property taxes prior to sale; although we have no idea where he got that money.

You inquire of him as to the disposition of the $80,000. His answer, "Well I paid my sister back the money she lent me to pay my medical bills when I had cancer. I do have about $40,000 left."

"Where is it?"

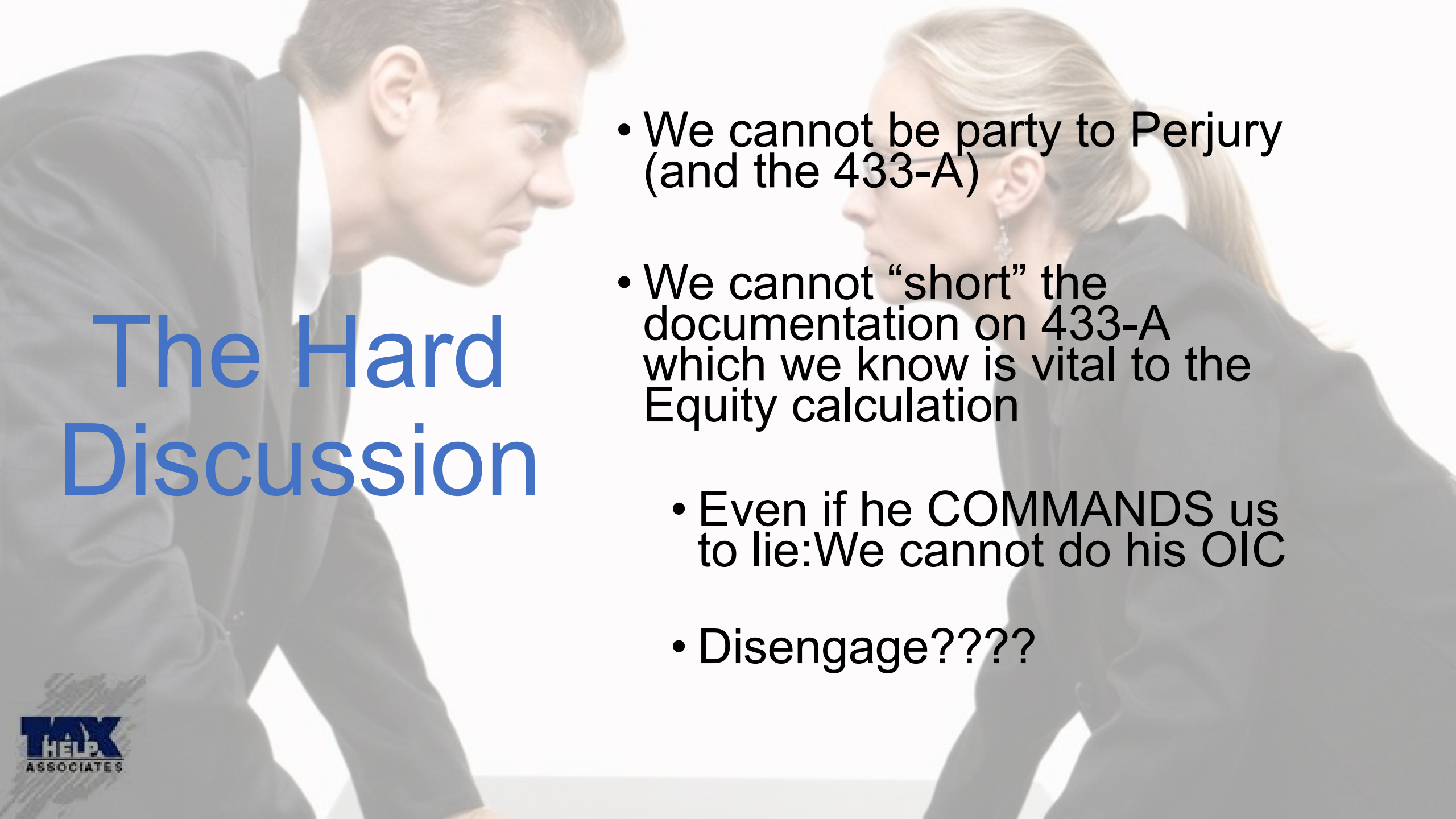
"At home."

After about 10 minutes of him waving his hands in front of you and asking why you have that stunned look on your face you tell him that you really need some time to think about this given that he was coming to your office to sign the Form 433-A OIC so that it could be given to the Revenue Officer in the next couple business days.

Do you give the IRS the required 3 months of bank statements?

How do you prepare the Form 433-A OIC section which requests an answer to "In the past 10 years, have any assets been transferred by the individual for less than full value?"

What do you tell him?



The Hard Discussion

- We cannot be party to Perjury (and the 433-A)
- We cannot “short” the documentation on 433-A which we know is vital to the Equity calculation
  - Even if he COMMANDS us to lie:We cannot do his OIC
  - Disengage????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Questions?

Thank You

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