



48th Annual Meeting

Best Practices in Handling Audits and Appeals

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LEARNING OUTCOMES

- Apply effective strategies to maximize results and minimize costs
- Evaluate options at key decision points
- Gain perspective from multiple vantage points on audit and appeals process



AGENDA

- Preparing for audit
 - Audit-ready documentation
- Defending the audit
 - Developing and executing game plan
- Prosecuting protests and appeals
 - Maximizing opportunities to win



DISCLAIMER

- Personal opinions only
- Not professional advice
- Consult your advisor



POLLING QUESTION

Are you directly responsible for defending your company's SALT audits?

A. Yes

B. No



PREPARING FOR AUDIT

- Maintain contemporaneous, audit-ready documentation of positions
 - Factual and legal basis; *intent*
 - Supporting documentation
 - Individuals with knowledge
 - Memos from tax advisors
- Keep at least for SOL – even if no audit



PREPARING FOR AUDIT

- Leverage UTP/ASC 450 review process
- Tax returns/estimated payments
- Supporting workpapers
- Federal returns and RARs
- Pre-filing agreements/managed compliance agreements



PREPARING FOR AUDIT

- Don't wait for potential audit
- There is no substitute for preparation
- Burden of proof universally on taxpayer to substantiate positions
- Consider VDA/amnesty *before* audit notice
 - Compromise potential exposure



NEXUS QUESTIONNAIRES & LETTERS OF INQUIRY

- Determine response policy
 - Should company respond?
 - If so, who should respond on company's behalf?
- Potential for estimated assessment if no response



POLLING QUESTION

My company's policy on nexus questionnaires is:

- A. Consult our tax advisor and respond promptly
- B. Wait until after the response deadline to consult our tax advisor
- C. Throw them away unanswered
- D. Deny that we ever received it



AUDIT NOTICE

- Define “winning” and set goals up front
 - *E.g.*, Cost/benefit analysis; reserves
- Develop game plan to meet goals
 - Follow game plan at each step
- Marshal resources to implement game plan
 - Internal stakeholders
 - External advisors



AUDIT NOTICE

- Manage internal expectations
 - Under-promise/over-deliver
 - Communication is key



AUDIT NOTICE

- Assign point person
 - Control access to and flow of information
- Confirm statute of limitations
- Know your rights
 - Taxpayer Bill of Rights



AUDIT NOTICE

- Prior to initial conference with auditor:
 - Gather requested documents or reasonable substitute
 - Analyze returns' strengths and weaknesses
 - Hot button audit issues
 - Gray areas



AUDIT NOTICE

- Prior to initial conference with auditor:
 - Consider how DOR defines a “win”
 - Reconnaissance on auditor/issues
 - COST/industry members
 - Review past audits/filing history
 - Review reserve implications



POLLING QUESTION

My company consults with other COST/industry members on audit issues:

- A. Routinely
- B. Occasionally
- C. Rarely
- D. Never



AUDIT NOTICE

- Prior to initial conference with auditor:
 - Every audit is a refund opportunity
 - Parse returns and positions
 - Prepare/file protective refund claims
 - Determine why selected for audit



INITIAL CONFERENCE

- Establish rapport/earn trust
 - Professional and cordial demeanor
 - Chain of command vs. going to the top
- Establish logistics
 - Timing and location
 - Audit method
 - Data transfer methods



INITIAL CONFERENCE

- Establish ground rules for mutual accountability
 - Controlled timelines
 - Controlled access to and flow of information – people and documents
 - Written confirmation of communications – requests and responses



INITIAL CONFERENCE

- Establish ground rules
 - Requests for information
 - To point person only
 - In writing and response timeframe
 - Notice of auditor requests to third parties



INFORMATION REQUESTS

- Review prior to responding
 - Internal counsel/external advisor review
 - Understand ramifications of information
 - Provide information requested or an acceptable substitute



INFORMATION REQUESTS

- Protect attorney/accountant-client privileged and work product matters
 - Do not disclose or waive
 - Seek determination from counsel
 - *Kovel* letters
- Inability to rely on information withheld in audit process? (*UPS – NJ 2013*)



FIELD WORK

- Regular communication with auditor
- Document conversations/verbal agreements/timelines
- Keep auditor on task, factually focused
- Identify disagreements and develop supporting documentation
 - Seek technical advice before assessed
- Maintain records provided to auditor



SAMPLING

- Method? – block, statistical, etc.
- How will projection be used?
 - Forecast potential results
- Sign agreement?
 - Effect on ability to later challenge sample
 - Outliers
 - Offsets



WITNESS INTERVIEWS

- Tax advisor/counsel should
 - Pre-select witnesses (who may need to later testify if matter is litigated)
 - Be present and take lead



UNREASONABLE AUDITORS

- Bad behavior/inappropriate conduct
 - Don't respond in kind – focus on your goals
 - Escalate to supervisor/manager
 - Escalate to taxpayer rights advocate
 - Request audit reassignment
 - Request audit report and proceed to next level



UNREASONABLE AUDITORS

- Excessive demands for documentation
 - Document requests/responses
 - Limit scope as reasonably necessary
- Failure to timely respond or excess delays
 - Follow-up in writing (maintain a record/log)
 - Reduction of interest considerations
 - Elevate to audit supervisor



STATUTE WAIVERS

- Pros
 - Build goodwill with auditor?
 - Reduce penalties?
 - Avoid estimated assessment
 - Opportunity to organize documents/information
 - Opportunity to organize team/involve tax advisor



STATUTE WAIVERS

- Cons
 - Extends audit/creates gap period
 - Additional issues may be raised
 - Further internal/external time/costs expended
 - Reserves may need to be maintained
 - Continued uncertainty for company



STATUTE WAIVERS

- Other considerations
 - Company policy
 - Exceptions
 - Request due to auditor's delay?
 - Reduce length of extension
 - Impact on interest exposure/credit



POLLING QUESTION

My company's policy on statute waivers is to grant them:

- A. Routinely
- B. Never
- C. Only for good cause
- D. Only if the delay is on our end (e.g., scheduling multiple audits)



WORKPAPER REVIEW

- Analyze for errors, consistent with company's goals
 - Pick your battles
 - Give auditor “victories”?
- Typically easier (and less costly) to remove issues at audit level than appeal level



WORKPAPER REVIEW

- Consider State/IRS Information Sharing
 - Duty to disclose filing positions in other states?
 - Duty to maintain consistent filing position among states?
 - *E.g.*, business/nonbusiness income – *Oracle* (Or. 2010)



AUDIT NEGOTIATION

- Understand DOR levels of authority to settle issues
 - Auditor/Manager
 - Audit Division
 - Legal Counsel/Commissioner
- Resolve at earliest possible time/
lowest possible level within DOR



INFORMAL PROTESTS

- Must be timely filed - typically within 30-60 days of assessment notice
 - Absent a timely protest, assessment becomes final by operation of law
- Consider payment and timely refund claim
- Must exhaust administrative remedies
 - Otherwise, refund *may* be only option



INFORMAL PROTESTS

- Determine who will handle protest consistent with goals
 - Internal tax department or counsel or external tax advisor
- Communicate with key internal stakeholders
 - Re-examine reserve implications



INFORMAL PROTESTS

- Style and Form
 - If timing short, file bare-bones protest and follow-up with supporting memorandum
 - Reserve right to add facts, issues and arguments prior to final determination
 - In some states, must raise issues prior to final determination or waive



INFORMAL PROTESTS

- Style and Form
 - Straightforward facts and arguments
 - Persuasive – best first impression
 - Raise hazards of litigation?
 - Raise policy considerations?
 - Raise compromise request?



INFORMAL PROTESTS

- Protest Conference
 - Request in writing
 - In-person typically more effective
 - Usually informal and not on record
 - Taxpayer presence changes dynamics
 - Thorough preparation is necessary
 - Have settlement parameters



INFORMAL PROTESTS

- Settlement considerations
 - Hazards of litigation
 - Interest accrual
 - Abatement of penalties
 - Trading issues (or years)
 - Precedential effect on subsequent years
 - Risk of publicity if litigated



INFORMAL PROTESTS

- Settlement considerations
 - Know DOR's settlement authority
 - Does State typically settle this issue?
 - What revenue at stake for State
 - Financial climate of State
 - Policy/political considerations
 - Industry impact if litigated



INFORMAL PROTESTS

- Settlement agreements
 - Specificity: periods and taxes covered (not limited to particular assessment)
 - Confidentiality/NDA: permit disclosure to outside accountants, etc., but limit information-sharing
 - Address impact on subsequent years
 - Address refund claims
 - Resolve all potential exposure (tax, interest, penalties, fees, and costs)



BOARD OF TAX APPEALS

- Jurisdictional requirements (timing, filing office) are critical
 - Issue specification in notice of appeal
 - Notice of appeal may need to be filed by attorney authorized to practice in jurisdiction –*Marena 4142, Inc.* (OH BTA 2017)
 - Pay-to-play (taxpayer may be required to pay assessment, post bond or prove financial security prior to filing)



BOARD OF TAX APPEALS

- Independent administrative tribunal in some states (*e.g.*, AL, GA, IL, KY, OH)
- Review may be either *de novo* or based on record developed before DOR
- Board may not have jurisdiction over constitutional issues
- Although less formal than court, must treat as litigation and adhere to local rules
- Burden of proof universally on taxpayer



APPEAL TO COURT

- Timely file appeal (e.g., 30 days in most states)
- Appeal may be to Circuit/District Court or Appellate Court (prior to 10/1/17, directly to OH Supreme Court from BTA)
- Determine whether appeal must be filed at both Court and BTA level prior to expiration of filing deadline



APPEAL TO COURT

- Litigation Preparation
 - Assemble team and counsel
 - Tax counsel may involve litigator/appellate specialist
 - Be litigation-ready: records, arguments and potential witnesses should already be well-established and thought out based on steps above (unless appellate proceeding only)



QUESTIONS





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