

THE INCOMPETENT AUTHORITY: QUESTIONS AND ANSWERS

Documents, Conflicts, and Just Getting Started

By **Andy Howlett**, Miller & Chevalier, Washington, DC; **Guinevere Moore**, Johnson Moore LLP, Chicago, IL; and **Andrew Strelka**, Latham & Watkins LLP, Washington, DC

Editor's Note: This is to introduce a new feature for *ABA Tax Times*, *The Incompetent Authority: Questions and Answers*, to provide some useful responses to your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions. If we don't know the answer, we know who to ask. And we hope to offer the answer with a touch of humor. Of course, the standard disclaimer applies: this column does not dispense individualized tax advice, but merely presents the considered views of the writers about tax topics of general interest to the readers.

Andy Howlett is a member at the law firm of [Miller & Chevalier](#) in Washington D.C. He focuses his practice on tax planning and helps his clients understand and plan for the federal tax consequences of a wide range of transaction. He is married with two children, all of which made sense from a tax perspective at the time.

Guinevere Moore is a tax controversy and litigation partner with [Johnson Moore LLP](#) in Chicago. She's worked at big shops (both accounting and law firms) but has found true tax bliss at her four lawyer firm. She is married with four children, all of whom are still young enough to want to spend time with her. Her favorite section of the Internal Revenue Code is § 7430. Obviously.

Andrew Strelka is counsel at [Latham & Watkins LLP](#). He has worked for the IRS, the D.C. U.S. Attorney's Office, the Department of Justice Tax Division, and the White House Counsel's Office, and can therefore speak authoritatively on the varying definitions of what constitutes "business casual attire" in D.C.

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Dear Incompetent Authority,

When you're working with clients who have been pulled for audit that had been working with tax preparers, are there any common mistakes that you see preparers or other advisors make that result in issues with the IRS or other taxing agencies?

– *Wants to Get It Right*

Dear Wants to Get It Right,

This is such a great question! Everyone makes mistakes, but some of the most common mistakes we see in audits are completely preventable. We don't have room for all of our exam representation tips here, but here are some big ones.

Information Document Request (IDR) Responses

We were going to make a rule prohibiting abbreviations in parentheses in this column, but let's face it. As tax lawyers we can't resist. So let's embrace it and move on. There are a lot of ways to respond to IDRs, and there's no "right way" to do it, per se. But there are a lot of wrong ways, including the following:

- Sending in IDR responses but not keeping a complete copy of what you send to the IRS, including documents produced, the letter attaching the documents, and proof of timely delivery to the IRS;
- Sending in IDR responses without actually reading the documents being produced;
- Sending in IDR responses without actually reading the documents being produced and not noticing that the documents contradict the position taken on the tax return;
- Sending in IDR responses without actually reading the documents being produced, not noticing that the documents contradict the position taken on the tax return and the position the practitioner is defending in the letter enclosing the IDR response;

(Are you sensing a pattern here?)

- Missing IDR Response deadlines;
- Not crafting an IDR response letter that shows that the taxpayer is complying with IRS requests for information, making it harder to argue that burden shifting under § 7491 applies if the case goes to trial;
- Failure to object to IDR questions that are objectionable;
- Allowing taxpayers to create documents in response to IDRs that didn't exist before the audit without thinking through the ramifications of doing so.

Not Recognizing Conflicts of Interest

We get it. It can be hard, really hard, to see that you have a conflict, let alone tell your client. But it will be much, much worse if you represent your client all the way through exam and appeals without considering whether you have a conflict if you are the return preparer, the estate planner, or the attorney who planned or implemented the transaction being questioned. So here's a quick reference guide for considering whether you have a conflict:

- You designed the estate plan and there's a potential for your client to pay additional tax and penalties, but the client would likely get out of penalties by raising reliance on professional advice as a defense;
- You prepared a tax return and now it is under exam and there's a chance the client will get out of penalties by raising reliance on professional advice as a defense;
- You represent two clients who have taken different positions on the same tax issue, both are under exam and both want to defend the position;

- You are no longer competent to represent the client and don't raise your hand and tell the client. Things we have seen:
 - There's a potential the case is going criminal and the long-time practitioner can't tell and doesn't take the right action;
 - The case is going criminal and the long-time practitioner can't tell and doesn't take the right action;
 - You feel in over your head but don't want to say so for fear of losing the client.

And this last one doesn't fit into either one of those categories but needs to be said. Do not ever produce your client for an interview without taking detailed notes. First consider carefully whether your client can be interviewed; if so, take detailed notes. There's nothing quite like the sinking feeling of taking over a case after learning the client has been interviewed and there are no notes from the meeting.

Want to see your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions answered by The Incompetent Authority? Readers may submit questions anonymously for a future The Incompetent Authority column through our [Submission Portal](#).

Dear Incompetent Authority,

A client has asked me about the tax consequences for a very specific kind of transaction, and I don't know where to start! Where do I start?

– Really Wants to Get It Right

Dear Really Wants to Get It Right,

Another great question. Have you tried googling it, er, I mean, running a targeted World Wide Web search on a site like Bing.com or Google.com?

In all seriousness, practitioners sometimes forget that internet search engines can be a great resource for a first level of review. Here, it's a good idea to utilize advanced search terms to isolate exactly what you're looking for (e.g., tax AND "horizontal double dummy"). This might yield a practitioner's slides or client alert on the subject, which will point you to the appropriate Code section and regulations, and in the right directions.

What if that doesn't work? The next bet is to check through any (searchable) treatise to which you might have access. If it's a common issue, there's a good chance that the relevant treatise at least covers the basics—again we're looking for a jumping off point, not the end-all answer you bring back to the client. Look for terms that describe the transaction as broadly as possible, e.g., "reverse merger" or "partial liquidation" and focus in from there.

Finally, don't neglect the possibility that a public entity has done something similar to what your client is contemplating. If so, it's likely that the entity described the tax treatment of their transaction in a document

filed with the Securities and Exchange Commission, such as a 10-K (the annual report) or an 8-K (a report for significant transactions and events). These forms are filed on [SEC EDGAR](#) (formally, “Securities and Exchange Commission Electronic Data Gathering, Analysis, and Retrieval”). While the search engine on the SEC’s website is only okay, some private companies (e.g., Bloomberg Law) allow for enhanced filtering based on a variety of criteria, including the type of transaction. As to what to search for, just think about how the company would describe its transaction to an investor (or, failing that, a grizzled securities lawyer).

Still stumped? Try showing up to an ABA Tax Section Meeting or event and asking there (though being careful not to reveal any client confidence). We’ve no doubt the answers you receive will be informative (and what’s more important) entertaining. ■