

Part 301

Section 7216.—Disclosure or Use of Information by Preparers of Returns

26 CFR: 301.7216-1: Penalty for disclosure or use of tax return information.
(Also § 6713; 301.7216-2.)

Rev. Rul. 2010-4

PURPOSE

This revenue ruling provides guidance on whether a tax return preparer is liable for criminal and civil penalties under Internal Revenue Code sections 7216 and 6713 when the tax return preparer discloses or uses tax return information under the circumstances described below.

ISSUES

(1) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the tax return preparer uses tax return information to contact taxpayers to inform them of changes in tax law that could affect the taxpayers' income tax liability reported in tax returns previously prepared or processed by the tax return preparer?

(2) Is a tax return preparer, who is lawfully engaged in the practice of law or accountancy, liable for penalties under sections 7216 and 6713 when the tax return preparer uses tax return information of taxpayers whose tax returns the tax return preparer has prepared or processed to determine which taxpayers' future income tax return filing obligations may be affected by a prospective change in tax rule or regulation and to contact the potentially affected taxpayers for whom B reasonably expects to provide accounting services in the next year to notify them of the changed rule or regulation, explain how the change may affect them, and advise them with regard to actions they may take in response to the change?

(3) Is a tax return preparer liable for penalties under sections 7216 and 6713 when the tax return preparer discloses tax return information contained in the list permitted to be maintained by the tax return preparer under section 301.7216-2(n) to a third-party service provider that creates, publishes, or distributes, by mail or e-mail, newsletters, bulletins, or similar communications to taxpayers whose tax returns the tax return preparers have prepared or processed containing tax information and general business and economic information or analysis for educational purposes or for purposes of soliciting additional tax return preparation services for the tax return preparer?

FACTS

Tax Return Preparers A, B, C, D, and E prepared individual and corporate income tax returns for 2008 and several other past years and expect to prepare 2009 income tax returns in the upcoming 2010 filing season.

Prompted by legislation passed by the Congress in 2009 authorizing net operating losses for 2008 to be carried back up to five years, Tax Return Preparer A reviews income tax returns and other tax return information of taxpayers whose income tax returns A has prepared or processed, even if A has not been engaged to prepare the taxpayers' most recent returns, in order to determine which taxpayer clients may be able to benefit from the expanded carryback rules. Following this review, A contacts the affected taxpayers to inform them of the change, advise them with regard to whether an amended return or returns can be filed for years affected by the change, and offer A's tax return preparation services with regard to preparing and filing the amended returns. A then prepares and files amended returns for some of the taxpayers.

Also in 2009, the Internal Revenue Service issues a temporary regulation interpreting the manner that a tax credit is to be calculated in future tax years. Tax Return Preparer B, who is lawfully engaged in the practice of accountancy, is prompted by this temporary regulation to review the income tax returns of the taxpayers whose tax returns B has prepared or processed, even if B has not been engaged to prepare the taxpayers' most recent returns, to determine who among B's clients may be affected by the revised credit calculation for tax year 2009. Following this review, B contacts these taxpayers to notify them of the change, explain how it may affect them, and suggest actions that the taxpayers may take to properly report the credit on their 2009 returns. B only contacts those taxpayers for whom B reasonably expects to provide accounting services with respect to the 2009 tax year, including taxpayers for whom B prepared an income tax return in previous years and who have not specifically informed B that they

do not wish to be contacted by B or will not be using B's income tax return preparation services in the upcoming filing season.

Tax Return Preparer C engages Third-party Service Provider X to publish both paper and electronic monthly newsletters containing educational tax information, tax tips, tax law updates, and direct solicitation for C's tax return preparation business. C discloses to X the names and mailing addresses of taxpayers whose tax returns C has prepared or processed who have not provided C with an email address, and X prints those addresses onto the paper newsletters it publishes for C. X provides C with the completed newsletters in paper and electronic format, and C then distributes them to C's tax return preparation clients, using a list that contains the tax return information authorized by § 301.7216-2(n), including taxpayer names, addresses and e-mail addresses.

Tax Return Preparer D has in the past periodically published and delivered to D's tax return preparation clients newsletters containing general educational tax information, tax tips, tax law updates, and direct solicitations for D's tax return preparation business. Due to growth experienced by D's tax return preparation business, D begins to outsource all aspects of this client communication activity to Third-party Service Provider X so that D may focus primarily on the business of tax return preparation. D discloses to X tax return information consisting solely of the names, addresses, and e-mail addresses of taxpayers whose income tax returns D has prepared or processed, and X then creates and distributes the newsletters to these taxpayers as directed by D.

Twice a month Tax Return Preparer E publishes her own newsletter containing general educational tax information, tax tips, tax law updates, and direct solicitations of E's tax return preparation business. After publication, E sends the newsletters to Third-Party Service Provider X, and X then distributes the newsletters to taxpayers whose income tax returns E has prepared or processed, as instructed by E. To allow X to distribute the newsletters, E provides X with the names, addresses, and e-mail addresses of E's tax return preparation clients.

Tax Return Preparers C, D, and E each have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed tax return information, and by following these procedures each concludes that X has sufficient data confidentiality procedures in place to protect the disclosed tax return information.

Third-party Service Provider X, located in the United States, is in the business of creating, publishing, and distributing newsletters, bulletins, advertisements, and similar communications. X does not provide substantive determinations or advice affecting the tax liability reported by taxpayers. X provides its services to tax professionals, including income tax return preparers. X creates, customizes, prints, and publishes newsletters containing general educational tax law updates it has aggregated from various sources, information on general filing requirements, general educational business or economic information and analysis, and tax compliance tips. X may also include in these communications any specific updates or solicitations submitted by its tax professional

clients. X will also distribute these communications to taxpayers by mail or e-mail as directed by its clients.

LAW

Section 7216(a) establishes a criminal penalty that is applicable to tax return preparers who knowingly or recklessly disclose or use any information furnished to them for, or in connection with, the preparation of income tax returns for any purpose other than to prepare, or assist in preparing, any such returns.

Section 7216(b)(3) establishes an exception to the penalty for disclosures or uses of information which are permitted by regulations prescribed by the Secretary.

Section 6713(a) establishes a civil penalty that is applicable to tax return preparers who disclose or use any information furnished to them for, or in connection with, the preparation of tax returns for any purpose other than to prepare, or assist in preparing, any such returns.

Section 6713(b) provides that the rules of section 7216(b) shall apply for purposes of section 6713.

Section 301.7216-1(a) states that section 7216 imposes a criminal penalty for tax return preparers who “knowingly or recklessly disclose or use tax return information for a purpose other than preparing a tax return.”

Section 301.7216-1(b)(1) defines “tax return” as any return, or amended return, of income tax imposed by chapter 1 of the Internal Revenue Code.

Section 301.7216-1(b)(2)(i)(B) defines “tax return preparer” for purposes of section 7216 and the regulations thereunder as including “[a]ny person who is engaged

in the business of providing auxiliary services in connection with the preparation of tax returns....”

Section 301.7216-1(b)(2)(iii) provides that a person is engaged in the business of providing auxiliary services in connection with the preparation of tax returns if, in the course of the person’s business, the person holds himself out to tax return preparers or to taxpayers as a person who performs auxiliary services, whether or not providing the auxiliary services is the person’s sole business activity and whether or not the person charges a fee for the auxiliary services.

Section 301.7216-1(b)(3)(i) generally defines tax return information to mean “any information, including, but not limited to, a taxpayer’s name, address, or identifying number, which is furnished in any form or manner for, or in connection with, the preparation of a tax return of the taxpayer.”

Section 301.7216-2(d)(1) provides that a tax return preparer may disclose, without taxpayer consent, tax return information of a taxpayer to another tax return preparer located in the United States for the purpose of obtaining auxiliary services in connection with the preparation of any tax return, so long as the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers.

Section 301.7216-2(h)(1)(i) allows a tax return preparer who is lawfully engaged in the practice of law or accountancy to use tax return information for purposes of providing other legal or accounting services to the taxpayer consistent with applicable legal and ethical responsibilities.

Section 301.7216-2(n) allows a tax return preparer to compile and maintain a separate list containing certain information regarding taxpayers whose tax returns the tax return preparer has prepared or processed. This list may be used by the compiler solely to contact the taxpayers on the list for the purpose of providing tax information and general business or economic information or analysis for educational purposes, or soliciting additional tax return preparation services to such taxpayers. The list may not be used to solicit non-tax return preparation services to these taxpayers.

ANALYSIS

Issue 1. A change in the tax law that affects previously filed tax returns may require a tax return preparer to review taxpayer clients' income tax return information to determine which of those clients may be affected by the change. Taxpayers who engage a tax return preparer can reasonably expect that their tax return preparer will advise them regarding a change in tax law that affects them and whether the change supports the filing of amended returns or other actions by the taxpayer related to any affected returns. A tax return preparer who performs this type of review in response to a change in tax law will contact the affected taxpayers to advise the taxpayers about the change in tax law and on a course of action to be taken, and can use a variety of mechanisms to do so (including direct contact, newsletters, e-mail, and other forms of communication).

Section 7216 does not prohibit the use of tax return information when the use is for the purpose of preparing a "tax return," which is defined as "any return (or amended return) of income tax imposed by chapter 1 of the Internal Revenue Code." Section

301.7216-1(b)(1) specifically includes amended returns in the definition of tax return. Accordingly, A's use of client tax return information to identify affected taxpayers, inform them regarding the change in tax law, advise whether it would be appropriate for them to file amended income tax returns, and assist in the preparation and filing of any amended returns is permitted under section 7216, because those uses are for the purpose of preparing a tax return as defined in the regulations.

Issue 2. Section 301.7216-2(h)(1)(i) allows a tax return preparer who is lawfully engaged in the practice of law or accountancy to use tax return information "for the purpose of providing other legal or accounting services to the taxpayer," consistent with applicable legal and ethical responsibilities. "Other legal or accounting services" that are consistent with applicable legal or ethical responsibilities can include advice related to current and future income tax compliance. Taxpayers who engage a tax return preparer lawfully engaged in the practice of law or accountancy can reasonably expect that the tax return preparer will advise them regarding changes in tax rules and regulations that might affect a tax return being prepared or future income tax return filing obligations.

Accordingly, B, who is lawfully engaged in the practice of accountancy, may use tax return information of taxpayers whose tax returns B has prepared or processed, regardless of whether B prepared or processed the most recent tax returns for a taxpayer, to determine whether the taxpayers may be affected by the temporary regulations issued by the Internal Revenue Service, and to contact the potentially affected taxpayers in order to explain the regulations and to advise them regarding their

response to the regulations. B's use of tax return information is permitted by § 301.7216-2(h)(1)(i) because it is for the purpose of providing other accounting services to taxpayers. B does not, however, use the tax return information of those taxpayers who have specifically informed B that they do not wish to be contacted by B or will not be using B's income tax preparation services in the upcoming filing season.

Issue 3. Third-party service providers that create, publish, or distribute tax-focused newsletters, bulletins, or similar publication or communication services typically hold themselves out to tax return preparers and other tax professionals as persons who perform services that are auxiliary to tax return preparation. These service providers also may monitor current tax events and have access to a broad range of knowledgeable tax and business professionals; they are able to provide current and relevant information to a tax return preparer's clients while allowing the tax return preparer to focus on the business of tax return preparation.

X holds itself out as providing services that are auxiliary to tax return preparation. X's services are provided in connection with the preparation of tax returns by C, D, and E because the services are intended to offer additional tax information and tax preparation services to the preparers' clients. Section 301.7216-2(n) specifically allows a tax return preparer to offer such information and additional services to clients. Because it provides services in connection with the preparation of tax returns by C, D, and E, and because C, D, and E have procedures in place that are consistent with good business practices and designed to maintain the confidentiality of the disclosed tax return information and, by following these procedures, they concluded that X has

sufficient data confidentiality procedures in place, X qualifies as both an auxiliary service provider and a tax return preparer under § 301.7216-1(b)(2)(i)(B).

C, D, and E may disclose to an auxiliary service provider, without taxpayer consent, tax return information to the extent necessary to obtain auxiliary services in connection with the preparation of any tax return under § 301.7216-2(d)(1), provided the service provider is located in the United States and the services provided are not substantive determinations or advice affecting the tax liability reported by taxpayers. X is located in the United States and does not provide substantive determinations or advice affecting the tax liability reported by taxpayers. As directed by C, D, and E, X may use the names and mailing or e-mail addresses disclosed to it to contact the taxpayers for the purpose of creating, publishing, or distributing newsletters, or similar bulletins or communications, containing tax information and general business or economic information and analysis for educational purposes. The newsletters may include tax law developments, information on filing requirements, and tax compliance tips, together with solicitations for additional tax return preparation services by C, D, or E, under § 301.7216-2(n). The disclosure to X does not constitute a transfer under § 301.7216-2(n) but rather a disclosure to an auxiliary service provider pursuant to § 301.7216-2(d)(1). X, however, is prohibited from the further use or disclosure of the tax return information provided to it by C, D, and E for purposes other than those related to the provision of the auxiliary services provided to C, D and E or as otherwise expressly permitted under sections 7216 and 6713.

HOLDINGS

(1) Tax Return Preparer A is not liable for penalties under sections 7216 and 6713 when A uses tax return information to contact taxpayer to inform them of a change in tax law that could affect the income tax liability on the taxpayers' returns that were previously prepared or processed by A.

(2) Tax Return Preparer B, who is lawfully engaged in the practice of accountancy, is not liable for penalties under sections 7216 and 6713 when B uses tax return information of taxpayers whose tax returns B has prepared or processed to determine who might be affected by the temporary regulation and to contact the potentially affected taxpayers for whom B reasonably expects to provide accounting services in the next year to notify them of the changed regulation, explain how the change may affect them, and advise them with regard to actions they may take in response to the change .

(3) Tax Return Preparers C, D, and E are not liable for penalties under sections 7216 and 6713 when they disclose tax return information limited to the information listed in § 301.7216-2(n) to Third-party Service Provider X, which holds itself out as providing services that include creation, publication, and distribution of newsletters, bulletins, or similar communications to taxpayers whose tax returns the tax return preparers have prepared or processed containing tax information and general business and economic information or analysis for educational purposes or for purposes of soliciting additional tax return preparation services for the tax return preparer.

DRAFTING INFORMATION

The principal author of this revenue ruling is Molly K. Donnelly of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Ms. Donnelly at (202) 622-4940 (not a toll-free call).