

## Tax Practice: Hawkins Says OPR Will Scrutinize Court Rulings for Clues on Practitioner Behavior

*By Alison Bennett*

DENVER—The Internal Revenue Service Office of Professional Responsibility carefully reviews tax rulings by the courts to see if there are issues that might implicate tax advisers, OPR Director Karen Hawkins said Oct. 21.

“I read a lot of [U.S.] Tax Court opinions,” Hawkins said at the fall meeting of the American Bar Association Section of Taxation. Regardless of the outcome of the case, Hawkins said, she checks for indicators of the behavior of advisers, such as whether the court said they received fees out of proportion with the transaction.

Her remarks came in the context of a discussion on a broad range of issues surrounding tax opinions, including the Tax Court's controversial decision in *Canal Corp. v. Commissioner*.

Canal Ruling Described.

In that case, the court ruled that the formation of a joint venture between a subsidiary of Chesapeake Corp. (now known as Canal Corp.) and Georgia Pacific (GP), an unrelated third party, was actually a disguised sale under tax code Section 707(a)(2)(B) ([Canal Corp. v. Commissioner, 135 T.C. No. 9 \(2010\); 150 DTR K-3, 8/6/10](#)).

One point the court noted was the size of the fee received by the tax adviser to the transaction.

Speaking to the tax section's Real Estate Committee, Hawkins said, “When I have a judge make a footnote that there is an ‘unconscionable fee,’ it gets my attention.”

She noted that she takes a similar approach in cases in process inside IRS. For example, she said, when the Appeals function recognizes a “reasonable cause” defense and abates a penalty based on reliance on an adviser, OPR will look at the adviser for competence and correct analysis of the case.

Underlying Issues, Behavior Seen Key.

“I'm looking for underlying issues and behavior,” Hawkins said. “My focus is on fitness to practice.”

Also speaking on the panel was Matthew Cooper, a senior technical reviewer in the IRS Office of Chief Counsel (Procedure & Administration). He said IRS continues to have an open project on Sections 10.35 and 10.37 under Circular

230, which governs the conduct of those who practice before the Internal Revenue Service.

He also said the agency is working on guidance to address “a huge amount of changes” to the accuracy-related penalty under tax code Section 6662 in the past few years.

Hawkins told practitioners that Section 10.35 should be the least of their worries, however, noting that in two and a half years IRS has not seen a case brought under that section.

“You have many more things to worry about from me,” she said. Hawkins said advisers should be more concerned about Section 10.22, which requires that practitioners must ensure the accuracy of advice given to clients and information given to IRS.

Facts, Law Seen Critical.

“Don't open your mouth until you know the facts and the law,” Hawkins said, stressing that advisers must be aware of specific facts and should not rely on a set of generic facts to make their representations.

For a taxpayer to say they are going to rely on a long-standing adviser is not enough, Hawkins said. “The adviser has to be competent.

The panel was moderated by Michael Desmond, Bingham McCutchen LLP, Washington, D.C. Richard Lipton, Baker & McKenzie LLP, Chicago, discussed the *Canal* case.