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CTMonica

MEMORANDUM FOR JOHN S. FOWLER
Chief, Office of Tax Crimes
(Criminal Investigation) OP:CI:O:T

FROM: Barry J. Finkelstein
Assistant Chief Counsel (Criminal Tax)

SUBJECT: Sharing of Client Lists and Other Pertinent Information in
Abusive Trust Investigations

This responds to your memorandum dated February 15, 2000 in which you requested advice regarding the sharing of client lists and other pertinent information with the Examination Division ("Exam") and/or other civil functions, where such information was obtained through administrative or grand jury investigations of abusive trust schemes.

QUESTIONS PRESENTED

1. In the context of an administrative or grand jury investigation of abusive trust schemes, when is it appropriate for the Criminal Investigation Division ("CI") to share client lists or other pertinent information with Exam or other civil functions?
2. Is it permissible in a grand jury investigation of abusive trust schemes for CI to release information to Exam or other civil functions where the information was received outside of the grand jury process, such as through a search warrant or confidential informant?
3. Is it permissible in a grand jury investigation of abusive trust schemes for CI to release information to Exam or other civil functions where the information was received prior to the commencement of the grand jury process?

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In order to properly and thoroughly answer these questions, a detailed analysis of Federal Rule of Criminal Procedure 6(e) is required.¹ Therefore, we are attaching for your review Litigation Guideline Memorandum CT-3: "Grand Jury Evidence - Matters Occurring Before The Grand Jury" (the "LGM"). This document was originally prepared by our office in September, 1994, and remains today an accurate reflection of the state of the law concerning Rule 6(e) and its applicability. Initially designed to provide internal guidance to Counsel attorneys, the LGM has since been released in full to the public and our disclosure of it to you does not violate any internal Service confidentiality prohibitions. In the following discussion, we will attempt to provide brief, specific answers to your questions, accompanied with citations to the LGM, where a more in depth, detailed answer can be found.

DISCUSSION

Question 1:

A. In a purely administrative criminal investigation conducted by CI, information such as client lists may be shared with Exam and/or other civil functions.² Upon obtaining a client list, CI should review the list and determine if any of the individuals should be pursued criminally. The remaining names on the list may then be shared with Exam for civil purposes. If this occurs, CI must be extremely cautious to not use Exam, or agents thereof, as investigatory tools in any impending criminal investigation. See, United States v. Tweel, 550 F.2d 297 (5th Cir. 1977). Should Exam later determine there are firm indications of fraud with respect to any of the clients on the list, Exam should then refer those cases to CI.

¹ Federal Rule of Criminal Procedure 6(e)(2) provides for the secrecy of grand jury proceedings as follows:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

² Indeed, the recent report of the abusive trust task force, impaneled in March, 1999 to deal with civil and criminal issues in abusive trust cases, encourages the sharing of information between CI and Exam in non-grand jury investigations.

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B. In the case of a grand jury investigation, Rule 6(e) severely limits the exchange or sharing of information derived from that grand jury investigation. Briefly stated, absent a court order, Rule 6(e) prohibits the disclosure of "matters occurring before the grand jury" and further provides that knowing violations are punishable as "contempt of court." When determining what constitutes "matters occurring before the grand jury" and, therefore, the implication of Rule 6(e), the standard to follow is whether the disclosure of the particular evidence would reveal the content of the grand jury proceedings, the strategy or direction of the grand jury, the identity of grand jury witnesses or the substance of their testimony. A positive answer with respect to any of these questions prohibits disclosure of the information. Because the proper determination of these issues will most likely depend on the facts of each individual case, we are unable to provide a blanket statement or definitive answer as to when client lists obtained in a grand jury investigation may be shared with Exam and/or other civil functions.

For a more detailed discussion of what constitutes "matters occurring before the grand jury," please see the LGM at pgs. 3-11; and pg. 17, "After A Grand Jury Convenes."

Question 2:

Generally speaking, evidence obtained by a truly independent source which does not reveal the inner workings of the grand jury may be used for civil purposes. Moreover, evidence obtained during the course of a grand jury investigation, without use of grand jury process, without any disclosure as to the existence of a grand jury, and which was not presented to the grand jury, does not invoke Rule 6(e). For example, the Fourth Circuit has held that grand jury secrecy requirements were not violated when an Internal Revenue Service special agent made available to IRS civil agents materials obtained from criminal investigation targets through search warrants, even though the warrants were obtained and executed during the pendency of a grand jury investigation. See, In re Grand Jury Subpoena, 920 F.2d 235 (4th Cir. 1990).³

For a more detailed discussion, please see the LGM at pg. 16, "Independently Obtained Evidence."

³ Significantly, the affidavit supporting the search warrant application was based on information provided to CI by a confidential informant. This is an example of evidence obtained from an independent source during the grand jury process which was then shared with Exam for civil compliance purposes.

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Question 3:

Evidence gathered prior to a grand jury referral, which has been clearly identified and segregated, is not Rule 6(e) matter, even if the evidence is eventually presented to a grand jury. For example, books, records, documents, witness statements, special agents' reports, Counsel reports, Service fact sheets, and similar items which were obtained or prepared prior to referral do not constitute "matters occurring before the grand jury." See, Lombardo v. Commissioner, 99 T.C. 342 (1992) (client lists of attorney under investigation for preparing false tax returns, obtained by CI prior to grand jury referral and shared with Exam, held not to be "grand jury matter"). Of vital importance in this area is assurance that evidence in existence and obtained prior to the grand jury referral is segregated and indexed in order to establish it is not Rule 6(e) material. See, I.R.M. 9.5.2.4.3(2).

For further explanation, please see the LGM at pg. 14, "Matters Obtained Prior To Referral."

CONCLUSION

We understand CI's desire to formulate a system to release client lists and other pertinent information on abusive trust schemes to Exam and other civil functions in order to enhance the overall compliance effect. Hopefully, the above discussion combined with that found in the LGM will serve as a foundation to create such a system of sharing information in the future. However, it is critical to keep in mind there is no definitive, concrete answer as to what constitutes "matters occurring before the grand jury." As the LGM cautions, this is an issue the Supreme Court has not expressly addressed and is the subject of numerous and often conflicting court opinions. Therefore, every decision to release or share evidence gathered from abusive trust investigations must be made on a case by case basis. Moreover, in designing a system to share such information as client lists, we strongly urge that consultation with a Criminal Tax attorney become an integral part of the decision making process.

If you have any questions or comments, please feel free to contact Chris Monica of my staff on (202) 622-4470.

Attachment

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