

*Successfully Navigating the TCJA
Penalty Provisions take Aim at
Preparers*

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Refresher

- Enrolled Agents and those CPAs and Attorneys who choose to practice before IRS are held to multiple standards when they prepare tax returns
 - 31 C.F.R. Subtitle A, Part 10 aka Circular 230
 - Standards codified primarily in penalty statutes found in the Internal Revenue Code
 - Industry Professional Standards such as Codes of Conduct, AICPA's SSTS, and ABA's Model Rules

IRC Provisions apply to...

- “Tax return preparer” (as defined in IRC 7701(a)(36)(A) as) “any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title.”

Selected Circular 230 Provisions

- Diligence as to Accuracy (10.22)
- Due Diligence Standards – Returns/Docs (10.34)
- Competence (10.35)
- False and Misleading representations (10.51(a)(4))
- Aiding and Abetting (10.51(a)(7))

§10.22 Diligence as to Accuracy

- Must exercise Due Diligence in:
 - Preparing, approving and filing tax returns, documents, affidavits etc. relating to IRS matters
 - Determining correctness of oral/written representations made to the client or to Treasury personnel
- Reliance on Another's Work Product? With Reasonable Care

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§10.34(a) Standards for Tax Returns

- May not sign a tax return or advise a position on a tax return, willfully, recklessly, or through gross incompetence if:
 - Lacks reasonable basis
 - Unreasonable position (6694(a)(2))
 - Willful attempt to understate liability (6694(b)(2)(A))
 - Reckless, intentional disregard of rules and regulations (6694(b)(2)(B))
- Patterns matter

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§10.34(b) Standards for Documents and Other Papers


- May not advise taking Positions that are Frivolous
- May not advise Submissions:
 - to delay or impede tax administration
 - that are frivolous
 - containing or omitting information that demonstrates an intentional disregard of rules or regulations

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§10.35 Competence

- A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged


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Do potential penalties affect our level of diligence when preparing returns?

SEC. 6695 OTHER ASSESSABLE PENALTIES WITH RESPECT TO THE PREPARATION OF TAX RETURNS FOR OTHER PERSONS

6695(g) Failure to be diligent in determining eligibility for certain tax benefits.



- Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with due diligence requirements imposed by the Secretary by regulations with respect to determining --
 - (1) eligibility to file as a head of household (as defined in section 2(b)) on the return, or

6695(g) Failure to be diligent in determining eligibility for certain tax benefits.

- (2) eligibility for, or the amount of, the credit allowable by section 24, 25A(a)(1), or 32,
- [that's Child Tax Credit, American Opportunity Tax Credit, and Earned Income Credits]
- shall pay a penalty of \$500 for each such failure.
 - Section 6695(h) provides an inflation adjustment for the penalty

Form 8867 Department of the Treasury Internal Revenue Service	Paid Preparer's Due Diligence Checklist <i>Earned Income Credit (EIC), American Opportunity Tax Credit (AOTC), Child Tax Credit (CTC), and Additional Child Tax Credit (ACTC)</i> ▶ To be completed by preparer and filed with Form 1040, 1040A, 1040EZ, 1040NR, 1040SS, or 1040PR. ▶ Go to www.irs.gov/Form8867 for instructions and the latest information.	OMB No. 1545-1629 2017 Attachment Sequence No. 70
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Part V	Credit Eligibility Certification
▶ You have complied with all due diligence requirements with respect to the credits claimed on the return of the taxpayer identified above if you:	
A. Interview the taxpayer, ask adequate questions, document the taxpayer's responses on the return or in your notes, review adequate information to determine if the taxpayer is eligible to claim the credit(s) and in what amount(s);	
B. Complete this Form 8867 truthfully and accurately and complete the actions described in this checklist for all credits claimed;	
C. Submit Form 8867 in the manner required; and	
D. Keep all five of the following records for 3 years from the latest of the dates specified in the Form 8867 instructions under <i>Document Retention</i> .	
1. A copy of Form 8867,	
2. The applicable worksheet(s) or your own worksheet(s) for any credits claimed,	
3. Copies of any taxpayer documents you may have relied upon to determine eligibility for and the amount of the credit(s),	
4. A record of how, when, and from whom the information used to prepare this form and worksheet(s) was obtained, and	
5. A record of any additional questions you may have asked to determine eligibility for and amount of the credits, and the taxpayer's answers.	
▶ If you have not complied with all due diligence requirements for all credits claimed, you may have to pay a \$510 penalty for each credit for which you have failed to comply.	
12	Do you certify that all of the answers on this Form 8867 are, to the best of your knowledge, true, correct, and complete?
	<input type="checkbox"/> Yes <input type="checkbox"/> No

Form 8867 (2017)

IRC 6694(a) - Understatement due to unreasonable positions

- *If a tax return preparer*
 - *(1) prepares a return or claim for refund with an understatement of liability due to an “unreasonable position” and*
 - *(2) knew (or should have known) of the position, then the preparer shall pay a penalty*

Unreasonable Positions are ones for which there is no substantial authority

- A “reasonable basis” standard applies if
- “the relevant facts affecting the item’s tax treatment are adequately disclosed in the return or in a statement attached to the return”
 - Disclosure per Rev. Proc. 2018-11
 - Disclosure on Form 8275

Getting to Reasonable...

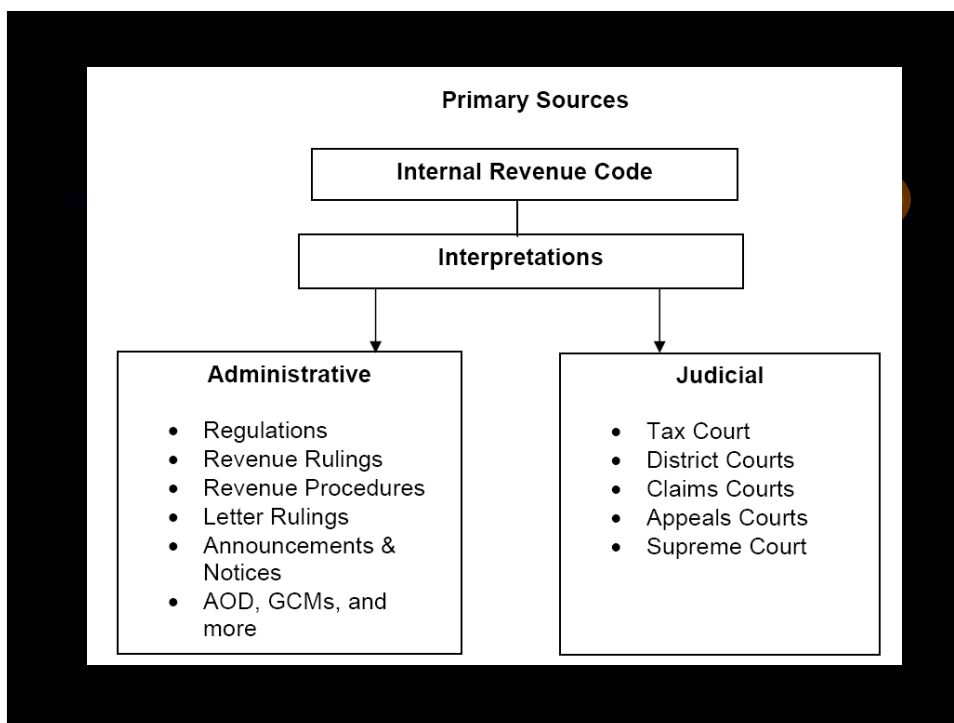
NOT REASONABLE

- Position involves a tax shelter
- Position was not disclosed and there was no substantial authority
- Position was disclosed, but there was no reasonable basis

WHAT'S REASONABLE?

STANDARDS

- More Likely Than Not...
- Substantial Authority
- Reasonable Basis with disclosure (more than arguable, relied upon in good faith)



The key to drawing conclusions...

- ...is understanding the significance of the documents you evaluate
- The primary authority for any tax position is the Internal Revenue Code. Various Judicial and Administrative resources interpret the Code, but each carries a different degree of authority
- “Commentary and Analysis” are not authority
- IRS publications and forms are not authority

TCJA & Sec. 6662 Imposition of accuracy-related penalty on underpayments

- (a) Imposition of penalty
- If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.
- For purposes of this section, there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of--
 - (i) 10 percent of the tax required to be shown on the return for the taxable year, or
 - (ii) \$5,000.

Problem Created by TCJA Change...

- 6662 (d)(1)(C) Special rule for taxpayers claiming section 199A deduction. -- In the case of any taxpayer who claims any deduction allowed under section 199A for the taxable year, subparagraph (A) shall be applied by substituting "5 percent" for "10 percent".

***HOW DO WE
TRAVERSE THIS
MINEFIELD IN THE
ABSENCE OF
GUIDANCE AS TO THE
INTRICACIES OF THE
NEW IRC 199A?***

