

Filing a Tax Whistleblower Submission to the IRS—Six Tips for Success

By Dean Zerbe

Dean Zerbe examines the six keys to filing a tax whistleblower submission to the IRS.



In working with the IRS on a number of whistleblower submissions, and talking and listening to senior IRS officials, it is clear that there are six keys to having the IRS give a hard consideration to your claim.

Clearly Identify the Tax Issue and Taxpayer

The IRS whistleblower office has continuously kicked out filings that they believe do not clearly identify the taxpayer and the tax issue. Do not leave any uncertainty of who is the taxpayer and what is the tax matter in question.

Current Issues

The IRS is going to be much more interested in a submission that is dealing with a tax matter in open tax years. For a big corporation, this can often be back seven to eight years, but for an individual or a small or medium company it may be more likely three years from the date the return was filed. A plus if the issue is ongoing—*e.g.*, it started seven years ago and is continuing through to today.

So if your story starts with—“In 1999 ...”—not a good place to be in general.

Why is that? The IRS would have to open up a tax year that has been closed in some cases (particularly a big company audit) and in other cases have to look to prove fraud or that there was a significant misstatement of taxes. These are high hurdles for the IRS to clear—and they have plenty of other fish-to-fry. It is not to say if you’ve got chapter and verse on tax fraud from six years ago it’s not worth submitting, but you better have a lot else going for you (*see below*). The one exception to this rule would be if the statute has remained open—as in the case of offshore accounts that have not been reported and taxpayers who have never filed.

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Real Dollars

While the threshold is \$2 million for the 7623(b) mandatory award program—the IRS has to prioritize and a credible whistleblower coming in with a discussion about tax evasion at a major company involving big dollars—tens or hundreds of millions or even billions is going to get a stronger look. Related to that—is that the tax dollars are collectible—is this company solvent? Paying taxes (paying taxes in near future)?

However, that said, if it is a case involving an individual and the dollars involved are worth of \$2 million dollars—it will likely move to the top of the IRS SBSE workload.

Documents

Who doesn't love documents? The IRS sure does. It's one thing to say "Jimmy's got a Swiss bank account." It's another thing to say—"Here's Jimmy's account statement from UBS." Having good documents that support your statements is of great help—(and a related point—organizing the documents so the IRS can understand what-is-what is equally important). While the IRS doesn't expect you to have A-Z on the documents (although that is certainly nice)—having enough documents to show some of the fire as well as the smoke is a good place to be. If you don't have documents (or great documents) having supporting witnesses and names of participants and promoters can be critical to catching the IRS' attention. Also—come with your best party dress—include your best documents in the initial filing—don't hold back imagining that the IRS will come calling and then you will provide the internal company email that says "I know it's illegal, but what are the chances the IRS will ever figure it out"

One issue on documents—attorney-client privilege. The IRS is wary of any documents that may be subject to attorney-client privilege. It is a good idea to provide an explanatory note of the providence of the documents and why the documents are not subject to taint.

Knowledge/Creditability

In general, the IRS is going to be in a happier place if the whistleblower is viewed as someone with good information, understands the issues and is well-placed. While the whistleblower doesn't necessarily have to be an insider (although that's great) the whistleblower needs to be seen as credible. Part-in-parcel, it can be helpful to have a submission that reflects also an understanding of the tax laws at issue—applying the facts to the law.

Don't be speculative—or an arm-chair analysis—"my review of the cotton industry and its public filing suggest that there may be a matter"

I find it helpful to think about it that the IRS has limited manpower—and you are asking the IRS to launch a thousand ships (ok, one ship)—so you have to give the IRS confidence that the whistleblower know what they are talking about and it is worth the IRS' time to look at the matter further.

Bad Actors/Industries

While not as important as the other factors, I do see that the IRS has stronger interests in some areas (*e.g.*, offshore banks and accounts) than others. In particular, the IRS sharpens its pencils when the whistleblower highlights that there are potential bad actors—knowing violations or disregard the tax laws. You want to identify all the actors involved—the CPAs; lawyers; financial advisors that are aiding and abetting in the improper activity—if possible, identifying who has access/control of documents; who are potential friendly witnesses, *etc.* Bottom line, put yourself in the IRS shoes—if you were them how would you go about examining this issue—what documents to get (where are those documents, who has control, what are they called; and, who should the IRS talk to (especially former employees who can support your claims))?

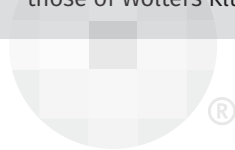
While these are rules of the road—it is important to bear in mind that the IRS is facing a tough time in its work—down from 107,000 employees to now roughly 87,000 employees in the last seven years. In addition, the IRS is saddled with a great deal of the Affordable Care Act (ACA), the new tax reform bill, increased filers, *etc.* In short, the world has changed at the IRS a great deal from 2006 when the whistleblower law was passed. I have found that, at times, it can be vital to bang the pots with IRS senior management to get their attention on a whistleblower submission.

Conclusion

The challenge you have is to write all this in an easy-to-understand manner that is not eye-watering in length—10 pages double-spaced is a good target (not including documents).

The IRS should be able to read it and say "I get it"—and at the same time anticipating possible defenses or counterarguments. Lastly, patience. While a recently-enacted law (thanks to Senators Grassley R-IA and Wyden D-OR) allows for improved communication between the IRS and the whistleblower—you still need to be prepared for years of waiting.

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