

**The 30th Annual Institute on Current Issues in
International Taxation:
Ethical Issues in International Tax Practice
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Introduction and Framework

- A. Introduction of Panel
- B. General approach to ethical issues in international tax practice
 - 1. What do the ABA Model Rules, State Bar Rules, AICPA Standards, Circular 230 and/or Standards of Ethical Conduct for Employees of the Executive Branch say about the issue?
 - 2. How should we handle issues that are not covered by these sources?
 - 3. If relevant in the context of the matter at issue, what do other countries do?

Facts for Hypotheticals 1 & 2

- Giganto Mining Company (“GMC”) is a global mining company organized under the laws of, and headquartered in, Singapore. GMC has affiliates in the US and Canada.
- GMC-US is being audited by IRS for 2012 and 2013. GMC-US’s Tax Director, Molly Gold, has engaged Pete Practitioner (an international tax lawyer at NYLAW LLP in New York) to handle the IRS audit.
- Pete files an IRS Form 2848 as the taxpayer representative.

Hypothetical 1

- The IRS has asked for substantiation of a \$1,000,000 deduction in 2012. The expense, which was booked as a “commission expense,” was incurred in connection with the sale of GMC-US’s leasing division. Pete’s team finds a one page “Broker Fee Agreement,” under which the seller agreed to pay a 1% commission on the \$100,000,000 sale price to a purported broker whose name Pete does not recognize. The Agreement states that funds will be wired to a numbered investment account at XYZ Bank in Luxembourg.
- Pete asks Molly if she knows what this is and she says no. He then asks the CFO for information and the CFO tells him, “Molly knows everything about that. Check with her.”
 - What steps may or must Pete take?
 - How should Pete respond to the IRS?

Hypothetical 1

Cites:

- Circular 230 sec. 10.22 (diligence as to accuracy), 10.29 (conflicting interests), 10.33 (best practices), 10.34 (standards re tax returns and documents)
- Model Rules 1.6 (confidentiality of information), 1.7 (conflict of interest), 1.13 (organization as client), 3.4 (fairness to opposing party and counsel), 4.1 (truthfulness in statements to others)

Hypothetical 2

- A number of US-based employees are enrolled in GMC's stock bonus plan. Share awards, which vest immediately, are reflected on the company's share register maintained in Singapore.
- Through a series of honest mistakes, GMC failed to properly account for and reflect on the employees' W-2s the awards from 2013 through 2016. Moreover, with all of the focus on foreign bank account reporting, it has just dawned on Molly that these accounts might be reportable on employees' FBARs.
- As Pete, Molly and Jean Louis, GMC-US's CFO, discuss the problem, Jean reminds Pete and Molly that he is a French citizen and US green card holder.

Hypothetical 2

Cites:

- Circular 230 sec. 10.21 (knowledge of client's omission), 10.29 (conflicting interests), 10.33 (best practices)
- Model Rules 1.7 (conflict of interest), 1.13 (organization as client)
- AICPA SSTS No. 6 (knowledge of error: return preparation and administrative proceedings)

Hypothetical 2: A Variation

- This comes to your attention just prior to the filing deadlines for W-2s for 2017, and it appears that the same share rewards were paid out in 2017.
- You are asked how the company should handle this in its current filings. There is not enough time to get the numbers right.
- Another variation . . . Jean-Louis, the CFO, comes to you and asks if he has a problem.

Hypothetical 2: Variations

Cites:

- Circular 230 sec. 10.21 (knowledge of client's omission), 10.22 (diligence as to accuracy), 10.29 (conflicting interests), 10.33 (best practices), 10.34 (standards re tax returns and documents)
- Model Rules 1.2(d) (scope of representation), 1.7 (conflict of interest)
- AICPA SSTS No. 1 (tax return positions), No. 4 (use of estimates), No. 6 (knowledge of error: return preparation and administrative proceedings)

Hypothetical 3: 7525 Protection

- (Honest) Abe is a tax practitioner at Accounting Firm. Abe is advising Bigco on the US federal income tax consequences of the sale by Bigco of its “X” business division.
- Bigco tells Abe it wants a written tax opinion but that the opinion *must* be protected by privilege.
 - Bigco asks if there is any risk that 7525 privilege will *not apply* because of the “promotion of a tax shelter” exception to 7525 (since Accounting Firm is assisting in getting the transaction done).
- Honest Abe tells Bigco that there is **no chance** the “promotion of a tax shelter” exception would apply because the case law is consistent about applying that exception only if the 7525 advisor is actively encouraging the taxpayer to enter into the transaction.

Hypothetical 3: 7525 Protection

- Is there anything else that Honest Abe should be telling Bigco about limits on the 7525 privilege?
- Is it possible that 7525 does not apply to written advice given outside of the scope of an IRS proceeding?
- Let's look at the text of 7525.

IRC Section 7525

“With respect to **tax advice**, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any **federally authorized tax practitioner** to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.”

(A): ““**federally authorized tax practitioner**” means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under 31 USC 330.”

(B): ““tax advice” means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A).”

31 USC 330: “the Secretary of the Treasury may . . . regulate the practice of representatives of persons before the Department of the Treasury”.

Regulations under 31 USC 330 (“Circular 230”)

§10.2 (a)(4) “*Practice before the Internal Revenue Service*” comprehends all matters connected with a presentation to the [IRS] relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the IRS. Such presentations include, but are not limited to,

- preparing documents;
- filing documents;
- corresponding and communicating with the IRS;
- rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and
- representing a client at conferences, hearings, and meetings.”

More Circular 230

§10.3 Who may practice.

“(b) *Certified public accountants.* Any CPA . . . may practice before the IRS by filing with the IRS a written declaration that the CPA is currently qualified as a CPA and is authorized to represent the party or parties.

- “Notwithstanding the preceding sentence, CPAs who are not currently under suspension or disbarment from practice before the IRS are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the IRS.”

Circ. 230 describes tax advice that is subject to Circ. 230

§ 10.37 Requirements for written advice.

(a)(1) “A practitioner may give written advice (including by means of electronic communication) concerning one or more **Federal tax matters** subject to [that advice meeting the requirements in 10.37(a)(2).]”

(a)(2) “The practitioner must— Base the written advice on reasonable factual and legal assumptions, Reasonably consider all relevant facts and circumstances, [etc].”

(d) ***Federal tax matter.*** Federal tax matter, as used in this section, is any matter concerning the application or interpretation of---

(1) A revenue provision as defined in IRC 6110(i)(1)(B);
(2) Any provision of law impacting a person’s obligations under the internal revenue laws and regulations, including but not limited to the person’s liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the IRS.

7525 “practice before the IRS” includes Abe’s tax opinion, right?

- Loving v. IRS, 742 F.3d 1013 (DC Cir 2014), and Ridgely v. Lew, 55 F. Supp. 3d 89 (DDC 2014):
 - 31 USC 330 “practice of representatives before the [IRS]” means the actions of a person who has authority to act on another’s behalf (i.e., a “representative”) during an actual interaction with the IRS (“practice ... before the IRS”).
 - It does *not include* preparing a tax return that will be provided to the IRS by the taxpayer.
- Sexton v. Hawkins (D. Nev. 03/17/2017)
 - And it also does not include rendering tax advice, notwithstanding that the IRS regulations in Circular 230 say that it does.

Some arguments against 7525 being limited in this way

- 7525 is referring to 31 USC 330 for purposes of limiting scope to advice on US federal taxes; it was not intended to limit scope to interfacing with the IRS.
 - This is why 7525 uses the term “tax advice.”
- 7525 explicitly contemplates that it covers tax opinions issued to taxpayers and which are not intended to be given to IRS.
 - “The privilege . . . shall not apply to any written communication which is . . . between a federally authorized tax practitioner and [any person] in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662(d)(2)(C)(ii)).”
- 31 USC 330(e) explicitly contemplates that Circular 230 will govern written tax advice, so courts are incorrect about limitations on scope of 31 USC 330.
 - “Nothing in this section or in any other provision of law shall be construed to limit the authority of the Secretary of the Treasury to impose standards applicable to the rendering of written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion.”

Hypothetical 4: Divided Loyalties

- You are preparing a written opinion for a client that discusses all the relevant case law. A colleague casually mentions that a now-retired partner wrote an opinion on a similar issue a few years back (shortly before he retired) for “Other Client.” Your associate retrieves the opinion issued to Other Client from your Firm’s document management system (computers are amazing) and you are dismayed to see that the prior opinion omitted discussing a number of “unhelpful” cases that might have changed the conclusion.
- What are your obligations?

Hypothetical 4

- Assume you gather your tax partners and spend three agonizing days trying to decide if the opinion would be issued with the same conclusion if the unhelpful authorities were taken into account.

At the end of the three days, a majority of you believe the answer is “yes”.

- Are you obligated to tell Other Client about this?
- Does the answer differ if the tax partner are unanimous that the answer is “yes”?
- Does the answer differ if you know for certain that the SOL on Other Client’s relevant return has closed?
- Does the answer differ if your Firm is no longer doing any work for Other Client?
- Does the answer differ if the retired partner tells you he knew all about the unhelpful authorities and that Other Client asked him to leave them out of the opinion?

Hypothetical 4

- Who is your client? The corporation? Your firm? Or your partner?
- Does it matter whether you formerly provided tax advice to the client? Does it matter that you actually reviewed the opinion for your now-departed senior partner?
- What must/should you tell the client?

Hypothetical 4

Cites:

- Model Rule 1.4 (communications), 1.6 (confidentiality of information), 1.7 (conflict of interest: current clients), 1.9 (duties to former clients), 1.10 (imputation of conflicts of interest)
- Circular 230 sec. 10.21 (knowledge of client's omission), 10.29 (conflicting interests), 10.33 (best practices), 10.37 (requirements for written advice)
- AICPA SSTS No. 6 (knowledge of error: return preparation and administrative proceedings), No. 7 (form and content of advice to taxpayers)

Hypothetical 5

- Christina Wagner is a German national who became a US citizen after marrying her American husband. Christina tells you that she is about to receive a \$20,000,000 gift from her father, a prominent businessman in Germany. The funds will be wired from a Swiss bank that participated in the DOJ program. The account is held in the name of a Liechtenstein foundation of which Christina is a purely discretionary beneficiary. She tells you that she has never received anything from the foundation.
- Christina has heard that she will have to file a Form 3520 upon receipt, and asks you whether there is anything else she needs to be worried about as far as the IRS is concerned.
- She also informs you that her father has suggested that his lawyers will set up a Delaware LLC to hold the funds for investment, but that Christina will have practical control of the funds.
- What are your ethical obligations?

Hypothetical 5

Cites:

- United States v. Pasquantino, 544 U.S. 349 (2005)
- 18 U.S.C. 1341, 1343, 1956/1957 (mail fraud, wire fraud, money laundering)
- Circular 230 sec. 10.22 (diligence as to accuracy), 10.33 (best practices)
- Model Rule 1.2(d) (scope of representation), 1.6 (confidentiality of information), 2.1 (advisor)

Hypothetical 6

- Diligent Dan is advising MNE on the US tax aspects of the pending purchase of a US corporation. Before the closing, legislation is introduced in Congress that, if passed, would have a significant negative impact on how MNE has modeled the value of the purchase.
- Dan explains this to the MNE US tax director, but also explains that there is substantial uncertainty as to what, if anything, will be enacted and when it would become effective.
- The US tax director decides that the likelihood of anything passing is remote and that he does not need to alert anyone else at MNE about this.
 - Dan is not certain but he thinks that the US tax director's bonus will be much bigger if the transaction closes.
 - Dan is also not certain about the chances of the law being enacted, but he knows other clients who are taking it very seriously.
- What should Dan do? Must Dan do anything?

Hypothetical 6

Cites:

- Circular 230 sec. 10.22 (diligence as to accuracy), 10.33 (best practices), 10.35 (competence), 10.37 (requirements for written advice)
- Model Rule 1.1 (competence), 1.13 (organization as client), 2.1 (advisor)

Have a safe trip home!