

IRS Has Special Agents, Too

By Robert W. Wood

The IRS recently raided Caterpillar's headquarters over its offshore tax practices. Caterpillar was almost surely surprised by the raid, which (after all) makes the execution of a search warrant much more effective. But in some sense, the company has been in the hot seat for years over whether it inappropriately shifted its corporate profits from the U.S. to a Swiss subsidiary.

A 2014 congressional investigation concluded that the company's plan would slash \$2.4 billion off the company's tax bill. As the IRS sifts through the evidence, there will be arguments on both sides over whether Caterpillar's actions were legal. Some of it may come down to that old but often somewhat blurry line between tax planning and tax evasion.

It is worth asking how most Americans would react to IRS agents seizing their computers and documents. The issue is real all year round, but can be particularly poignant this time of year. There is often a noticeable uptick in press releases, criminal indictments and convictions. This probably gives many taxpayers pause: *There's that penalty of perjury language at the bottom of every tax return again!*

When a person is convicted or even indicted of a tax crime, it may be too late to suggest some basic steps the taxpayer should follow. For the rest of us, though, sometimes the simplest rules are the most important. They can keep you off the IRS's publicity hit list in a future tax season.

The IRS is vast and imposing, but there is a discreet part of it that is criminal and not civil. Like FBI special agents, the IRS Criminal Investigation Division uses the special agent terminology. If you are visited by an IRS special agent, you should consult with an attorney. You are not legally required to talk to them.

In fact, the Fifth Amendment guarantees your right against self-incrimination. That means you can't be compelled to be a witness against yourself in a criminal case. You may believe that by answering a few simple questions you will not hurt yourself. Don't be so sure. Speaking up may actually help the IRS build a criminal case against you. The IRS may (quite honestly) tell you that you are not the target of the investigation, but merely a witness. Even so, you are entitled to retain counsel.

In the early stages of IRS criminal investigations, a person may be told he or she is a witness. You may therefore think there is no harm in being forthcoming. However, as the investigation continues, a witness can become a target. Even if you are convinced you are merely a witness and will remain so, you have rights. The U.S. Supreme Court has ruled that you have the right to assert your constitutional privilege against self-incrimination. See *Bellis v. United States*, 417 U.S. 85 (1974).

If you are approached and questioned by a special agent, ask for his or her business card. Firmly but politely state that you do not want to answer any questions and that you will have your attorney contact the special agent. You can fully cooperate through your attorney.

This may sound paranoid, but the ramifications of getting flustered and saying something that can later be used against you can be extreme. Particularly given the fluid nature of who is a witness and who is a target, even statements you think sound innocent may not be.

If you answer falsely, even to simple questions, you may face felony charges. See 18 U.S.C. Section 1001. Plus, making a false statement can be considered evidence of an attempt to conceal other criminal conduct. Even if the question seems more tax-related, you might misspeak. For example, suppose you are asked, "do you have any foreign bank accounts?"

You might assume that a foreign mutual fund or securities account doesn't count. Or you just might think they couldn't possibly know about your account or they would not be asking. The dangers can be much bigger than you may realize.

Moreover, books and records can be big issues. You have to keep them in order to fulfill your tax filing obligations. You even have to keep bank account records for accounts outside the U.S. If the IRS asks you if you have any foreign bank accounts, can you take the Fifth? You can, but it probably won't help.

Even if you claim the Fifth, the IRS can hand you an "information document request" to produce your records. You can refuse, but the IRS will issue a summons. If you refuse to answer that, the IRS will take you to court, which will probably order you to comply.

Ironically, you can refuse to talk, but you cannot refuse to produce the documents. Your own private papers are personal records, and if they might incriminate you, they are protected by the Fifth Amendment. But the Required Records doctrine says you must hand over certain documents, no matter how incriminating.

The government requires you to keep certain records and it has a right to inspect them. This can mean that pleading the Fifth in response to a subpoena for foreign account records can cause even more trouble than claiming it on your tax returns. Numerous courts have ruled that no Fifth Amendment protection applies to such foreign account records.

Despite repeated requests, the Supreme Court has been unwilling to hear this issue. In short, it is appropriate to respect the power of the IRS, especially the Criminal Investigation Division. It is, as they say, better to be safe than sorry.

Robert W. Wood is a tax lawyer with www.WoodLLP.com, and the author of "Taxation of Damage Awards & Settlement Payments" (www.TaxInstitute.com). This is not legal advice.