

Lawyers going pro se against the IRS have fools for clients

By Robert W. Wood

Should you handle your own tax dispute? In a word, no. If you are a lawyer, you are used to advocacy and documentation. You may even be a crackerjack trial lawyer.

But you are probably familiar with the adage that a lawyer who represents himself has a fool for a client. It may be a tired expression, but it's still more true than not. Besides, most taxpayers — even lawyers — feel a chill when dealing with the Internal Revenue Service.

With all the controversy surrounding the IRS these days, this traditional chill is even worse today. Acting IRS Commissioner Danny Werfel has issued a large report outlining actions he is taking to fix problems at the IRS. But many will continue to wonder about efficiency, targeting, and more.

No one wants to be audited, and that goes double today. What does it mean if your name comes up before this powerful agency? Do you need a lawyer, or at least an accountant?

This was a common reaction even before recent events. It was recently underscored by the revelation that some Tea Party groups say they were treated one way if they had a lawyer and another if they didn't. A review of nine groups in Ohio and Kentucky that sought nonprofit status shows not having legal representation meant inappropriate questions from the IRS. When it comes to being targeted by the IRS, having a lawyer may help, a review by the Cincinnati Enquirer found.

As a tax lawyer for over 30 years, on average, I believe that taxpayers (lawyers or not) come out better if they don't represent themselves. That's so even taking the cost of professional fees into account. I'm not saying that you need a tax lawyer every time a piece of paper comes from the IRS.

You might receive a letter from the IRS asking about some aspect of your return. You might want to handle it yourself. Still, be cautious and reflective, especially in more serious matters.

Hiring a tax professional is not a panacea, but you generally can't represent yourself very effectively. This has nothing to do with anything bad at the IRS. It is probably true in many types of cases. Sure, there are cases in which representing yourself can make sense, but they are fairly rare.

Note too that the point at which you need a representative is often early. In fact, I have occasionally seen taxpayers spend large sums with tax professionals precisely *because* they tried to handle the case themselves. Sometimes you can dig a hole that is bigger, wider and deeper than if you had you handed it to a professional from the start.

If you just can't help yourself from handling your tax case on your own, at least get some good accounting legwork. Many tax court cases handled by taxpayers pro se (including by lawyers) are astoundingly badly handled. A case in point was once-famous lawyer F. Lee Bailey.

He represented himself in tax court in a \$4 million dispute with the IRS. See *Bailey v. Commissioner*, T.C. Memo. 2012-96 (Apr. 2, 2012). To his credit, Bailey won the major issue in the case, but he lost most of the other ones (including his claimed loss deductions for his yacht). Worse, the court approved significant negligence penalties against him that I'm guessing he could have avoided with tax counsel.

The IRS had multiple claims against Bailey. The most serious involved the IRS claim the he was taxable on client funds he was holding. The IRS wanted to tax him on nearly \$6 million since it seemed to be available to him for his own use — his client was a fugitive. Amazingly, Bailey mostly won this issue, although the tax court did tax him on about \$450,000 of the funds that he “wrongly appropriated” and later repaid.

Bailey lost on most of the other issues, as is revealed in the whopping 143-page tax court opinion. One big stinker was the tax treatment of Bailey's expensive and custom-built yacht, “Spellbound.” You guessed it: Bailey claimed that he operated it (unsuccessfully) as a profit-making activity.

The hobby-loss part of his case wasn't worth arguing, and especially not by the very person at its epicenter — Baily. One of the elements of a “hobby loss” case is whether the taxpayer derives personal pleasure from the activity. Bailey said the yacht was just no fun. As the tax court put it:

“The Commissioner contends that Mr. Bailey took a great deal of personal pleasure from sailing on the Spellbound with his family and friends, but Mr. Bailey claims that “it's no fun to drive a boat”. Mr. Bailey testified that the steering wheel and navigational instruments of the Spellbound are isolated from the rest of the deck, and the pilot is therefore isolated from the party-goers on the deck.

“While it may be true that Mr. Bailey did not enjoy piloting the yacht, the record belies the claim that he derived no personal pleasure from it. First, the Spellbound was built to Mr. Bailey's specifications, and he testified that it was beautiful. Second, the record does not show that Mr. Bailey always took on the job of piloting the Spellbound. PBR hired a captain and crew to sail and maintain the Spellbound, and Mr. Bailey could have used their services to pilot the yacht any number of times. Even assuming arguendo that Mr. Bailey piloted the Spellbound on every personal trip — and that he disliked the task — we find that he derived pleasure from sharing the yacht with his family and friends and that he anticipated doing so when he purchased the yacht in 1989.”

All in all, the IRS prevailed on most issues. And the tax court upheld the penalties imposed on Bailey. Of course, F. Lee Bailey is not the only lawyer to fail in handling his own tax case. Here are two other tax court cases: *Hale v. Commissioner*, T.C. Memo 2010-229, and *Pace v. Commissioner*, T.C. Memo 2010-273.

In each case, as in Bailey's, there were fundamental accounting problems that someone with good records could have handled. My guess is that a tax lawyer handling the case would have seen and addressed that problem. But seeing your own case clearly isn't easy.



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