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Focus

IRS Audits: Understanding Criminal Rights and Risks

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Internal Revenue Service (IRS) tax audits are at the least frustrating annoyances, and at worst nerve-wracking anxieties and distractions for the subject individuals and businesses. An audit can close with agreement on adjustments or lead to collection proceedings which can morph into an offer and compromise to extinguish the tax liability for a reduced lump sum payment based on inability to pay the full assessed tax amount due. Alternatively, should the taxpayer be unable to pay the tax obligation after the audit, long-term installment payment agreements can be entered into with the IRS. Revenue officers who conduct the collections process have broad leverage and supervised discretion, and unfortunately on occasion little sympathy for the taxpayer who has shirked his, her or its tax obligations.

An audit notice is most alarming, however, when the taxpayer has purposely evaded or disguised tax liability from the IRS or when the facts and circumstances might suggest this is the case. Rightly the taxpayer will fear that the IRS revenue agent conducting the audit will uncover the illegal behavior or misread innocent conduct, and make a referral to the criminal investigations division ("CID") of the IRS. While the "ostrich bury its head in the sand" can be the taxpayer's approach, sometimes with the careful advice of experienced criminal tax counsel, the taxpayer might voluntarily disclose the understatement of tax liability or failure to file tax returns in earlier years in order to wipe the slate clean and hopefully to avert referral to CID. A criminal referral by the auditing revenue agent is entry into a very different enforcement world where the risks are not simply civil penalties and interest, but also imprisonment and criminal fines. Generally, actively averting criminal referral and indictment should be the primary goal of any taxpayer, although the facts and circumstances of a particular case could justify a wait-and-see approach by the taxpayer.

Taxpayers faced with an audit notice, or concerned about the risk of an audit, often need the input of a criminal tax practitioner to weave through the audit/enforcement fabric of the IRS. Analysis of criminal exposure by tax defense counsel as soon as possible is essential. The taxpayer also needs to understand the ins and outs of the 5th Amendment privilege against self-incrimination and the protective cloak of attorney-client privilege and attorney work product protection.

In a grand jury proceeding or criminal trial, an individual defendant can "take the 5th" and refuse to testify with complete impunity. By contrast, although in a civil IRS enforcement proceeding the defendant can refuse to testify at all or selectively, the trier of fact (judge or jury) may draw an adverse inference against the taxpayer on that very basis. Moreover, statements made by the taxpayer in an audit can be introduced as evidence against him or her in a subsequent civil enforcement action and criminal prosecution alike, even if he or she asserts the 5th Amendment privilege in such proceedings. Unlike individuals, corporations and limited liability companies (LLCs) have no 5th Amendment privilege. True business proprietorships and common law partnerships indirectly get the benefit of the 5th Amendment privilege because the individual owner legally is the proprietorship for all purposes, as the individual partners are the partnership for all purposes, and all have full avail of the privilege.

Once investigated by CID or IRS District Counsel's Office or by a federal grand jury for tax evasion or failure to file tax returns, taxpayers generally are (and should be) quick to retain criminal defense counsel. But it is in the audit stage, if not before, that taxpayers need to be more alert to the benefits of criminal tax representation and advice. In certain instances it is imprudent and can be devastating to an individual or company not to get criminal tax advice at these early stages.

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Amazing Clients®

A Big Company with a Low Profile

Focus on Jim Duffy, President of Ravago Holdings America, Inc.

Jim Duffy has been very busy in recent years, cobbling together a commercial entity that counts its revenue in the billions of dollars after a series of strategic and successful acquisitions involving specialty companies in the plastics and rubber industry.

Duffy is the president of Ravago Holdings America, headquartered in Orlando, and now the largest subsidiary in the global group of companies operating under the Ravago name (the "Ravago group") as part of Ravago Holding S.A.

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When is a Mom not a Mom?: *De Facto* Parenting in Massachusetts

RONALD P. BARRIERE
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From same-sex marriages to the visitation rights of grandparents, Massachusetts case law continues to be at the forefront of the evolving dialogue surrounding what does – and does not – constitute a family. Increasingly, one or both caregiving "parents" do not fit within the narrow statutory definition of biological parent, and the shifting family dynamic is outpacing the legislature, leaving the courts to fill in the gaps.

It is well-settled law in Massachusetts that the appropriate standard to be applied in relation to those decisions involving the care, custody, and maintenance of a child is the so-called "best interests of the child standard." See, e.g. M.G.L. c. 208 § 28; M.G.L. c. 209C § 1; M.G.L. c. 210 § 6. The question arises: What if the best interests of a child are best served by the regular care – or even financial support – of a person having no statutory obligation to, or biological connection to, the child?

The Massachusetts Supreme Judicial Court expressly adopted the concept of "*de facto*" parenthood in E.N.O. v. L.M.M., 429 Mass. 824 (1998). The parties were female partners who planned to become parents. They executed a co-parenting agreement stating their intention to co-parent a child, and one of the women, the eventual defendant, had a baby boy by artificial insemination. Once the child was born, the parties acted as a family unit, and the child referred to both parents as his mothers. When the parties later separated, the defendant denied the other mother access to the child.

The Court held that based upon the facts of the case, visitation with the plaintiff was in the best interests of the child, as she had acted as a "*de facto*" parent. The Court defined a *de facto* parent as "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The *de facto* parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent." The case was groundbreaking, as it solidified the notion that an examination of the best interests of a child should include consideration of the fact that the "child may be a member of a nontraditional family in which he is parented by a legal parent and a *de facto* parent." As a result, the Court created a set of facts to be considered in assessing whether or not someone could be considered to be a *de facto* parent. These include: the shaping of a child's daily routine, addressing the child's developmental needs, disciplining the child, providing access to education and medical care, and serving as a moral guide.

The case law since E.N.O. has refined the *de facto* parenting concept further. Care and Protection of Sharlene, 445 Mass. 756, 767 (2006) suggested the Probate Court must focus "on the existence of a significant preexisting relationship that would allow an inference, when evaluating a child's best interests, that measurable harm would befall the child on the disruption of that relationship." Blixt v. Blixt, 437 Mass. 649 (2002) stated that a *de facto* parent should have to live with the child for at least two years, for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship or because of a legal parent's complete failure to perform regular caretaking functions for the child. However, Massachusetts courts have not meaningfully examined the impact of a *de facto* parent seeking to shirk from responsibilities s/he has voluntarily assumed. For example: Is the Probate Court truly serving the best interests of the child by denying child support from a party who has held him or herself out to the world as a parent? While the best interests standard does not empower probate judges to impose legal obligations on people who have no legal obligations to begin with, are judges putting form over substance in denying to require child support where a non-biological parent historically held him or herself out to the world as a parent but seeks to deny the responsibilities of parenthood only when the relationship ends?

It is clear that the family dynamic – and the definition of family itself – will continue to shift over time, and the Massachusetts legislature and courts will continue to try to keep pace. The fact-specific nature of *de facto* parentage cases make it even more important for parents in these situations to have the guidance of competent counsel to ensure their case is properly handled. Simply put, *de facto* parenting cases are difficult to litigate and hinge upon a careful presentation of the facts. The skilled professionals of Burns & Levinson LLP's Private Client group are uniquely capable of handling these complex domestic relations issues.

Can the Private Sector Help Solve the Infrastructure Funding Gap?

ANATOLY M. DAROV
Partner and Chair, Design & Construction Group

For the past several years, the state of our infrastructure has garnered more attention than it has anytime since the 1930s – and not a moment too soon. On March 19, 2013, the American Society of Civil Engineers issued its latest report card on America's infrastructure, rating the nation's overall infrastructure a D+. Although some may say that civil engineers have a vested interest in trumpeting the decline of our roads and bridges, the empirical evidence is all around us.

Much of the nation's infrastructure was constructed during a surge of investment starting with the New Deal's Civil Conservation Corps in the 1930s, and continued through a major investment in water and wastewater systems undertaken during the 1970s in conjunction with the passage of the Clean Water Act. These pieces of infrastructure are now decades old and many are deteriorating, failing, or simply too far over-capacity.

Despite the growing need for increased infrastructure spending, governments across the country are unable to fund baseline transportation, water or school construction programs to maintain a state of good repair—let alone fund significant capacity or service upgrades. It is estimated that over $2.4 trillion is needed over the next decade to bring the nation's infrastructure to a satisfactory condition. Where will this money come from? With the exception of the 2009 American Recovery and Reinvestment Act legislation, federal

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Amazing Clients®

A Big Company with a Low Profile

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The Ravago name is not one you hear often in the media, as the privately-held company prefers to keep a low and modest profile. But the Ravago group, as a whole, is the world's largest distributor and compounder of plastic resins, and a major player in the rubber industry. They also operate more than 20 manufacturing, recycling and compounding plants that serve more than 40,000 active commercial customers around the globe.

"Our plastics and rubber products are in just about everything," Duffy says, explaining that Ravago sells products that are used in many applications, including everything from housewares and packaging to medical, aerospace, automotive and high-technology products.

Their broad market penetration is the result of a successful strategy deploying brand-name divisions that provide different channels to market, including:

- Entec Polymers;
- Channel Prime Alliance;
- Amco Distribution;
- H. Muehlstein; and
- Ravago Manufacturing Americas

Duffy is particularly excited about his company's expanding recycling capability. "We do a lot of post-industrial recycling. For example, we can take post-industrial and post-consumer carpet and recycle it back into nylon feedstock for use in our proprietary compounds that go into a multitude of industrial applications such as automotive and electrical. We also recycle post-industrial plant scrap from the major chemical companies for use in our industrial grade compounds," he says.

Ravago Holdings America does so much work in the recycling and compounding arena that it recently purchased an environmental services company to find more opportunities to service the major chemical companies' needs for efficiency and disposal of scrap plastic.

When Duffy started his career as a customer service rep for Massachusetts-based Plastic Distribution Corp. ("PDC"), a small privately held player in the polymer and plastics industry, he never envisioned where it would take him. After becoming the top sales person for that company, he left and founded Performance Polymers Inc. along with four other former PDC employees. Performance Polymers grew into a $200 million distribution company and was sold in 1997 to a British public company.

After a brief period of reflection and regrouping, Duffy dove into the industry again, rolling up several distribution and light manufacturing companies held under the North America Group name that eventually merged with Entec Polymers and ultimately became a key component of what is now Ravago Holdings America.

Duffy helped to build Ravago's broad presence in the Americas with the help of Frank A. Segall, co-chairman of Burns & Levinson's Corporate, Finance, and Financial Restructuring and Distressed Transaction groups. "Frank and I have probably done 20 [merger and acquisition] deals together. I first hired him after he represented the bank in a deal we were doing some years ago. I decided I would prefer to have him on my side of the table," Duffy recalls.

"I like Frank and his team because they understand our needs, and they listen," says Duffy. He adds that Segall's team works well with others, avoiding the legal haggling matches that often come with big deals, adding significant delays, running up transactional and financing costs, and leading to missed opportunities.

"They understand their role. They protect the company's interests, but they also smooth things out and get things done when problems arise. They work well with everyone, including our in-house counsel," Duffy says, noting that the Burns & Levinson team has tackled many kinds of substantive issues relating to environmental law, real estate, and operational matters in the course of due diligence related to complex mergers and transactions.

"They have also helped us with non-compete agreements and employment issues, as well as labor issues at our unionized plants. They are big enough to have multiple core competencies, but the right size to make sure we get the necessary individual attention," Duffy adds.

He affirms that the Burns & Levinson team has been a good fit with him and with Ravago's mission and values. "We want people to do business with us not because we are big, but because we provide them with the best possible professional expertise and service," Duffy explains. "We also treat our own people extremely well. Ravago's employees enjoy working for the company and are very loyal; we have very little turnover, and that is a pretty rare thing these days," he adds, noting that more gets done when people are happy and they get along.

"If I want to have an argument, I'll do it with my teenage kids," he quips, noting that he tells new executive hires to "just work hard, have fun and get along with your colleagues." Duffy also tells employees that "titles are not important here because it is what you do and what you contribute that makes the difference in what you earn."

That emphasis on service and humility rather than title and power comes from the very top of the Ravago group, according to Duffy, who praises the Belgian family that owns the private parent company. "They are very good people, they employ the majority of the population of the town the company resides in, and they see it as a social responsibility to continue to invest in the company and its employees," he says.

"Serving others is important to them, and so is modesty. They are very humble and so are their children," Duffy adds, noting that the family does not seek coverage by the media or live in the spotlight.

That is a theme that Duffy himself has adopted, and it tempers the view he takes of his own role within the 52-year old house of Ravago. "My role is just to be a facilitator to the next generation that succeeds me, and I am a caretaker for them," he concludes.

- John O. Cunningham, freelance writer/editor

Can the Private Sector Help Solve the Infrastructure Funding Gap?

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infrastructure spending has not increased in a decade, and given the fiscal hurdles facing lawmakers in Washington, no one expects the federal government to be in a position to cover the funding gap.

As a result, a growing number of state and local jurisdictions across the country are looking toward the private sector for solutions. Unlike in the U.S., private participation in infrastructure is common in other parts of the world where private companies, investment banks and pension funds have participated in the delivery of toll roads, bridges, energy and water systems, and other types of infrastructure through partnerships with public sector agencies. Public-private partnerships, or "P3s," cover a broad spectrum of project delivery models but generally all involve a governmental entity teaming with a private sector partner in some portion of the construction, financing or operation of a traditionally public facility. For their part, private partners bring several assets to the table, including access to private debt and equity markets and innovative ideas on how to deliver infrastructure assets in the most economical fashion while still meeting the performance standards set by the government.

Public-private partnerships offer some hope to cash-strapped governments, but as the P3 delivery model gains traction in the U.S., what is needed to successfully deliver such projects? At the top of the list may be political leadership. Bringing private sector entities into what has traditionally been a public realm has been challenging in many states sensitive to perceived impacts to public employees and can create a general uneasiness with the prospect of relinquishment of control of public infrastructure to private hands. In jurisdictions where P3s have been successful, elected officials have been able to work with the many stakeholders involved with such projects to overcome these challenges.

Second, governments looking at the P3 model must be ready to commit to a pipeline of projects to offset the investment required to undertake P3 project delivery. P3s typically require legislative action, and the ensuing regulatory, legal and financial frameworks are complex. Where governments are committed to undertake a series of projects, high transactional costs may be mitigated once these frameworks are in place.

Third, P3s are not created equal, and projects are more successful when the private sector participates in long-term operations and maintenance of a facility, and retains responsibility for its condition upon turnover to the government. Experts in the field who have studied P3s cite a spectrum of outcomes that vary based on several factors—an important one of which is the role of the private partner. Requiring the private entity to operate and maintain a facility for a pre-defined term materially changes the way such entities will finance, design and build a given facility. Aligning the long-term interests of the government agencies and the public with the private partner's financial goals is critical to success.

As more governments explore P3s as a means to close the infrastructure funding gap in this country, the private sector should have more opportunities to participate. P3s will continue to evolve slowly, however, unless there is political will and a proper structuring of these projects. Even more than traditional infrastructure delivery methods, P3s are long-term, high-risk commitments that require all parties to understand the legal, financial and technical challenges involved. The attorneys in Burns & Levinson's Design & Construction Practice are monitoring these developments and are eager to assist organizations interested in P3s.

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Criminal tax defense attorneys bring our administrative, civil and criminal tax experience to the table. We know how to devise and integrate the best strategy in each of these areas, either separately or concurrently when related proceedings are pending or threatened in multiple venues at the same time (so-called "parallel proceedings"). Taxpayers are mistaken when they think they can go it alone in the administrative audit or the like. In brief, failure to appreciate the potential criminal risks of an audit can predict doom in an otherwise salvageable government tax audit or compliance inquiry.

Criminal tax attorneys also work with the client taxpayer's accountants and coordinate their presentations to the auditor, often not known to the revenue agent depending on the circumstances. On occasion we may openly participate in a particular audit when it can maximize the clients' ability to avert criminal referral. Generally we engage the client's accountant or, when necessary, outside forensic accountants to assist us in rendering sound legal advice to the client, thereby bringing the accountant into the realm and protections of attorney-client privilege and attorney work product.

The Criminal and Tax Divisions of the Department of Justice (DOJ) have general and specific voluntary disclosure policies and programs whereby taxpayers can qualify for mitigation of criminal penalties or even declination of criminal prosecution. Advice about these programs before an audit commences is critical to taxpayers because an audit or indeed other events likely to lead to IRS discovery of possible misconduct will disqualify the taxpayer from the benefits of a formal voluntary disclosure program.

The IRS has a voluntary disclosure program specific to a taxpayer's violation of requirements to file reports disclosing foreign accounts. Detailed information must be timely reported to the IRS on Form TD 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), if the aggregate value of the accounts exceeds $10,000 during the calendar year. Civil penalties for FBAR violations are draconian and criminal penalties can be severe. In the past few years FBAR investigations and prosecutions by the IRS and DOJ have grown dramatically.

If you are concerned about a potential IRS audit, you and your accountant should seriously consider getting advice from a criminal tax defense attorney. Burns & Levinson is well qualified to handle these matters.

BURNS & LEVINSON LLP **Focus**

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