

## Know Your Rights: Managing Exposure During Audits Through Legal Representation



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The 2022 Inflation Reduction Act (the “IRA”) allocated \$80 billion in funding to the Internal Revenue Service (“IRS”), much of which was earmarked for increased enforcement efforts. After some starts and stops, that funding has found its mark, and now, over the last two years, taxpayers and practitioners have felt its impact in the form of a substantial increase in audits, enforced collection efforts, and criminal investigations primarily targeting high net worth individuals, partnerships, and large corporations.

The increase in the number of these enforcement cases is not the only change practitioners are facing. The IRS has dramatically increased the scope and depth of its audits and investigations. Revenue Agents are now being trained to *insist* on direct, in-person, or virtual communications with taxpayers at the beginning of audits, even when the taxpayer is represented under a valid Form 2848. Generally, the correct and prudent response to such a demand is to decline such direct communications and interviews and instead offer to answer any relevant questions or requests for information through responses to properly formulated Information Document Requests (“IDRs”).

We are learning that more and more Revenue Agents are refusing to accept this established protocol and have become increasingly aggressive in their responses. Revenue Agents are now routinely threatening to label taxpayers as “uncooperative” if they refuse direct communications or to be “interviewed” at the beginning of an audit. This label is far more than just an adjective used in frustration. It is a legal standard that has a dramatic impact if the examination concludes unagreed. If the IRS can successfully establish that a taxpayer was “uncooperative” during the audit process, it can use that to change the burden of proof at trial in the United States Tax Court, making it more difficult for the taxpayer to prevail.

In the Tax Court, the burden of proof shifts from the taxpayer to the Commissioner if the taxpayer (1) introduces credible evidence relevant to the issue; (2) complies with IRS information requests; (3) maintains and produces adequate records in accordance with Internal Revenue Code (“IRC”) § 6001; and (4) *cooperates with the IRS during the initial audit*. IRC § 7491. If the taxpayer does not meet the criteria under IRC § 7491(a), the burden of proof remains with them and makes it more difficult to prevail at trial.

Taxpayers and accountants are, therefore, finding themselves in precarious situations when approached by IRS agents or investigators seeking these interviews. The reality, however, is that declining direct taxpayer contact or initial interviews *does not*, by itself, warrant a finding that the taxpayer is uncooperative. Taxpayers have well-established rights under federal law to protect their interests. These rights include the ability to decline direct contact with the Revenue Agent and designate an attorney or other authorized representative to act on their behalf. Below, we highlight some of the laws protecting taxpayers in this area. Understanding these principles will provide the representative with tools to confidently navigate these types of IRS demands and inquiries.

### ***IRC § 7521: Leveraging Your Right to Representation***

The IRC includes specific provisions that reinforce taxpayers' ability to use legal representation:

- **IRC § 7521(b)(2)**: Unrepresented taxpayers can terminate an in-person interview at any time. If the IRS requests an interview, taxpayers are under no obligation to participate or continue, particularly if they feel unprepared or wish to consult with a representative first.
- **IRC § 7521(c)**: If a taxpayer has a designated power of attorney (“POA”) or other authorized representative, IRS agents are prohibited from bypassing this representative without prior authorization. This ensures taxpayers have a buffer to reduce direct exposure to IRS pressures.

By invoking these provisions, taxpayers can redirect IRS inquiries to their chosen representatives. If the accountant who prepared the tax form(s) is the chosen POA, the accountant should consider adding an attorney to Form 2848 to serve as a buffer for these communications to not subject themselves to direct questioning as a purported witness. Engaging an attorney also allows for the use of a *Kovel* letter, which brings the accountant under the attorney-client privilege umbrella with respect to certain issues and areas of inquiry, shielding such communications with the taxpayer.

### ***Constitutional Protections***

Your rights during an IRS investigation are further bolstered by constitutional protections. The Fifth Amendment of the U.S. Constitution ensures that no individual can be compelled to incriminate themselves. This means that you

are not obligated to answer questions during an interview that *might* be self-incriminating. When dealing with IRS criminal investigators, it is even more critical to invoke this right and rely on experienced legal counsel. Anything you say during an interview could be used against you in future proceedings.

The Fifth Amendment is also important in the context of civil examinations. Anything disclosed in a civil investigation can be shared with IRS Investigators, and the case can be referred for criminal prosecution. As such, taxpayers' Fifth Amendment rights extend to audits.

### ***The Taxpayer Bill of Rights***

Codified at IRC § 7803(a)(3), the Taxpayer Bill of Rights consolidates fundamental protections that taxpayers enjoy in their dealings with the IRS. Two key rights stand out in this context:

- 1. **The Right to Retain Representation** : Taxpayers have the right to hire an attorney, certified public accountant, or enrolled agent to represent them before the IRS.
- 2. **The Right to Privacy** : Taxpayers are entitled to a fair and respectful process that avoids undue intrusiveness.

These rights provide taxpayers with important protections and shield them from being coerced or intimidated during IRS examinations or investigations.

### ***IRC § 6304(a)(2): Protection from Harassment***

Another layer of protection lies in IRC § 6304(a)(2), which prohibits the IRS from engaging in conduct that could be considered harassment or abuse. If an IRS agent insists on speaking with the taxpayer directly despite having designated representation, such behavior could potentially violate this statute.

### ***Practical Advice for Taxpayers and Accountants***

#### **1. Never Feel Obligated to Interview Without Legal Representation.**

IRS agents are attempting to establish direct contact with taxpayers and schedule interviews immediately after initiating the audit. Taxpayers are generally not required to comply with this demand. Request time to consult with an attorney before proceeding with any audit.

#### **2. Designate a Power of Attorney (POA)**

Form 2848 (Power of Attorney and Declaration of Representative) allows taxpayers to formally appoint a representative. This form ensures that the IRS must direct all inquiries to the taxpayer's designated individual. Often, accountants will serve as a taxpayer's POA, which is a useful tool for resolving many tax issues. However, in the context of sensitive or "eggshell" audits and/or investigations, it is important to consider whether an attorney should be added to Form 2848 to serve as the direct contact with the IRS so as to shield the taxpayer *and* the accountant from any potentially unlawful or improper investigative techniques by IRS Agents. As explained above, Kovel protections are important in this regard.

#### **3. Document All Communications**

Keep a written record of all IRS correspondence and interactions. If an agent attempts to bypass the representative, the taxpayer should not engage and immediately notify the POA. The representative should

diligently respond to all IDRs issued to the extent appropriate and reaffirm in written communications cooperation with the audit process, willingness to answer any proper IDRs, and provide any documentation relevant to the audit upon receipt of an IDR. When denying an interview, the representative should do so in writing and clearly communicate the fact that the decision to have questions and requests flow through your representative must in no way be construed as some failure to cooperate in the audit or an effort to improperly hinder the examination. It is, quite simply, the exercise of the taxpayer's statutory and constitutional rights.

#### **4. Professional Guidance Early**

Engaging a tax attorney or qualified representative as soon as possible can significantly reduce stress and ensure that the taxpayer's rights are protected throughout the audit process in a manner that will not negatively impact success down the road.

#### ***Conclusion***

Taxpayers have the legal and constitutional right to protect themselves when facing IRS inquiries. By understanding the protections provided by IRC provisions, the U.S. Constitution, and the Taxpayer Bill of Rights, taxpayers and accountants can confidently assert their right to legal representation and avoid unnecessary risks during IRS audits and investigations.

Protecting your rights starts with knowing them and exercising them wisely. If you're ever unsure about how to handle an IRS inquiry, consult a qualified tax professional or attorney immediately. Justin J. Andreozzi, the leader of Lippes Mathias' tax collection defense team, can be contacted via email at [jandreozzi@lippes.com](mailto:jandreozzi@lippes.com), or via telephone at 716-565-1100 x1837.

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