

8th Annual Northwest Gaming Law Institute

The Rise of IRS and Other Federal Agency Casino Investigations

Strategies For Defending An IRS Investigation

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First Line of Defense

Know the IRS' ITG Policies, Practices and Mandated Protocols

Title 26 and Title 31 Differences

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IRS Protocols and Policies

- Treasury Consultation Policy
 - Overarching context
 - 7/30/10 OMB Memo,
 - <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf>
 - How is it applied by ITG?
 - Pre-action consult for policymaking, legislation, regulations
 - Government to government relationship paramount

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IRS Protocols and Policies

- What are "consultation" rights in context of Title 26 or Title 31 Audit?
 - IRM 4.87.1.1 – ITG Mission and Protocols:
 - to work with tribes to mitigate the need for enforcement
 - to provide education and assistance
 - Build and strengthen government to government communications as a means to resolve any new or continuing Federal tax concerns.
 - 7/30/10 OMB Memo: Meaningful consultation concerning *administration and enforcement* of laws
 - Still follow basic examination rules and IRC laws

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IRS Protocols and Policies

Title 26

- IRS Compliance check vs. audit?
- Compliance check:
 - Voluntary on the part of the Tribe (can decline)
 - Improve understanding of record keeping and information reporting obligations of the tribe
 - Jointly develop solutions to any problems
 - Not to determine a tax liability for any particular period, but it can turn into an audit

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IRS Protocols and Policies

Title 26 (cont'd)

- Audits generally result in unagreed issues and tax liability
- IRS increasing enforcement in lieu of compliance check
- Education and outreach continuing, but "old" issues are seeing enforcement action

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IRS Protocols and Policies

- Title 31
 - Memo of Understanding between FinCen and IRS regarding Title 31 "BSA" Audits
 - Role of ITG
 - Opening, closing, follow up on compliance
 - Maintain government to government protocols
 - Different procedures and emphasis
 - POA, Summons, Letter 1052 Notice
 - Focusing on record keeping (5 yrs) and adequacy of AML program

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Second Line of Defense

- Prepare for Key Controversies
 - Current "Work Plan" of IRS
 - In-house risk assessment /internal audit
 - Title 26
 - Title 31

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Key enforcement issues – Title 26

- ITG expanded staff by 40% from the fiscal year 2009 staffing, and will continue to hire new staff during its 2010/2011 fiscal year.
- **GOAL:**
 - Increase the number of audits
 - Increase awareness and understanding
 - to crack down on tax avoidance and improper tax reporting.

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Key enforcement issues – Title 26

- Casino Issues:
 - Employment tax
 - Tip agreements
 - Forms W-2G
 - Forms 1099
 - Forms 1042, foreign tax issues
 - Aggregating prizes and awards

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Key enforcement issues – Title 26

- Tribal Government issues –
 - Information Reporting, particularly Form 1099
 - Back up withholding.
 - Taxing benefits and "general welfare" exemption:
 - Challenged if no proof of "financial" need
 - housing assistance, utility payments, loans, senior programs, cultural education (travel), burial benefits, life insurance, higher education benefits outside of IRC Sec. 117 (room, board, parking, etc), "gifts" to members, food/meal service.

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Key Enforcement Issues Title 31

- The ITG, in conjunction with Bank Secrecy Act (BSA) staff, expects to conduct at least 30 more BSA audits this year.
 - Tribes with low levels of FinCEN Forms 103 (CTRCs) and 102 (SARCs) filings will be the targets of these audits.
- BSA Compliance Checks will increase.
 - To validate that tribal entities are meeting training, program oversight, and recordkeeping requirements.

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Key Enforcement Issues – Title 31

- SARCs are the particular area of concern/problems
- CTRCs – usually technical problems – SSN, P.O. Box, incomplete address, unfiled
 - Must create procedure to establish due diligent effort to obtain address and SSN
 - Must create due diligent procedures for mismatched SSNs as identified by the Enterprise Computing Center—Detroit on filed CTRCs
- Failure to adequately use all available information
 - Use more than first hand observation for SARCs
- Inadequate AML written program and employee training

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Third Line of Defense

- ☐ *Control the Audit*
 - Advance Preparation
 - Control Interaction with IRS
 - Manage the Response

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Managing the IRS audit

- Pre-Audit meeting(s)
 - with key personnel
 - Prepare and review IDR responses
 - identify potential areas of risk
 - Prepare finance/accounting personnel for interview
- Schedule regular meetings between management and the person(s) overseeing the audit
- Commit necessary resources – staff, management, information systems

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Managing the IRS Audit

- Initial meeting with IRS agent
 - Confirm year(s) involved
 - Confirm the scope – anticipated compliance issues
 - tips from third parties or other persons?
 - Establish communication protocol – no IRS direct contact with Tribal personnel
 - Representative is liaison
 - Designate an official on an ongoing basis by Resolution per IRM 4.86.1.6.1.2

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Managing the IRS Audit

- Audit IDR – wholesale resistance will result in summons.
- Limit document review by narrowing the scope of audit
- Discourage a blanket viewing of general books and records. Make IRS commit to what they want to look at, and then provide it to them.
 - Limit on-site presence
- Do not volunteer additional documents, unless you have a specific reason to provide them to the agent.

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Managing the IRS Audit

- Before producing IDR responses:
 - Confirm sources and chain of custody
 - Confirm personnel understood what was being asked for
 - Review and vet responses
 - Redact privileged documents (e.g., Resolution minutes with counsel present)

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Managing the IRS Audit

- Statute of Limitations Extensions
 - IRS needs at least 1 year remaining on SOL
 - You are not obligated to extend
- If no extension
 - IRS will close case “unagreed”
 - Go to Appeals without fully developed facts
 - Appeals may kick it back anyway
 - Tribe risks missing opportunity to shift the burden of proof. IRC § 7491.
- If agree to extend
 - Limit the time
 - Limit the issues. Close agreed issues.

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Managing the BSA Audit

- Same pre-audit procedures as with Title 26
 - Prepare IDR Response
 - Prepare employees for interview.
 - See, IRM 4.26.9 exam techniques
 - Identify risk areas and correct proactively
- Cooperate – failure to cooperate is a specific basis for penalty referral

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Managing the BSA Audit

- BSA auditor will find deficiencies – regardless
 - Usually Letter 1112 (no penalties) *if*
 - No priors
 - technical, minor, infrequent, isolated, non-substantive deficiencies
 - not intentional

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Managing the BSA Audit

- Minimize penalty referral.
 - Make the recommended corrections – similar failures later are treated more harshly
 - Explain reason for deficiency and steps taken or will be taken to correct
 - Conduct periodic independent review of AML program with written risk assessment
 - Compliance officer should update regularly
 - Address key enforcement issues

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Managing the BSA Audit

- The IRS - ITG will return for a compliance check to ensure changes made to AML procedures based on BSA auditor recommendations
 - the changes must be reflected in the AML Program
 - each change should be carefully documented by the Casino

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