

## NEWS ANALYSIS

### For DOJ Tax Division, Consistency And Deterrence Are Key

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The success of the government's efforts to combat tax evasion and deter tax crimes depends heavily on the cooperation and effectiveness of nearly 100 separate but connected federal entities.

The IRS Criminal Investigation division refers potential tax crimes to the Justice Department Tax Division, which decides whether to authorize a grand jury investigation or prosecution. The investigation and prosecution can be conducted either by the Tax Division itself, or with or through one of the 95 U.S. attorney's offices.

As a result, the relationship the Tax Division has with each of those offices is critical to the consistent enforcement of U.S. tax laws. A U.S. attorney typically can bring any number of prosecutions in any number of areas. But for tax charges, no matter the size or scope, all roads lead to the Tax Division for authorization.

Title 26 of the U.S. code, which affects every U.S. person, must be applied consistently, and the Tax Division has the last word on whether to authorize tax charges against a defendant. The Tax Division is responsible for all civil and criminal tax trials outside the Tax Court, as well as appellate litigation involving the Internal Revenue Code. How that is accomplished, and how the Tax Division executes the priorities it and the IRS have designated, can be baffling to practitioners.

#### New Sheriff in Town

In March the Senate confirmed Kathryn Keneally as assistant attorney general of the Tax Division. Keneally, a New York-based tax practitioner, came highly regarded, with practitioners and former DOJ, IRS, and Treasury officials supporting her confirmation in letters to the Senate Judiciary Committee. (For prior coverage, see *Tax Notes*, Apr. 2, 2012, p. 33, *Doc 2012-6746*, or *2012 TNT 62-2*.)

The Tax Division went more than three years without a confirmed appointee. Nathan Hochman left the position in January 2009 at the end of the George W. Bush administration, and President Obama's first nominee, Mary L. Smith, saw her

nomination flounder after objections from lawmakers and practitioners because of her limited background in tax.

The tax bar praised John DiCicco, principal deputy assistant attorney general, for his efforts in leading the Tax Division while it was without a confirmed assistant attorney general. But Keneally faces many challenges in her new role, including prosecuting offshore tax evaders, refund fraudsters, tax shelter promoters, and tax deniers.

Keneally is no stranger to criminal tax issues. Before joining the government, she was defense counsel for more than 25 years, the last 10 as a partner with Fulbright & Jaworski LLP. In an interview with *Tax Analysts*, Keneally said she was hard-pressed to find areas of the Tax Division that badly needed improvement. "I've known the division for many years as a tax practitioner, and now on the inside, [and] it's a remarkably well-run organization. . . . I think it was in good hands before I got here, and is in very good shape, and I'm grateful for that," she said. (For the interview with Keneally, see p. 1262.)

#### With Consistency Comes Deterrence

Unlike other violations of the U.S. code, those under Title 26 can affect any U.S. person in any given year. Tax crimes are "potential felonies that confront every American each year," said Mark E. Matthews, a former deputy assistant attorney general for the DOJ Tax Division and a former IRS deputy commissioner.

As a result, uniformity and consistency in enforcing those laws are critical, said Matthews, now in private practice with Caplin & Drysdale. Both federal law and the U.S. attorney's manual mandate that indictments in tax cases be authorized by the Tax Division, no matter which office is bringing the case. "That's a key protection," said Scott Schumacher, a former Tax Division attorney and now a professor at the University of Washington School of Law.

Other, non-IRS government agents investigating violations of the law can go directly to the assistant U.S. attorney to help develop and prosecute a case, said Eileen J. O'Connor, former assistant attorney general in the Tax Division, now with Pillsbury Winthrop Shaw Pittman LLP. "But when a violation of the Internal Revenue Code is involved, the Tax Division must authorize" any grand jury investigation or prosecution, she said.

However, the process of seeking Justice approval to indict someone for a tax crime has historically caused tension between U.S. attorneys and the Tax Division, Matthews said. “For good or for bad, we’ve decided that the same filters should exist nationally,” he said, adding that the Tax Division brings both that neutral filter and the resources to help a prosecution.

**Violations of Title 26 can affect any U.S. person in any given year, making uniformity and consistency in enforcing the tax laws critical.**

Consistency of enforcement is important to the public perception that similar crimes will face similar prosecution nationwide and likely yield similar results. Equally important is the principle that a law that is not enforced is not respected, which is one reason why the final decision on whether charges will be authorized rests solely with the Tax Division.

But enforcement depends on the cooperation of various entities, including CI and the individual U.S. attorney’s offices. Coordinating policies within a single organization can be challenging, and the coordination of those policies across several organizations is even more difficult.

The task of maintaining uniform prosecution across the country falls on several units within the Tax Division, including the regional criminal enforcement section chiefs, said Hochman, now in private practice with Bingham McCutchen LLP. Those chiefs lead the Northern, Southern, and Western sections and have a wealth of experience, he said. “You rely on the fact that these folks have decades of experience and have been around the block many, many times.” That type of experience not only allows the government to pursue various types of alleged tax crimes uniformly, but it also helps it avoid overreaching on a case — a benefit to all parties, Hochman said, adding, “The mere bringing of an indictment exacts great damage to your reputation, even if you prevail.”

### Step by Step

Maintaining a consistent approach to prosecutions requires coordination, planning, and oversight. From initial investigation to indictment, a potential defendant’s case is reviewed by several organizations. In a typical administrative investigation case, a revenue agent may refer the case to CI after encountering what appears to be an indication of fraud, and an IRS special agent then investigates. CI tax counsel may assist the division in determining whether a prima facie case exists. That investi-

gation goes to the CI special agent in charge, who conducts her own review.

If the special agent in charge deems the case worthy of prosecution, the file is sent to the Tax Division with a request that it authorize prosecution. A Tax Division prosecutor reviews the file, with several possible outcomes, said O’Connor.

In the clearest and most well-developed cases, the reviewing Justice attorney will recommend prosecution. If the attorney believes more evidence is needed and can be obtained by the IRS’s investigative authority, the Tax Division refers the case back to the IRS for further administrative investigation. If more evidence is needed that cannot be obtained by the IRS, the Tax Division authorizes a grand jury investigation and refers the matter to the appropriate U.S. attorney’s office for that purpose.

The reviewing attorney’s recommendations will include not only whether to prosecute or further investigate, but also suggestions about legal theories and trial strategy. Those will be reviewed by an assistant chief, the chief of the regional criminal enforcement section, the deputy assistant attorney general, and, in some cases, the assistant attorney general.

At each step, conferences are held between investigators and prosecutors of the agencies. Defense counsel will have the opportunity to meet with the Tax Division to try to persuade it not to authorize prosecution. Defense counsel sends an “if and when” letter — that is, if and when the Tax Division receives a referral on the taxpayer — to request a pre-decision conference as soon as they learn that the client might be under criminal tax investigation.

When the Tax Division approves a grand jury investigation for a tax crime, the CI special agent works as an investigator for the assistant U.S. attorney. At the end of the investigation, the special agent writes a report summarizing the result and makes a recommendation for prosecution that must be approved by the Tax Division before a plea can be entered or an indictment can be sought by the U.S. attorney’s office.

Nontax cases may have criminal tax aspects. In those situations, the U.S. attorney’s office will invite CI’s district special agent in charge to participate in the investigation, said Sandra Brown, assistant U.S. attorney and tax division chief in the U.S. attorney’s office for the Central District of California.

Former and current Tax Division attorneys and officials said that even with all the moving parts between the Tax Division, the IRS, and the U.S. attorney’s offices, the relationship between the organizations is stable. “It’s remarkable the efficiency — and this is a government agency — in the way [the Tax Division] handles this stuff. A large part of it is due to the lack of friction within the agency,”

said Edward M. Robbins Jr., Brown's predecessor, who is now with Hochman, Salkin, Rettig, Toscher & Perez PC in Beverly Hills, Calif.

Keneally praised the DOJ's relationship with CI, saying, "It's a very close relationship. We're partners in law enforcement. Cases come to us primarily as referrals from CI, so for the most part, we're addressing their enforcement priorities."

### Relationship With U.S. Attorney's Offices

Only a few of the 95 U.S. attorney's offices have assistant U.S. attorneys who regularly handle their own criminal tax prosecutions.

Assistant U.S. attorneys in the largest and busiest U.S. attorney's offices — the Southern District of New York, the Northern District of Illinois, the Southern districts of Florida and Texas, the Eastern District of Virginia, and the Central and Northern districts of California — have experience prosecuting tax cases. The Southern District of New York has long been relatively independent in developing and bringing its own prosecutions — although subject to the approval of the Tax Division.

Because many smaller jurisdictions lack the resources or expertise to prosecute tax cases from beginning to end, the Tax Division sends attorneys out to conduct investigations, present evidence to a grand jury, seek an indictment, and prosecute a case. The assistant U.S. attorney acts as a liaison, introducing the Tax Division attorney to the judge and assisting with local rules, according to Jack Townsend, a former Tax Division attorney who is now in private practice with Townsend & Jones LLP in Texas. Beyond that, the Tax Division will handle the case almost exclusively, he said.

The larger U.S. attorney's offices rarely request advice or assistance from the Tax Division because they have experienced criminal-tax assistant U.S. attorneys, Townsend said. But DOJ attorneys are likely to materially participate in high-profile cases such as the investigations of alleged tax shelter promotions by KPMG LLP and prosecutions of taxpayers with unreported offshore accounts.

***The UBS prosecution was successful because of coordination between the Tax Division and the local U.S. attorney's offices, said Neiman.***

Justice Department involvement in high-profile cases furthers the Tax Division's goal of consistency across both decisions to prosecute and in how prosecution is conducted. The prosecution of Swiss bank UBS was successful because of coordination between the Tax Division and the local U.S. attorney's offices, said Jeffrey A. Neiman.

As a coordinator of the Tax Division's investigation into UBS, Neiman spent much time overseeing the government's case and ensuring that local U.S. attorney's offices were in sync with the Tax Division.

Neiman, who is now in private practice, said that without the Tax Division's input, tax crimes would not be prosecuted as they should be, partly because U.S. attorney's offices often are resistant to tax cases, considering them more complicated than other criminal matters. "Tax might as well be a four-letter word in U.S. attorney's offices," he said.

Keneally described the Tax Division's interaction with the U.S. attorney's offices as constructive, saying, "It's a very strong working relationship."

### Stability

While no government agency is impervious to political changes, practitioners told Tax Analysts that the Tax Division comes close to being independent.

The division is fairly insulated from political changes, Brown said. Changes to the division result mostly from policy shifts. The president sets policy, and his directives are sent down to the attorney general, Treasury, and the IRS. When those policy decisions are made, the Tax Division responds, said Hochman.

The federal government prosecutes thousands of civil and criminal tax cases each year, returning billions in lost revenue to the treasury. With an annual budget of just over \$100 million, the Tax Division has a huge return on investment — even larger than the IRS's.

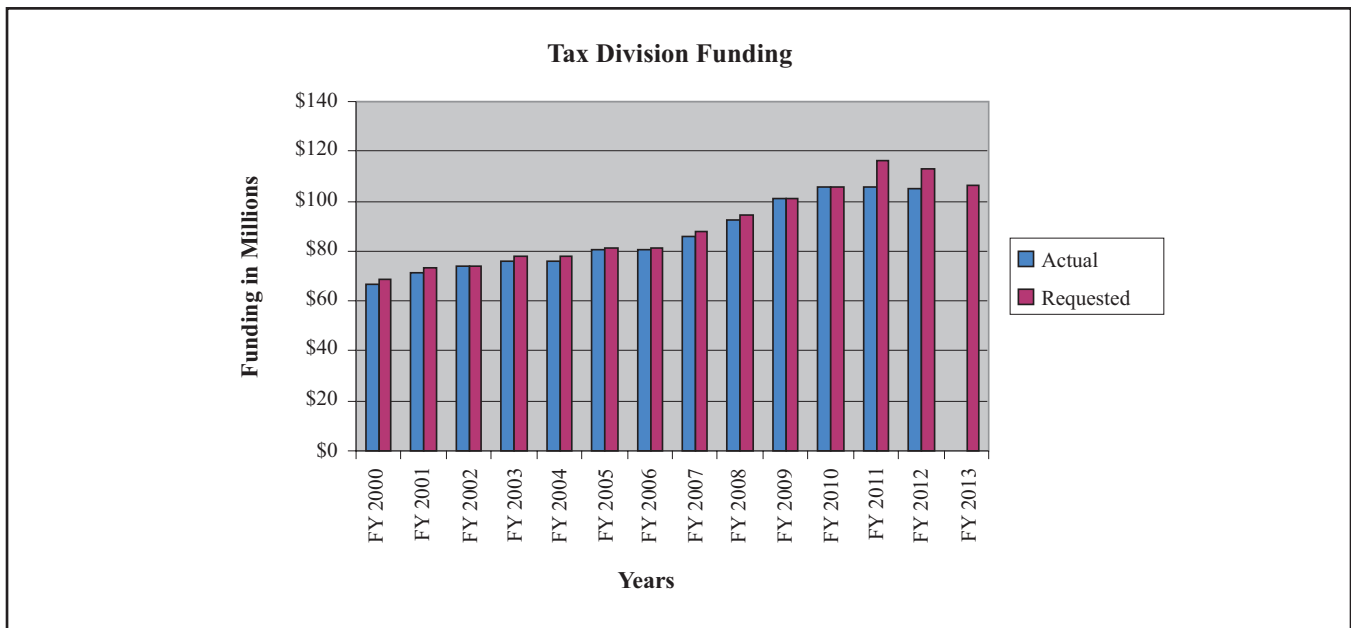
The current and former Tax Division attorneys who spoke with Tax Analysts had few complaints about the division's operations. The only general criticism was that the division is underfunded, a common complaint from most attorneys working for the federal government.

That isn't to say that budgetary calamity has befallen the Tax Division. Its annual budget increased substantially during O'Connor's tenure between 2001 and 2007 and has remained steady since fiscal 2010. O'Connor said her budget requests showed that every increase Congress made in the IRS's enforcement budget resulted in an increase in the Tax Division's budget two years later.

Given the increased responsibilities Tax Division attorneys have to investigate and prosecute offshore tax evasion, illegal tax shelters, refund fraud, and other tax crimes, an ample budget would be a big help.

### Conclusion

The role of the Tax Division should not be understated. Its duties to consistently enforce the tax laws and deter evasion are challenging. For



effective prosecution, the Tax Division must balance not only the potential outcome and hazards of litigation, but also what impact a case may have on the tax system as a whole.

The moving parts matter, and effective enforcement of the tax law depends on the active cooperation of many entities, including the DOJ and IRS. The tax law is unique in that it affects every U.S.

person. That requires specialized prosecution and administration that is both consistent and deterring.

“We enforce the tax laws. That’s it,” Keneally said. “That’s where all conversations begin and end.” ■

*Marie Sapirie and Jeremiah Coder contributed to this article.*