ABA Panel: Automation No Substitute for Pros When Pursuing VDAs

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By Paul Jones

The process of seeking voluntary disclosure agreements (VDAs) shouldn't be overly automated, practitioners argued during a panel at the American Bar Association Section of Taxation meeting on January 19.

Panelists said that pursuing VDAs properly requires tax professionals who would carefully vet a taxpayer's situation, understand states' disparate rules and requirements, and communicate with tax agency staff to advocate for their clients when complications arise. The panel speakers were DiAndria Green of Bennett Thrasher LLP, Aaron Johnson of Lane Powell PC, and Sonia Shaikh of Miles & Stockbridge, while the moderator was Jennifer Karpchuk of Chamberlain, Hrdlicka, White, Williams & Aughtry.

The practitioners warned about some of the potential pitfalls of technology. Green stressed that she doesn't recommend that taxpayers rely on automated tax compliance services for VDAs. She said that while providers of those services, like Avalara, Sovos, and Vertex, do a lot of things well, issues could arise from the heavy use of automation, such as a taxpayer’s identity being disclosed prematurely to a tax agency that allows initial anonymity.

Clients have had “to come back to me to review the application because, again, Avalara has automated everything to the point where they fill out too much information,” Green said.

Green said heavily automated services also don’t work as well when complications arise for clients. Those taxpayers benefit from having practitioners who understand their situations and advocate on their behalf to the tax agency, she added.

With a largely automated service, taxpayers might get “denied, and nobody pushes any further,” Green said, arguing that practitioners can represent their clients and push back.

Separately, the panelists also noted that practitioners should review determinations, including those about nexus or taxability, that have been made by automated services. “A lot of clients are not sophisticated enough to have full . . . tax departments” and lean heavily on automated tax services, Johnson said. “Just be careful when you're seeing that those things are getting automated,” he said.

The speakers also noted that practitioners need to be careful when submitting computer files about a taxpayer that is pursuing a VDA anonymously. Shaikh recounted that when she was at the District of Columbia Office of Tax and Revenue, she got to review a few VDA documents that were anonymous, but the file names had the clients identified.

Johnson added that the metadata of documents can include the name of the individual who created or modified it. “You can get to a point where you find out who it is, you put their name into Google, and you can find out what company they work for. So just be careful,” he said.

Johnson said he had suspicions that some taxpayers had been denied VDAs because tax agencies had identified them using metadata contained in documents.

Panelists also said it’s advisable for practitioners to put in the time to meet and develop a relationship with tax department staff who will be involved in the VDA process. “Get to know those people, too, so you can find an auditor, a policy person, in each one of those offices,” Green said.

The practitioners discussed a range of other issues as well, including the potential downsides that can arise from pursuing VDAs, such as additional compliance obligations, depending on a taxpayer's situation and states' rules, and unanticipated costs.

Johnson noted that taxpayers can benefit from self-managed audits, but that if a taxpayer’s factual circumstances are complicated, those audits may not be a good option and can become lengthy and expensive.

“As you go longer and longer, you're going to frustrate the agent that you're working with more and more,” Johnson said. He said he knew of one situation in which a taxpayer’s managed audit, which offered the benefit of securing the taxpayer a lower penalty rate, ended up going on for over two years.

The panel also discussed the Multistate Tax Commission's multistate voluntary disclosure program, which provides a single application and initial anonymity for taxpayers that want to address liability in multiple states. However, they noted that the program can be a slow process and taxpayers may still end up working with the states to address their situations.

Johnson also noted that some states' rules may have disparate effects that make it harder, on average, for minority and women business owners to address past noncompliance. He said that in Washington state, for example, “if there is collected and unremitted sales tax, it’s the department policy that they have committed ‘tax evasion,’” triggering higher penalties. Because the types of businesses that deal with sales tax are disproportionately owned by minorities and women, this creates a tougher situation for those business owners.

“Are they getting harsher penalties or consequences just because they so happen to work in that space in which sales tax will be collected?” Johnson asked later on. “There's biases that occur against such business types that . . . they're just trying to take cash under the table,” when in reality, many business owners are simply making mistakes, he added.