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To Be or Not 2B? - Transcript

[Speaker 1]

Hello and welcome to this episode of Charity Therapy. It's January, so non-profits, do you know where your 990 is? If you've got a calendar year fiscal year, now is the time to start getting ready for your May filing.

And to help, we're revisiting this episode from the backlist with Queen of the 990, Eve Borenstein. Keep listening for all the details about what happens when the IRS makes a mistake and why 990s are a great surprise source of non-profit gossip. I hope you enjoy.

Welcome to Charity Therapy, the podcast where we explore the ups and downs of the non-profit sector and answer your burning questions. I'm your host, Jess Birken, owner of Birken Law Office, and I'm excited you're here. Imagine hanging out with me and my super smart, funny non-profit expert pals.

You get to ask them anything about your nitty gritty non-profit life and get their wisdom for free. Whether you're a seasoned pro or just strapping on your non-profit boots, we're here to share stories and remind you, you're not alone on this journey. So get ready to join the conversation and bring me the tough questions.

I ain't scared. Ready to rock? Let's dive in.

Hello and welcome to this episode of Charity Therapy. Today, I am joined by the one and only Eve Bornstein. Ah, crowd noise.

Eve is a hero to me. She's so smart and she's a fellow tax-exempt attorney, but really her real title in the congressional record is Queen of the 990, and that is totes true because Eve continually makes the 990 updates an interesting topic, which is no mean feat in and of itself. Eve, thanks so much for being here today.

[Speaker 2]

Well, it's really great to be here. I just, it's fun to be trying to help small organizations and it's a never-ending task because it's a world of incredible complexity and it's a very highly regulated industry and yet we want to help the small go out and do the most.

[Speaker 1]

Yeah, absolutely. I've had so many clients over the past few years who are having trouble, more trouble than usual with the IRS and they clearly have some issues since the beginning of the pandemic that have been causing automatic revocations and mistakes, long wait times. With your insight into what's going on, can you tell us like what's wrong with the IRS?

What's going on?

[Speaker 2]

Okay, so you take a 1960s computer system, which was built on COBOL, which most people don't even know what that original punch card language, really secure, was all about, and then you add decades of complexity. The exempt organization taxpayers are the most complex in terms of coding purposes in the IRS database, but they're just a tiny little bit of the database. The database is insufficient in how it works to meet everything that the sector needs, and it's

been dysfunctional for a while and the pandemic just made it worse as the IRS ran into an incredible resource loss, inefficiencies, as people went home, modes of communication had to change internally and externally, and it has been a huge disaster.

[Speaker 1]

Yeah, you know, of course, I listen to you talk all the time, so I know about the COBOL thing. It's interesting that it's the complexity of the database that breaks everything.

[Speaker 2]

Well, I was thinking about Amazon, not that I am promoting them in any way, shape, or form, but you think about what is, you know, 21st century Uber, we have to keep complete information on all of our customers, and then we have to be ready to intersect with them properly. They have an annual order, they have these other things they do with us, and the IRS system just is not built for that. It's using wooden blocks in place of firing gigabytes across synapse in the computer wires, so it's a real problem for the exempt sector, and you and I are going to talk more about some of the specific problems that have been exacerbated.

[Speaker 1]

It's like you've done this before. Let's just kick right off then into our questions with that lovely segue. Here's our first question.

Our small nonprofit got a letter of automatic revocation from the IRS. It doesn't make any sense because although it's true we failed to file our 990 for two years in a row, we should have been able to file the third and stay in their good graces. We filed our 2020 990 easy before May 15th as required, but then the letter came saying we'd been revoked.

I tried to contact them and point out this was a mistake, but all they wrote back and said was there's no appeal process for an automatic revocation. What should we do?

[Speaker 2]

Okay, so key words with the IRS right now, or the key word is erroneous, and you already used it, Jess, but when the IRS does something wrong in its system, it generates a result that is erroneous. Okay, so here you have an organization because of the straight-up paper backlog. Now, if this was really a 2020 refiling, if it was an easy, you could still paper file it.

If it was a 990, you were supposed to e-file it, so it wouldn't have been lost in the paper log. It would have been potentially, you know, in the ethos of their system, but at least it would have been processed faster. Paper filed returns are usually backed up from 2019.

They're just resolving that. Your 2020 return that went in on May 15th of 2021 wasn't there in time for the IRS to see that you saved the fail. You needed to have them see it before they saw it in their systems.

So that revocation is because of their mistake. So there's an erroneous auto-revocation. This is the second year of them.

There are, you know, tens of thousands. I'm sure there are something like 50,000 organizations in that boat. There is a fax line, which I forgot to write down.

[Speaker 1]

Okay, we'll put in the show notes later if you want to send it to me.

[Speaker 2]

Yeah, and the IRS website, I promise if you just search erroneous auto-revocation, there is a fax line where you will send your information. I do want to speak to the letter that you got back. It is true that you cannot appeal an automatic revocation.

However, when one is erroneous, you can undo it. So, you know, you got back a form letter that said the right thing, and it's almost a miracle to me that somebody read it and responded.

[Speaker 1]

Right? Props to them for actually paying attention. That's number one.

[Speaker 2]

A larger issue that I just want to point out here, or wider issues, you know, 990s are dealt with as the, ugh, my accountant needs some information. That is not true. Your organization has, if you're big enough, maybe an annual report.

You send it out to your supporters, etc. You post it on Facebook, whatever. The 990 is your annual report.

It's your report to the world. You cannot control where it goes. It is completely visible.

Once filed with the IRS, maybe backlogged right now, but you'll be able to see it. There are free websites that have them all the way back to 2003. It's really easy for your funders, for your supporters, for your board members, for people who don't like you, etc., to see your 990s and 990-EZs. This is your responsibility. Knowing that you didn't do it for two years, being in a small

organization board of the treasurer told us they were going to do it, and they didn't do it. Every board member needs to know that that can't happen.

So, medium, large, and small organizations all need to make sure their 990 speaks the truth about them and that it's being handled properly. Accountants are not psychics. They do not know all the answers to the questions, except the number of questions, which only take up 20% of the form.

This is importantly on you. Don't ever get to a situation where you're two years in arrears and don't yourself file something that's erroneous. Don't claim that you can do a 990-N if you can't because that's just going to poke the bear and help Jess and my retirement fund as we try to say that you didn't really mean the mistake.

[Speaker 1]

It's so true, though, and it's, you know, it is, I wish that I had a magic wand that I could just wave at non-profit boards and be like, you now care about the 990 because it is so important. And just the fact that they dropped it for two years, I love that they were trying to be on top of it. And, you know, maybe there was turnover, and somebody realized, but it's like, okay, but now, like, what are we going to put in place to make sure that that never happens again?

[Speaker 2]

And with a dysfunctional IRS in the world of erroneous revocations that started to happen in the fall of 2020, when the IRS wasn't processing the 19 returns timely, and we were already in pandemic times, a lot of organizations were forced to create a new entity because it was faster to get a new C3 letter than it was to just start all over. If you're automatically revoked, you have to file a new exemption application. So, you know, it, it was a new group with a new EIN could come in.

So that's just horrible. You know, I, I try to create a warrior force of 990 ninjas in the accountant community. And I like to teach on the 990, but really the best way to teach on it to lay people is to go through and say, hey, look at all the gossip I just got about you guys.

So, I mean, think of it that way.

[Speaker 1]

I love that. Yeah. Also warrior force of 990 ninjas is an, I like, we need t-shirts that say that, that you can like shoot out of a t-shirt cannon at conferences that you speak at with accountants.

[Speaker 2]

I love it.

[Speaker 1]

Yes. Right. Also saying the word erroneous so many times is giving me flashbacks to my childhood in the eighties where there was this guy named Ernest and it was like a comedy thing for kids.

And there was an Ernest goes to camp movie and the eggs erroneous. I dare someone to look that up and figure out what Ernest has to say about eggs erroneous. All right.

Oh, I'm going to be rewatching some Ernest goes to camp with my children and finding out they don't hold up my prediction.

[Speaker 2]

Better than me working on 990 webinars. If you want to see someone ultimately look really bored, it's me after the 13th hour of that.

[Speaker 1]

Well, let's give you another question. Try and inject some more excitement into your day. Here we go.

I'm trying to complete a 1023 EZ application for income tax exemption. And in section four, question two, it asks whether A, do you normally receive at least one third of your support from public sources, or you normally receive at least 10% of your support from public sources and you have other characteristics of a publicly supported organization or B, you normally receive more than one third of your support from a combination of gifts, grants, contributions and membership fees and gross receipts from permitted sources from activities related to your exempt functions and normally receive not more than one third of your support from investment income and unrelated business taxable income.

Oh my gosh, what are the qualities of a publicly supported organization the IRS is referring to? And how do I choose whether to pick A or B?

[Speaker 2]

Okay, bear with me because I'm gonna riff on this. So you guys could not see me just shaking my head the whole time she was reading this question, which is exactly what I was doing when I read the question because the EZ is for these small organizations. And the, you know, and shorter because it's basically a postcard registration thing except for one of these questions, shorter than the full Form 990.

But let me just say in the full Form 990, the parallel question, are you meeting the first public support test, you know, doing the, you know, I made a third generally for blah, blah, blah, blah. Are you meeting the second public support test, which brings in program service revenue, which the first public support test didn't. See, I'm already turning you all off and you're not listening.

Okay, the full 990, and those two questions are followed by a third. And the third is, we don't know yet. Well, you know, you'll help us figure that out at the end of our fifth tax year.

Why they don't do that on the EZ is beyond me. But that's the question, right? And the real question the person asked was, you know, can you explain what this is?

And no, I mean, I can. It took me three years training in like an hour or two hour session to accountants who have some introduction to this arena with a crib sheet before I could not use the crib sheet. It took me three years to be able to explain the complexities of these tests in a way that was satisfactory to me that I wouldn't forget.

Okay, so let's just change the question. I will answer that question. But let me change it to the real answer that the person asked for, which is, is it to a or is it to be?

Okay, here's how you remember the answer to be or not to be. Okay, it's not to be. It's never to be there to be.

Okay, 95% or more of the time, organizations are going to meet the first public support test. And that's the one in 2A, which is going to give a yes to 2A, not a yes to 2B, which is the second public support test. The first public support test just said when you went out there and were soliciting monies from the public, you had some diversity of donors.

You're not beholden to old, rich person who it through them, their foundation and their family members and their companies are giving, oh, I don't know, 95% of the money. Okay, so and you get a five year test period. And so all of the complexity here is how we measure across five years.

But you know, it's easy to spot from a mile away when someone flunks the first public support test. So it's not that easy to explain how to go out and do it because you're just going to go out and do it. And by the way, the donation platforms these days online, which are using their own C3 public charities, which is what you're checking the box you qualify for under one of the two public support tests since you're not a school, church or hospital.

When you use those donation platforms, the gift is coming from a C3 public charity and all of their dollar's count is diverse. So if all the money you're getting is from those web online web platforms, you are like 100% public support and not 33 and a third percent, which would be your desirable percentage. The second public support test is a failsafe for groups who don't want to be soliciting funds and are able to show that they are diversely supported by people buying their charitable output.

They're selling fee, they're selling services or through programming or goods that are somehow charitable.

[Speaker 1]

So it'd be like summer camp or something where your activity is charitable, but you've got a fee for service revenue model.

[Speaker 2]

Exactly. And even in those cases, I say, look to the first test, to the first public support test. You're probably meeting that just because you have program service revenue.

[Speaker 1]

You ain't building that new camp cabin with just camp fees is my guess. Right. Probably actually are publicly supported with donations.

[Speaker 2]

Yeah. So anyway, please remember my Shakespeare to be or not to be. Not to be.

[Speaker 1]

I see so many nonprofits that like really screw that up where they say a lot of times they're going through like legal zoom or something where they've said they have one donor. And what they mean is right now I'm personally donating all the money to get this thing going, but they end up creating a private foundation accidentally.

[Speaker 2]

It's buried in the easy instructions, which again, made my head explode. Like, really? You wrote these really?

Oh, and they said that the instructions were simplified about the tests. And then for the first test, there was seven steps, which were gibberish. And then for the second test, there were eight steps.

Like, really, you said these were simple. This was a simplified realm. At the beginning, before they describe the lines, they point out that if you haven't been around, you're just talking about what you already have accomplished.

And the next number of years in the future to get you to five, can you in good faith say we're trying to get diverse donations? Yep, you can. That's why you're going to check to a and that's why I appreciate the question, even though I kind of ran a field on it, because it's an easy answer and truly 95% or more of all C3s who are meeting one of the two public sport tests either are or should be, some of them are still doing all the additional data for the other tests, but they easily would meet the first test.

You will all easily meet the first test. And those of you who don't have a fallback and you can figure it out in year six. So don't worry about it now.

[Speaker 1]

Yeah. Man, the IRS stuff is just not written for human consumption.

[Speaker 2]

Well, that's Congress. And then, and then, and then their resources, which we didn't even speak to how few resources they have. There's less than 550 employees in the exempt organization division for 1.4 million registered charities, another 200,000 C4s and a smattering of others who file 600,000 990s or 990 EZs a year. Some, okay, that's not the PF returns and the 990Ts. Oh my gosh. Less than 550 employees.

And they're trying to hire 10,000 new bodies to the IRS. And they had 200 applicants in the first three months that they first posted that.

[Speaker 1]

I hope they're paying those people well.

[Speaker 2]

Amazon and Target were paying both 20 and \$24 an hour in Kansas City and starting positions at the IRS there were \$15 an hour.

[Speaker 1]

Yeah. See, so we're not attracting the top talent either.

[Speaker 2]

Well, we do want to be working in the IRS that occasionally the government shuts down and then you don't get paid.

[Speaker 1]

Yeah. Okay.

[Speaker 2]

This again, Congress, they need to fund the IRS. Do they want to have a group who brings in revenue for, you know, the government? And I know some people think that the government's dysfunctional.

You don't fund it until it becomes less dysfunctional, but that seems to be a circle here.

[Speaker 1]

Well, right. And those both can be true. We need to fund the IRS, and the government can be not very functional.

So here's our last question. We need an eight hour bitch session about the IRS needing funding. Okay.

Here we go. I'm on the board of a small nonprofit and we file the 990EZ each year. We filed our last year's 990 by mail, and it was accepted by the IRS.

Later that year, we got a notice from the IRS saying we owe thousands of dollars in penalties for non-filing. Our accountant responded to the IRS right away as requested saying this was a mistake and sending in the proof. But then three months after that, we got another penalty letter.

And this time there's an intent to levy our property. What do we do?

[Speaker 2]

This is a disaster situation in what's been going on in the last nine months. The erroneous penalty letters often exist because they haven't processed the return yet. So the question said that the return was accepted.

Well, unfortunately, the IRS does not send out letters saying that your return was accepted. What you're referencing is that you have a proof of delivery and proof of delivery is just that, that it was delivered, not opened or processed. Same thing with even e-filing.

We can prove that the IRS received it. Your RO report from your filer proves that it was not rejected and they got it. When you're mailing something, that proof of delivery is not often accompanied by someone taking a photo of them at the post office with the front page of the 990.

And I have had IRS people say, I want to see what was in the envelope. So word to the wise in a beleaguered IRS, start keeping more documentation about what you send to them, but empathy to both whoever you were, your accountant, whether they were pro bono or paid, they feel responsible to help you out. You're spending resources, whether they're spending resources on putting correspondence into a file that may not register with the IRS because of mail backlog.

I just saw a treasury inspector general report on tax administration that came out last week that said that there's 9 million pieces of unprocessed mail. This was when they audited through the end of November. There's an appendix that says of the 9 million, 2 million are letters and responses to notices that haven't been addressed yet.

And almost 50% of them are overage, meaning that they're past the deadline that the IRS sets to be able to address these things. So, you know, this is, it may be an erroneous penalty letter because it could be that the late filing has been generated by them not seeing the extension that went in earlier. And the problem here is nobody's comfortable with the advice.

You got to sit and wait. Sending a second letter just adds to the backlog. Dear IRS, we already sent you a letter.

I mean, I used to write those again, you know, because I have a retirement fund, but you know, for clients who are just like, no, no, we know that it's costing us more to have you write letters

than the penalty would be. But on principle, we don't want to pay it. You know, check the penalty notice number because the IRS is slowly starting to suspend some of those.

And so, Jess, you and I have to stay in communication to put this in the notes, but you know, some of the notices, if they're going to be suspended, then you could just point to the letter as one that the IRS is saying you don't need to respond to. If you've already responded, they don't want you to respond again. In the good old days, we would call the collections hotline and ask them to turn off collections.

You can't get through. The hotlines are all just very, very difficult to get through to. So I'm really sorry.

This is the therapy part.

[Speaker 1]

I know. No, I mean, I've had to counsel clients on this to be like, okay, now we're done. Like, we have to just, I know it's stressful.

[Speaker 2]

You have to sit and wait. And the intent of notice to levy, Congress is onto this. They know that people, individuals and businesses and the exempt sector are really freaking out that the letter says that they're going to be levied or lien's going to be filed.

On the newer, the more recent years returns, I wouldn't worry about that. On old returns, I would still worry that it's possible. There's still an agent out there, an errant guy named Ernest, right?

Erroneous notices. Right. Well, he's erroneously doing a job that they told him not to do, but the message didn't get to him because the email.

[Speaker 1]

That's the next Ernest movie. Ernest goes to the IRS. That's clearly what's wrong with the IRS is Ernest works there now.

Oh my gosh. Yeah.

[Speaker 2]

I hate to bash the IRS because I think they are trying to do so much. Like they said at a professional meeting, I think probably you were also listening in on Jess, the T-E-G-E-E-O counsel. They're like, go read our website.

You know, we have so much information there. And then someone like me goes there and I find like mistake there and mistake there. And I have some tech friends up there and I write them, and I say, that would be really helpful if you clarified that because it contradicts something on another page.

And then they try, but you know, they have to find the penny that it's going to take to do that before they can flip that switch. Software technology is their hardest problem. And the fact that they have so few people means that any chance of running what they're going to do by real people, they don't have the bandwidth to do that.

Cause we used to beg them, could you just show us what you're going to post? And if none of us understand it, then maybe you have to rewrite it. They're like, well, it's technically right.

It's like, yeah, but it's not understandable, which is much of what people say about my talk. So I'll be quiet now.

[Speaker 1]

I feel like you make it as digestible as it possibly can be. And that's the thing. Cause like, it's not very digestible.

I mean, I did my damndest on that last question before to make it sound like a human was saying something. But the problem is their words, they just don't communicate in a way that regular people can understand, let alone attorneys.

[Speaker 2]

So I have to tell you the thing that just made me laugh hysterically. On LinkedIn, a DC colleague pointed out that her power of attorney to the IRS was rejected. And the jurisdiction they're licensed in, they use the letter A because, you know, the alphabet and attorney starts with, okay.

And you didn't put a state in, you put in DC. So we're returning it for you to, okay. So really the rule says what state or other local jurisdiction you're licensed in.

But somebody at the IRS said, well, it has to be a state. And then wrote a letter that said it had to be a state. Nobody vetted the letter that said it has to be a state.

It does not have to be a state. And so this got posted on LinkedIn with a hashtag DC statehood, which I thought was very amusing. But in any case, I mean, you know, if we, if we were going to spend the day laughing at poorly written IRS letters, I could get you going on that Jess.

[Speaker 1]

I mean, that could be a podcast unto itself. Maybe you should start that. I can help you get set up.

[Speaker 2]

They should number, by the way, then I years ago told them that I thought that the 990 should be renumbered to 666. I had checked and it was available. But I think, you know, I think on the grounds of separation of church and state, they were hesitant to do that.

[Speaker 1]

Oh, I love that so much. Oh, well, okay. I've got like three kinds of key takeaways.

And if you've got any more, feel free to chime in. Here's what I've got based on our questions today. Kind of going in backwards order.

If you've got an intent to levy and it's a newer return, just try to wait. Like, just try to just wait it out, even if it's hard. And then secondly, you know, it's okay if you can't understand what the IRS is saying.

If you're looking at a notice or, you know, information online, and you're just like totally confused, or you're doing a tax exemption application, even we think it's confusing a lot of times. So don't feel bad. It is just not written for human consumption.

And then sort of the last one that bubbled up for me is file your 990 every year. It is your best PR tool. It's not just a necessary evil that you have to go through.

It truly is how you can tell the world what a great job you're doing.

[Speaker 2]

And the proof of that thing about the 990, because on the EZ it's less evident that this is a great gossip sheet, etc. Both EZ and the full form ask you to talk about your program accomplishments for the year. Oh my gosh, this should change every year.

Accomplishments for the year. It has numbers on how many, you know, how many people did you serve? You and your boards need to read that and be able to say, well, there's some of the number stuff I don't get, or some of the questions I'm not sure of.

And on the full 990, you should have someone explain it to you because of the import. But the people need to feel really happy that their 990 says what they wanted to say, because it's going to be out there on a bazillion websites. And people poke at what's not there as much as they poke at what's there.

[Speaker 1]

Amen to that. Amen to that. Eve, thank you so much for being here.

If folks want to connect with you online, learn about you and what you can do for them with the IRS, where can they find you?

[Speaker 2]

Well, you can always email me and feel free to be a squeaky wheel if you need something more immediately. My first name, Eve, at taxexemptlaw.org. I got a website with three Ws before that, taxexemptlaw.org.

Twitter, I'm @taxexemptlaw. Do you detect a theme here?

[Speaker 1]

Yeah, you're very consistent. It's very good. It's on brand.

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About the Author



Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

Let's connect!

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