

Expect More Prosecutions For Offshore Accounts

By Robert W. Wood

In 2009, UBS paid \$780 million to the Internal Revenue Service and changed Swiss banking forever by handing over the names and details of American account holders. Many other banks in Switzerland and elsewhere have followed suit, some quietly, some not. IRS amnesty programs in 2009, 2011 and today have offered a way of correcting past failures and insuring that the process is handled civilly with no criminal tax exposure.

Generally, Americans caught in this pickle have no choice but to follow through with the IRS program. Clearly, disclosure and penalties are vastly better than the alternative. And discovery by the IRS is looking more and more likely.

The current amnesty deal involves paying taxes on any unreported income over an eight-year period, a 20 percent penalty on that under-reporting, interest, and a penalty equal to 27.5 percent of the highest aggregate balance in the offshore accounts. The eight-year deal applies even if the account existed for decades. Conversely, if you only had the account for three years, only three years are involved.

One common client question is whether closing down the account or giving the money to charity is an alternative. As it stands, this is no solution. Merely closing a foreign bank account does not solve disclosure problems or avoid criminal exposure. Taking additional steps to hide money can actually exacerbate the problem and constitute further evidence of tax evasion.

Disclosing the foreign account and reporting the income going forward can also be risky. The IRS may ask where the account and income came from and why it wasn't reported in the past. In that sense, reporting prospectively can be seen as an admission. At a minimum, if you only report and disclose the account and income prospectively, you may have to wait several years before you feel secure that the IRS will not ask about the past.

Moreover, for those who don't step forward, the IRS and Department of Justice are making clear that they have even more resources at their disposal. In fact, Kathryn Keneally, assistant attorney general for the Department of Justice's Tax Division, recently told a group of tax advisers that the way UBS was handled is no model. Famously, UBS alerted account holders ahead of time that their names would be disclosed to the IRS. Many went to the IRS first and averted serious problems by joining the IRS program.

Today, account information is flooding into the IRS from many sources and often with no advance warning. Keneally made ominous statements noting that prosecutions would be forthcoming where there was no indication that the federal government was pursuing a particular institution or account holders. FATCA, the Foreign Account Tax Compliance Act, will clearly ramp up worldwide transparency. FATCA was passed in 2010, but takes effect in 2013. It requires financial institutions worldwide to turn over the names of U.S. account holders.

You must report your worldwide income on your U.S. income tax return. If you pay tax in other countries, you generally get a credit for those foreign taxes paid on your U.S. return. As part of your tax return, you may also need to file an IRS Form 8938 to report your foreign accounts and assets. This new form required by FATCA took effect for 2011 and later tax returns. It generally requires disclosure of any foreign financial assets worth \$50,000 or more.

In addition to tax returns, all U.S. persons with foreign bank accounts exceeding \$10,000 at any time during the year must file a Report of Foreign Bank Accounts, or "FBAR," by each June 30. Lawyers and other fiduciaries must file an FBAR even if they have no beneficial interest in the account. Mere signature authority is enough.

Huge Civil and Criminal Penalties Apply

Tax fraud and evasion are serious crimes, and the penalties can be severe. Even in cases that are not pursued criminally, civil tax fraud carries a 75 percent penalty on top of taxes and interest. But clients fear criminal exposure most of all.

Keneally made ominous statements noting that prosecutions would be forthcoming where there was no indication that the federal government was pursuing a particular institution or account holders.

Failing to report income can be considered tax evasion and fraud. Tax returns must be signed under penalties of perjury, and the criminal statute of limitations is six years. Plus, the statute of limitations never expires on civil tax fraud.

FBAR penalties, both civil and criminal, are even worse than the tax penalties. The civil penalty for failing to file an FBAR is \$10,000 for each non-willful violation. But it can be assessed account by account. That means if you had five undisclosed accounts for five years, your penalty — even if you were fortunate enough to convince the IRS it was non-willful — could be \$250,000.

If your FBAR failure is judged as willful, the civil penalty is the greater of \$100,000 or 50 percent of the amount in the account for each violation. Each year you didn't file is considered a separate violation. Criminal penalties are possible too, and as with tax charges, these are the most frightening.

Criminal penalties for FBAR violations are even worse than for traditional tax crimes. Tax evasion can carry a prison term of up to five years and a fine of up to \$250,000. Filing a false return can mean up to three years in prison and a fine of up to \$250,000 as well. Failing to file a tax return can mean a one year prison term and a fine of up to \$100,000. But in the case of failing to file FBARs, the monetary penalty can be up to \$500,000 and a prison term of up to 10 years.

U.S. persons can have money and investments anywhere in the world, as long as they disclose their foreign accounts and income. If you or your clients face these issues, get some professional advice and try to get the situation resolved.



Robert W. Wood is a tax lawyer with a nationwide practice (www.WoodLLP.com). The author of more than 30 books including "Taxation of Damage Awards & Settlement Payments" (4th Ed. 2009 With 2012 Supplement www.taxinstitute.com), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.