IRS Offshore Account Amnesty

Lawyers and Clients Should Be Aware

BY ROBERT W. WOOD

Lawyers, law firms, companies, and their clients should be aware of the latest developments in the Internal Revenue Service's continuing campaign to achieve full transparency with foreign bank accounts and financial assets. With a carrot and stick, the IRS has said again and again that these matters are serious. Recent developments show that the stakes are going up and that failure to comply with tax and disclosure rules will henceforth be more harshly addressed.

Lawyers and their clients should pay attention, even where their roles as signatories of foreign accounts are merely fiduciary rather than beneficial in nature. Some lawyers may think they need not be concerned if their role was solely as a signatory on a trust or other fiduciary account. In fact, there are filing obligations in that situation, too.

About 34,000 taxpayers came forward over the last few years to disclose Swiss and other accounts. The IRS knows there's a much larger number who haven't. U.S. citizens and permanent residents must report their worldwide income on U.S. tax returns.

That includes investment income on foreign accounts and assets anywhere, no matter how small they may be. Each tax return also asks (on Schedule B to Form 1040) if you have a foreign account. If so (and if the total of all foreign accounts exceeds $10,000 at any time during the year), you must check "yes."

If you check "yes," it refers you to a separate filing, a Foreign Bank Account Reporting form known as an FBAR. This is separate from a tax return and must be filed each year by June 30 for the prior year. No payment is required, but this disclosure form has been in the law since 1970. It contains separate sections for foreign accounts which you own beneficially and for those over which you have signature authority but no ownership.

The IRS takes this very seriously. Income tax penalties for failing to include income or disclose foreign accounts can be severe, including criminal prosecution. The FBAR penalties are even worse, including up to $250,000 in penalties and up to five years in prison for each failure. It is no longer possible for people to claim ignorance over these rules — some taxpayers are being indicted for failure to file FBARs.

Given the stakes, the IRS has had two programs to encourage compliance, one in 2009 and another in 2011, under which the IRS collected $4.4 billion. Despite stating publicly that it was unlikely to offer a third type of amnesty program, the IRS did so this year. Unlike the prior two, this program has no announced deadline. For many, it could represent the last best chance at easy compliance.

For taxpayers without any beneficial ownership in foreign accounts or assets, it was and is still necessary to file FBARs disclosing their signature authority. Fortunately, most such cases can be resolved outside of the IRS amnesty by preparing and filing the back FBARs. They should generally be accompanied by an explanatory letter noting that your tax returns are correct, you just became aware of the FBAR requirements, you will commence filing FBARs annually, and you ask that no penalties be imposed.

Taxpayers whose noncompliance involved not only FBARs but also tax

returns should consider the IRS's third offshore program. It is similar to the 2011 program, and although there is no deadline, its terms could change at any time. Taxpayers who already came forward to the IRS since the closing of the 2011 program qualify to be treated under the provisions of the new program.

The biggest change is a 27.5 percent penalty on the highest aggregate balance (in foreign bank accounts/entities or value of foreign assets) during the eight years before disclosure. This is an increase from a 25 percent penalty in the 2011 program and 20 percent in 2009. However, taxpayers whose offshore accounts or assets did not surpass $75,000 could face only a 12.5 percent penalty.

In addition, taxpayers who feel the penalty is disproportionate may opt out and deal with the issue as an audit item. There's more flexibility there and a greater array of procedural rights (such as going to the IRS Appeals Office) if it doesn't go to your liking. As in the past, participants must file all original and amended tax returns and include payment for back taxes and interest for up to eight years as well as paying accuracy-related and/or delinquency penalties. They must also compete and file FBARs.

One reason to consider joining this IRS program relates to the absence of alternatives. Regardless of penalties, remaining silent seems increasingly risky. The IRS has made clear that "quiet disclosures" (in which a taxpayer prepares and files amended tax returns and FBARs without calling attention to them and without joining the program) will be dealt with strictly. Moreover, the IRS is getting good information and is more and more likely to discover foreign accounts and assets and treat them harshly.

Recently, a California tax lawyer, Christopher M. Rusch, and two businessmen, Stephen M. Kerr and Michael Quiel, were indicted over various alleged income tax and FBAR violations. There have been many others against whom similar criminal charges have been filed and more are likely on the way. In part, this is due to the treasure trove of information (including dates, names, and details) the IRS obtained via its 2009 and 2011 amnesty submissions.

Yet the IRS is getting still more data. The IRS has issued John Doe summonses forcing some banks to name names. In addition, the IRS has resorted to issuing grand jury subpoenas to individuals suspected of overseas banking to produce their *own* bank records. It requires turning over the suspect's *own* bank account details, including statements with the highest annual balances.

A dozen or more of these subpoenas have reportedly been issued. It is unclear whether such an individual can refuse and successfully assert protection under the Fifth Amendment. There is an established exception for "required records" that are not covered by the protections of the Fifth Amendment. Some

courts are considering whether offshore private banking falls within it.

The Ninth Circuit, in *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011), allowed prosecutors to compel an offshore account holder to produce account data even if it was self-incriminating. In contrast, in a similar case in Texas, *In re: Grand Jury Subpoena*, No. 4:11-mc-00174, (S.D. Tex. Feb. 11, 2011) (under seal), the judge ruled that a taxpayer did not have to comply. The government is appealing.

All of this is occurring as criminal investigations of 11 Swiss banks continue. The banks are suspected of enabling tens of thousands of wealthy Americans to evade U.S. taxes. Banks in the crosshairs include Credit Suisse AG, HSBC Holdings plc, and Basler Kantonalbank.

In fact, there have been massive data transfers by Swiss banks in the face of a January 30, 2012, deadline for these banks to turn over data on their offshore business. The data is said to contain many thousands of pages of encrypted data, including the names of client advisers. It is unclear if the encrypted data is any use to the IRS and other authorities in its current form, but the assumption is that it will be soon.

It is said to contain details of services to American clients. Therefore, it could provide a rich vein of information for tax authorities and prosecutors to pursue. The Swiss government is attempting to prevent criminal charges being filed against the banks and hopes cooperation in data transfers plus the payment of fines may be enough.

As this drama plays out, additional account details and prosecutions are likely in what has become an epic battle over global transparency. Lawyers and their clients are almost certainly better off trying to stay out of it. For more information, the IRS has a FAQ site at http://tinyurl.com/irsfaqs.

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