

Be Careful Out There When It Comes To Offshore Accounts

By Robert W. Wood

First time reporters of offshore accounts have skyrocketed. In part, it is due to FATCA, America's Foreign Account Tax Compliance Act, which makes foreign banks turn over names of American account holders to the Internal Revenue Service. The effect has already been palpable, and it's likely to get worse.

In fact, the Government Accountability Office (GAO) has been urging the IRS to go after offshore accounts *even more aggressively*. The IRS can just look at Schedule B to your Form 1040, where you list interest and dividends. There are also several questions on Schedule B. Is the "I have a foreign account" box checked?

If so, you usually file an FBAR. If not, how come? And if you check the box this year but it wasn't checked the prior year, the GAO says the IRS should check it out. The same with initial FBARs. Why didn't you file an FBAR last year? When was that account opened anyhow?

Audits, investigations, and even prosecution in extreme cases are possible. If you had foreign accounts over \$10,000 in the aggregate at any time during 2015, you should file an FBAR — also called Form 114. June 30, 2016 was the filing deadline this year, but next year it jumps to April 15, and next year an extension is available, just like tax returns.

If you missed the deadline, cheer up. Most tax professionals think it is better to be correct even if you are late. And given the risks, you don't want to take action without thinking it through and considering your tax returns too, as well as past years, usually six years back.

FinCEN requires that you file your FBAR, Form 114, electronically. FBAR penalties can include willful and non-willful civil penalties and even criminal violations. But should you file for precious metals and currency held in a box or custody? Is it clear when a safe deposit box is itself a financial account? Is it clear that the safe deposit box's contents could be aggregated with the financial account amount to reach a higher dollar total?

Some of the answers depend on what is a "financial institution" and whether safe deposit boxes with precious metals or currency are considered financial accounts. In most cases, filing is now required, and that can raise worrisome questions about the past. Adding to the difficulty is the fact that the particulars between the taxpayer and the institution can influence whether reporting is required.

It is hard to argue with the wisdom of going overboard when the FBAR penalties are so draconian. If the safe deposit box can be accessed by a financial institution, the safe deposit holds precious metal certificates, or the financial institution provides insurance or other services for the contents within the safe deposit box, then the safe deposit box and its contents are more likely to be subject to U.S. income tax reporting and disclosure obligations.

The U.S. depositor may not even know about all the terms and conditions applying to the safe deposit box. Many people do not read or retain a form agreement they sign with a bank. And, what of the internal record-keeping of the financial institution?

For example, should it matter whether we are discussing a standalone safe deposit box at foreign bank X, or a safe deposit box that is somehow linked to a bank account at foreign bank X? The risk of the safe deposit box being deemed a financial account goes up when there is a connection to a traditional bank account.

Will filing one FBAR prompt questions from the IRS, the Financial Crimes unit of the Treasury Department, and the Justice Department about whether you had the account in the past? Why didn't you file then? And what about your tax return? Did you indicate that you had a foreign account and report the income?

Since the statute of limitations for civil or criminal violations is generally six years, opening yourself up to that kind of exposure is frightening. If you are belatedly addressing foreign accounts and income for the first time, and not trying to address the past, filing a first FBAR is worth reflection.

You want to have an organized plan for what you are doing and how you are doing it. Will you go Streamlined or OVDP? Which tax years will count? Will you do a quiet disclosure or just start filing prospectively? Do you have all your accounts now or only some? Do you have account statements?

You don't want to rush to file and have to amend it shortly thereafter. These forms are filed under penalties of perjury. A GAO report on offshore tax evasion said the IRS has done a good job of collecting \$5.5 billion in taxes and penalties from around 40,000 offshore disclosures. See *Offshore Tax Evasion*, GAO-13-318 (Mar. 2013) at p. 2, available at <http://www.gao.gov/assets/660/653369.pdf>.

But the report goes on to say that the IRS is missing out on quiet disclosures. That is one big reason the three IRS programs may be preferable, depending on the facts:

- 2012 Offshore Voluntary Disclosure Program
- Streamlined Filing Compliance Procedures
- Delinquent International Information Return Submission Procedures

The latter is for taxpayers who do not need to use either the OVDP or the Streamlined Filing Compliance Procedures. But as with any IRS program, there are qualifiers. For example, the taxpayer cannot be under a civil examination or a criminal investigation by the IRS. The taxpayer also cannot have already been contacted by the IRS about delinquent FBARs.

Be careful out there.



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