



Even Tax Cheats Can Claim IRS Whistleblower Rewards

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Recently, former UBS banker Bradley Birkenfeld was awarded \$104 million for helping to change the landscape of offshore banking forever. The IRS award is the biggest and only sizable award in the much discussed program. It's making many whistleblowers more alert and more claims are on the way.

Yet Birkenfeld was admittedly not free of all wrongdoing. In fact, although his lawyers were none too happy about it, after Mr. Birkenfeld came forward with all his data about UBS's account dealing, he went to jail. In 2008, he was charged with withholding information about his tax help to a wealthy California developer.

He pleaded guilty to one count of conspiracy and served part of a 40-month sentence. He was recently released to a halfway house. His lawyers say he will pursue a presidential pardon.

In 2009, UBS paid \$780 million to resolve a pending criminal case and agreed to turn over information on U.S. account holders. That same year, Birkenfeld filed a whistleblower claim. While \$104 million is not 30% of the \$5 billion Birkenfeld's lawyers claim his actions produced, it is still an astounding recovery and great sign for the IRS program.

But how much should his own complicity matter? The tax code allows the Whistleblower Office to reduce awards when it determines that the individual "planned and initiated the actions that lead to the underpayment of tax."¹ In fact, the IRS is required to deny awards when the individual has been convicted for that role.

Insiders everywhere seem happy that Birkenfeld-despite his conviction-got a big award. Indeed, several of Birkenfeld's lawyers have acknowledged the obvious: you need someone whose hands are dirty to find dirt. Still,

just how the IRS will evaluate such issues and the full ramifications of wrongdoing is unclear.

After all, "planning and initiating" suggests a key role. And while Birkenfeld may have had a key role in *some* efforts to help American clients hide money from the IRS, it's clear he was merely a cog in a very large machine. It seems likely that issues such as the extent to which the whistleblower personally benefited from the tax avoidance will be important.

In addition, there are analogs in the Federal False Claims Act, another federal whistleblower statute that dates all the way back to the Civil War. Under that statute, it is generally only the *primary wrongdoer or ringleader* that faces reward limitations. It is too soon to tell just how this issue will play out.

But for the U.S. tax system, there could probably not be a stronger signal than Birkenfeld's \$104 million reward to show that the IRS Whistleblower Office means business.

For more information, in the Tax Management Portfolios, see Alexander and Gleicher, 623 T.M., IRS Procedures: Examination and Appeals, and in Tax Practice Series, see ¶13823, Confidentiality and Disclosure of Returns and Return Information.

¹ §7623(b)(3).