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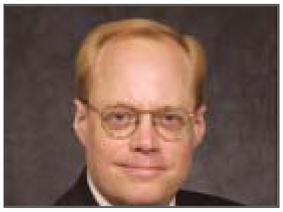

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Feds Push Prison For Undisclosed Offshore Accounts

The IRS and Justice Department want more prison time. They hope to make an example of a decidedly fat cat, Beanie Babies creater Ty Warner. He is ranked #663 of Billionaires and #209 on the Forbes 400. Mr. Warner already plead guilty to criminal charges over a Swiss account and paid a whopping $53M for Offshore Tax Evasion.

But at his sentencing, he got probation, and that lack of jail time made prosecutors mad. The feds wanted at least a year behind bars. The 69-year-old entrepreneur's lawyers argued successfully that he should get off with probation and community service because of his age and good works. Government appeals of sentences are not common, but this one is set for oral arguments September 17th in Chicago.

The feds have lost few cases related to offshore accounts. The last thing they want is to look to be going easy on the ultra-wealthy. The U.S. has always taxed worldwide income, but it turns out more Americans had secret offshore accounts than ever could have been imagined. Government victories have been astounding.


(Photo credit: Wikipedia)

After bitter litigation and summons enforcement proceedings, in a 2009 settlement, UBS capitulated to the feds. UBS paid a $780 million penalty and began handing over names of U.S. account holders. Many other banks followed, and now over 100 Swiss banks made deals with the feds under a program penalizes them less depending on how many more American names they hand over.

Meanwhile, the IRS is in its 5th year of ‘amnesty’ programs for U.S. account holders. Nearly fifty thousand Americans have participated and more are still streaming in to avoid prosecution and pay taxes and penalties. The IRS has already netted billions. Any taxpayers that have failed to come forward face even bigger risks now.

FATCA, the Foreign Account Tax Compliance Act, America’s global tax law, is now in effect. It requires foreign banks to reveal American accounts holding over $50,000. Virtually the entire world has agreed, even Russian and China, and names are being revealed to the IRS. Americans must report worldwide income and must file financial disclosure forms known as FBARs.

It's harder to claim ignorance now. IRS says any person with foreign accounts should read tax forms and instructions. And failing to follow-up or get professional advice can provide evidence of willful blindness. See Excerpt From Internal Revenue Manual, 4.26.16.4.5.3, Paragraph 6.

For Ty Warner, U.S. District Judge Charles Kocoras picked two years' of probation, partly swayed by about 70 letters detailing his acts of kindness. Yet the government appeal claims the judge gave too much weight to Warner's charitable acts, noting too that many letter writers were current or former employees. Many sentences do involve jail time, and it's likely that the feds will be even tougher in the future.

There is a new focus on willfulness. Ironically, it may be due in part to a new IRS program designed to give a break to innocent taxpayers with foreign accounts for whom the OVDP seems too harsh. The new Streamlined program involves fewer years and vastly smaller penalties. The penalty is only 5% for domestic taxpayers, with no penalties for Americans abroad.

But the willful question can be subjective, and the IRS thinks this program may be being abused. The IRS still thinks more people should go into the more traditional OVDP, which guarantees no prosecution, albeit with higher penalties. If you knew you had a duty to file FBARs, you knew it was illegal not to file them.

But even if you didn't know about FBARs, are you off the hook? Not necessarily. Your conduct is relevant. And this is where evaluating your facts and conduct can be tough. A purpose to disobey the law can be inferred by conduct meant to conceal, including:

1. Setting up trusts or corporations.
2. Filing some forms and not others.
3. Reporting one account but not another.
4. Using another passport.
5. Telling your bank not to send statements.
6. Using code words in communications.
7. Visits in person.
8. Cash deposits and withdrawals.
9. Moving money from one bank or country to another.
10. Not telling your return preparer.

Any of these can indicate willfulness, and it's hardly an exhaustive list. Some, such as moving money from one bank or country to another, may be because the banks put you in this tough spot. Your advisers may have told you to follow these protocols, saying everyone's doing it.

But "they made me do it" as a defense generally won't absolve you. If you're considering the two IRS programs known as the OVDP and the Streamlined program, remember that the latter requires a certification of non-willfulness. The IRS can and does audit participants in the Streamlined program, and you may be more vulnerable than you think.

There's one Streamlined program for U.S. Taxpayers Residing Outside the United States. There's another for U.S. Taxpayers Residing in the United States. But the IRS and Justice Department have suggested that the latter is being used by some people who should go for the more expensive but much more secure program known as the OVDP. Increasingly, there's need for caution.

Contact me 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.