

Correcting IRS Income Tax and Foreign Asset Reporting Problems

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- More than 15 years of experience investigating and defending IRS tax matters
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The Problem

- Many US taxpayers have not been fully compliant with their income tax and foreign asset reporting legal requirements
- IRS has long been aware of the underreporting of non-US income, but previously has been unable to detect non-compliant taxpayers
- The Foreign Account Tax Compliance Act (“FATCA”) will provide IRS with new information

Two Areas of IRS Filing Problems

1. Income Tax Reporting

- US taxpayers are taxed on worldwide income

2. Foreign Asset Reporting

- Separate annual obligation to report:
 - Non-US financial accounts (FBAR form –FinCEN Form 114)
 - Non-US controlled business entities (Forms 5471 & 5472)
 - Non-US trusts (Form 3520 & 3520A)
 - Non-US Assets (FATCA Form 8938)

IRS Filing Problem #1: Income Tax Reporting

- US citizens are taxed on worldwide income
 - Not just US-sourced income
- Double taxation offset by:
 - Foreign Tax Credit
 - Foreign Earned Income Exclusion
 - Tax treaties

IRS Filing Problem #2: Foreign Asset Reporting

Foreign Bank Account Report (“FBAR”) – FinCEN Form 114

- U.S. persons who have an interest in or signature authority over non-US accounts must file a FinCEN Form 114, (“FBAR”) if the aggregate value of the accounts is over \$10,000 U.S. dollars during the year
- A “U.S. person” is a U.S. Citizen or U.S. “resident”, which can include corporations, partnerships, trusts, etc.

IRS Filing Problem #2: Foreign Asset Reporting

Non-FBAR Foreign Asset Filing Obligations:

- Filed with US Income tax return
 - Form 5471: Non-US business entities owned by US taxpayers
 - Form 5472: US business entities owned 25% by non-US persons
 - Form 8938: New in 2011 – repeats other forms
- Filed Separately from US Income Tax return
 - Form 3520 & 3520A: foreign trusts and transfers to foreign trusts
 - FBAR

Possible Penalties: Tax and Certain Non-US Assets

- Income tax:
 - Criminal Charges for Intentional violation
 - Civil penalties range from 20% to 75% of tax due
- Non-US Asset Reporting Obligations
 - Criminal Charges for intentional violation
 - Non-FBAR penalty per violation usually \$10,000
 - FBAR Negligence: Maximum \$10,000 per violation
 - FBAR Intentional: **Higher of \$100,000 or 50% of high balance** of unreported accounts per year

Brief History of OVDP

- 2008 Criminal Charges against UBS for conspiracy to assist US taxpayers in committing tax evasion
- 2009 first OVDP when names of UBS account holders delayed

Solution: Offshore Voluntary Disclosure Program

- IRS has always had *General* Voluntary Disclosure Program
- Purpose is to encourage taxpayers to disclose compliance problems to IRS by promising not to pursue criminal charges and impose reduced penalties
- Specific Offshore Voluntary Disclosure Program began in 2009 in response to UBS case

Current OVDP Options

2014 OVDP (“regular” OVDP)

- Available to any taxpayer with unknown problem
- No criminal charges
- 8 years of income tax filings and 20% penalty on tax due & interest
- One-time 27.5% or 50% penalty on unreported assets

2014 Streamlined OVDP (Resident & Non-Resident)

- To qualify as a Non-US resident, taxpayers must have spent less than 35 days in the US during at least one of the last 3 years
- 3 years of income tax filings and 6 years of FBARs
- 5% (US-resident) or 0% (non-US resident) on unreported assets

2014 OVDP (“regular” OVDP)

- Three Step Process – Can take Over 1 Year

A. Pre-Clearance request

Includes: Name, social security number, date of birth, address, account name(s), account number(s)

B. OVD letter and attachments

Generally describes amount of assets disclosed

Includes details about account information and transactions

C. OVD Full Package

Includes amended returns, FBARs & other forms, penalty calculation

2014 OVDP (“regular” OVDP)

- Full package subject to IRS audit and approval
- Increased 50% penalty for assets at listed financial institutions
- Form 906 Closing Agreement ends program
- Will usually not be reopened except in cases of fraud

Foreign Financial Institutions or Facilitators Under the 50% Penalty

- UBS AG
- Credit Suisse AG, Credit Suisse Fides, and Clariden Leu Ltd.
- Wegelin & Co.
- Liechtensteinische Landesbank AG
- Zurcher Kantonalbank
- Swisspartners Investment Network AG, Swisspartners Wealth Management AG, Swisspartners Insurance Company SPC Ltd., Swisspartners Versicherung AG
- CIBC FirstCaribbean International Bank Limited, its predecessors, subsidiaries, and affiliates
- Stanford International Bank, Ltd., Stanford Group Company, and Stanford Trust Company, Ltd.
- The Hong Kong and Shanghai Banking Corporation Limited in India (HSBC India)
- The Bank of N.T. Butterfield & Son Limited (AKA Butterfield Bank and Bank of Butterfield), its predecessors, subsidiaries, and affiliates

2014 Streamlined OVDP

- New as of July 1, 2014
- Different programs for US and Non-US Residents
- Taxpayers MUST certify under oath that non-compliance was not intentional
- Lower penalties (5% of assets for US-residents and 0% for non-US residents)
- Requires 6 years of asset reporting and 3 years of tax returns

2014 Streamlined OVDP – Non-Willful Conduct

- Conduct that is due to negligence, inadvertence, or mistake, or conduct that is the result of a good faith misunderstanding of the requirements of the law

2014 Streamlined OVDP - Acceptance

- Streamlined submissions are subject to less scrutiny than regular OVDP
- IRS may open an audit within 3 years if it believes submission is false
- Regular OVDP is not available if IRS rejects Streamlined submission

QUESTIONS