

IRS has deal for offshore evaders

As part of its plan to generate intelligence on accountant, bankers and lawyers who help clients evade U.S. taxes by hiding money in offshore accounts, the Internal Revenue Service will grant leniency to those who volunteer to pay taxes on overseas account in exchange for information on who aided them in hiding the money abroad.

A new voluntary disclosure program, lasting six months, will guarantee a taxpayer will not face criminal prosecution. However, the disclosure could come at a higher cost, explained Robert McKenzie, tax partner at Chicago-based Arnstein & Lehr.

“The penalties they’re proposing could be higher than before the program was announced,” he said. “Before the announcement, the taxpayer could face a penalty of up to 50 percent per year of the amount in the foreign account for six years, which would equal 300 percent. But the IRS could, and in many cases did, merely assess a \$10,000 penalty for not filing FBAR, the foreign bank account report.”

The requirements for filing Form TD F 90-22 (Report of Foreign Bank and financial Accounts, commonly known as an FBAR) is in the regulations under 31 U.S.C. Section 5314, which is a provision of the Bank Secrecy Act. Generally, the civil penalty for willfully failing to file FBAR can be as high as the greater of \$100,000 or 50 percent of the total balance of the foreign account, as well as any criminal penalties that may apply.

“In the new announcement, the IRS lists exactly what you will face,” said McKenzie. “If you come in and voluntarily disclose that you did not report your foreign account, they will give you a letter guaranteeing that you will not be prosecuted. The penalty is 20 percent of the highest amount you had in the account over the last six years. On top of that, you have to amend your income tax returns and report all income from the account for the past six years, and pay tax and interest due on the income.”

LOOKING FOR INFORMANTS

The IRS has added 28 questions to the voluntarily disclosure form, which ask for details regarding the individuals' motivation for tax evasion. Of particular interest to tax advisors, the form asks for the name and contact information of anyone who advised the individual to open an offshore account.

"Even if the client gets no prosecution, that doesn't protect the person who advised him to open the account," said McKenzie. "I anticipate the IRS will eventually go to these advisors and demand the names of all their clients. Most of my clients involved in this did not just choose to open a foreign account someone in the U.S. advised them to do it."

The current offer is the result of the government's lawsuit against Swiss banking concerns UBS, according to Harold Pskowski, managing editor for international publications at tax researcher BNA.

"It goes beyond UBA, but it's the UBS customers who are most likely to take advantage of it, because they're the ones most likely to be discovered," he explained.

In a pending case against UBS, the government had obtained the names of 250 account holders. It says that there are 52,000 more Swiss accounts held by Americans. "We don't really know how incredible that is, but they had to pick a number," said Pskowski.

"There's been a lot of discussion as to whether it's worth while to take the IRS offer, because it's not a great offer," he explained. "A taxpayer has to balance what will happen if he takes advantage of the offer to what will happen if he gets caught. Clearly there's no risk of criminal prosecution, by in most cases, it's no a great risk because the government doesn't have the resources to prosecute 52,000 people if, in fact, there are that many out there."

"The offer is particularly onerous in the flat 20 percent penalty on the highest value of the account over a six-year period," he said. "If you were invested in equities and lost 50 percent of

their value, it could amount to a 40 percent penalty of what you now have. On top of that, you have to pay tax and other penalties and interest, and once you settle with the IRS, you have to settle with your state, so you could actually pay more than 50 percent of the value of the account.”

“Six years is a relatively long time,” Pskowski noted. “Some taxpayers in the past might have settled and limited their taxes to a three-year period, though in theory the IRS can go back forever there is no statute of limitations. And now, if they discover you before you accept the settlement offer, all bets are off. Having announced the new program, they’re not going to give anyone a better deal.”

There are two other pressure points regarding offshore accounts, he observed.

“On a broader level, we’re on the cusp of seeing major changes in bank secrecy laws and exchange-of-information agreements. There’s increased pressure on European countries to enter these agreements, which is why it was a topic on the agenda for the G-20 the group of 20 finance ministers and central bank governors,” he said.

“In addition, the Stop Tax Haven Abuse Act has need re-introduced in both the House and the Senate. Those bills do a number of things to strengthen the mechanisms of the IRS to get information, and would blacklist a number of countries for being secrecy jurisdictions. Since President Obama was one of the original co-sponsors, everyone assumes there will be legislation,” said Pskowski. “With parallel actions going on at the national and international level, Switzerland may cave and open up its accounts. The IRS may get what it’s looking for that way, rather than through court actions.”

Under the new guidelines, all voluntary disclosure requests will continue to be initially screened by the IRS’s Criminal Investigation unit to determine if the taxpayer is eligible to make

a voluntary disclosure. All requests containing offshore issues will be forwarded by Criminal Investigation to the IRS's Philadelphia Offshore Identification Unit for civil processing.

RISK V. REWARD

One positive aspect of the new voluntary program is the certainty it creates, according to Bruce Zagaris, a partner at Washington-based Berliner, Corcoran & Rowe LLP.

"Before, there were more questions about exactly what the penalties were and what was required," he said. "It's useful that some of those uncertainties have been cleared up."

"But one of the difficulties is that when taxpayers do the calculations, they're going to realize that the costs of participating in the program are very significant," he continues. "Many will say that as much as they want to participate, they may not be able to afford it."

Another issue, noted Zagaris, is "If I don't participate, will they really catch me? Until now the IRS hasn't shown it has the resources to find people and prosecute them, but it is making progress."

The action by the IRS to prosecute account holders and high-level officials at UBS, as well as going after professionals outside of UBS that had a role in advising people, is one of the things to consider, according to Zagaris.

McKenzie agreed. "If UBS actually turns over the names of the account holders, voluntary disclosure won't protect you" he said. "Even though the penalties are high, it's still to your advantage to come in to the voluntary disclosure program because the danger of not telling the IRS and then being discovered is great. And if you don't come in within the next six months, the penalties could be harshly enforced."

"The current voluntary program echoes a 2003 amnesty that was instituted on the heels of a congressional offshore banking investigation," noted Selva Ozelli, an international tax attorney

and CPA. “While only 1,000 taxpayers participated in the 2003 amnesty, this new program is likely to attract increased participation by taxpayers, their lawyers and accountants.