IRS Cracks Down on Unreported Overseas Accounts

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Mr. Ben-Cohen earned his law degree *cum laude* from Georgetown University Law Center. While at Georgetown, Mr. Ben-Cohen was a member of *The Tax Lawyer*, where he published The Real Estate Exception to the Passive Activity Rules in *Mowafi v. Commissioner* and the New Burden Shifting Statute, 55 *TAX LAW*. 961 (2002). Mr. Ben-Cohen has also published Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants, 10 *GEO. J. ON POVERTY L. & POL'Y*, 1 (2003).

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Additional articles published by Mr. Ben-Cohen include:

- "Payments by Majority Shareholders to Minority Shareholders to Secure Change in Control: Ordinary Income or Capital Gain?," *Daily Tax Report*, August 17, 2005
- "Consideration of Subject Matter Jurisdiction of District Courts Required When Preparing Cases Where Taxpayers Seek Solely Statutory Interest." *Daily Tax Report*, November 30, 2004

FBAR and Voluntary Disclosure

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I. THE PROBLEM

- Any U.S. Citizen or resident who has signatory authority over or a financial interest in a financial account located in another country is required to file a report with the Treasury Department on Form TD F 90-22.1 (Report of Foreign Bank and Financial Account), "FBAR," provided the balance was more than $10K at any time during the calendar year.

- President Obama promised in his campaign to target wealthy Americans who "do not pay their fair share" of taxes on the backs of the middle class and working poor. The Obama administration has set out to curb what costs the US Government an estimated $100 Billion in revenue annually.

- Of course, earnings on the account must be reported on the tax return.
  1. Schedule B contains the following question:
     a) At any time during 2008, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?
        – Checking the box that says "No" subjects a taxpayer to a possible criminal charge of filing a false income tax return which is a felony.

II. VOLUNTARY DISCLOSURE PROGRAM

- Who qualifies?
  1. Any taxpayer that makes a voluntary disclosure request, and who fully cooperates with the IRS both civilly and criminally.
  2. Taxpayer must come forward before contacted by the IRS.
  3. Taxpayers with illegal source income will NOT qualify.

- What penalties will be imposed under the amnesty?
  1. All taxes and interest going back 6 years will be assessed.
  2. Taxpayers must file amended returns and FBARS for 2003 – 2008.
  3. Accuracy related penalty of 20% must be imposed. No reasonable cause allowed.
  4. In lieu of all other penalties which may apply, a penalty of 20% of the highest aggregate account balance in the accounts during the 6 preceding years.

II. VOLUNTARY DISCLOSURE PROGRAM CONT.

- What penalties will be imposed under the amnesty? CONT.

  1. A 5% penalty is available if ALL of the following conditions are satisfied:
     a) The taxpayer did not open or cause the account to be opened;
     b) There has been no activity in the account (no deposits, withdrawals, etc.) during the period the account was controlled by the taxpayer; and
     c) Only the account earnings have escaped U.S. taxation, in other words, only previously taxed money has been deposited in the account.

III. EXAMPLES

Year	Amount on Deposit	Interest Income	Account Balance
2003	$1,000,000	$50,000	$1,050,000
2004		$50,000	$1,100,000
2005		$50,000	$1,150,000
2006		$50,000	$1,200,000
2007		$50,000	$1,250,000
2008		$50,000	$1,300,000

- Example 1

1. If the taxpayer comes forward and has their voluntary disclosure accepted by the IRS, they would pay **$386,000** plus interest. This includes:
2. Tax of $105,000 (six years at $17,500 -- $50,000 X 35%) plus interest,
3. An accuracy-related penalty of $21,000 (i.e., $105,000 x 20%), and
4. An additional penalty, in lieu of the FBAR and other potential penalties that may apply, of $260,000 (i.e., $1,300,000 x 20%).

III. EXAMPLES CONT.

- Example 2

  Same as Example 1, except the taxpayer does not come under the voluntary disclosure program and the IRS discovers the taxpayer's offshore activities.

  – Taxpayer can face up to $2,306,000 in tax, accuracy-related penalty, and FBAR penalty. The taxpayer would also be liable for interest and possibly additional penalties, **and an examination could lead to criminal prosecution**.

- Example 3

  A U.S. Citizen decides to buy a flat in London so that he will have a place to stay while on vacation, and he might retire there. Opens an account in England and wires $500K to an account at the Bank of Scotland to use as a down payment. Two weeks later he turns that money over to his solicitor to close the purchase.

- Example 4

  A taxpayer was born in Israel; he has lived in the U.S. for 20 years, but still maintains accounts in Israel in order to provide for family members there, and to invest a portion of his assets in the growing Israeli economy.

III. FREQUENTLY ASKED QUESTIONS

- Question 1
  - Do all U.S. citizens and residents have to report foreign bank accounts? Or, only taxpayers who have accounts in Switzerland?
- Question 2
  - What are some of the criminal charges I might face if I don't come in under voluntary disclosure and the IRS finds me?
  - A taxpayer may be convicted of tax evasion which is subject to a prison term of up to five years and a fine of up to $250,000. Filing a false return subjects a person to a prison term of up to three years and a fine of up to $250,000. A person who fails to file a tax return is subject to a prison term of up to one year and a fine of up to $100,000. Failing to file an FBAR subjects a person to a prison term of up to ten years and criminal penalties of up to $500,000.
- Question 3
  - Has the September 23 deadline to come under the voluntary disclosure program been extended? If not, do you think it will be extended?

III. FREQUENTLY ASKED QUESTIONS CONT.

- Question 4
  - Can I come under the voluntary disclosure program if I have unreported income in taxable years 2003 through 2008? What if I have unreported income prior to 2003?
- Question 5
  - If I come under the voluntary disclosure program, can I recognize any capital losses incurred in foreign accounts during 2003 through 2008?
- Question 6
  - I have properly reported all my taxable income but I only recently learned that I should have been filing FBARs in prior years to report my personal foreign bank account. May I come forward under the voluntary disclosure practice to correct this?
- Question 7
  - I'm currently under examination. Can I come in under voluntary disclosure?