Offshore Bank Account Reporting and Compliance Options

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Pedram Ben-Cohen is an Attorney-at-Law and a Certified Public Accountant (CPA) who specializes in civil and criminal tax controversy and litigation. Mr. Ben-Cohen is also a Certified Taxation Law Specialist, certified by the State Bar of California Board of Legal Specialization. Mr. Ben-Cohen represents clients in civil and criminal tax matters, including voluntary disclosures, offshore matters, audits, appeals, litigation, and collection defense.

Prior to establishing the Ben-Cohen Law Firm, PLC in 2009, Mr. Ben-Cohen was associated with the international law firms of Latham & Watkins, LLP and Gibson, Dunn & Crutcher, LLP. He also gained tax controversy experience working at Deloitte & Touche, LLP and the Tax Division of the U.S. Attorney's Office. Mr. Ben-Cohen was admitted to the California Bar in 2003. Mr. Ben-Cohen has been named a Rising Star in Tax Law by Super Lawyers from 2009 to 2016, an honor achieved by no more than 2.5 percent of the lawyers in California. In addition, Mr. Ben-Cohen ranked in the top 100 of the Up-And-Coming Rising Stars by Super Lawyers in 2015. He is also a member of the Tax Section of the American Bar Association.

Mr. Ben-Cohen graduated from Georgetown Law School and earned a B.S. degree from the University of Southern California, where he majored in accounting.

Articles published by Mr. Ben-Cohen include:

- OVDPs: The IRS Should Put Its Money Where Its Mouth Is, Tax Notes International, August 11, 2014
- IRS's Offshore Bait and Switch: The Case for FAQ 35, Daily Tax Report, March 9, 2011
- New Safe Harbor For Like-Kind 1031 Exchanges, Real Property Section Review, Los Angeles County Bar Association, Volume V, Issue 4, June 2010
- Payments by Majority Shareholders to Minority Shareholders to Secure Change in Control: Ordinary Income or Capital Gain?, Daily Tax Report, By Pedram Ben-Cohen - 2005
- Consideration of Subject Matter Jurisdiction of District Courts Required When Preparing Cases Where Taxpayers Seek Solely Statutory Interest, Daily Tax Report, By Pedram Ben-Cohen - 2004
- The Real Estate Exception To The Passive Activity Rules In Mowafi v. Commissioner And The New Burden Shifting Statue, The Tax Lawyer, By Pedram Ben-Cohen - 2002
- Public Civil Defenders: A Right To Counsel For Indigent Civil Defendants, By Pedram Ben-Cohen & Simran Bindra

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 Fincen Form 114 (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 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.

- Earnings on foreign accounts must be reported on tax returns as U.S. persons are subject to tax on their worldwide income.
  1. Schedule B contains the following question:
     a) At any time during 2015, 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 can be a felony.

How do we solve the problem?

II. PROSPECTIVE COMPLIANCE

- Timely filing FBARs in future years;
- Check the box “Yes” on Schedule B;
- Report all foreign income on the return;
- Include Form 8938 Statement of Specified Foreign Financial Assets with income tax return;
- The advantage to this approach is that it costs very little today; and
- The disadvantage is that you do nothing to clean up past non-compliance.

III. STREAMLINED OFFSHORE FILING PROCEDURES

- Three years of amended returns;
- Six years of FBARs;
- Onetime 5% (or 0% for persons who have spent significant time abroad) offshore penalty;
- Establish failure to report is non-willfull;
- Could be audited in the future;
- Must agree to retain financial records for six years;
- Cannot be currently under audit;
- Filing false certification could be used as a badge of fraud in a future criminal case;
- The advantage to this approach is that you would be voluntarily coming forward pursuant to an IRS program and you can clean up your past;
- The disadvantage is that this program does not provide a formal closing agreement; and
- Another disadvantage is that it only applies to a small class of taxpayers.

IV. QUIET DISCLOSURE

- Three or Six years of amended returns;
- Six years of FBARs;
- No IRS Program;
- No upfront Offshore Penalty;
- Generally avoid criminal prosecution;
- The advantage to this approach is that you can clean up the past without paying the 5% offshore penalty required in the Streamlined Offshore Filing Procedures; and
- The disadvantage to this approach is that it increases the likelihood of an audit and it could be costly when you take into account legal and accounting fees.

V. VOLUNTARY DISCLOSURE PROGRAM

- Taxpayer must come forward before contacted by the IRS;
- Taxpayers must file amended returns and FBARs for the prior eight years;
- Accuracy related penalty of 20% must be imposed. No reasonable cause allowed;
- In general, a 27.5% offshore penalty applies to the highest aggregate balance of offshore assets. A 50% offshore penalty applies if a foreign financial institution at which the taxpayer had an account has been publicly identified as being under investigation;
- The advantage to this approach is that it provides you with the best protection. You can clean up the past for good because you receive a formal closing agreement and you receive criminal clearance; and
- The disadvantage is it is costly.

How to determine whether Taxpayer is willfull or non-willfull

- What discussions took place between taxpayer and taxpayer's tax return preparer regarding the accounts and FBAR reporting requirements;
- Taxpayer's age;
- Source of the account funds: Inheritance, gift, reported income, unreported income;
- How long ago the account was opened and by whom (Taxpayer or someone else);
- Type of account, e.g. simple interest bearing account, brokerage account; whether there were stock trades, bond purchases, etc.;
- Taxpayer's level of involvement in investment activity; How often taxpayer met with bank representatives in the United States or abroad;
- Taxpayer's sophistication level, education level and profession;
- Taxpayer's command of the English language, both written and spoken;
- Whether the taxpayer moved to the U.S. from a foreign country, and at what age;
- Reasons for opening the foreign account;
- How the account was held, e.g. in name of taxpayer, numbered account, nominee entity such as trust, corporation, foundation, etc. used to hold accounts with taxpayer as beneficial owner;
- Whether there was a hold mail agreement;
- Amount of money in the account: $100,000 is very different from $100 million;
- Whether the offshore account was used as collateral to obtain a loan in the U.S. (i.e., a back to back loan);
- How much annual foreign income was unreported as compared to taxpayer's reported domestic income; Taxpayer's total foreign assets as compared to domestic assets;
- Whether taxpayer is a U.S. citizen living abroad and paying foreign taxes on the income earned offshore; and
- Taxpayer's reasons for continued non-reporting of the foreign accounts in light of heightened publicity relating to FBAR.