

## **2011 and 2012 and Forward OVDI: Co-Ownership of Offshore Bank Accounts**

**Issue:** When foreign bank accounts are co-owned, can the value of the account(s) and the income associated with the account(s) be divided among the co-owners? (See FAQ's #24-2012 and #40-2011 and 2012.)

### **A. Married Filing Joint Taxpayers**

#### **1. Married Taxpayers who co-own accounts** *(Both CPS and NCPS-see #2 below)*

Spouses are allowed a 50/50 split of co-owned accounts if co-ownership is verified. Verification of co-ownership can be accomplished through an inspection of the names listed on the bank statements.

*(Change- Prior direction stated spouses would be looked at as a unit to value offshore assets. Now we are going to treat spouses, even if they filed jointly, the same as we would other joint owners and allow accounts to be split if appropriate.)*

If only one spouse has their name on the account and the second spouse has a beneficial interest, such as signature authority, we would still consider them co-owners if the beneficial spouse is treating the account as theirs. For instance, if the beneficial spouse can withdraw funds from the account under their signature, then the beneficial spouse is treating the account as theirs.

#### **2. Married Taxpayers who individually owned accounts (in one spouse's name only):**

**Non Community Property State (NCPS)** – If spouses are in a NCPS, accounts owned jointly could be split and those owned individually could be included in only one spouse's HAB.

**Community Property State\* (CPS)** – If spouses are in a CPS, all accounts, including those individually owned would be combined for the HAB. Once all individually owned accounts are combined, these accounts could then be split between the spouses, unless there is an explicit agreement between them otherwise. This agreement must be pre-existing and not one they entered into after they made a voluntary disclosure. In addition, if the spouse owned the account before the marriage, this account could be excluded from the community property. The general rule is that if they are going to invoke the community property law they have to do it with respect to every account and not just the ones that will be beneficial.

*\*CPS- California, Texas, Arizona, Idaho, New Mexico, Nevada, Washington, Wisconsin and Louisiana.*

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**For married taxpayers who are splitting the Offshore Penalty, use this special language ( F906 will need Technical Advisor approval ):**

*3. In addition to the accuracy-related penalties [and/or delinquency-related penalties, as applicable] described in paragraph 2, and in lieu of any other penalties that the Internal Revenue Service may impose with respect to the offshore financial arrangements that were the subject of the voluntary disclosure referred to in paragraph 1, Taxpayers agree to pay, and the Internal Revenue Service may assess under Title 26 of the United States Code miscellaneous penalties in taxable year [year] in the following amounts:*

*[Name of Husband]                      \$ \_\_\_\_\_*

*[Name of Wife]                              \$ \_\_\_\_\_.*

**NOTE:** If married taxpayers split the Offshore Penalty, in addition to using this F906 special language, two separate Offshore Penalty modules must be established and two separate Offshore Penalty files and F8278s must be prepared.

**Additionally, if separate 906's are prepared, different special language may be required and should be discussed with your Technical Advisor. (See Section E.)**

### **B. Other Co-Owners of Accounts:**

Co-owners, other than married taxpayers, who co-own accounts will calculate the HAB and the unreported income based on their individual ownership percentages. Verification of co-ownership can be accomplished through an inspection of the names listed on the bank statements. If the taxpayer claims that the actual ownership differs from what it appears it should be, then they will have to prove this. See FAQ # 40-2012.

**Special Language will be required in these co-ownership scenarios.**

#### Examples:

- One owner claims full responsibility because they funded an account and added the other owner for convenience or some other reason. We will accept if the taxpayer can verify this arrangement.

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- Three co-owners are asserting 50%, 30% and 20% ownership through an inheritance. Again, this would have to be verified to be accepted. If accepted, the owners may qualify individually for different penalty percentages (it is possible that one taxpayer could qualify for 5% and the other could qualify for 12.5%).
- If the HAB calculation falls below \$75,000, then we would require additional documentation to prove they each added equally to the account. EX: Multiple Co-Owners.

Taxpayers cannot assign the Highest Aggregate Balance in an arbitrary manner but they can divide who pays the penalty. In other words, the miscellaneous offshore penalty may be allocated to anyone who wishes to pay it but the foreign account and asset balances can only be allocated to the individual co-owners by their certified ownership percentages.

### **C. Co-Ownership With a Foreigner (Non U.S. Taxpayer):**

If a taxpayer is requesting an account be split between U.S. and non-U.S. persons and thus a reduced penalty is calculated, a determination should be made as to who funded the account. If the account was funded in whole or in part by a non-U.S. taxpayer, then the proportionate amount of the account balance funded by the non-U.S. taxpayer may be excluded from the HAB.

If the U.S. taxpayer states that the money was a gift to a foreigner, a U.S. gift tax return (F709) must have been filed at the time of the gift. If the gift was from a non-U.S. taxpayer, F3520 is required. The burden of proof is on the taxpayer to provide the evidence that a gift transaction occurred.

Examples:

- A married couple who opens an account in India for the mother's living expenses. The mother lives in India and is not a U.S. taxpayer. The married couple is in OVDI and wants to split the account allotting 1/3 of the HAB to the mother. The account was funded by the married couple. This account can be split if the taxpayer filed a gift tax return at the time of the gift.
- Same scenario as Example 1 except the mother partially funded the account with her own funds. The portion funded by the mother would be excluded but it is the taxpayer's burden to prove this.

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### **D. Additional verification is required in co-ownership decisions.**

#### **Documents that may assist agents in verifying co-ownership:**

- Bank Statements with account owner names listed
- Account opening document
- Beneficial Owner Statement
- Wills for Inherited Accounts
- Pre-Nuptial Agreements

### **E. General Instructions:**

- Accounts that are split with different penalty percentages for a husband and wife will require:
  - An Offshore Penalty F5345-D will be completed for each spouse. If one spouse was already on the system, then complete for the second spouse.
  - A separate F8278 and separate case file will be required for each spouse.
- Co-Ownership cases require discussion with the Technical Advisor.
- If special language is added to the F906, Technical Advisor approval is required and the approval e-mail should be obtained before the case is sent for pre-issuance review.