A Brief Guide to Getting (and Keeping) Your Clients with Foreign Connections out of Trouble, Including FBARs, OVDP, and Lesser Known Issues

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Dennis N. Brager
Certified Tax Specialist
State Bar Of California
Brager Tax Law Group
A Professional Corporation
10880 Wilshire Blvd, Suite 880
Los Angeles Ca 90024
(310) 208-6200 Fax (310) 478-8030
www.bragertaxlaw.com
www.taxproblemattorneyblog.com

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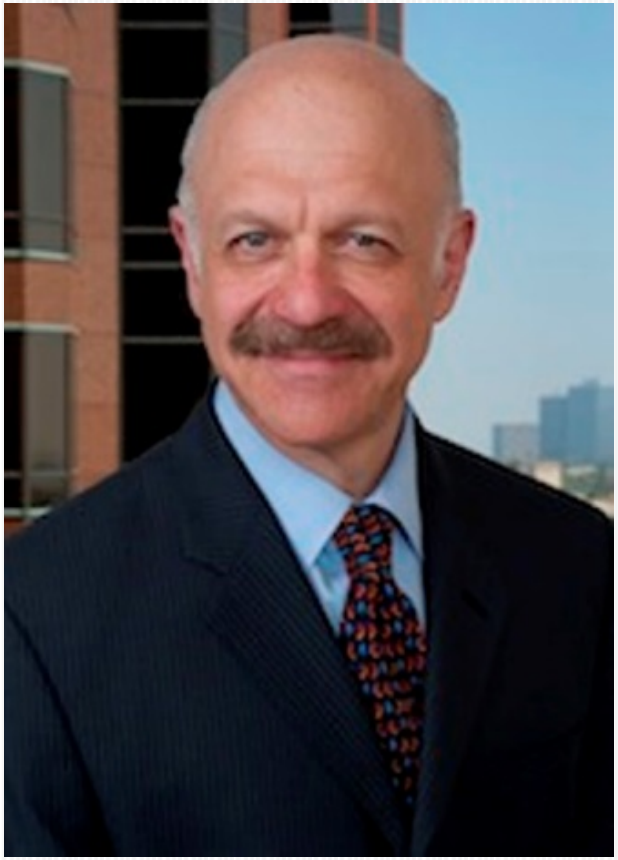
  jsmolovic@bragertaxlaw.com

Dennis Brager

- Ex-IRS Trial Lawyer
- State Bar Certified Tax Specialist
- 30+ Years Tax Dispute Experience with IRS, EDD, BOE, FTB Problems
- Nationally Recognized Tax Litigation Attorney



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Dennis Brager is a California State Bar Certified Tax Specialist and a former Senior Trial Attorney for the Internal Revenue Service's Office of Chief Counsel. In addition to representing the IRS in court, he advised the Service on complex civil and criminal tax issues. He now has his own four attorney firm in Westwood, and has been named as a Super Lawyer in the field of Tax Litigation by Los Angeles Magazine. He has been quoted as a tax expert, by Business Week, the Daily Journal, the National Law Journal, The Daily Beast, USA Today, Palm Beach Daily News, Money Laundering, the Los Angeles Daily Journal and Tax Analyst.

Having worked for the IRS for six years, he gained valuable insight into the inner workings of that organization. This not only helps in developing the right strategies, but facilitates working with the system quickly and efficiently. Mr. Brager has limited his practice to representing clients having disputes with the IRS, the Franchise Tax Board, the State Board of Equalization and the Employment Development Department--both at trial and administrative levels.

He has appeared on ABC Television's Good Morning America show, Fox Business News, and TV One Access. He has also spoken before the California Continuing Education of the Bar, the California Society of CPAs, the UCLA Tax Controversy Institute, the California State Bar Tax Section, the Consumer Rights Litigation Conference, the California Trial Lawyers Association, the American Bar Association, the Warner Center Estate and Tax Planning Council, and the National Association of Enrolled Agents. Dennis Brager has been an instructor at Golden Gate University's Masters in Taxation Program and a guest speaker at the University of Southern California. Mr. Brager has testified as an expert witness on Federal tax matters.

His articles have appeared in the California Lawyer, Daily Journal, Taxation for Lawyers, Los Angeles Lawyer, The Consumer Advocate, Family Law News, California Tax Lawyer, Journal of Tax Practice and Procedure, and Journal of Taxation of Investments. They include "Offshore Voluntary Disclosure – The Next Generation," "Partial Offshore Tax Amnesty – Voluntary Disclosure 2.0," Anatomy of an OPR Case (Definitely Not R.I.P.)," "FBAR and Voluntary Disclosure," "The Tax Gap and Voluntary Disclosure," "Circular 230: An Overview," "Recent Developments in Tax Procedure," "Damages, Rescission and Debt Cancellation as Client Income," "Ponzi Scheme Victims May Be Able to Mitigate Losses with Tax Deduction," "Prevailing Party-Recovering Attorneys Fees From the IRS," "The Taxpayer Bill of Rights--A Small Step Toward Reining in the IRS," "Challenging the IRS Requires a Cohesive Strategy," "The Innocent Spouse Defense," "IRS Guidelines for Installment-Payment Agreements," "Expert Advice: New Rules on 1099 Forms," "Tax Brakes: The Taxpayer Bill of Rights 2," and "Expert Advice: Avoiding Payroll Taxes."

Mr. Brager received his undergraduate degree from Pace University (B.B.A., magna cum laude, 1975, Accounting/Finance), and his law degree from New York University (J.D., 1978). He is a former chair of both the Tax Compliance, Procedure and Litigation Committee of the Los Angeles County Bar Association, and the California State Bar, Tax Procedure and Litigation Committee. He is admitted to practice before the U.S. Supreme Court, the Ninth Circuit Court of Appeals, U.S. Claims Court, U.S. Tax Court, U.S. District Court and the U.S. Bankruptcy Court.

Agenda

- Problem
- FBARs
- Criminal Penalties
- FATCA
- OVDP
- SDOP & SFPO
- Willful Blindness
- Malpractice Avoidance

The Problem

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- U.S. Persons who have signatory authority over, or a financial interest in an offshore account must file an FBAR- Form FINCEN 114 (formerly Form TD F 90-22.1) for accounts with combined balances over 10k U.S. dollars.
  - U.S. Person = U.S. Citizen or U.S. "resident"
  - Currently a resident means:
    - a resident alien under IRC Section 7701(b) includes:
      - Green card test
      - Substantial presence test
    - any entity including but not limited to, a corporation, partnership, trust, or limited liability company created, organized, or formed under the laws of the United States
  - Substantial presence test may not apply prior to the issuance of latest FINCEN regulations on March 28, 2011

The Problem (Continued)

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- Financial Interest Definition
  - Owner of record or holder of legal title
  - A United States person has a financial interest in each foreign account for which the owner of record or holder of legal title is
    a) A person acting as an agent, nominee, attorney or in some other capacity on behalf of the United States person with respect to the account,
    b) A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than certain exempted entities) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits,
    c) A trust, if the United States person is the trust grantor and has an ownership interest pursuant to Code Sections 671 to 679, or
    d) A trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

The Problem (Continued)

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- Schedule B Question: At any time during 2014, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions…..
  - If “Yes,” are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), formerly TD F 90-22.1, to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements.

- 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.

FBARs are Due June 30th

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- They are not filed with the tax return, but must be filed electronically with the Financial Crimes Enforcement Network (FINCEN).
- Extensions of time to file federal income tax returns do not extend the time for filing FBARs. There is no statutory or regulatory provision granting an extension of time for filing FBARs.
- Statute of Limitations for the IRS to Assess the FBAR Penalty is 6 years from June 30th even though no FBAR was filed.

Criminal Penalties

- Willful failure to file an FBAR. Up to $250,000 or 5 years in jail or both.

- Willful failure to file an FBAR while violating another "law of the United States" or as part of a pattern of any illegal activity involving more than $100k in a 12 month period. Up to $500k or 10 years in jail or both.

- Filing a false return, IRC § 7206(1). Up to 3 years in jail or $100,000 or both.

- Tax Evasion. IRC § 7201. Up to $100,000 or 5 years in jail or both.

Civil FBAR Penalties

- Negligent Violation. Up to $10k for each violation.
  - The IRS takes the position that if there are multiple accounts then there are multiple violations
    - e.g. a taxpayer who has three different accounts would be liable for $30,000 of penalty each year.
    - This position has not yet been litigated.
  - But see new FBAR guidance.

More Civil FBAR Penalties

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- Willful failure to file. Up to the **greater** of $100,000, or 50 percent of the amount in the account at the time of the violation, i.e. June 30th.
  - A 50% penalty can be imposed for year the account is open

- Willful failure to keep records of the account. Any person required to file the FBAR must keep certain records of the account for five years.

Civil Title 26 Penalties

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- Civil Fraud Penalty for Willful Failure to Report Income. 75% of the tax due.
- Accuracy Related Penalty for negligent failure to report. 20% of the tax due.
- Penalties for failure to file a Form 3520 reporting the transfer of funds to a foreign trust or receipt of a distribution from a foreign trust, which begins at 35% of the amount transferred to or received from the foreign trust.
- Penalties for failure to file a Form 3520 to report the receipt of a gift or inheritance from a foreign person or estate, or a gift received from a foreign corporation or partnership, which begins at 5% per month of the value of the gift and can reach as high as 25% of the value.
- Penalties for failure to report transfers of property to a foreign corporation (Form 926), which begin at 10% of the value of the property transferred to the corporation and which can reach a maximum of $100,000 per return.

Civil Title 26 Penalties (Continued)

- Penalties for failure to file foreign corporation information returns (Form 5471 and or Form 5472), which begin at $10,000 and can run as high as $50,000 per return.
- Penalties for failure to file Form 3520-A reflecting ownership of a foreign trust under the grantor trust rules, which consists of a penalty of 5% of trust assets.
- Penalties for failure to file foreign partnership information returns (Form 8865), which start at $10,000 and can reach a maximum of $50,000 per return, plus up to $100,000 of the value of property transferred to the foreign partnership.
- There is no statute of limitations on the failure to file the various foreign information reporting forms.
- Interest.

Not Just For Tax Cheats

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- Client 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. The client is required to file an FBAR.

- Client born in the U.S. moved to Australia to live and work. As a natural consequence he has accounts in Australia. FBAR required.

- Client was born in India; he has lived in this country for 20 years, but still maintains accounts in India in order to provide for family members there, and to invest a portion of his assets in the growing Indian economy. FBAR required.

- Client is the vice president of a company with a division in France. The vice-president is a signer on the corporate accounts in France. The VP must file his own FBAR, in addition to any corporate FBARs.

- Client has a Canadian Retirement Account. FBAR required.

- Client fled the Iranian revolution in the mid-70s, moved to the United States, and placed money in Israeli banks for safety. FBARs are required.

How Will the IRS Find Out? Let Me Count the Ways

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- FATCA (Foreign Account Tax Compliance Act of 2009)
  - June 2015 Vatican signs on to FATCA

- *IRS Investigations*
  - *Credit Suisse*
  - *Julius Baer*
  - *HSBC*
  - *Basler Kantonalbank*
  - *Bank Leumi*
  - *Bank Hapoalim*
  - *And 10 others*

Swiss Bank Tax Amnesty

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- Swiss Banks had until Dec. 31, 2013 to seek non-prosecution agreements
- 106 Swiss Banks signed up
- Penalties of up to 50% of the maximum aggregate account balance for Category 2 banks
- Information regarding the accounts held by the bank that existed as of Aug. 1, 2008 must be turned over to the IRS as part of the deferred prosecution agreements
- June 30, 2015 is the deadline for Swiss banks to submit data to DOJ

FATCA

- July 1, 2014 FATCA withholding began.

- FATCA requires a 30 percent withholding tax on any "withholdable payment" made either to an FFI (e.g. an offshore bank) or certain other entities if it fails to comply with new reporting, disclosure, and related requirements.

- FATCA reporting of specific account information is effective for accounts open as of January 1, 2014, and the reports are due March 15, 2015.

- FFIs are required to:
  - Obtain information from each account holder as is necessary to determine which accounts are "U.S. accounts"

  - Comply with verification and due diligence procedures with respect to the identification of U.S. accounts

FATCA (Continued)

- Report annually certain information related to any U.S. account maintained by such institution

- Deduct and withhold 30 percent on certain pass thru payments made to the benefit of an account holder that refuses to provide the required information (a "recalcitrant account holder")

- Attempt to obtain a waiver in any case in which any foreign law would (but for a waiver) prevent reporting of information under the provision related to any U.S. account maintained by such institution and, if a waiver is not obtained, to close the account.

- File a 1099 with the IRS, or provide detailed information about the foreign account. E.g.
  - Name and address
  - Account Balance
  - Gross Receipts and Gross withdrawals

More Exposure

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- Whistle Blowers
  - Disgruntled Bank Employees
  - Bank Employees Under Indictment
  - We're Just in it for the Money
  - Ex-Spouses
  - Ex-employees
  - Ex-business partners

- Foreign Banks. Most foreign financial institutions are closing accounts of U.S. persons who refuse to fill out Form W-9, and agree to information reporting to the IRS.
- IRS Activity
  - HSBC Summons
  - Interview Pool of more than 50,000 taxpayers participating in OVDP/OVDI as of January 2015
  - Sometime in 2012 Credit Suisse turned over client information to IRS pursuant to a treaty request
  - Guilty Plea by Wegelin Bank
  - Swiss Bank Clariden Leu turned over client information to IRS in late 2011
  - Ongoing negotiations with the Swiss government and Fourteen Swiss Banks who are under investigation by IRS and Department of Justice
  - 110 clients turned over to IRS by Swisspartners

Tax Amnesty - Offshore Voluntary Disclosure Program (OVDP)

- Who is not eligible?
  - Taxpayers under audit **whether or not** related to offshore issues
    - Individual shareholder of C Corporation may be eligible.
  - Taxpayers under investigation by CI (Criminal Investigation)
  - Taxpayers with illegal source of income

OVDP-History

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- OVDP Provided for a 20% Penalty for Disclosures Prior to Oct. 16, 2009
  - OVDP Permitted a Taxpayer to argue for less than a 20% penalty without "opting out"
- OVDI 2011 Provided for a 25% Penalty for Disclosures Prior to Sept 10, 2011
- OVDP 2012 Provides for a 27.5% Penalty. Announced Jan. 9, 2012. IRS Notice 2012-5

OVDP Penalties

- 27.5% of the highest account balance at any time during the prior 8 years.
  - The penalty base is not limited to foreign financial accounts required to be reported on an FBAR. Instead the 27.5% penalty applies to all of the taxpayer's offshore holdings that are related in any way to "tax non-compliance"
  - An accuracy related penalty of 20% of the tax due pursuant to IRC Section 6662
  - If applicable, the failure to file and failure to pay penalties under IRC Section 6651(a)(1) and (a)(2)
- The taxpayer may not argue lack of willfulness
- No reasonable cause exception

OVDP 2014-Major Changes

- Penalty Increased to 50% for taxpayers with financial accounts at "bad banks"
  - A 50% offshore penalty applies if either a foreign financial institution at which the taxpayer has or had an account or a facilitator who helped the taxpayer establish or maintain an offshore arrangement has been publicly identified as being under investigation or as cooperating with a government investigation.
- Currently this list includes 21 financial institutions
  - This listed can be updated at any time by the IRS. Two more were added within the last week.
  - Expect many, many more names to be added shortly after June 30 as the deadline for the Swiss Bank DPA program expires, and the IRS concludes DPAs.
- FAQs 17 and 18 have been eliminated/revised
- Documentation submission changed
- The reduced penalty structure under former FAQs 52 and 53 has been eliminated

FAQ 17 Superseded

- OLD FAQ 17. If all taxable income was reported then the taxpayer could file the delinquent FBAR with an explanation, and no penalty would be imposed.

- New Delinquent FBAR Submission Procedures: Very similar.

OLD FAQ 18 Eliminated. Bad News!

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- Old FAQ 18. A taxpayer who has failed to file tax information returns, such as Form 5471 for controlled foreign corporations (CFCs) or Form 3520 for foreign trusts but who has reported, and paid tax on, all their taxable income with respect to all transactions related to the CFCs or foreign trusts, could file delinquent information returns. No penalty.

- New Delinquent International Information Return Submission Procedures. A statement of reasonable cause with a statement of all facts establishing reasonable cause for the failure to file must be submitted.

- The statement should be signed by the taxpayer under penalties of perjury

- Must include a certification that the entity for which the return is being submitted did not engage in tax evasion.

- FAQ No. 1 Delinquent International Information Return Submission Procedures reiterates that **"**Unlike the procedures described in OVDP FAQ 18, penalties may be imposed under the Delinquent International Information Return Submission Procedures if the Service does not accept the explanation of reasonable cause."

- But Cf. OVDP FAQ 32 and 35 excepting from penalties accounts and assets which generated no gross income.

Major Changes.
OVDP Documentation

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- FAQ 25 contains a laundry list of documents to be submitted, but most importantly to clients:

- A check for the full amount of taxes, interest, and penalties must be sent in with the full disclosure submission that is sent 90 days after preliminary acceptance by CI.

Streamlined Compliance Procedures (Effective July 1, 2014)

- Two Programs
  - **The Streamlined Domestic Offshore Procedures (SDOP) and**
  - **The Streamlined Foreign Offshore Procedures (SFOP)**

Streamlined Compliance Procedures. Generally Eligibility Requirements

- Taxpayers must certify under penalty of perjury that their failure to report foreign income, and the failure to file FBARs, and information returns was non-willful.
- Taxpayers are not eligible if the IRS has initiated a civil examination of a taxpayer's return for any taxable year, regardless of whether the examination relates to undisclosed offshore assets.
- Taxpayers who are participating in OVDP are not eligible for the Streamlined Procedures
  - But may be entitled to a 5% penalty under "transitional treatment". See OVDP FAQ 1.4. Also see separate FAQs for transitional treatment.
- Prior quiet disclosure doesn't prevent streamlined disclosure
- Taxpayers at "bad banks" are not prohibited from entering Streamlined Procedures.

Streamlined Compliance Procedures. General Requirements and Features

- Three years of amended tax returns must be filed
- Six years of FBARs must be filed.
- Non-willful certification signed under penalty of perjury
- No accuracy penalty is assessed
- No late filing, or late payment penalties
- Streamlined is a “procedure” not a “program”
  - No acknowledgment of acceptance of Streamlined filing
  - No Form 906 closing agreement
  - No protection from criminal prosecution

Differences Between SDOP and SFOP

- All penalties are waived in SFOP
- SDOP requires a 5% miscellaneous penalty on the highest financial account balance during the prior six year period.
  - Unlike OVDP the penalty base does not include non-financial assets.
- SFOP filers must meet non-residency requirements
- SDOP filers must have timely filed the previous three years of income tax return, if a return was required

Who is a non-resident under SFOP

- In any one or more of the most recent three years for which the U.S. tax return due date (or properly extended due date) has passed, the taxpayer did not have a U.S. “abode” AND the taxpayer was physically outside the U.S. for at least 330 days.

- Neither temporary presence of the taxpayer in the U.S. nor maintenance of a dwelling in the U.S. by an individual necessarily means that the taxpayer’s “abode” is in the U.S.

Definition of U.S. Abode is Imported from IRC Section 911(d)(3) and Treas. Reg. Section 1.911-2(b)

- Abode has been defined as one's home, habitation, residence, domicile, or place of dwelling.
- It does not mean your principal place of business.
- Abode has a domestic rather than a vocational meaning and does not mean the same thing as "tax home."
- The location of your abode often will depend on where you maintain your economic, family, and personal ties.
- You are not considered to have a tax home in a foreign country for any period in which your abode is in the U.S.

Non-Willfulness. Will You Know It When you See It?

- "Non-willful conduct" for the new Streamlined Programs is "*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.*"
- Per the IRM, and most case law willfulness is "a voluntary, intentional violation of a known legal duty."
- *Does "willful blindness" negate non-willful conduct?*

What is Willful Blindness

- Under the concept of "willful blindness," willfulness may be attributed to a person who has made a conscious effort to avoid learning about the FBAR reporting requirements.
- "Willful blindness" requires proof that:
  - a person subjectively believed that there was a high probability that a fact exists and
  - he took deliberate actions to avoid learning of that fact. "
- Willful blindness" is more than recklessness or negligence. A willfully blind person is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.
- Some courts have (incorrectly?) found willful blindness based on the failure to review Schedule B of the tax return

Downsides of Streamlined Compliance Procedure

- The new procedure provides no protection from the risk of criminal prosecution
- Once a submission is made if the IRS determines that the Streamlined Compliance Procedure is not appropriate, the taxpayer may not participate in the Offshore Voluntary Disclosure Program (OVDP)
- It is not a DIY project, and will require substantial legal and accounting fees to produce:
  - 3 years of tax returns and 6 years of FBARs
  - An analysis to determine whether or not the client has criminal exposure which makes the streamlined procedure inadvisable

Alternatives to Entering OVDP: Just Say No?

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- Filing a quiet disclosure
- Filing accurate 2014 tax returns, and/or FBARs, but not self correcting prior years
- Enter OVDP followed by Opt-out
  - In June 2011 IRS published an "opt-out" guide for its agents instructing them on procedures to follow in the case of an opt-out.
- Stick head in sand, and do nothing (Not Recommended!)
- Potential Risks
  - Full Blown Audit
  - Potential Penalties Exceeding the Value of Offshore Assets
    - Pay special attention to failure to file "information returns" e.g. 5471, 3520 etc.
  - Possible criminal exposure including jail time
    - Deportation of non-citizens
- Potential Rewards
  - No Taxes
  - No Penalties
  - No Audit

Penalty Process Outside of OVDP

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- FBAR penalty imposed under the Bank Secrecy Act (BSA) not the Internal Revenue Code
- Appeals Review Available
- The Tax Court does not have jurisdiction over the penalty. *Williams v. Commissioner*, 131 T.C. 54 (2008).
- FBAR penalties are not dischargeable in bankruptcy. *U.S. v. Simonelli, 102 AFTR 2d 2008-6577*
- The FBAR penalty can not be collected unless the taxpayer agrees, or the IRS brings suit in federal district court and proves that the penalty applies.
    - But offsets of payments due from the federal government are possible
- FBAR Penalties can not be collected through summary IRS Collection Procedures

May 2015 FBAR Guidance. **SBSE-04-0515-0025**

- Effective for all open cases
- Only applicable to non-program cases. (Not OVDP, or Streamlined).
- Places Limits on the Amount of the maximum willful penalty
  - Total penalty for all years will never exceed 100% of the highest aggregate balance for all years
  - In most cases the penalty will be limited to 50% of the highest aggregate balance
  - Facts and Circumstances could reduce the penalty below 50% or above 50%, but again never over 100%
  - Probably concerned about the Constitutional limits on the penalty.

May 2015 FBAR Guidance. (Cont.) Penalty for Non-willful violations

- Generally limited to one 10k penalty per year no matter how many accounts there are.
- In the past the IRS position has been a 10k penalty per account, per year.
  - *E.g. six accounts with 50k each, means a non willful penalty of 60k per year, for a maximum of 360k in penalties.*
- However, depending on the facts and circumstances the examiner can impose either a penalty smaller than 10k per year, or a larger penalty of up to 10k per account per year, but not to exceed 50% of the highest aggregate balance.
- Reminds examiners that the starting point is the mitigation guidelines set forth in the IRM
  - Smaller penalties for accounts under $250,000 in the aggregate.

May 2015 FBAR Guidance (Cont.)

- Group managers not the FBAR Coordinators will make the final decision as to the type and amount of penalty.
  - In the past we have been told that the FBAR coordinator was overriding the group manager's decision.
- Counsel review is unnecessary except if there is a willfulness determination made by the group manager.
- Provides a check list of items that must go into the FBAR case file
- Most importantly is the examiner's "Summary Memo" explaining the reasons for the FBAR violation.
- That memo is supposed to be supplied to the taxpayer.

Malpractice Avoidance Tactics

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- Consider Circular 230 Section 10.34(d).
  - A practitioner may generally rely, in good faith and without verification, on information furnished by a client. A practitioner may rely on information provided by a client in good faith.
  - However, a practitioner may not ignore the implications of any information provided to or actually known by the practitioner. If the information furnished by the client appears to be incorrect, inconsistent with other known facts, or incomplete, the practitioner is required to make further inquiry. Good faith reliance contemplates that a practitioner will make reasonable inquiries when a client provides information that implies possible participation in overseas transactions/accounts subject to FBAR requirements

Malpractice Avoidance Tactics (Cont.)

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- Obtain written affirmative representations from clients about the non-existence of foreign assets before failing to file Form 8938, or checking the "no" box on Schedule B. Stating the taxpayer has no financial interest in, or signatory authority over a foreign financial account.
  - Clients have short and selective memories

- Advise the client of the need to file an FBAR in writing.
  - The preparer is not required to prepare the FBAR

Malpractice Avoidance Tactics (Cont.) Considerations Upon Discovery of Undisclosed Accounts

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- According to the Texas CPA Society: " It is essential that an attorney be involved before a CPA prepares an amended return that discloses a previously unfiled FBAR or Form 8938, or that includes previously undisclosed foreign income. An attorney should also be involved before a CPA advises the client on these matters, including whether the client should enter into the IRS voluntary disclosure program in connection with such funds in offshore accounts."
- Circular 230, Section 10.34(c). The practitioner has a duty to advise a client of any potential penalties likely to apply to a position taken on a return

• Statement on Standards for Tax Services No. 6, Knowledge of Error: Return Preparation

  - If a member is requested to prepare the current year's return and the taxpayer has not taken appropriate action to correct an error in a prior year's return, the member should consider whether to withdraw from preparing the return and whether to continue a professional or employment relationship with the taxpayer. If the member does prepare such current year's return, the member should take reasonable steps to ensure that the error is not repeated.

  - While performing services for a taxpayer, a member may become aware of an error in a previously filed return or may become aware that the taxpayer failed to file a required return. The member should advise the taxpayer of the error and the measures to be taken. Such recommendation may be given orally. If the member believes that the taxpayer could be charged with fraud or other criminal misconduct, the taxpayer should be advised to consult legal counsel before taking any action.

Malpractice Avoidance Tactics (Cont.) Considerations Upon Discovery of Undisclosed Accounts

- Potential Conflict of Interest. Can the client claim reliance on YOU the preparer?
- The filing of a 1040x, or a late FBAR is an admission, and a waiver of the 5th amendment privilege, not only as to the information contained in the document, but as to all communications regarding the same subject matter.
  - The filing of an amended return, or late FBAR provides NO protection against criminal prosecution.
- The Preparer as IRS witness
  - Federal Authorized Practitioner Privilege (FAPP) v. Attorney Client Privilege
    - FAPP may not apply to FBAR issues because FAPP only covers "tax advice"
    - FAPP does not apply to criminal matters
- "Information that a person furnishes the preparer of his tax return is furnished for the purpose of enabling the preparation of the return, not the preparation of a brief or an opinion letter. Such information is therefore not privileged." *United States v. Frederick*, 182, F.3d 496, 502 (7th Cir. 1999).
- Query: Are you sufficiently comfortable analyzing the legal test for willfulness, and the impact of the various priviliges to risking waiving the client's 5th amendment rights?

Brager Tax Law Group

Los Angeles
10880 Wilshire Boulevard, Suite 880
Los Angeles, California 90024
Phone: 310.208.6200
Toll Free: 800.380.TAX LITIGATOR
Fax: 310.478.8030

Email Jovana for your webinar evaluation form & certificate
jsmolovic@bragertaxlaw.com

www.bragertaxlaw.com
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