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HEADLINE: 2014 TNT 230-2 NEWS ANALYSIS: WHAT THE OVDP TRAINING MATERIALS TELL US. (Release Date: NOVEMBER 25, 2014) (Doc 2014-27989)

ABSTRACT: In news analysis, Marie Sapirie discusses what can be learned from the release of materials related to the IRS's offshore voluntary disclosure programs.

SUMMARY:

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The evolution of the IRS's offshore voluntary disclosure programs has been less smooth than the agency seemed to expect when it announced the terms of the initial program in 2009.

The development of the programs is reflected in a series of documents and training materials recently released by the government in response to a Freedom of Information Act request. The materials show an agency looking for answers to thorny and often unanticipated technical questions, but trying to explain its policies effectively to agents. Practitioners with extensive experience dealing with the 2009 and 2012 OVDPs and 2011 offshore voluntary disclosure initiative (OVDI) found almost no surprises in the released documents. However, the materials provide insight into the IRS's thinking that is valuable for understanding the programs.

The Brager Tax Law Group in Los Angeles released the results of its FOIA request November 18. Dennis N. Brager said that the motivation for the request came from interactions between taxpayer

representatives and IRS revenue agents in which the agents told representatives that they had to seek approval of resolution of an issue from a technical adviser. He explained that when the technical adviser's decision was contrary to the agent's opinion, the government offered little rationale for the decision. "I was hoping to find memos or guidance as to how some of these decisions were made," said Brager.

The 6,600 pages of documents provided by the IRS do not include e-mails. However, they offer a comprehensive historical look at the instructions given to revenue agents. Brager said the documents were interesting because they show the kind of spin that the IRS is putting on its interpretation of willfulness. "I don't think there's anything in there that comes as a big surprise for those of us who have done hundreds of these [offshore voluntary disclosures]," he said.

One of the more valuable aspects of the documents is that they provide confirmation of internal practices that practitioners had deduced through interactions with the IRS while guiding clients through the OVDPs and OVDI, said Brian C. McManus of Latham & Watkins LLP. For example, he said that the explanation in the training materials that the 5 percent penalty almost never applies confirmed many practitioners' suspicions.

Another area in which the documents offered confirmation of IRS practice is "barred years," or payments made by taxpayers outside the two-year window for making a claim for refund or credit. The IRS's position is that if taxpayers are removed from the OVDP or opt out, even if they do not owe tax, the government will not apply barred payments to other years or issue a refund (Doc 2014-27967). McManus noted that this policy was not publicized or discussed in any frequently asked questions.

Because the IRS's position as reflected in the materials was not understood by the practitioner community, disputes arose in the programs. "As practitioners, we want to ensure that our clients are being treated similarly to others, so it is helpful to understand the positions that the IRS has in advance," McManus said.

Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP said some of the materials aid practitioners by letting them know that the positions they were taking were also those of the IRS. "For practitioners who have worked very hard to take the right position, this makes them feel better that some of the materials support their efforts," he said.

The documents highlight some potential areas of confusion for agents, despite the generally high quality of the training materials. For example, in a document on reasonable cause for failure to file a foreign bank account report, the IRS explained that "if a return is required under the statute and regulations, the mere uninformed belief that no return is due, no matter how genuine, is not reasonable cause. To have reasonable cause, the taxpayer must inquire of a professional, disclose all relevant facts, and rely on the advice given." Brager noted that there is support in case law for the idea that, depending on the taxpayer's background, it is possible to have reasonable cause without inquiring of a professional. "That's one of the statements that I'm not surprised by, but it's not a complete statement of the law in the area. Unfortunately, a revenue agent looking at that might take a very narrow view of reasonable cause," he said.

In a separate presentation to examiners (Doc 2014-27928), the IRS explained that reasonable cause should be considered, and it noted that lack of knowledge of the filing requirement is generally not reasonable cause. The presentation told agents that reasonable cause determinations are made using an objective test and that the question to ask is "Did this taxpayer act like an ordinary, reasonable, prudent person?" It explained that one way taxpayers could establish reasonable cause was to show reliance on professional advice.

The IRS struggled with how to deal with offshore accounts and transactions that were not used for tax fraud, but that had not been reported. Ungerman noted that the materials show the IRS wrestling with very technical issues and trying to come out the right way. "That's the challenge of a one-size program," he said.

Training Materials

The materials explain and elaborate on the FAQs that were the centerpiece of the program. In a presentation for revenue agents (Doc 2014-27926), the FAQs are described as having "become the 'Code' for OVDI." The training materials provide more information on IRS policies and procedures than the FAQs, particularly on some technical issues.

The roadmaps of the programs laid out in the PowerPoint slides and accompanying text show that IRS agents had extensive training on issues related to voluntary disclosure. "It is clear that the IRS has really put a lot of time and effort into training their agents regarding many issues that surround the OVDP and the examination of offshore cases," said Ungerman. He noted that the materials include information on non-program disclosures as well.

McManus noted that the training materials (Doc 2014-27963) include form interview questions for agents (Doc 2014-28021). Those documents are especially helpful for preparing taxpayers for interviews, he said. Like the positions on technical issues, these questions would have been helpful for advisers to have in advance.

The materials occasionally reflect the assumptions made by the government about the pool of potential taxpayers at the beginning of the first OVDP. In a discussion of reliance on professional advice (Doc 2014-28022), the documents note that "in offshore cases the taxpayers are typically wealthy. It may be unreasonable for them to fail to seek competent tax advice."

According to estimates in a Government Accountability Office report (Doc 2013-10302) from 2013, the bottom 10 percent of participants in the 2009 OVDP had aggregate account balances of less than \$ 79,000, and the bottom 25 percent had balances of less than \$ 190,000. Although the top 10 percent had balances over \$ 4 million, there were still a significant number of participants whose accounts were not particularly large. Other presentations included a disclaimer that explained that "there are legitimate or non-tax motivated reasons [why] a U.S. Taxpayer would engage in offshore transactions."

In a set of slides on investigative techniques (Doc 2014-28020), the IRS explained to examiners that "it is important that we examine the whole taxpayer and not just the return assigned." Agents were encouraged to "put themselves in the taxpayer's shoes, understand the motivation for going offshore, and judge the reasonableness of their explanations for a specific transaction in that light." The presentation distinguished between an offshore investigation and a routine audit by explaining that in the former, agents needed to go behind invoices, other records, and oral testimony that they might accept at face value in a routine audit and "verify transactions in a multitude of ways."

Redactions

Although the released materials comprise thousands of pages, the IRS redacted a lot of information. Also, no substantive e-mails or memos were included, although the FOIA request specifically asked for them, said Brager. He noted that the IRS withheld over 700 pages. "We have filed an administrative appeal," he said.

Brager said that the redaction of the names of technical advisers and coordinators was disconcerting. "It is part and parcel of what I've seen, which is to try to keep technical advisers isolated from taxpayers and representatives," he said. "I think it would be really helpful if the technical advisers had a better window into what taxpayers were thinking when they didn't report foreign accounts. The technical advisers could make better decisions if they had all the information."

Ungerman said the liberal redaction of the materials was unfortunate. "I think the government would have been better served if they would have provided more information to practitioners who are trying to take the right positions," he said. Although many of the materials were not intended for use outside the government, some of the positions explained in them would have been helpful if

they had been incorporated into the public FAQs for the programs, he said.

The differences between the training materials and the FAQs likely led to more confusion and contention in the resolution of voluntary disclosure cases than the IRS intended. "I think the IRS could have saved itself and taxpayers a lot of time and effort by better publicizing their positions. They tried hard to do that through the FAQ process, and they deserve credit for the way they attempted to publicize their positions," said McManus. However, the training materials show that although there were many other questions that practitioners and revenue agents had to answer that were internally resolved, the answers were not made public. That made it difficult for practitioners to determine whether their clients were being treated similarly to other taxpayers, he said.


The programs were not intended to create an adversarial process. They were designed to bring taxpayers in to quickly resolve their unreported offshore accounts and ensure future compliance. The training materials in the released documents are thorough and well thought out. It is understandable that the IRS would want to release guidance and policies regarding the OVDPs and OVDI through its established FAQ format, but it might have been advisable to include more of the information on the established practices that are included in the materials in the publicly available information as well.

Additional documents

- Offshore voluntary disclosure initiative 2011 presentation (Doc 2014-27965)
- Report of foreign bank and financial accounts workshop (Doc 2014-27927)
- FBAR examination (Doc 2014-27929)
- FBAR penalty investigation workshop (Doc 2014-27930)
- OVDI opt-out and removal presentation (part 1 of 2) (Doc 2014-27973)
- OVDI opt-out and removal presentation (part 2 of 2) (Doc 2014-27974)
- Area FBAR coordinators presentation (part 1 of 2) (Doc 2014-27975)
- Area FBAR coordinators presentation (part 2 of 2) (Doc 2014-27976)
- Interim mark-to-market reduction in tax supplemental guide (Doc 2014-27964)
- OVDI opt-out and removal foreign penalty workshop (Doc 2014-27966)
- Passive foreign investment company presentation (Doc 2014-27968)
- Quiet disclosure FBAR investigations presentation (Doc 2014-27969)
- FBAR investigative techniques guide (supplement to

the quiet disclosure training) (Doc 2014-27970)

- FBAR case procedure guide (supplement to the quiet disclosure training) (Doc 2014-27971)
- Desk guide for examining tax years of taxpayers filing an amended return reflecting an additional tax liability (Doc 2014-27972)

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