LOS ANGELES
Daily Journal
www.dailyjournal.com
FRIDAY, AUGUST 3, 2012
GOVERNMENT

Offshore Voluntary Disclosure Program

By Brad Martinson

If a "United States person" has a financial interest in or signature or other authority over a foreign financial account, including a bank account, brokerage account, mutual fund, trust or other type of foreign financial account, the U.S. person is in most circumstances required to report it to the Internal Revenue Service, even if the account produces no taxable income. For these purposes, a U.S. person means U.S. citizens or residents, trusts or estates formed under the laws of the U.S., and also entities including corporations, partnerships, or limited liability companies created or organized in the U.S. or under the laws of the U.S.

A person will generally be considered to have a "financial interest" in an account in situations in which the U.S. person is the owner of record or holder of legal title, as well as situations in which the U.S. person's ownership or control over the owner of record or holder of legal title rises to such a level that the person should be deemed to have a financial interest in the account. A person has "signature authority" over an account if such person can control the disposition of money or other property in it by delivery of a document containing his or her signature (or his or her signature and that of one or more other persons) to the bank or other person with whom the account is maintained. "Other authority" exists in a person who can exercise power that is comparable to signature authority over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

Failure to timely file the Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, commonly known as an "FBAR") with respect to foreign financial accounts could potentially result in substantial civil penalties, criminal penalties or both. Generally, the civil penalty for willfully failing to file an FBAR can be as high as the greater of $100,000 or 50 percent of the total balance of the foreign account per violation. Non-willful violations that the IRS determines were not due to reasonable cause are subject to a maximum $10,000 penalty per violation. No penalty will be asserted if the IRS determines that the late filings were due to reasonable cause. In any event, it is possible that the civil penalties assessed for FBAR violations can exceed the balance in the foreign financial account.

Possible criminal charges include tax evasion, filing a false return and failure to file an income tax return. Willfully failing to file an FBAR and willfully filing a false FBAR are both violations that are subject to criminal penalties. Taxpayers may also be required to make other filings with the IRS with respect to offshore accounts, and additional penalties may also apply if such filings are not made.

Earlier this year, to help people with unreported offshore accounts get current with their taxes, the IRS reopened the Offshore Voluntary Disclosure Program (OVDP) following continued strong interest from taxpayers and tax practitioners. A similar program that was initiated in 2011, and modeled after a 2009 program, was closed down on Sept. 9, 2011. To date, the IRS has collected more than $5 billion in back taxes, interest and penalties from 33,000 voluntary disclosures made under the 2009 and 2011 programs, and another 1,500 disclosures have already been made under the 2012 OVDP.

The 2012 OVDP comes as the IRS continues working on a wide range of international tax issues and follows ongoing efforts with the Justice Department to pursue criminal prosecution of international tax evasion. Therefore, the risk of the IRS discovering a taxpayer's undisclosed offshore accounts increases every day. To that point, IRS Commissioner Doug Shulman has issued a warning to taxpayers who have not yet disclosed offshore accounts: "As we've said all along, people need to come in and get right with us before we find you. We are following more leads and the risk for people who do not come in continues to increase."

The goal of the OVDP is to bring taxpayers that have used undisclosed foreign accounts into compliance with U.S. tax laws, and the OVDP is designed to permit taxpayers to become compliant, avoid the substantial civil penalties described above, and generally eliminate the risk of criminal prosecution.

Use of the OVDP does not, however, come without cost. For taxpayers using the 2012 OVDP to come into compliance with U.S. tax laws, the penalty structure is as follows:

* Participants face a penalty of 27.5 percent of the highest aggregate balance in unreported foreign accounts during the eight full tax years prior to the disclosure.

* Certain taxpayers in limited situations may instead qualify for reduced 5 percent or 12.5 percent penalties. For example, people whose offshore accounts or assets did not surpass $75,000 in any calendar year covered by the new OVDP should qualify for the 12.5 percent rate.

* In addition, taxpayers participating in the 2012 OVDP must file all original and amended tax returns and include payment for back taxes and interest for up to eight years, as well as pay any accuracy-related and/or delinquency penalties.

As under the prior programs, taxpayers who feel that the applicable penalties are disproportionate may opt instead to be examined.

Under the 2012 OVDP, there is no set deadline for people to apply. However, the terms of the program could change at any time going forward. For example, the IRS may increase penalties in the program for all or some taxpayers or defined classes of taxpayers — or decide to end the program entirely at any point.

Brad Martinson *is a partner in Rutan & Tucker's Corporate Section specializing in tax and corporate law. He represents domestic and foreign corporations, partnerships and joint ventures involved in business transactions, including mergers and acquisitions. He can be reached at (714) 338-1870 or BMartinson@Rutan.com.*

Reprinted with permission from the ***Daily Journal***. ©2012 Daily Journal Corporation. All rights reserved. Reprinted by Scoop ReprintSource 1-800-767-3263