Foreign Account Disclosures Continue

by Christopher A. Karachale

Since 2009, the IRS has allowed taxpayers with undisclosed foreign accounts and unreported foreign earnings to enter voluntary programs to correct these compliance failures. Under the terms of these programs, taxpayers typically submit eight years of amended tax returns, Forms TD F 90-22.1 ("FBARs") reporting the foreign accounts, and account statements of their foreign accounts. In addition, taxpayers must pay tax on the previously unreported income, interest, and certain penalties.

More than 30,000 voluntary disclosures have been made since the programs began in 2009, resulting in more than $5 billion in back taxes, interest and penalties paid to the IRS. The voluntary disclosure program provides many benefits for certain taxpayers. Most importantly, taxpayers can avoid potential criminal prosecution for failure to report their foreign accounts. In addition, taxpayers can resolve their delinquent tax and reporting issues in a relatively streamlined process. Finally, with the implementation of the Foreign Account Tax Compliance Act (FATCA) and the IRS's increased focus on offshore tax evasion, U.S. taxpayers are increasingly unable to avoid their obligation to report their accounts and income worldwide.

The terms of the current 2012 voluntary disclosure program may be unappealing to many taxpayers. In addition to tax and interest, the IRS generally requires taxpayers to pay a monetary penalty equal to 27.5 percent of the highest aggregate balance of the taxpayers' foreign bank accounts/entities or value of foreign assets during the period covered by the voluntary disclosure. Despite the severity of the monetary penalty, taxpayers should consider the risk of criminal prosecution for non-compliance with the foreign account reporting rules and the potential for criminal penalties.

The monetary penalty can lead to inequitable results for many taxpayers, especially given the market fluctuations since 2008. The IRS appears to recognize that the voluntary disclosure programs many not be appropriate for all taxpayers. For example, certain non-resident taxpayers as well as dual citizens may be allowed to correct their prior income and reporting delinquencies without entering a voluntary disclosure program. Beginning September 1, 2012, such taxpayers, provided they are deemed not to be compliance risks, may simply submit

delinquent tax returns for the past three years, FBARs for the past six years, and certain other information without being subject to a civil or criminal penalty. This special dispensation may be particularly helpful for long-time residents of Canada or other nations who remain U.S. taxpayers.

Hanson Bridgett LLP attorneys have extensive experience addressing offshore compliance issues and the many intricacies of the voluntary disclosure programs.

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