May 12, 2010

To Clients and Friends of the Firm:

On May 8th, IRS representatives and members of the private bar whose practice is concentrated on white collar matters participated on a panel addressing the current status of the voluntary disclosure program for unreported foreign financial accounts. The panel was sponsored by The American Bar Association Section of Taxation. The free flow of comments and responses among the participants was enlightening. Here are some of the highlights.

Expect more activity; the offshore voluntary disclosure is a priority

More than 97% of the participants have been accepted into the program. Although only a small fraction of participants have moved into the examination stage, about 225 agents have been trained and assigned to work in the program. Consequently, more activity from the IRS is now expected. This corroborates recent activity in our practice where we have received telephone calls initiating examinations on a daily basis for the last week or ten days.

The IRS understands the difficulty in gathering capital gain statements

A segment of our clients are having difficulties in gathering information from foreign financial institutions that is useful in computing capital gains from particular transactions. Rather, information on sales proceeds is provided in statements; costs are buried in earlier transaction statements. As the accounts were typically run on a discretionary basis and periodic statements were never mailed to customers of these institutions, tracking purchase price and sales proceeds is often extremely difficult. Apparently, the IRS understands the difficulty that participants are having in matching the basis element against the sales proceeds in a capital gain information. A consensus existed among the panelists that, for the majority of taxpayers, a reasonable approach in measuring gains should be acceptable. The concept of flexibility at the agent level was stressed, although it was tempered by an IRS concern that all participants in the program should be treated equally.

“Quiet Disclosure”

The IRS is concerned about quiet disclosure. This is the IRS term for taxpayers that file amended returns and amended or initial FBAR forms outside the program. Apparently there is a large segment of taxpayers who have decided to accept the risk of penalties rather than the certainty of, inter alia, the 20% penalty on the highest capital amount in the account. When dealing with quiet disclosure taxpayers, the IRS suggested that its starting position would be that all failures to

file FBAR forms are intentional, and the major penalty will be imposed. This view was met with significant skepticism by the private bar. The IRS stated that those who go the quiet disclosure route will, if examined, be subject to intense scrutiny and full penalties.

Ongoing voluntary disclosure

Prior to issuing the special voluntary disclosure program for offshore accounts, the IRS had a general voluntary disclosure program ("ongoing voluntary disclosure program") which is still available for taxpayers that want to make a voluntary disclosure subsequent to the October 15, 2009 closing date. The problem encountered in the ongoing voluntary disclosure program is that it does not provide specific penalties or ceilings on penalties. Some members of the private bar commented that a penalty imposed on persons who are caught by the IRS -- viz., persons who do not come forward voluntarily -- rarely exceeds 50% of the unreported amount in issue. If that is the typical ceiling for persons who are caught by the IRS, the penalty for those who come forward under the ongoing voluntary disclosure program should not exceed 25%. Without a significant discount in penalties, the incentive to come forward voluntarily is relatively weak. The IRS acknowledged the argument, but made no other public comment, except to say that the IRS has no plans to issue another special deal.

Best regards,
Stan

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