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Is another Amnesty in the Works? The attack on Tax Havens and Tax Evasion Continues

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IRS Commissioner Shulman announced this week that the IRS is seriously consider ting offering a new Offshore Voluntary Compliance Initiative (OVCI). The last OVCI expired in October 2009 and produced a total of 18,000 filings according to the Commissioner. There was ample reason to have filed under the 2009 OVCI not the least of which were a waiver of criminal prosecution and a limit on the FBAR penalty to 20% of a single year account balance, plus the tax and interest and an accuracy related penalty on the tax. Since October 2009, the U.S. and Swiss government signed an amendment to the U.S.-Swiss Information Exchange Agreement allowing for the U.S. to request information on all U.S. account holders, by class, as opposed to individual designation with a cause showing. This amendment was a paradigm shift in bank secrecy law application. The Swiss had a 200 year history of maintaining depositor account information in confidence and with the amendment that all but disappeared as between nation states. The amendment was challenged in the Swiss courts, but the Swiss highest court said that a treaty provision was enforceable over domestic law. The result is that another 4,450 account holders will and are finding that their account information is being delivered to the IRS. Some of the account holders will be subject to criminal prosecution. Some taxpayers will find themselves subject to FBAR penalties both civil and criminal and tax penalties both civil and criminal. So why another amnesty offer?

The OVCI in 2009 produced significant amounts of usable data about the practices of UBS AG and the Swiss banking system, and much more. The data appears to lead to many other banks, and nation state actors. A result of the U.S. attack on bank secrecy/tax haven jurisdictions are amendments to the IRC in the HIRE Act. The HIRE Act was signed into law on March 8, 2010 and added taxpayer disclosure sections 6038D and 6048. In addition FATCA, the Foreign Account Tax Compliance Act, (Sections 1471-1474) were added.

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Under Section 6038D taxpayers must disclose on their tax returns a schedule with lists all foreign financial assets which in the aggregate are valued at $50,000 or more. Section 6048 requires that taxpayers who make transfer to foreign trusts treat those assets as personal "grantor trust" assets reportable on the 6038D schedule. Civil penalties for failure to report are serious and can be as much as $50,000. So there is now a disclosure requirement for tax purposes that is in addition to the disclosure on the FBAR form. FBAR's are required to be filed annually under the Bank Secrecy Act for all U.S. persons holding foreign financial accounts that have a balance of $10,000 at anytime in a calendar year.

FATCA is the attack on bank secrecy that may be the motivator for beginning on January 1, 2013 foreign financial institutions will have to disclose specified detailed account holder information for all U.S. persons who directly or indirectly hold accounts. To accomplish this goal the U.S. will impose a 30% withholding on all foreign financial institutions who have financial investments in the U.S., unless they enter into agreement with the U.S. Treasury to provide the specified information. The reporting will be no less often than annually and the reports will go to the IRS. Some foreign financial institutions have begun asking U.S. persons to close accounts rather than face the risk of being found in non-compliance.

Going into 2011 it seems reasonable that the IRS would make a new OVCI to give taxpayers an opportunity to come clean before the additional Code provisions are implemented and information is provided by foreign financial institutions. This approach will certainly prove to be rewarding to the Treasury.

The decision to wait and see has proved to be a very risky decision for some U.S. taxpayers who did not take advantage of the first OVCI. It will likely take time for all the systems to be put in place and some nations will not cooperate. Some will have bargaining power by reason of their control of U.S. debt instruments, (Treasuries), and some have strategic parity so that the U.S. may not wish to put alliances at risk over this issue. But, needless to say for the average taxpayer to rely on geopolitics may be a risky bet. The U.S. brought down Swiss bank secrecy and there seems to be no inherent limit to continuance of the actions. In fact, several European countries have announced similar attacks on bank secrecy with the objective of reducing cross border tax evasion. The ultimate result may be changes in the OECD Model Information Exchange Agreement allowing for request for bank information by class, not by individual.

The parameters of the new OVCI may prove to be the deciding force in evaluating how many U.S. taxpayers take up the offer. I remain committed to helping taxpayers figure out a safe way through this very complex matrix.

Happy Holidays.

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