

Tax DECISIONS & RULINGS

Tax Enforcement

Indictment of Former Swiss Banker, Partner Seen as Sign of Increased FBAR Enforcement

The indictment of a former UBS AG banker and his partner in Florida May 13 for helping an American billionaire evade taxes using overseas accounts indicates that, after several offers of partial tax amnesty, the Internal Revenue Service is getting serious about enforcing foreign bank account report (FBAR) filing requirements, according to Hale E. Sheppard, an attorney specializing in tax controversies and international tax.

Bradley Birkenfeld, a former UBS private banker, and Liechtenstein businessman Mario Staggi allegedly assisted American real estate developer Igor Olenicoff to avoid paying taxes on \$200 million in offshore hidden assets, according to the indictment filed in the U.S. District Court for the Southern District of Florida (93 DTR K-4, 5/14/08). Olenicoff pleaded guilty to failing to disclose the overseas accounts in December 2007.

Sheppard told BNA May 16 that IRS has been gearing up for a major international enforcement effort since at least 2003, when it took over FBAR enforcement from the Treasury Department.

Sheppard is an attorney with the firm of Chamberlain, Hrdlicka, White, Williams & Martin in Atlanta who has written extensively on the FBAR, international compliance initiatives, and IRS enforcement efforts.

"I think that we are going to see a tremendous amount of international enforcement," Sheppard said. "And I think a lot of that will be FBAR."

In 2007 IRS received 322,000 FBARs, Sheppard said. That number most likely represents a small fraction of the taxpayers with overseas accounts, he added.

IRS Takes Over FBAR Enforcement. Before IRS took over FBAR enforcement, Sheppard said that ensuring the reports were filed was not a priority for the Treasury Department.

The government took action to improve enforcement by both transferring authority to enforce the FBAR provisions to IRS and through the passage of the American Jobs Creation Act of 2004, which enacted new penalty provisions, including a provision allowing IRS to seize up to 50 percent of the undisclosed account in some cases, he said.

However, IRS has been slow to use the new penalty provisions, Sheppard said.

"There is a reason why you haven't seen any penalties yet," he explained. "That's because a large number of people who have these accounts have already come forward through OVCI [Offshore Voluntary Compliance Initiative], which essentially gave them amnesty."

When OVCI expired in April 2003, it was replaced by the Last Chance Compliance Initiative (LCCI), Sheppard said. Under LCCI, IRS sent taxpayers letters stating that the service knew about a taxpayer's overseas ac-

count that contained the last four digits of the account number and, in some cases, foreign bank statements.

"Under those two programs, a lot of people turned in their FBARs," said Sheppard. "But I suspect that the last chance has passed and now you are going to see full enforcement. I don't think the IRS is going to have a last, last chance program because that would undermine their enforcement authority."

Sheppard added that, after being given two opportunities to come forward voluntarily, taxpayers who are discovered to have unreported overseas accounts can expect to receive little in the way of leniency from IRS.

Other Signs of IRS Enforcement Efforts. Sheppard said that those who keep a close eye on IRS have noted several other signs the service has significant plans to step up international tax enforcement. First, he pointed out that IRS has been hiring international examiners.

Additionally, he said that in recent years there have been an increased number of IRS field memorandums and other internal documents discussing the issue of penalties for FBAR noncompliance.

"The foot soldiers—the revenue agents—are either considering penalties or asserting them," Sheppard explained. "That's why they're asking for guidance."

Sheppard observed that in 2004 the IRS Advisory Council issued a recommendation that emphasized the importance of FBAR reports.

"The practitioner needs to know that in today's world, Form TD F 90-22.1, 'Report of Foreign Bank and Financial Accounts,' might be the most important form they screen for," the report said. "The Service should not stop there, and should translate into plain examples how schemes can be adapted to the SBSE [small business/self-employed] realm. We can't just settle for the 31 nasties on an interview sheet: 'You can be caught' and 'it rips off every taxpayer in the country' just doesn't inspire much contrite compliance. It is more likely to be labeled as a scold with no enforcement teeth behind it."

Finally, Sheppard said IRS's increased emphasis on foreign accounts can be seen in the information document requests related to taxpayer audits.

"Almost without fail, they ask for any information on any accounts 'foreign and domestic,'" he said. "In the old days, they wouldn't have asked you about your foreign activities. Those questions were rarely raised."

By J.P. FINET