

KOSTELANETZ & FINK, LLP

Presents



International Information Return Penalties

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Timed Agenda for CLE:

International Information Return Penalties

December 13, 2018, 8:30AM-9:30AM

Kostelanetz & Fink, LLP

7 World Trade Center, 34th Floor, 250 Greenwich Street, New York, NY 10007

Topic	Time
Foreign Account Tax Compliance Act (FATCA)	5 min.
Foreign Information Returns And Failure To File Penalties	10 min.
Other Foreign Information Returns	10 min.
Increased Tax Penalties for Failure to Report Foreign Assets	5 min.
Extended Statute of Limitations for Failure to Report Foreign Assets	5 min.
FBAR Reporting and Penalties	5 min.
Willfulness	5 min.
Reasonable Cause	5 min.
Options To Become Compliant	10 min.

Course Description

This program will cover the basic requirements for reporting non-U.S. assets, and then discuss the penalties for failure to file these foreign information returns, the procedures for assessment and review, and taxpayer defenses.

CLE: 1 credit hour in Areas of Professional Practice

CPE: 1 credit hour in Taxation, Sponsor License #002853

KOSTELANETZ & FINK, LLP

MEGAN L. BRACKNEY, Partner

Megan L. Brackney has a distinguished track record of delivering exceptional results for clients facing complicated and difficult tax issues. An expert in the interplay between civil and criminal tax controversies, Ms. Brackney develops innovative strategies to resolve compliance concerns, civil audits, and criminal investigations. Ms. Brackney also advises clients on tax issues that arise in other contexts, such as business and matrimonial disputes, and she represents clients in litigation in the U.S. Tax Court and federal district courts. Ms. Brackney has been recognized by the "New York Super Lawyers" since 2012.

Prior to joining Kostelanetz & Fink in 2004, Ms. Brackney was an Assistant United States Attorney for the Southern District of New York. She also served as an Assistant Attorney General for the State of Missouri.

Ms. Brackney is currently a member of the Executive Committee of the New York State Bar Association Section of Taxation and a member of the American College of Tax Counsel.

Ms. Brackney has previously served as a Council Director for the American Bar Association Section of Taxation, the Chair of the Taxation Committee of the New York County Lawyers' Association, and the Chair of the Individual and Family Taxation Committee of the American Bar Association, Tax Section. She received the American Bar Association Tax Section's John S. Nolan Fellowship for 2008-2009.

Ms. Brackney received her J.D. from the University of Kansas School of Law and her LL.M. in Taxation from New York University, and is a member of the Board of Governors for the University of Kansas School of Law.

RECENT PRESENTATIONS

- "Is Voluntary Compliance Becoming Less Voluntary? A Whistleblower Case Study And Other Tax Compliance Topics", NYSBA Tax Section Annual Meeting, New York Hilton Midtown, New York, NY, January 23, 2018
- "Use Of Reasonable Cause To Avoid Penalties", 2018 PrimeGlobal North America Annual Tax Conference, Omni Scottsdale Resort & Spa at Montelucia, Scottsdale, AZ, January 9, 2018



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EDUCATION

University of Kansas, B.A. Philosophy (1995), with honors

University of Kansas, J.D. (1998)

New York University School of Law, LL.M. (2009)



INTERNATIONAL INFORMATION RETURN PENALTIES

Megan L. Brackney

December 13, 2018

KOSTELANETZ & FINK

Foreign Account Tax Compliance Act (FATCA)

Foreign Account Tax Compliance Act (FATCA)

- Added to the Internal Revenue Code by the 2010 HIRE Act to force foreign institutions to identify their US account holders
- Added new 30% withholding tax requirements under Chapter 4, Sections 1471 through 1474
- Requires foreign financial institutions or non-financial foreign institutions to:
 - Ascertain U.S. ownership of its accounts; and
 - Provide the IRS with information regarding such accounts.

FATCA

- The US has entered into approximately 113 “Intergovernmental Agreements” (IGAs) with foreign jurisdictions to implement FATCA.
 - Foreign Financial Institutions (FFI’s) in these jurisdictions disclose information directly to the IRS; or
 - FFIs disclose information to their local tax authorities who then transfer that information to the IRS.
- FFIs file Form 8966 (like a 1099) with respect to their US account holders
- Have to look at the Ultimate Beneficial Owners, looking through partnerships, corporations and trusts to identify US owners

Definitions

- An FFI includes any:
 - Depository institution -an entity that accepts deposits in the ordinary course of a banking or similar business
 - Custodial institution- as a substantial portion of its business holds financial assets for the account of others
 - Investment entity An entity that is engaged primarily in the business of investing, reinvesting, trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities.
 - Holding company
 - Specified insurance company that issues policies having cash value or annuities
- Definition is broad, thus foreign banks, brokers, custodians, and funds, including foreign mutual funds, funds of funds, exchange traded funds, private equity, venture capital funds, commodity pools, and hedge funds all qualify.

Information On U.S. Accounts

- FFI's must annually report the following information about each of its U.S. accounts on Form 8966 by March 31 (plus a 90-day extension):
 - the name and address and tax identification number of the U.S. account holder
 - the account number
 - the account balance and
 - the gross receipts and gross withdrawals or payments from the account
- If accountholder refuses to provide W-9 to identify self as U.S. person, FFI will file Form 8966 and identify taxpayer as a "recalcitrant accountholder."

Taxpayers with Foreign Assets: What Needs to Be Reported

Two Categories of Reporting:

1. Income Tax Reporting
 - ALL Income must be reported by U.S. Taxpayers.
 - U.S. tax system is a world-wide taxing system.
 - Income earned in any manner on any asset must be reported.
2. Information Reporting
 - Certain financial activities must be reported on “Information Returns.”
 - These reports must be filed regardless of whether the asset or transaction generated income.

Foreign Information Returns And Failure To File Penalties

Form 8938 (Statement of Specified Foreign Financial Assets)

- Form 8938 – Self Reporting Part of FATCA
 - Starting with 2011 Income Tax Returns.
 - Reports ownership interest in foreign assets.
 - Must report nearly all accounts that would be reportable on the FBAR *and*:
 - Foreign financial assets held outside of an “account”
 - Interest in Hedge Funds
 - Interest in a Foreign Corporation or Partnership
 - Interest in a Foreign Trust or Estate
 - Foreign Stock held directly

Form 8938

- Filing Thresholds:
 - Individual return: \$50,000 on the last day of the taxable year or \$75,000 at any time during the taxable year;
 - Joint return: \$100,000 on the last day of the taxable year or \$150,000 at any time during the taxable year;
 - Individual return of a US citizen or resident living abroad: \$200,000 on the last day of the taxable year or \$300,000 at any time during the taxable year;
 - Joint return of US citizens or residents living abroad: \$400,000 on the last day of the taxable year or \$600,000 at any time during the taxable year.
- Requires specific accurate information.

Form 8938

- The following is not reportable:
 - Safe Deposit Boxes
 - Foreign Currency
 - Bank accounts held with a foreign branch of a U.S. bank
 - Foreign Real Estate held directly in the name of an individual
 - Actual, Physical Precious Metals held directly by an individual
 - U.S. Mutual Funds that hold foreign investments
 - Foreign Social Security
- Taxpayers who do NOT have a tax return filing obligation are not required to report

Form 8938

- If a taxpayer is filing any of the below forms, the taxpayer may need to file Form 8938:
 - FBAR – Form FinCEN 114
 - Form 3520
 - Form 5471
 - Form 8865
- If reporting is duplicative, Form 8938 can refer to the other forms.
- Does not apply to the FBAR – the FBAR is intentionally duplicative of Form 8938.
 - The FBAR is not subject to taxpayer confidentiality laws and is more easily shared with other law enforcement.

Form 8938 For Domestic Entities

- Starting with the 2016 Tax Year, Domestic Entities are Subject to 8938 Reporting.
- Applies to Specified Domestic Entities:
 - A Closely Held US Entity with Predominantly Passive Assets
 - Domestic Corporation or Partnership that is Closely Held
 - Corporation: if 80% of voting stock or 80% of total value of stock is owned directly or indirectly by a Specified Individual (generally a US Taxpayer).
 - Partnership: if 80% of the capital or profits interest is held directly or indirectly by a Specified Individual (generally a US Taxpayer).
 - Constructive Ownership (267(c) and (e)(3)) applied as if the family of an individual includes the spouses of the specified individual's family members.
 - Passive
 - 50% Passive Income, or
 - 50% Passive Assets

Form 8938 For Domestic Entities

- Reporting Thresholds:
 - \$50,000 on last day of tax year, or
 - \$75,000 at any time during the year
- Aggregate Foreign Financial Assets held by domestic entities that are owned by the same specified individual
 - This prevents an individual from avoiding reporting by establishing multiple LLCs, Corps., etc.
- Any Foreign Financial Asset reported by the entity on an alternative form (3520, 5471, etc.) does not count towards the filing threshold.
 - This is different for individuals who DO need to include such assets in determining the 8938 filing threshold.
- Public Corporations, Tax Exempts, REITs, RICs are Exempt from the current 8938 regime.

FBAR v. 8938

	8938	FBAR
Financial (deposit and custodial) accounts held at foreign financial institutions	Yes	Yes
Financial account held at a foreign branch of a U.S. financial institution	No	Yes
Financial account held at a U.S. branch of a foreign financial institution	No	No
Foreign financial account for which you have signature authority	No—unless you otherwise have an interest in the account, as described above	Yes—subject to exceptions

	8938	FBAR
Foreign stock or securities held in a financial account at a foreign financial institution	The account itself is subject to reporting, but the contents of the account do not have to be separately reported	The account itself is subject to reporting, but the contents of the account do not have to be separately reported
Foreign stock or securities not held in a financial account	Yes	No
Foreign partnership interests	Yes	No
Indirect interests in foreign financial assets through an entity	No	Yes, if sufficient ownership or beneficial interest (i.e., more than a 50 percent interest) in the entity. See instructions for further detail.

	8938	FBAR
Foreign mutual funds	Yes	Yes
Domestic mutual fund investing in foreign stocks and securities	No	No
Foreign accounts and foreign non-account investment assets held by foreign or domestic grantor trust for which you are the grantor	Yes for both foreign accounts and foreign non-account investment assets	Yes for foreign accounts
Foreign-issued life insurance or annuity contract with a cash-value	Yes	Yes
Foreign hedge funds and foreign private equity funds	Yes	No

	8938	FBAR
Foreign real estate held directly	No	No
Foreign real estate held through a foreign entity	No, but the foreign entity itself is a specified foreign financial asset and its maximum value includes the value of the real estate	No
Foreign currency held directly	No	No
Precious Metals held directly	No	No
Personal property held directly, such as art, antiques, jewelry, cars, and other collectibles	No	No
‘Social Security’- type program benefits provided by a foreign government	No	No

Form 8938 Penalties

- \$10,000 for failure to file.
- Additional \$10,000 for each 30-days after IRS notice.
- Maximum penalty of \$60,000.

Other Foreign Information Returns

Other Foreign Asset Information Reporting

- Form 5471 (Information Return of U.S. Persons With Respect To Certain Foreign Corporations)
- Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business)
- Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships)
- Form 3520 (Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts)
- Form 3520-A (Annual Information Return of Foreign Trust With a U.S. Owner)

Form 5471

- Who is Required to File?
 - U.S. citizen or resident who is an officer or director AND who has either:
 - Acquired stock which meets the 10% ownership requirement (vote or value), or
 - Increased stock ownership by 10% during the year.
 - U.S. citizen or resident who:
 - Acquired stock during the year reaching 10% or more ownership,
 - Became a citizen or resident during the year while holding 10% or more ownership, or
 - Sold or transferred stock so as to fall under the 10% ownership during the year.
 - U.S. citizen or resident who had control (more than 50% of vote or value) of a foreign corporation for at least 30 days during year.
 - U.S. citizen or resident who owns stock in an entity that was a CFC for at least 30 days during any tax year AND owns that stock on the last day of that year.
- See IRC § 6038; Treas. Reg. § 1.6038-2(a); IRC § 6046

Form 5471 (cont'd)

- Penalties
 - An \$10,000 initial penalty plus an additional \$10,000 penalty for every 30-day period, or part thereof, after the IRS has mailed a notice of failure.
 - Maximum total of \$60,000 (IRC § 6038(b))
 - Reduction of foreign tax credits (IRC § 6038(c))

Form 8865

- Required under IRC § 6038; Treas. Reg. 1.6038-3(a).
- Filing Requirements:
 - Certain U.S. persons with an ownership interest in a foreign partnership or who make contributions to or receive distributions from a foreign partnership.
 - A U.S. person who controlled the partnership (that is, a partner who holds over 50 percent of capital, profits, deductions, or losses interest).
 - A U.S. person who owned at least 10 percent of the partnership (10 percent capital, profits, deductions, or losses) while U.S. persons owning at least 10 percent each controlled the partnership.
 - Certain U.S. persons who make contributions to the partnership during the year.
 - Certain U.S. persons who acquire or dispose or have a substantial change in proportional interest of a partnership interest during the year. (IRC § 6046A – File Schedule P)

Form 8865 (cont'd)

• Penalties

- Same as Form 5471
 - An \$10,000 initial penalty plus an additional \$10,000 penalty per 30-day period, or fraction thereof, after the IRS has mailed a notice of failure capped at a total of \$60,000 (IRC § 6038(b)).
- Reduction of foreign tax credits (IRC § 6038(c)).
- Accuracy-related penalty increase under IRC § 6662(j) to 40%.
- Statute of limitations on assessment is suspended under IRC § 6501(c)(8) on the entire return.
 - If the failure to file is due to reasonable cause, the SOL is suspended only with respect to items related to the form.

IRS Form 3520 (Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts)

- **Filing Requirements**
 - With respect to foreign trusts
 - Creation of foreign trust by US grantor
 - Transfer of assets to foreign trust by US person
 - For each year US person is treated as owner of a foreign trust
 - For each year a US person receives a distribution from a foreign trust
 - With respect to gifts by foreigners
 - A US person who receives a gift from a foreigner in excess of \$100,000 of value
 - A US person who receives a gift of \$10,000 or more from a foreign corporation or partnership

Form 3520

- Form is Due with Taxpayer's Tax Return
- Reports Two Categories of Activities:
 - Receipt of a Foreign Gift or Bequest
 - Receipt from a foreign individual or estate
 - Reporting threshold of \$100,000
 - Receipt from a foreign business
 - Reporting threshold of \$15,797 (inflation adjusted)
 - Must aggregate gifts from related persons.
 - Penalties
 - 5% of the amount of the gift or bequest, which increases at 5% per month to a maximum of 25% after IRS Notice
 - Transactions w/ a Foreign Trust
 - Receipt of Distribution
 - Transfer to a Foreign Trust
 - Certain Other Transactions

Penalties for Failure to File Forms 3520

- Initial penalty is 35% of the “gross reportable amount.”
- Continuation penalty is \$10,000 for every 30 days until gross reportable amount reached.
- The “gross reportable amount” is the transfer of any money or property (directly or indirectly) to a foreign trust by a U.S. person, or the aggregate amount of the distributions so received from such trust during such taxable year.
- For failure to report a foreign gift over certain thresholds, penalty is 5% of the amount of such foreign gifts applies for each month for which the failure to report up to 25%.

Form 3520-A (Annual Information Return of Foreign Trust With a U.S. Owner)

- Form 3520-A is the annual information return of a foreign trust with a U.S. owner.

IRC § 6048(a).

- Must be filed by any taxpayer who is treated as the owner of a foreign trust under the Grantor Trust Rules

- **Penalties**

- Initial penalty is 5% of gross reportable amount. IRC § 6672.
- Continuation penalty is \$10,000 every 30 days until gross reportable amount reached.
- The “gross reportable amount” is the gross value of the portion of the foreign trust assets treated as owned by the U.S. person under U.S. law. IRC § 6672(b)(2).
 - This could be 5% of the value of the trust!

Penalties for Failure to File Form 3520-A

- Initial penalty is 5% of gross reportable amount. IRC § 6672.
- Continuation penalty is \$10,000 every 30 days until gross reportable amount reached.
- The “gross reportable amount” is the gross value of the portion of the foreign trust assets the taxpayer is treated as owning under U.S. law.

Increased Tax Penalties for Failure to Report Foreign Assets

Increased Accuracy-Penalties

- New accuracy-related penalty of 40 % of the understatement of tax due to “any undisclosed foreign financial asset understatement.” I.R.C. § 6662(b)(7),(j)(3).
- “Undisclosed foreign financial understatement” is “for any taxable year, the portion of the understatement for such taxable year which is attributable to any transaction involving an undisclosed foreign financial asset,” which includes reportable interests required to be reported on Forms 8938, 3520, and 3520-A and other foreign information returns.
- The taxpayer can avoid this penalty by showing that he or she acted with reasonable cause and in good faith.

Extended Statute of Limitations for Failure to Report Foreign Assets

Statute of Limitations

- Statute of Limitations is generally 3 years
- Extended to 6 years in case of greater than 25% underreporting of income.
- Section 6501(c)(8) - if foreign information return, e.g., Form 5471, etc. is incomplete or not filed, then statute does not expire until 3 years after information is provided to the IRS.

FBAR Reporting and penalties

Unreported Foreign Bank Accounts

- Bank Secrecy Act of 1970
 - Requires US taxpayers to maintain foreign bank account records and report foreign accounts annually on:
 - Schedule B of Form 1040 (individual tax return)
 - FBAR (FinCEN Form 114 (Formerly Form TD F 90-22.1))
 - Report any financial account in a foreign country with a value exceeding \$10,000 at any time during the calendar year

FBAR's

- Report of Foreign Bank and Financial Accounts “FBAR”
 - Currently on Form FinCEN 114 (previously Form TD 90-22.1)
 - Must report all foreign financial accounts if aggregate balance at any time during the year is \$10,000 or more.
 - Bank Account
 - Brokerage Account
 - Insurance Account (with a cash value)
 - Includes accounts at a foreign branch of a U.S. bank
 - Foreign Mutual Fund
 - Must also report signature authority over any foreign account.
 - Must report accounts held by a partnership or corporation in which taxpayer has a MORE than 50% interest.
 - Must Report some foreign accounts held by a trust in which the taxpayer has an interest.

FBAR Penalties

- Three Penalty Levels
 - Level 1: Failure due to “Reasonable Cause”
 - No penalty
 - Level 2: Failure due to negligence (non-willful)
 - \$10,000 per account per year. 31 U.S.C. § 5321(a)(5)(B).
 - IRS guidance stating that it will not impose a penalty of more than \$10,000 in most cases. SBSE-04-0515-0025.
 - There are other mitigation guidelines that the IRS may apply where the taxpayer had an interest in smaller accounts (e.g., those with an aggregate balance of under \$250,000).
 - Level 3: Willful Failure
 - The greater of:
 - \$100,000, or
 - 50% of the balance in the account. 31 U.S.C. § 5321(a)(5)(C).
 - IRS guidance stating that it will only seek to assess one 50% penalty, assessing the penalty in the year in which the account values were highest, but can impose multiple penalties in its discretion, but not to exceed %100 of the account. SBSE-04-0515-0025.

Statute of Limitations for FBAR Penalties

- The IRS has six (6) years from the due date of the FBAR to assess penalties. 31 U.S.C. § 5321(b).
- For example, the 2010 FBAR was due on June 30, 2011, and the IRS's time to assess FBAR penalties will expire on June 30, 2017.
- Note that this is different from income tax returns, in which the time period for assessment does not begin to run until the returns are filed.

Willfulness

Willfulness

- Willfulness is defined as “an intentional violation of a known legal duty.”
 - Ignorance of the law is a defense in tax case. *Cheek v. United States*, 498 U.S. 192 (1991)
- A taxpayer’s subjective state of mind is proven by circumstantial evidence.
- Willful blindness theory applies in tax cases
- IRS previous position in FBAR cases had been that it had to prove willfulness by clear and convincing evidence, but the IRS’s new position is preponderance of the evidence.

Indicia of Willfulness in Foreign Asset Cases

- Indicia of willfulness (a/k/a “badges of fraud”)
 - Use of a bank secrecy jurisdiction
 - Motivation was to hide from spouse or partner
 - Failure to pay tax on the corpus
 - Failure to pay tax on the income
 - Numbered account or pseudonym
 - Entities or structures
 - Hold mail
 - Move the account
 - Use of cash or debit card
 - Use of other non-reportable assets
 - Failure to tell accountant or other advisor
 - Failure to check the box

Reasonable cause

Reasonable Cause

- The foreign information return penalties and FBAR penalties will not be imposed if the taxpayer can establish that he or she acted with reasonable cause and in good faith.
- Reasonable cause requires the taxpayer to exercise “ordinary business care and prudence.”
- “Ordinary business care and prudence” means that the taxpayer made provisions for business obligations to be met when reasonably foreseeable events occur and exercised the same degree of care that a reasonably prudent person would.
- Also, IRS considers the taxpayer’s compliance history and the steps that the taxpayer took to correct after discovering the error.

Reasonable Cause Standards of IRC § 6651 Also Apply to:

Failure to file foreign information returns, such as: Form 8938, Statement of Specified Foreign Assets, Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations, Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipts of Certain Foreign Gifts, among others. See [Chief Counsel Advisory 201147030](#) (CCA) (Aug. 22, 2011).

Failure to File Reports of Foreign Bank Accounts (“FBAR’s”). See *Jarnagin v. United States*, -- Fed. Cl. -, 2017 WL 5897808 (Nov. 30, 2017).

Treas. Reg. § 301.6651-1(c)(1)

“If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.”

Ordinary Business Care and Prudence

- Ordinary business care and prudence includes making provisions for business obligations to be met when reasonably foreseeable events occur. A taxpayer may establish reasonable cause by providing facts and circumstances showing that he or she exercised ordinary business care and prudence (taking that degree of care that a reasonably prudent person would exercise), but nevertheless were unable to comply with the law.
- Internal Revenue Manual (“IRM”) 20.1.1.3.2.2(1).

General Reasonable Cause Factors

The taxpayer's explanation, compliance history, the length of time between the noncompliance and subsequent compliance, and any circumstances beyond the taxpayer's control. IRM 20.1.1.3.2.2.

Inability to Obtain Records

- Explanations relating to the inability to obtain the necessary records may constitute reasonable cause in some instances, but may not in others.
- If the taxpayer was unable to obtain records necessary to comply with a tax obligation, the taxpayer may or may not be able to establish reasonable cause. Reasonable cause may be established if the taxpayer exercised ordinary business care and prudence, but due to circumstances beyond the taxpayer's control, he or she was unable to comply.
- Information to consider when evaluating such a request includes, but is not limited to, an explanation as to the following:
 - Why the records were needed to comply.
 - Why the records were unavailable and what steps were taken to secure the records.
 - When and how the taxpayer became aware that he or she did not have the necessary records.
 - If other means were explored to secure needed information.
 - Why the taxpayer did not estimate the information.
 - If the taxpayer contacted the IRS for instructions on what to do about missing information.
 - If the taxpayer promptly complied once the missing information was received.
 - Supporting documentation such as copies of letters written and responses received in an effort to get the needed information.

IRM 20.1.1.3.2.2.3.

Inability to Obtain Records

Note, for failure to file foreign information returns, the IRS warns that not having access to records or information is not reasonable cause: “[i]t is not reasonable or prudent for taxpayers to have no knowledge of, or to solely rely on others for, international transactions.”

--IRM 20.1.9.1.1(4).

Ignorance of the Law

- Reasonable cause may be established if the taxpayer shows ignorance of the law in conjunction with other facts and circumstances. For example, consider the following:
 - The taxpayer's education.
 - If the taxpayer has previously been subject to the tax.
 - If the taxpayer has been penalized before.
 - If there were recent changes in the tax forms or law which a taxpayer could not reasonably be expected to know.
 - The level of complexity of a tax or compliance issue.
- The taxpayer may have reasonable cause for noncompliance due to ignorance of the law if the following are true:
 - A reasonable and good faith effort was made to comply with the law, or
 - The taxpayer was unaware of a requirement and could not reasonably be expected to know of the requirement.

--IRM 20.1.1.3.2.2.6

Reliance on Professionals

- *United States v. Boyle*, 469 US 241 (1985)
 - Executor of estate hired a lawyer to handle the estate, including filing the Form 706
 - Executor had no experience with estate taxes
 - Executor called the lawyer several times to determine if return was filed
 - Despite assuring the executor that it would be taken care of, the lawyer failed to file on time

Reliance on Professionals

- *Boyle* does not involve reliance on erroneous advice of counsel regarding a question of law.
- In dicta, Court states: “When an accountant or an attorney advises a taxpayer on a matter of law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice.”
- “By contrast, one does not have to be a tax expert to know that returns have fixed filing deadlines and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common but that reliance cannot function as a substitute for compliance with an unambiguous statute...such reliance is not reasonable cause for a late filing penalty under 6651(a)(1).”

Reliance on Professionals

Neonatology Associates, P.A. v. Commissioner, 299 F.3d 221 (3d Cir. 2002)

1. the advisor was a competent professional who had sufficient expertise to justify reliance;
2. the taxpayer provided necessary and accurate information to the adviser; and
3. the taxpayer relied in good faith on the advisor's judgment.

Options To Become Compliant

Options for Non-Compliant Taxpayers

1. Do nothing (Illegal and risky)
2. Get compliant going forward
3. File amended returns and FBARs
4. Voluntary Disclosure
5. Streamlined Procedures
6. Delinquent FBAR and Information Return Procedures

Voluntary Disclosure Programs – Internal Revenue Manual 9.5.11.9

Four Requirements

1. Timely
2. Complete and truthful
3. Cooperate
4. Pay, or make good faith arrangements to pay

Four Benefits of a Voluntary Disclosure

1. Effectively take criminal off the table
2. Limit the look-back period
3. Limit the civil penalties that will be imposed
4. Taxpayer can use the money without guilt or risk

Procedures for Making a Voluntary Disclosure

- Pre-clearance
- Voluntary disclosure letter (Form 14457)
- Amended returns and FBAR's, and other OVDP documents
- Pay tax, penalties, and interest
- Conclude with a Form 906 closing agreement

New Procedures for Voluntary Disclosures LB&I-09-1118-014 (Nov. 20, 2018)

- Applies to all voluntary disclosures received after Sept. 28, 2018.
- For offshore voluntary disclosures, 2014 OVDP procedures apply for disclosures received on or before Sept. 28, 2018.
- For non-offshore voluntary disclosures received on or before September 28, 2018, examiners have discretion to apply the new procedures.

New Procedures for Voluntary Disclosures LB&I-09-1118-014 (Nov. 20, 2018)

- Six-year disclosure period.
- Civil fraud penalty (§ 6663 or § 6651(f)) on one tax year, the year with the highest tax liability.
- Fraud penalties can be applied on more than one year based on the facts and circumstances, including where there is no agreement on the tax liability.
- Fraud penalties may be applied beyond six years if taxpayer fails to cooperate.
- If offshore, willful FBAR penalties will be applied according to existing guidance.
- Taxpayers may request accuracy penalties and non-willful FBAR penalties, but the grant of these requests is “expected to be exceptional.”
- Penalties for failure to file information returns not automatic, and examiner discretion will take into account the application of other penalties.

Streamlined Domestic Offshore Procedures

- Resident of the U.S.
- Filed U.S. tax returns for each of the past three years
 - Procedure not available to U.S. resident non-filers
- File amended tax return for past three years with schedules
- File delinquent FBARs
- Pay tax, interest and pay a 5% penalty
 - Penalty is based on the highest balance of accounts and assets that should have been reported on the FBAR or Form 8938
 - If the asset was reported but the income from the asset was not reported, then the asset goes into the penalty base, if the asset is a foreign financial asset.

Streamlined Foreign Offshore Procedures

- Non-resident
 - Both spouses for joint returns
- Non-resident means
 - For U.S. citizens or green card holders
 - In any one or more of the most recent three years for which the tax return due date (as extended) has passed, the individual did not have a U.S. abode and the individual was physically outside the U.S. for at least 330 full days
 - For U.S. citizens or green card holders
 - In any one or more of the most recent three years for which the tax return due date (as extended) has passed, the individual must fail substantial presence test
- File amended or delinquent original returns for past three years with schedules
- File amended or delinquent FBARs for past six years
- Pay the full amount of tax and interest due with the filings
- No penalties

Delinquent FBAR Submission Procedures

- Taxpayers who do not need voluntary disclosure or streamlined procedures to file delinquent or amended returns to report and pay additional tax but who
 - Have not filed FBARs
 - Are not under audit or examination
 - Have not been contacted by the IRS
- Should file the FBARs and include a statement explaining why the FBARs are delinquent
 - No penalty if all income reported and tax paid on the foreign accounts

Delinquent International Information Return Submission Procedures

- Taxpayers who do not need voluntary disclosure or streamlined procedure but who
 - Have not filed one or more required information returns (3520, 5471, 8865, etc.)
 - Have reasonable cause for failure to file
 - Are not under examination or investigation
 - Have not been contacted by the IRS
- Should file delinquent returns with a statement of facts that establish reasonable cause and a certification that any entity for which the delinquent returns are being filed was not engaged in tax evasion

How to Decide Which Option? Willfulness Is The Key.

- Criminal prosecutions
 - All require “willfulness”
- Willful FBAR Penalties
 - The 50% per year penalties require IRS to prove “willfulness”
- Streamlined Submissions
 - Must certify that “My failure to report all income, pay all tax and submit all required information returns, including FBARs, was due to non-willful conduct”
- Delinquent FBAR and Informational Returns
 - Require reasonable cause.



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