

OVDP Disqualifying Previously Cleared Offshore Account Holders

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The IRS Criminal Investigation division has been sending out letters stating that U.S. taxpayers who had previously been accepted into, and disclosed information under, the IRS's offshore voluntary disclosure program (OVDP) have since been deemed ineligible for the program, which rewards those who come clean about their unreported offshore financial accounts with protection from criminal prosecution and reduced penalties.

Recent press reports have focused on letters sent to account holders of Israeli banking giant Bank Leumi le-Israel BM, but practitioners contacted by Tax Analysts said the letters are being sent to clients of other banks as well and are not a recent phenomenon. (Prior coverage 2013 TNT 9-5: News Stories.)

"I've heard a lot of hysteria about this in the last couple of days but to my knowledge, Bank Leumi has not given over names" to the government, said Robert S. Fink of Kostelanetz & Fink LLP, who added that he has been in touch with the bank. "I started seeing [these letters] two years ago, which is why I don't understand what this hoopla [now] is all about," he said.

Edward M. Robbins Jr. of Hochman, Salkin, Rettig, Toscher & Perez PC agreed that the letters aren't something new. He said he thinks the post-clearance disqualification letters are because of miscommunication between CI, which administers the OVDP, and the Justice Department Tax Division, which has the bank records that lead to the disqualification.

According to FAQ 21 of the OVDP's frequently asked questions 2012 TNT 124-17: Other IRS Documents, "once the Service or the Department of Justice obtains information . . . that provides evidence of a specific taxpayer's noncompliance with the tax laws or Title 31 reporting requirements, that particular taxpayer will become ineligible for OVDP."

"CI clears these guys and unbeknownst to them, [the DOJ] is sitting on the bank records [that] disqualify them," Robbins said. He added that it is sensible from CI's perspective to disqualify people it originally cleared when it learns that the DOJ already had evidence of noncompliance. If CI were to decide instead to do nothing and allow those account holders to remain in the OVDP, "it builds in a defense for other people it might want to prosecute who have not been in the program," Robbins explained.

Robbins said most of his firm's clients who have received the letters got them after they had already submitted amended tax returns and paid the tax, interest, and penalties due. Thus, despite the concern that the letters cause, their recipients "are very unattractive candidates at that point for criminal prosecution," he said. The recipients, sometime in the future, "will be contacted by somebody from the civil side saying, 'Give us money,' and

then that will be the signal that CI is no longer interested in them," he said, adding, "The guys who went into the program and got the [disqualification] letter recently are far better off than the guys who didn't go into the program at all."

But Fink said the reversals can present some serious legal issues. After one of his clients received formal clearance into the OVDP and started submitting information, the client was told he was the subject of a grand jury investigation of the undisclosed account and was disqualified from the program. "They're going to have to prove that their evidence is not tainted [and that] they didn't basically lure my client into giving them information and then use it against him," Fink said.

Fink said his clients enter into the OVDP because "they feel that they can rely upon their government, and then in the end they discover they can't."

Larry A. Campagna of Chamberlain, Hrdlicka, White, Williams & Aughtry agreed that the post-clearance disqualification letters may turn out to be problematic for the government. Under *Kastigar v. United States*, 406 U.S. 441 (1972), the government must demonstrate that its prosecution does not rely on tainted evidence, he said. Information received in a voluntary disclosure submission would be tainted, he noted. Also, Campagna said the revocations create an atmosphere of distrust. "If counsel and taxpayers can't rely on the acceptance letters, then what is the use of the pre-clearance and acceptance process?" he asked.

Campagna said it's difficult to understand why the government would go after program participants when it has so many criminal cases to pursue involving people who did not come forward in the OVDP. "It's perplexing that the government would reverse these acceptances in order to have the option of prosecuting people who were trying to do the right thing," he said. "There are so many more unrepentant people to pursue."