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Brief

Global Tax Enforcement in 2015: What You Need to Know



Tax fraud occurs on a considerable scale that can exceed law enforcement's ability to detect and punish the conduct. This is true at both the federal and state levels. As of 2015, the Internal Revenue Service ("IRS") and the U.S. Department of Justice ("DOJ") Tax Division give their global efforts priority over virtually every other area of enforcement. They are committed to identifying and prosecuting those who hide income and assets offshore. Global tax enforcement is the number one priority of the U.S. authorities, and they are using their resources and tools in unprecedented ways to ensure that those who intentionally evade taxes are identified and brought to justice.

What Is the Cause?

The ease of establishing accounts at foreign financial institutions, combined with financial advisors who routinely establish foreign structures to hide income, create a unique opportunity for those inclined to hide their income and assets from governmental authorities. While the U.S. Congress and the U.S. Treasury Department have promulgated rules to address the myriad financial arrangements that might be encountered, the size and breadth of the foreign financial landscape and proliferation of foreign trust companies, non-U.S.-based foundations, foreign entity structures, contractual products, and tax shelter mechanisms make legislation and regulation a constant challenge.

Where to Look

"The investigation and prosecution of tax evasion have grown into a first-tier policy concern for the international community."

Identifying sources of unreported income and unpaid tax is currently a top priority for civil and criminal law enforcement efforts involving numerous governmental agencies. Whether the concerned party is the IRS, the DOJ Tax Division, the U.S. Senate Permanent Subcommittee on Investigations, or foreign nations seeking assistance through treaty requests, the U.S. tax enforcement regime is global and the techniques utilized by investigators are evolving to meet new challenges.

The investigation and prosecution of tax evasion have grown from a specialized subcategory of law enforcement into a first-tier policy concern for the international community. Starting with the U.S. government's crackdown on Swiss banks in 2008, there has been a constant drumbeat of news about prosecutions of taxpayers, bankers, and financial institutions around the globe.

Who Might Be Implicated?

Domestic and foreign financial institutions, private bankers, professional advisors, and U.S. taxpayers need to understand that stepped-up global tax enforcement has made the financial world smaller and more transparent. Anyone with concerns about these activities should seek a qualified tax attorney.

Banks in the Crosshairs

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The U.S. government's pursuit of financial institutions continues with no signs of abating, not least because of pressure from lawmakers. Recent Congressional hearings have maintained pressure on the DOJ Tax Division. In a twist on the DOJ's use of deferred prosecution and nonprosecution agreements, the DOJ announced a voluntary disclosure program for Swiss banks. On March 30, 2015, BSI of Lugano, Switzerland, became the first bank to earn a nonprosecution agreement under the U.S. DOJ's Program for Swiss Banks, paying a penalty of \$211 million. But the investigations are not limited to Switzerland and currently span the globe.

Many financial institutions facing investigation are taking proactive steps to come into compliance with the Foreign Account Tax Compliance Act ("FATCA") and Organisation for Economic Co-operation and Development ("OECD") due diligence standards. Implementing policies and procedures can be an effective tool to prevent improper behavior. If there is an investigation, only seasoned practitioners can advise on the hurdles that a financial institution may face.

Prosecution of Bankers, Lawyers, and Financial Advisors

Since 2008, the DOJ has publicly charged numerous bankers, lawyers, and financial advisors. Charging and prosecuting these actors allows the U.S. government to hold individuals responsible for assisting tax evasion. Caught in the web, though, may be the unsuspecting and innocent, who are in need of advice for a timely exit from the spotlight.

John Doe Summonses

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In the past decade, the IRS has greatly increased its use of the so-called John Doe summonses. A tailored summons request can identify potentially noncompliant account holders. It allows the IRS to seek information on an entire class of taxpayers whose identities are unknown. We have seen the IRS, the DOJ Tax Division, and the courts become far more willing to use this tool, and we believe that the use of John Doe summonses is likely to continue and even increase. Courts have been seemingly eager to authorize their issuance, and they are highly effective at producing evidence for use in civil and criminal tax investigations and prosecutions. Any financial institution that receives a John Doe summons should immediately consult with qualified counsel. Similarly, any account holder who receives notice from his or her bank that it has received a John Doe summons should prepare to face civil or criminal enforcement if he or she is not in compliance with tax obligations.

FATCA

Congress enacted FATCA in 2010 as part of the Hiring Incentives to Reduce Unemployment Act (“HIRE Act”). Its purpose was to force foreign financial institutions (“FFIs”) to report their U.S. customers to the IRS. To relieve some of the compliance burden, the U.S. government allowed FATCA partner countries to enter into intergovernmental agreements (“IGAs”) with the United States. These agreements simplify compliance and provide alternative reporting arrangements for FFIs in countries whose privacy laws prevent direct reporting of U.S. customers’ data to the IRS. The Treasury has entered into numerous IGAs and has reached “agreements in substance” with a number of countries.

OECD’s Common Reporting Standard

The OECD has taken inspiration from FATCA and proposed an even more sweeping regime called the Standard for Automatic Exchange of Financial Account Information, commonly known as the Common Reporting Standard. Like FATCA, the Common Reporting Standard calls for automatic, rather than on-request, exchange of account information between countries that agree to participate in the initiative. The Common Reporting Standard’s reach is far greater than the U.S. FATCA regime. Focused on anti-money-laundering concerns, the Common Reporting Standard’s level of detail and breadth of information are much greater than FATCA’s and will provide the recipient country with a considerable amount of financial and other information to make multijurisdictional tax enforcement a reality.

Offshore Voluntary Disclosure Program and Streamlined Alternative

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The IRS’s Offshore Voluntary Disclosure Program (“OVDP”) is currently in its third incarnation. The first OVDP was available for a limited time in 2009 and allowed taxpayers with unreported foreign bank accounts to pay 20 percent of their highest annual account balance and escape criminal prosecution and the potential for an annual civil penalty of 50 percent of their highest annual account balance. The second OVDP was available in 2011 and provided the same benefits in exchange for 25 percent of the taxpayer’s highest account balance, but it imposed an eight-year look-back period instead of the previous six-year period. Finally, in 2012 the IRS opened the current OVDP, increasing the cost to 27.5 percent of the taxpayer’s highest account balance. The OVDP has attracted tens of thousands of taxpayers and has resulted in billions of dollars in payments to the IRS.

Today, as part of the 2014 voluntary disclosure options, taxpayers can choose a streamlined filing with no penalty or a 5 percent penalty, depending on the taxpayer’s circumstances. To take part in these programs, U.S. persons should consult a seasoned professional.

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How to Protect Yourself

Our experience defending banks, nonfinancial companies, financial and legal advisors, and U.S. taxpayers in international and domestic criminal tax matters has shown us that the U.S. government and foreign governments will not back down anytime soon. It is essential to partner with dedicated criminal tax counsel who can assess the exposure and determine how to address noncompliance problems when there is an investigation. In many instances, a voluntary disclosure before any investigation is a viable and preferable alternative.

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