

Offshore Bank Accounts and FATCA Worries Continue

by Robert W. Wood

Unless you have been living under a rock for the last ten years, you know that the IRS cares a lot about offshore bank accounts. You have to declare them, and report the interest you earn even if you don't get a Form 1099 from the foreign bank. One of the key ways the IRS can get your information is FATCA, the Foreign Account Tax Compliance Act.

FATCA goes to the source, requiring offshore financial institutions to report Americans and make sure they pay the IRS. Institutions that don't rat out Americans face a series of stiff penalties. Some people have offshore accounts, interests in offshore trusts, or just signature power but no beneficial interest in an account. All of these require disclosure.

If you are a U.S. citizen or resident and have a foreign bank account anywhere, it is no longer secret. There's no universal answer how to deal with bank queries. But how to deal with the IRS is relatively clear. You must report worldwide income on your U.S. tax return. If you have an interest in a foreign bank account, check "yes" (on Schedule B).

Worldwide income means everything, including interest, foreign earnings, wages, dividends and other income. If your income is taxed somewhere else, you might be entitled to a foreign tax credit. If you are living and working abroad, you might be entitled to an exclusion from U.S. tax for some or all income earned abroad. But you still must report it.

You also must file an FBAR annually if the aggregate of your foreign accounts exceeds \$10,000 at any time during the year. FBARs have actually been in the law since 1970, but did not become critical until about 10 years ago. If you don't want to go to jail, pay attention to these forms — the government sure does.

Another form under FATCA is IRS Form 8938, and it is part of your tax return. In general, it requires reporting where your foreign assets exceed \$50,000 in value. It covers many assets not covered by FBARs too.

If you fail to report your worldwide income or fail to check the foreign account box it can be considered tax evasion and fraud. The criminal statute of limitations is six years. Plus, the statute of limitations never expires on civil tax fraud, so the IRS can pursue you 10 or 20 years later for back taxes, interest and penalties.

If you failed to report income, your civil liability to the IRS can include a 20 percent accuracy-related penalty or a 75 percent civil fraud penalty. Failing to file an FBAR can carry a civil penalty of \$10,000 for each non-willful violation. If willful, the penalty is the greater of \$100,000 or 50 percent of the amount in the account for each year you didn't file.

Filing a false tax return is a felony that can mean up to five years and a fine of up to \$250,000. Failing to file FBARs can also be criminal, carrying fines up to \$500,000 and up to ten years in prison. Fortunately, the IRS has had several amnesty programs.

The longest running of these programs is the Offshore Voluntary Disclosure Program, but it is ending in September. It offers a kind of bulletproof amnesty with a kind of no-questions asked approach. And for that reason, the announced September 28, 2018 closure date is causing an uptick in people joining before it is too late.

The other IRS amnesty known as the Streamlined program is less expensive but also less certain. And that program is continuing.

Some people don't want to pay any of the penalties these amnesty programs require, so prefer a "quiet" disclosure. That usually involves amending tax returns and filing FBARs outside the IRS amnesty programs, and without drawing attention to what you are doing. The IRS frowns upon this practice, and says it will treat you harshly if it catches you. But a few people are comfortable doing it and it can be better than doing nothing.

In some cases, such filings might not be considered aggressive. For example, if you don't owe U.S. taxes (because of foreign tax credits, for example), filing past due FBARs is usually not grounds for any penalties. Even if you didn't report your offshore income on your tax return or disclose your account, you may be able to recompute your taxes to fit within this rule.

And while both tax returns and FBARs are important, FBARs today are arguably even more sensitive than tax returns. Civil and criminal penalties for failing to file FBARs are worse than tax penalties. That's one reason filing FBARs can make a huge difference even if minor errors on your tax returns are not corrected.

Even today, many people have never heard of FBARs. You can avoid penalties if you had "reasonable cause" for not filing FBARs, but the grounds for waiving penalties aren't terribly clear. And it gets harder and harder to claim ignorance.

Depending on how serious your past problems are, some people just start filing accurate tax returns and FBARs prospectively. However, the risks are high. The IRS may ask about the lack of prior FBARs and of prior tax returns disclosing a foreign account. If they ask questions, you should respond through your attorney. And remember, never lie to the IRS.

There continues to be confusion and noncompliance involving foreign bank accounts. For anyone facing these issues, ignoring them is not a good idea. Ideally, get some professional advice and get your situation resolved.