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Ten Things to Keep in Mind as Offshore Amnesty Deadline Nears

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Wesley Snipes and Willie Nelson may not like paying income taxes (who does?), but I am guessing they now spend more on tax advisers than most people; particularly today, the line between what is legitimate and what is not can become blurred, and there is no substitute for professional advice.

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The Internal Revenue Service has always tried to ferret out tax cheats, but it can claim few successes as big as its attack on Swiss banking giant UBS over the last two years. Since UBS brazenly sent bankers to the United States recruiting wealthy clients to stash money in secret Swiss accounts, IRS and UBS have engaged in legal fisticuffs.

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This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

IRS eventually broached vaunted Swiss bank secrecy. The result has been a few high-level prosecutions, netting IRS some big-ticket publicity of the decided “we’ll get you, too” sort.

But a larger and arguably more grassroots consequence of IRS’s victories came in the program announced amid little fanfare in March. It was set to expire Sept. 23 but IRS has now granted a reprieve to Oct. 15. Called tax amnesty, voluntary disclosure, or offshore income settlement, it is an unheralded program that has left taxpayers and tax practitioners alike asking still further questions.

There is little time remaining, since on Oct. 15 this program will go away.

Here, then, are 10 (last minute) things you need to know about the IRS “tax amnesty” deal.

1. Do Not Take Your Sweet Time

Just before the long-announced (and supposedly ironclad) Sept. 23 deadline, IRS relented. Announcing an extension until Oct. 15, IRS responded to tax adviser pleas and threw open its doors. Now taxpayers have a little more time to, in the words of IRS Commissioner Douglas Shulman, “get right with the government.”

But this extension is a one-time deal. To participate, you must tell IRS on or before Oct. 15, and submit some basic data about your foreign account(s). The details can come later.

2. It Is Not Technically Amnesty

This is negative, so let us get this canard out of the way. The IRS program indicates that if you participate, you probably will not be prosecuted. IRS has stopped short of saying that you definitely will not be prosecuted.

It is troublesome that there are no criteria about what circumstances will be egregious enough to merit prosecution. Advisers have some ideas, but most believe prosecutions are very unlikely. You have to get past this point and be willing to take a leap of faith.

3. You Cannot File the Voluntary Disclosure With Just Any IRS Office

You should work with a tax lawyer, but the submission has to be made to your local office of the IRS Criminal Investigation Division. That fact alone will make you nervous.

Yet really, this “new” procedure is not too different from historic practice. What is quite different is the way in which IRS has packaged this program, using a six-year window and a penalty template so you can calculate what you owe.

4. You Have to Amend Six Prior Tax Returns

You do not have to amend a lifetime of tax returns, but you do need to amend the last six years of tax returns if you omitted any income.

You need to pay the amount due based on those amended returns, which should report all your worldwide income. After all, U.S. citizens and U.S. permanent residents pay U.S. tax on their worldwide income. That is not a new rule.

If you have bank account interest from a bank account overseas, it is all taxable to the United States regardless of whether you pay tax in another country. You may receive foreign tax credits under U.S. law in some cases, but you must report it all.

5. You Have to File FBARs, Too

U.S. taxpayers have long been required to file a Report of Foreign Bank and Financial Accounts (FBAR) annually with IRS if they have foreign bank accounts. This rule has not changed. Recently, however, this filing requirement has become much more publicized. More and more taxpayers are waking up to find that IRS takes FBAR filings seriously.

In fact, part of the program for foreign bank accounts involves FBAR forms. You do not need to file FBARs where your aggregate foreign accounts contain less than \$10,000. All other foreign accounts should be the subject of an FBAR.

6. Law & Order: Criminal Intent

No one likes to discuss the possibility of criminal prosecution, but it is a necessary worry. As Snipes is well aware, the government takes these things seriously, and filing false tax returns is not to be taken lightly. Indeed, filing a false tax return can carry fines and up to three years in prison. Tax evasion merits higher fines and up to five years’ incarceration.

Surprisingly, failure to file FBARs can earn you up to 10 years! The best way to protect yourself is to get with the program and comply.

7. For Some Taxpayers, You Can Just File the FBAR Forms

If you have always reported all of your gross income, including income from foreign bank accounts, you do not need to amend your last six tax returns and participate in the program. Instead, you can simply file the past due FBARs.

8. You Will Have to Pay Income Tax and Penalties

If you do participate in the program, you have to pay tax on the income you failed to report when you originally filed your returns, plus interest. In addition, you have to pay an accuracy or delinquency penalty on the overdue tax.

On top of that, you must pay a penalty equal to 20 percent of your foreign account balance at its highest point over the last six years. That means if your highest account balance was \$1 million, your separate 20 percent penalty will be \$200,000.

9. This Is the Last Extension You Will Get

IRS had previously announced that the Sept. 23 deadline date would not be extended. At the last minute, IRS changed its mind, noting that many tax practitioners were pleading for more time.

Although it may not be a stampede, there has been an outpouring of interest, particularly in the waning days of this program. In extending the deadline by a few weeks to Oct. 15, IRS has noted that it already has received thousands of applications to the program, and more are anticipated.

10. Waiting for Godot?

Waiting for a better deal may be like waiting for Godot, a long and unproductive wait. In fact, there probably will not be a better deal coming from IRS. Some taxpayers may be tempted to do nothing, and hope they are never discovered.

Some taxpayers may adopt a more stealthy approach, such as filing one or more amended tax returns, filing one or more past due FBARs, or even simply starting to comply with the law prospectively (on tax returns and FBARs). For some people, this may make sense. For most, however, one of these non-programmatic choices may involve risks far greater than taking IRS up on its offer.

If you think of IRS as Vito Corleone, maybe this is an offer you cannot refuse.