IRS Revising FAQ for Offshore Voluntary Disclosure Program

By Shamik Trivedi — strivedi@tax.org

The IRS is seeking to revise and clarify frequently asked questions on its latest iteration of the offshore voluntary disclosure program (OVDP) to respond to inquiries submitted by practitioners and taxpayers, an IRS official said June 15.

The upcoming FAQ will likely clarify the rolling eight-year period of returns due with the voluntary disclosure, said Jennifer Best, IRS senior attorney-adviser (services and enforcement), at New York University's annual Tax Controversy Forum. ''If the return is not yet due for a year, then that year is not included in the eight-year period,'' she said. The IRS also plans to clarify that compliant years' returns are not due as part of the disclosure, she said.

Scott D. Michel of Caplin & Drysdale said one area of confusion for practitioners had been how far back returns were due for taxpayers who were new to the program. Best confirmed that under the proposed clarification, taxpayers who have not yet filed a 2011 return do not include their 2011 return as part of the eight-year period, but that taxpayers who filed a ''false'' 2011 return in April and then came into the OVDP in June must include a 2011 return. (For the 2009 OVDP FAQs, see *Doc 2009-14388* or *2009 TNT 120-8*.)

Asked by Jeffrey A. Neiman, a criminal defense attorney in Ft. Lauderdale, Fla., whether the IRS would address the questions raised by practitioners regarding FAQ 35, which apparently permitted examiners to accept less than the 20 percent offshore penalty, Best said she had no information on that. (For prior coverage, see *Tax Notes*, Jan. 9, 2012, p. 162, *Doc 2012-258*, or *2012 TNT 4-1*.)

> ***The upcoming FAQ will likely clarify the rolling eight-year period of returns due with the voluntary disclosure, said Best.***

Regarding FAQs 17 and 18, which address compliance measures to be undertaken by a taxpayer who has been delinquent in filing Form TD F 90-22.1, ''Report of Foreign Bank and Financial Accounts,'' or other information reporting documents but has reported and paid all tax, Best announced that the IRS would not be changing its position on that issue for the latest OVDP.

''I think we've all been getting a lot of questions from clients,'' Michel said, citing uncertainty over

LB&I OFFICIAL DEFENDS ECONOMIC SUBSTANCE DIRECTIVES

Contrary to what some practitioners may believe, directives from the IRS Large Business and International Division and a recent chief counsel notice do not ''administratively repeal'' the economic substance doctrine, an official said June 15.

Roland Barral, area counsel (financial services industry), LB&I, said he didn't think the directives or the chief counsel notice repealed anything. ''The directive sets forth guidance that the Service believes was appropriate'' and relates to real-life situations that point to the existence of real economic substance or the absence of economic substance, Barral said at New York University's annual Tax Controversy Forum in New York. (For prior analysis, see *Tax Notes*, Feb. 20, 2012, p. 911, *Doc 2012-3227*, or *2012 TNT 34-1*.)

The LB&I directives are designed to give general guidance to agents, Barral said, and the decision on whether to impose related penalties must be made by the director of field operations. (For LMSB-04-0910-024, see *Doc 2010-20089* or *2010 TNT 178-47*. For LB&I-04-0711-015, see *Doc 2011-15491* or *2011 TNT 137-17*.)

CC-2012-008 adopts the coordination procedures from the LB&I directives and requires even more coordination and consultation between the IRS associate chief counsel (procedure and administration) and the appropriate technical associate office in the IRS National Office, Barral said. Those reviews demonstrate ''a strong emphasis by the Service in asserting the doctrine in isolated circumstances,'' he said. (For CC-2012-008, see *Doc 2012-7209* or *2012 TNT 67-8*.)

Pamela F. Olson of PricewaterhouseCoopers LLP agreed that the directives and notice don't constitute an administrative repeal of the doctrine. ''I'd like to see [the IRS] turn it into published guidance that taxpayers can rely on,'' she said. ''I think it's quite useful for taxpayers.''

Armando Gomez of Skadden, Arps, Slate, Meagher & Flom LLP said the directives are forcing agents to be more rigorous in their examinations.

Kevin M. Flynn of Kostelanetz & Fink LLP, who represented the petitioners in the recent economic substance case *Historic Boardwalk*, asked Barral about the possibility of examiners skipping one or more of the four steps outlined in LB&I-04-0711-015 when determining whether to apply penalties. ''If agents are doing their jobs properly, they should walk through these criteria,'' Barral said. ■

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whether that policy would be continued in the third voluntary disclosure program.

The IRS announced January 9 the third iteration of its voluntary disclosure program, which is open indefinitely. The first round in the program began in 2009, and a second round was offered in 2011. All three programs offered reduced penalty rates for affected taxpayers who came in voluntarily. (For prior coverage, see *Tax Notes*, Jan. 16, 2012, p. 276, *Doc 2012-445*, or *2012 TNT 6-1*.)

Best said the program has remained open indefinitely based on the recognition of the ''continuing need and desire of taxpayers to come in.'' She added that the terms of the program are subject to change at any time.

Neiman, a former assistant U.S. attorney who played a major role in the prosecution of Swiss Bank UBS, asked whether the IRS could change the terms of the program for taxpayers who are customers of a specific bank. He pointed to the Justice Department's recent indictment of three tax return preparers who were helping taxpayers evade U.S. taxes using Israeli banks. (For the release, see *Doc 2012-12956* or *2012 TNT 117-85*.)

''That is certainly a possible scenario,'' Best said.

The IRS wants to revise the intake process for OVDP participants, Best said. The agency is trying to reduce some of the duplicative reporting in the process. It won't be a major change, but the information requested will look slightly different, she said.

Enforcement Update

David Massey, an assistant U.S. attorney for the Southern District of New York, said enforcement activity regarding offshore accounts tends to fall into three groups: individuals, so-called enablers of tax evasion, and banks and bankers.

Individuals' prosecutions, many of which have stemmed from the UBS deferred prosecution agreement, are ''old news,'' Massey said. About three dozen U.S. taxpayers have been charged, and almost all of them have been convicted, with none being acquitted at trial so far.

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Enablers include not only tax return preparers and accountants, but also asset managers, lawyers, and trustees, Massey said. After the UBS prosecution, enablers encouraged U.S. account holders to move their money to different banks, like Swiss bank Wegelin & Co., while remaining on as trustees or signatories, Massey said. (For related coverage, see p. 1569.)

Wegelin has no U.S. branches but did have a correspondent bank account in the United States, which had about $16 million in it the day Wegelin was indicted, Massey said. That money was seized in a civil forfeiture complaint and forfeited because Wegelin never showed up to claim it, he said. (For a DOJ release, see *Doc 2012-8759* or *2012 TNT 80-25*.)

Some banks saw UBS's prosecution by the Justice Department as an opportunity to get out of the business of aiding individuals with their offshore evasion, while others, like Wegelin, saw an opportunity to become involved, Massey said.

They ''gladly took in UBS clients, who were in some cases, it's alleged, literally walking around with bags of money in Zurich,'' Massey said. Wegelin thought that because it is a smaller bank with no U.S. branches, the IRS and DOJ wouldn't catch it, he said. The U.S. District Court for the Southern District of New York identified Wegelin as a fugitive after it failed to appear at a hearing. ■