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Tax Evasion

Official Says IRS Won't Define Standard for Non-Willful Conduct Under Streamlined OVDP

The Internal Revenue Service has no plans to define what it would consider non-willful behavior by taxpayers hoping to enter the streamlined version of the offshore voluntary disclosure program (OVDP), a key agency official said.

"We made a deliberate decision not to define it," according to Jennifer Best, senior attorney-adviser to the deputy commissioner (International) in the IRS's Large Business and International Division.

That question has been a big one for taxpayers since the IRS unveiled changes to the program in June. Taxpayers now have to certify their conduct was non-willful in order to qualify for little to no penalty when they disclose their overseas assets.

Speaking at a D.C. Bar Association Taxation Section luncheon on Nov. 6, Best said one of the agency's goals in deciding not to define "non-willful" behavior was to allow flexibility. Past efforts to define circumstances in which taxpayers would be eligible for less onerous versions of the OVDP didn't work and excluded many taxpayers because "there are a lot of other stories out there," she said.

"We continue to learn, we continue to listen to you, to learn from our own agents, and try to adjust," Best said.

Robust Declarations Urged. According to Best, agents are looking closely at declarations of non-willful behavior and "I would encourage you to make those fairly robust."

However, she said the agency isn't providing special training for agents on what they should view as willful behavior. Best said agents have had a lot of experience with this issue by working on cases where taxpayers want to opt out of the main OVDP. Under the main pro-

gram, taxpayers who pay a set penalty and disclose their offshore assets won't face criminal prosecution.

Many opt-out cases involve non-willful conduct by taxpayers, so agents "have a good idea of what to look for," Best said.

In other issues under the streamlined program, Best said the IRS understands that some taxpayers who live overseas are having trouble with the requirement for a valid taxpayer identification number. She said this is "tripping up" a lot of taxpayers who don't live in the U.S. and don't have a Social Security number even though they are eligible for one.

She emphasized, however, that the IRS won't change the rule because entry into the easier version of the program is "a filing procedure." According to Best, the IRS is reaching out to the Social Security Administration and the State Department to try to help fix the problems.

Residency Requirement. The IRS official acknowledged that some have raised issues with the residency requirement for taxpayers to qualify for foreign filing procedures. To be eligible, taxpayers must be able to show they didn't have a U.S. abode and spent at least 330 days outside the U.S. in one or more of the most recent three years for which the U.S. tax return due date has passed.

Best said while this criteria is "somewhat strict," taxpayers must only meet it in one out of three years because the IRS understands that taxpayers may have family and friends in the U.S. and other reasons to visit.

Best also discussed the agency's program allowing taxpayers in the main OVDP to transition into the streamlined program if they can show their conduct wasn't willful and meet other requirements. Those taxpayers will get the sharply reduced penalties while retaining the protections of the OVDP, such as a closing agreement and a guarantee that the IRS won't prosecute.

Best said any taxpayer now in the OVDP is still eligible to apply for the transition relief.

Speaking to Bloomberg BNA following the luncheon, Best addressed a point raised by panelist Douglas Andre of Ivins, Phillips & Barker. Andre said he has had experiences where the agent looking at a taxpayer's certification of non-willfulness has sent it back to the taxpayer for further explanation and detail.

Certifications Returned. Best said this is happening in cases where a taxpayer is trying to transition from the main OVDP into the streamlined program. Those taxpayers already have specific agents assigned to their cases and submitted their certifications of non-willfulness to that agent, Best said.

She said the IRS has gotten a "mostly positive" response to the changes in the streamlined program. The government announced a package of guidance on the program in October.

During the main discussion, panelist Victor Jaramillo of Caplin & Drysdale said agents are likely to be de-

tailed and thorough as they try to determine whether a taxpayer's conduct was willful. He raised a situation where a person used a professional to file returns. He said it is possible the IRS agent handling the case may ask for the name of the professional and the advice that was given, and may contact that professional as part of the inquiry.

Andre stressed that the OVDP is part of an increasing government focus around the world on finding assets and accounts offshore. "The world of information sharing across jurisdictional borders is growing," he said. "It's probably not a good idea to advise clients not to disclose," he said.

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