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Welcome to Edition 11 of The Newsletter from Scott H. Novak, Attorney at Law. The Newsletter is designed to bring timely and interesting topics to accountants and attorneys. Comments and suggestions are always welcome. Feel free to call or write at any time.

Offshore Voluntary Disclosure Program to End

The IRS has announced that the Offshore Voluntary Disclosure Initiative (OVDI) will terminate effective September 18, 2018. See IR-2018-52. The IRS also posted 10 new FAQs on its website relating to the ending of the program. The current OVDI program started in 2012 after two prior iterations. Under the program, the taxpayer was required to get precleared by the IRS Criminal Investigation Division. If preclearance was given, then the taxpayer had a certain amount of time to submit eight years of amended tax returns, FBARs and other specified documents and information. The penalties in this program were high - 27½% or 50% of the highest account value - but the program took the potential for criminal prosecution off the table. Submissions to the OVDI have dwindled quite dramatically, the IRS always left closing the program as an option and they are doing so now.

This means that for anyone who might still need to use the OVDI, the pressure is on to get their submission in to the IRS. FAQ 3 states that "complete voluntary disclosures ..... must be received or postmarked by September 28, 2018 and may not be partial, incomplete or placeholder submissions." Since it can take a month or more to get a preclearance letter, now is the time to start the process for anyone wishing to participate in the program. Anyone who has already submitted a preclearance letter must be mindful of the looming deadline and be sure to have everything completed by then.

The termination of this program does not mean that the IRS is going to slow or stop its offshore compliance activities. Offshore compliance continues to be a top priority for the Service. They have a tremendous amount of information and resources at their disposal to go after taxpayers with foreign accounts who have not come forward. Some form of this program has been around since 2009. Those who have not yet come forward are not likely to have a change of heart if the program continues on.

What about other programs for unreported foreign accounts? The OVDI is the big program for those who risk criminal prosecution, or at the very least can be seen as "willful." For those who can certify under penalties of perjury that their possession of an undisclosed foreign account was not willful, the Streamlined Filing Compliance Procedure will continue to exist. Unlike the OVDI, this program requires only three years of amended tax returns and six years of FBARs. For US residents, there is a 5% penalty associated with this program.

If a taxpayer's tax obligations have been met, but reporting of their foreign accounts was lacking, the Delinquent FBAR Filing Procedure continues to be available. There is no penalty in this program.

If neither of these programs will apply to a taxpayer and the date is post September 28, 2018, there exists the ordinary IRS voluntary disclosure program. This program has been around for a long time. What is different between this program and the OVDI is that the OVDI sets penalty parameters and this program does not. Ultimately, that may help or hurt the taxpayer who comes forward under this program.

Some taxpayers may choose to do a "quiet filing." This is where the taxpayer simply files amended returns and files FBARs, not entering a program and trying to stay under the IRS radar. Does this still work? From FAQ 8: "All quiet disclosures will be reviewed and will be subject to civil or criminal penalties as determined under existing law." Maybe quiet disclosures are not the best route at this point.

If you have any clients who have an undisclosed foreign account, now is the time to urge them to get off the fence. Time is growing short and, particularly for someone who can be deemed to have been willful, the pressure is on.

As Luck Would Have It

Even though most of us try to do the right thing, sometimes you just can't beat dumb luck. From *Stacey S. Marks v. Commissioner*, T.C. Memo 2018-49. Ms. Marks attempted to roll over her IRA from Company A to Company B during 2013 and treated it as a full rollover on her 2013 income tax return. The IRS determined that she had unreported income stemming from the rollover of about $98,000.

Both IRAs were self-directed. To accomplish the rollover, she directed Company A to distribute the IRA assets to her. This occurred in December of 2013. The assets that were distributed consisted of cash of $96,508 and two promissory notes for loans that she had made to her father and a friend. The notes totaled $100,000.

As most of you know, the best way to accomplish a rollover is through a trustee to trustee transfer. Any number of things can happen when the IRA owner has possession of the assets that blow the 60-day rollover rule. In any event, it is possible that the promissory notes prevented a trustee to trustee rollover. So Ms. Marks was able to roll over the cash, but not the notes. Somehow, the $100,000 became $98,000 and there they were in tax court.

This is where luck enters the picture. The judge spotted an issue that neither the IRS nor Ms. Marks' attorney picked up on. The loans made by the IRA were prohibited transactions under ERISA. The first loan was made in 2005, the second in 2012. At the time of the first loan, the IRA should have been disqualified. Since it should have been disqualified in 2005, the 2013 distribution cannot be a taxable distribution from an IRA. If you follow this through, the IRA should have been subject to tax in 2005, but that year is long closed, so the IRA escapes taxation. But ... if the IRA was disqualified, what about the annual earnings from 2006 through 2012. Those years are all closed too. Arguably a small amount of income might be taxable out of the $98,000 for 2013, as that year was still open. In addition, since what she put into Company B's IRA was in fact not from an IRA rollover, she might be subject to the 6% excess contributions excise tax. Even if she is, the result is far better than any other potential outcome of the case. Ms. Marks got very lucky indeed.

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