

THURSDAY, SEPTEMBER 29, 2011

The sanctuary of the foreign bank account is no more, government poised to strike

BY NATHAN J. HOCHMAN / GUEST COLUMN

On Sept. 9, the Internal Revenue Service concluded its second offshore voluntary disclosure initiative (2011 OVDI) targeting taxpayers who wanted to “come in from the cold” and disclose their unreported foreign bank accounts. The 2011 OVDI, like the one that preceded it in 2009, bargained away criminal prosecution and draconian civil penalties in exchange for taxpayers fully disclosing all their offshore accounts, agreeing to pay tax and interest on their offshore income, and completely cooperating in the government’s investigation of the banks and their intermediaries.

At the same time the 2011 OVDI was concluding, the U.S. Department of Justice was expanding its offshore tax evasion investigation by issuing a letter to the Swiss branches of three of Israel’s largest banks, Bank Hapoalim, Bank Leumi le-Israel BM and Mizrahi-Tefahot. In the Aug. 31 letter to these banks sent by Deputy

The IRS and Justice Department’s efforts to go after intermediaries and banks beyond UBS and in countries other than Switzerland, demonstrate its long-term resolve to change...

Attorney General James Cole, the Justice Department’s second-highest official, the Justice Department gave these three Israeli banks, along with seven Swiss banks, until Sept. 23 to produce broad statistical information on their Swiss operations with U.S. clients. The data requested covers the types of accounts disclosed in 2009 by UBS, one of Switzerland’s largest banks, as part of its \$780 million deferred prosecution deal with the Justice Department, and focuses on accounts opened before and after the February 2009 UBS-Justice Department agreement.

This “carrot and stick” approach to offshore tax compliance has been very successful in bringing taxpayers into the fold. On the “carrot” side, the IRS reported on Sept. 15 that it received 12,000 voluntary disclosures as part of the 2011 OVDI, in addition to the 18,000 voluntary disclosures it received during the first 2009 OVDI. The taxpayers who entered these OVDI programs had to pay tax and interest on their unreported income going



Sen. Carl Levin, D-Mich., chairman of the Senate Permanent Subcommittee on Investigations, center, questions Mark Branson, chief financial officer for UBS Global Wealth Management.

back to 2003 and up to a 20 percent or 25 percent “FBAR” penalty on the highest total amount of their foreign accounts. An “FBAR” penalty is the penalty associated with the failure to file a report on foreign bank and financial accounts (IRS Form TD F 90-22.1) and was a proxy for several other information reporting penalties that might otherwise apply. A FBAR must be filed on an annual basis by taxpayers with signature authority, other authority or a financial interest in one or more

foreign accounts with over \$10,000.

The reason the OVDI programs offered a significant benefit, in addition to a criminal declination, was that the FBAR penalty could skyrocket up to 50 percent of the aggregate total of the offshore accounts per year for a willful reporting violation. For example, if one had \$1 million in an unreported Swiss account for three years, then the FBAR penalty could be up to \$500,000 per year for each of the three years, totaling \$1.5 million.

As a result of the “carrots” offered by the OVDI programs, the IRS collected \$2.2 billion from people who participated in the 2009 program and another \$500 million in taxes and interest as down payments for the 2011 program.

On the “stick” side for those taxpayers not participating in the OVDI programs, the Justice Department has prosecuted dozens of them for felonies, potential imprisonment, and high restitution. The Tax Division’s website indicates that there have been approximately 150 criminal investigations initiated to date of offshore-banking taxpayers, of which 36 cases have been charged and 33 convictions obtained.

Two recent cases highlight what the Justice Department is pursuing. On Aug. 3, Robert Greeley pleaded guilty to concealing more than \$13 million in two UBS bank accounts in Switzerland by opening up the accounts with the help of a Swiss banker in the names of Cayman Islands nominee companies he controlled. On June 20, Nadia and Sean Roberts pleaded guilty to hiding more than \$1 million in Swiss, Liechtenstein, and Hong Kong bank accounts in names of nominee companies with the help of a Swiss account manager. In each case, the defendants face jail time, being convicted felons for the rest of their lives, and having to pay a 50 percent FBAR penalty in addition to back taxes plus interest and penalties on those taxes.

With the apparent success of the “carrot and stick” approach to pursue U.S. offshore tax evad-



Nathan J. Hochman is a partner in Bingham McCutchen’s white-collar investigations and enforcement and tax controversy groups and a former assistant attorney general with the U.S. Dept. of Justice. He can be reached at nathan.hochman@bingham.com.

Sanctuary of the foreign bank account is no more

ers, the government now seems poised to focus on those it believes facilitated the tax evasion and those account holders who did not disclose under either of the OVDIs.

As part of both the 2009 and 2011 OVDIs, the IRS required taxpayers to fully cooperate in its investigation of those who assisted the taxpayers with their foreign accounts. The IRS mandated that program participants identify which banks they kept their offshore funds at, which bank representatives they dealt with, and which additional intermediaries like lawyers, accountants, return preparer or business people interacted or advised them. Recent questions the IRS has asked OVDI participants include:

Did a representative of the foreign financial institution suggest to you the use of the offshore accounts, offshore investments, offshore entities or particular foreign countries as a way of avoiding taxes or avoiding the disclosure of your ownership of the account or asset?

Did a representative of the foreign financial institution suggest to you the use of practices such as holding mail at the institution, using of prepaid phone cards, bank storage of account documentation, or conducting face-to-face meetings to avoid the disclosure of your ownership of the account or asset?

Was an accountant, attorney, return preparer or other business person in the U.S. involved in setting up the offshore account, investment or entity or advising their use?

Did an advisor other person attempt to influence you to move funds from one foreign financial institution to another or from one foreign country to another to avoid disclosure of the account or asset?

Given that the IRS now has a database of 30,000 responses to these questions covering bank accounts from 140 countries, the IRS and Justice Department will be able to more accurately target those entities and individuals who allegedly helped U.S. taxpayers evade tax. If these targets in turn succumb to U.S. pressure and cooperate against their U.S. clients, the federal government will then be in an even better position to pursue U.S. taxpayers with still-unreported offshore accounts.

To date, the Justice Department has used the information obtained from OVDI participants to file charges against 15 foreign bankers, account managers and attorneys. For example, on July 21, the Justice Department indicted Benda Singenberger, a Swiss financial advisor, for conspiring with more than 60 U.S. taxpayers to hide more than \$184 million at various Swiss banks. Singenberger allegedly opened dozens of hidden accounts, used numerous sham Hong Kong and Liechtenstein entities, and helped taxpayers move their offshore accounts away from UBS to other Swiss banks to evade the IRS' investigation.

The IRS and Justice Department's efforts to go after intermediaries and banks beyond UBS and in countries other than Switzerland, demon-

strate its long-term resolve to change, which IRS Commissioner Douglas Shulman has referred to as, "the risk calculus" of U.S. taxpayers. "Americans now understand that if they try to hide assets overseas, the chances of being caught continue to increase," Shulman said in a Sept. 15 IRS news release on combating international tax evasion. He added: "By any measure, we are in the middle of an unprecedented period for our global international tax enforcement efforts. We have pierced international bank secrecy laws, and we are making a serious dent in offshore tax evasion.... Global tax enforcement is a top priority at the IRS."

Since the Senate Permanent Subcommittee on Investigations has estimated that the U.S. loses \$100 billion each year from offshore tax evasion, the pressure to pursue U.S. tax evaders and those that facilitate their tax evasion will increase for the foreseeable future. When one considers the additional requirements on offshore banks starting in 2014 under FATCA, the Foreign Account Tax Compliance Act, that will compel these foreign financial institutions to disclose information about U.S. taxpayers to the IRS or face a stiff 30 percent withholding penalty, the opportunities to hide income overseas will become more difficult and more perilous. Seeking advice on how to navigate these treacherous legal waters in order to understand how best to position oneself with the IRS and Justice Department is crucial to reaching the best possible outcome.