USA Bank Secrecy Act Update

Since 1970, US persons have been required to report their legal or beneficial ownership of foreign financial accounts. This requirement includes accounts over which a person has only signature authority, including under a power of attorney or as a corporate officer. Cash and security accounts are included. The requirement to report is independent of any other requirement. Even if an individual has *no obligation* to file a US personal income tax return, he or she can still have an obligation to file a Foreign Bank Account Report, or FBAR. The threshold is a $10,000 aggregate balance at any one time in a calendar year. Reportable accounts include deposit and custodial accounts held in non-US banks or non-US branches of US banks, as well as stock or security accounts in non-US financial institutions. Since 2013, this filing obligation must be met electronically through the Bank Secrecy Act Financial Crimes Enforcement Network (BSA FinCEN)[1]. The FBAR is due on April 15 of each year.

US Persons include citizens and residents as well as US Corporations, partnerships, limited liability companies, trusts and estates. If a US person has the obligation to file a US income tax return, additional reporting obligations may exist. See, for example, schedule B (Form 1040A or 1040), Schedule 8938 and Schedule 3520.

A recent case, Jarnagin v US, makes this clear. In that case, married US citizens purchased a ranch in British Columbia and opened a Canadian bank account. Later, the husband become a dual US-Canada citizen. The couple filed US income tax returns on Form 1040 which included schedule B. Each year, the certified public accountant (CPA) who prepared the returns answered no to the following question:

> At any time during [the tax year] did you [the taxpayer] have a financial interest in or signature authority over a financial account (such as a bank account, securities account or brokerage account) located in a foreign country? See instructions…

1 https://bsafiling.fincen.treas.gov/main.html

Upon discovering the existence of the Canadian account, the US Internal Revenue Service (IRS) imposed a penalty of $100,000, being $10,000 per year per taxpayer for a five year period. At some point, the IRS agreed to reduce the penalty to $80,000 by waiving the penalty for the first filing year.

The couple sought a waiver of all of the penalties claiming (i) general ignorance; and (ii) the use of a CPA for tax return preparation. This excuse fell on deaf ears at the US Court of Federal Claims. The couple were active in business and testified that they did not review the returns or read Schedule B. Thus, they had not exercised the “ordinary business care or prudence” required of them. They never solicited or received advice about reporting the Canadian bank account from the CPA. This next point is important: Judge Kaplan emphasized that a CPA, in signing a tax return, is not opining on the contents thereof. Essentially, the duty of ordinary business care and prudence can not be delegated, but rests squarely on the taxpayer.

The author recently confirmed with US Treasury Department personnel that US tax treaty waivers have no effect on the FBAR filing obligations discussed here.

If you would like to discuss this issue as it affects you, please contact us.