



The IRS and Offshore Tax Evasion - Risks of Gold Bullion

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September 2016

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Gary S. Wolfe has over 34 years of experience, specializing in IRS Tax Audits and International Tax Matters including: International Tax Planning/Tax Compliance, and International Asset Protection.

As of July 2016, Gary Wolfe has internationally published 15 books and 28 articles. Gary has received 14 international tax awards from five different Global expert societies in LONDON/UK including being voted one of the 100 leading world's law firms with votes from over 150,000 voters in over 160 countries with the following award: Global 100 (2016) (KMH Media Group) - CA/US International Tax Planning Law Firm of the Year.

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The IRS & Offshore Tax Evasion: Risks of Gold Bullion

Gold bullion as a hedge against stock market/currency risk is an investment of choice for many wealthy Americans. If the gold bullion is held offshore it may trigger information reporting requirements under the FBAR rules (Report of Foreign Bank and Financial Account, FinCen Form 114 due June 30 each year to report an interest in foreign financial accounts in excess of \$10,000), the FATCA rules (Form 8938, filed with Form 1040 annually to report specified foreign financial assets whose total value is more than \$50,000 on the last day of the tax year, or more than \$75,000 at any time during the tax year, \$100,000/\$150,000 for husband and wife).

The penalties for failure to file these information reports may be severe: for failure to file Form 8938 the penalty is up to \$60,000 and imposition of criminal penalties, for failure to file Form 114 the penalty for willful failure to file is 50% of the account balance (for each year not filed) and a 10 year felony (for each year not filed).

Current marketing materials tout that gold bullion is an exempt class and is not reportable if held offshore. These marketing materials may be incomplete, misleading and erroneous. Since they were not drafted by an attorney representing the client(s) they may not be relied upon in the event of an IRS tax audit since the client's individual facts have not been reviewed and analyzed under the relevant law. As discussed further below, threshold questions at the outset which trigger the tax reporting include:

- 1) Under the FBAR rules, if gold is held in a foreign country in a financial institution it is subject to FBAR reporting. If the gold is held by a US person

in a non-bank storage facility it is not a financial account as long as the party providing storage services is not a financial institution. The risk to the US taxpayer appears to be two fold: an FBAR filing may be required based on a specific fact finding inquiry. If the FBAR filing is not required because the gold is held in a non-financial institution the gold bullion may be subject to misappropriation (by the non-bank storage facility), risk of insolvency of the facility, unexpected loss through casualty (e.g. fire) which is uninsured with the US taxpayer left with no recourse other than international litigation to recover the gold, their damages or other remedies.

2) Under the FATCA rules, the specified foreign financial assets do not include gold held directly by the taxpayer. The FATCA rules would require information reporting for the gold bullion if held under Foreign Financial Accounts (Deposit and Custodial Accounts), which includes: foreign partnerships, corporations, mutual funds, hedge funds, foreign issued life insurance and annuities.

If the gold is held directly by the US Taxpayer it may not be subject to reporting under the FATCA rules but the safety, security and accessibility of the gold is dependent on the 3rd party who holds the gold (required if the US taxpayer is in the US and the gold bullion is offshore).

If the gold is held directly no FATCA filing is due but there is no definition in the IRS publications of what it means to hold gold directly for example, if in taxpayer's wall safe that may qualify as direct holding but if held in a precious metal vault (owned by a bank subsidiary) it may be subject to both FATCA (not held directly, held by 3rd party who is the custodian for taxpayer) and FBAR filings.

Many years ago, offshore banks offered themselves as "private and confidential" depositories for US investor funds only to "one day disappear" with no trace and the investor funds lost in the process. How are the risks any different for gold held by an offshore third party for the benefit of an American investor?

3) Although not clearly explained by the IRS the FBAR and FATCA information filings are two separate filings and may both be due or only one of them due. If the assets are under \$50,000 only the FBAR filing may be due. If the assets are over \$50,000 either one or both filings may be due. The filings are required under two separate laws: the FATCA form 8938 filing is required under the Internal Revenue Code and must be filed annually with Taxpayer's Form 1040 tax return (failure to include the Form 8938, suspends the statute of limitations for IRS civil tax audit of the taxpayer Form 1040). The FBAR filing (FinCen Form 114) is required under the 1970 Bank Secrecy Act and is filed with the US Dept. of the Treasury by (June 30 of each year) to their division Financial Crimes Enforcement Network.

In April 2003, the Financial Crimes Enforcement Network delegated authority for the FBAR filing to the Internal Revenue Service (IR 2003-48 (4/10/03); 31 CFR 103.5 (6) (b) (8)). The IRS enforces all penalties associated with the FBAR with the same power it enforces tax reporting and payment compliance. The IRS has been given the authority to enforce the filing rules and audit the FBAR filings as appropriate.

