IRS Offshore Tax Evasion and the 5th Amendment

Prepared by:
Gary S. Wolfe
THE WOLFE LAW GROUP

LORMAN EDUCATION SERVICES
November 2016

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 700 available
- ☑ **Slide Decks -** More than 1700 available
- ☑ **White Papers**
- ☑ **Reports**
- ☑ **Articles**
- ☑ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: **www.lorman.com/pass/?s=special20**

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

THE WOLFE LAW GROUP

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.

For more information please visit our website: gswlaw.com

Gary S. Wolfe, A Professional Law Corporation
6303 Wilshire Blvd., Suite 201
Los Angeles, CA, 90048
Tel: 323-782-9139
Email: gsw@gswlaw.com

IRS Offshore Tax Evasion and the 5th Amendment

23. SEP, 2016

Under the 5th Amendment, a party does not have to provide evidence that incriminates them. However, there are exceptions including the “Required Records Doctrine” which states that when certain conditions are met, records required to be maintained fall outside the scope of the privilege.

The US Court of Appeals (9th Cir.) in the case In re: Grand Jury Investigation (M.H.), case # 11-55712 (DC #10-GJ-0200 (opinion filed 8/19/11) held the defendant (MH Witness/Appellant) in contempt, affirming the District Court for failing to comply with a grand jury subpoena demanding that he produce certain records related to his foreign, secret UBS/Swiss bank accounts to evade his taxes. The foreign bank account information is required to be kept and maintained by taxpayer under the Bank Secrecy Act of 1970 (BSA) 31 USC 5311. MH was held in contempt pursuant to the recalcitrant witness statute (28 USC 1826) for refusing to comply.

In his excellent article (dated 4/24/15) pre-eminent criminal tax attorney Sanford I. Millar (MillarLawOffices.com) advised of the following key issues citing the MH Case:

1) The Required Records Doctrine is used by the US Dept. of Justice to compel taxpayer to produce what may be incriminating evidence of ownership or control of foreign financial accounts.

2) Under 31 USC 5322 (a) “pursuant to 31 CFR Sec. 103.32 all US holders of foreign bank account are required to create and retain certain records regarding those accounts for a period of 5 years.
Willful failure to retain such records may be criminally prosecuted.

3) The Required Records Doctrine is essentially regulatory in purpose so the production of documents and testimony about the documents was not subject to the 5th amendment privileges against self-incrimination.

In the MH case, Millar commented on the following matters:

1) Does the US taxpayer have ownership or control over an undisclosed foreign financial account?

2) Did US taxpayer reasonably rely on his tax preparer in not disclosing a foreign financial account on his income tax return, and not filing an FBAR form (Report of Foreign Bank Account) for tax years in question?

3) Since reasonable reliance is a defense to penalties, is US taxpayer liable for penalties?

As Millar explained, although reasonable reliance may be a bar to imposition of penalties, it is not a bar to compelled document production under the “Required Records Doctrine” or preclude the appearance before a grand jury since it is not part of the 5th amendment privilege. The Tax Advisor or Tax Preparers who were involved may be called to appear before the grand jury, interviewed in an IRS tax audit and any statement made or document produced must be truthful and accurate. An intentional error may be prosecuted as obstruction of tax collection (3 year felony).

For US taxpayers with undisclosed offshore accounts who fail to disclose them they may be subject to both civil fines & criminal prosecution and fines for their “willful behavior”. For example, the failure to file FBAR (Fincen Form 114) to disclose offshore accounts may subject the taxpayer to civil fines of up to 50% of the highest account balance per year (in the case of Florida taxpayer Carl Zwerner the penalty was nearly 150% of the account balance). In addition, income tax is due on account earnings, with a potential 75% civil tax fraud penalty (i.e. 75% of the tax as an additional penalty) on the unreported foreign income and interest.

Tax preparers are governed in their practice before the IRS by Treasury Dept. Circular #230, Sec. 10.21 that requires them to notify clients who have not complied with US revenue laws as to the fact of their non-compliance and the penalties for their continued non-compliance.

Taxpayers who fail to disclose foreign bank accounts/assets, or report foreign income face criminal prosecution for multiple tax crimes, including the following felonies:

1) Willful Evasion of Tax (IRC 7201) up to 5 years in jail

2) Obstruction of Tax Collection (IRC 7212), up to 3 years in jail

3) Filing a False Tax Return (IRC 7206 (1), up to 3 years in jail.

In addition under 18 USC 371 if two or more parties (e.g.. taxpayer and advisor(s) conspire to commit tax evasion it is a 5 year felony (known as a Klein conspiracy).

So the taxpayer is now in the following predicament:

1) If the US taxpayer produces the records, they might conflict with other information he previously reported to the IRS; or

2) The records sought might prove other information previously reported is not accurate.

3) If the taxpayer denies having the records, he risks incriminating himself because failing to keep the information when required to do so is a felony.

So what to do…. hire a tax expert. “Do it yourself” efforts are neither appropriate nor will they work. If you had a brain tumor, you would not operate on yourself, so if you are facing a grand jury perhaps you may understand the same analogy.