



Criminal Tax Issues

The IRS and Off-Shore Tax Evasion

Waiver of Civil and Criminal Penalties

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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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Criminal Tax Issues

Please review the following client criminal tax issues:

- 1) Your duty as a tax practitioner Treas. Dept Circular 230 (Sec. 10.21): your knowledge of client's non-compliance with US revenue laws, or omissions/ errors on tax returns requires you advise client promptly of fact of client's non-compliance or error and consequences;
- 2) Failures to file Form 3520 subject client to 35% penalty re: distributions received;
- 3) Failure to file Form 3520-A re: foreign trust distributions (which is a grantor trust due to a US beneficiary receiving trust distributions subjects client to criminal penalties under IRC sections 7203, 7206, 7207 for either failing to file or filing false tax returns (ie. Form 1040);
- 4) Failure to include foreign trust income received on their personal tax return is an unreported income issue, please review IRC Sec. 7201 (Tax Evasion ie. Willful Evasion of Tax is a 5 year felony); IRC 7212 Obstruction of Tax Collection is a 3 year felony);
- 5) If tax evasion proceeds were used as the source of funds to buy any assets (e.g.. real estate) the client may be subject to criminal prosecution for 3 separate felonies: Money Laundering (18 USC Sec. 1956 & 1957), Mail Fraud (18 USC 1341), Wire Fraud (18 USC 1341);
- 6) Under IRC Sec. 7525(a)(1)(2) there is no attorney-client privilege for common law protections of confidentiality in a criminal tax matter ie. you could be forced to testify against your client;
- 7) Client tax returns filed were apparently erroneously prepared by a CPA (not working under an attorney privilege ie. Kovel). The tax returns do not appear to be privileged at all ie. no Kovel privilege. In addition, it is the IRS position that the Kovel privilege does not apply to a filed tax return since there is no expectation of private communications in a public tax filing ie. a tax return.

In summary, your client and CPA appears to have a myriad of criminal tax issues and face multiple tax felonies for numerous tax years. Under Circular 230 you have an ethical duty to evaluate these issues, seek independent tax counsel in areas which you do not possess the requisite expertise and advise the client of both their failures of compliance and their penalties for non-compliance.

The IRS & Offshore Tax Evasion: Waiver of Criminal/Civil Penalties

U.S. Taxpayers who commit offshore tax evasion are subject to serious civil and criminal penalties, which may include:

1. An FBAR civil penalty of up to 150% of the account balance (see: 5/14 case of Florida Taxpayer Carl Zwerner)
2. 20%-40% accuracy related penalty (on underpayment of tax due).
3. Civil Tax Fraud penalty (75% of tax due) and suspension of the IRS statute of limitations for civil tax audits

Criminal Penalties

Criminal Prosecution for Tax Crimes: Willful Evasion of Tax (5 years in jail; IRC 7201), Obstruction of Tax Collection (3 years in jail; IRC 7212), Conspiracy to Commit Tax Evasion (5 years in jail; 18 USC 371), Filing a False Tax Return (3 years in jail; IRC 7206), Failure to File FBAR (10 years in jail for each tax year not filed; Fincen form 114) .

In addition, tax crimes may be linked to 3 separate 20 year felonies: mail fraud, wire fraud, and money laundering. Mail fraud requires the use of the postal system to effectuate a scheme to defraud (18 USC 1341). Wire fraud requires the use of a telecommunications facility to effectuate a scheme to defraud (18 USC 1343) and if the wire fraud affects a financial institution, the fine is up to \$1m and up to 30 years in prison.

Money Laundering is the use of illegal funds to purchase assets (hiding the origin of the illegal funds). These illegal funds may come from tax evasion. Tax evasion is a Specified Unlawful Activity ("SUA"), a predicate offense for money laundering under the Money Laundering Control Act, 18 USC 1956, 1957, as is wire fraud & mail fraud).

Tax evasion is a Specified Unlawful Activity in a financial transaction involving the proceeds of a specified unlawful activity with the intent to violate IRC Sec. 7201 (willful attempt to evade tax) or IRC Sec. 7206 (False tax return filed or false and fraudulent statements made to the IRS).

In addition to monetary penalties, violations of mail fraud, wire fraud and money laundering are punishable by civil and criminal forfeiture (18 USC 981(a)(1)(A): civil forfeiture 18 USC 982(a)(1)(A): criminal forfeiture.

Civil Penalties

For failure to file Fincen Form 114("FBAR") to report the off-shore account a penalty equal to the greater of \$100k or 50% of the balance in the account for each violation. In 2014 a Florida taxpayer, Carl Zwerner, lost at trial with the IRS for failing to file an FBAR and had a 150% of the account balance penalty imposed.

A 20-40% accuracy-related penalty for underpayment of tax.

A Civil tax fraud penalty (75% of tax due) and suspension of the IRS statute of limitations for civil tax audits.

Waiver Of Penalties/Good Faith Belief

Clearly, there is great risk for undeclared offshore accounts and unreported income. The key issue for the taxpayer to eliminate penalties is cited in IRC Sec. 6404(c) which states that no penalty will be imposed with respect to any portion of an underpayment if it is shown that there was reasonable cause and the taxpayer acted in good faith.

To avoid both criminal prosecution and criminal conviction the taxpayer must demonstrate that he had a "good faith" belief that he did not owe the tax. In *Cheek v. US* 1991(1991) 498 US 192 willfulness is required for federal tax crimes.

A good faith misunderstanding of the law, or a good faith belief that one is not violating the law negates the willfulness element of a tax evasion charge(See: Standard Federal Tax Reports Par. # 41.318.034; Tax Research Consultant Sec. 66.050, Practical Tax Explanations Sec. 40.245).

