LAW OFFICES OF
SANFORD I. MILLAR
MILLARLAWOFFICES.COM

Offshore Assets and 2011 Disclosure a Volatile Mix

January 22, 2012

The IRS Frequently Asked Question 47 which is part of the explanation of the Offshore Voluntary Disclosure Initiative has an ominous warning for taxpayers with undisclosed foreign accounts and more.

FAQ 47 it directed to tax return preparers and provides as follows:

I have a client who may be eligible to make a voluntary disclosure. What are my responsibilities to my client under Circular 230?

The IRS anticipates that taxpayers will seek qualified tax and legal advice and representation in connection with considering and making a voluntary disclosure. If a taxpayer seeks the advice of a tax practitioner, the practitioner must exercise due diligence in determining the correctness of any oral or written representations made to the client about the program and the implications for that taxpayer of going forward. If the taxpayer decides to proceed with the disclosure, the practitioner must exercise due diligence in determining the correctness of any oral or written representations that the practitioner makes during the representation to the Department of the Treasury; and must avoid giving, or participating in giving, false or misleading information to the Department of the Treasury or giving a false or misleading opinion to the taxpayer. If the taxpayer decides not to make the voluntary disclosure despite the taxpayer's noncompliance with United States tax laws, Circular 230 requires the practitioner to advise the client of the fact of the client's noncompliance and the consequences of the client's noncompliance. A practitioner whose client declines to make full disclosure of the existence of, or any taxable income from, a foreign financial account during a taxable year, may not prepare the client's income tax return for that year without being in violation of Circular 230

FAQ 47 would seem to apply not only to voluntary disclosures in connection with unreported foreign bank accounts (un-filed FBAR's) and unreported income from those accounts, but also to unreported

Law Offices of Sanford I. Millar

Office: 310-556-3007
Fax: 310-556-3094
Address: 1801 Avenue of the Stars, Suite 600
Los Angeles, CA. 90067
Email: smillar@millarlaw.net

www.millarlawoffices.com

gifts and bequests of specified foreign financial assets. A new form, Form 8938 s required to be attached income tax returns for 2011 if the taxpayer has specified foreign financial assets in excess of $50,000. Tax return preparers will now be under an affirmative duty to ask all tax payers, about such assets for purposes of completing Form 8938. The trap, if there is one, is that the taxpayer will be dealing in a communication that is not privileged by the Attorney-Client Privilege when the disclosure is made. The communications with the tax return preparer are simply not privileged. The failure to file a Report of Foreign Gift or Bequest in excess of $100,000 in a calendar year, absent a reasonable cause, carries substantial penalties. The return preparer who learns of such assets and the source must advise the taxpayer of their obligation to make the disclosure of the assets and to report the gift or bequest. Once the taxpayer has been advised, the return preparer should carefully consider whether to prepare the return or not in light of FAQ 47 and its warnings. It is not a far stretch to imagine a case where a return preparer is not only disciplined under Circular 230, but prosecuted. A proper course of action for a return preparer who learns of unreported foreign bank accounts or unreported foreign gifts or bequests should be to refer the client to counsel and put the return on extension.

Law Offices of Sanford I. Millar

Office: 310-556-3007
Fax: 310-556-3094
Address: 1801 Avenue of the Stars, Suite 600
Los Angeles, CA. 90067
Email: smillar@millarlaw.net

www.millarlawoffices.com