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2010

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UIL No. Report of Foreign Bank and Financial Accounts (FBAR) Job Aid and Counsel Review of Penalty Cases

FULL TEXT:

October 31, 2008

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**MEMORANDUM FOR ALL LMSB INDUSTRY DIRECTORS DIRECTOR,
INTERNATIONAL COMPLIANCE STRATEGY AND POLICY LMSB DIVISION
COUNSEL ALL EXECUTIVE ASSISTANTS****FROM:**

Robert L. Trujillo /s/Robert L. Trujillo

Director, Planning, Quality, Analysis, and Support

SUBJECT:**Report of Foreign Bank and Financial Accounts (FBAR)** Job Aid and Counsel Review of Penalty Cases

The purpose of this memorandum is to heighten awareness among LMSB personnel of the requirement for taxpayers to report foreign bank and financial accounts on Form TDF 90-22.1. During LMSB examinations, examiners should identify the existence of foreign bank accounts and ensure they are properly reflected in taxpayer returns. Extensive **FBAR** guidance is provided in new IRM 4.26.16 , **FBAR** Law and Examination Requirements, published in July 2008 and IRM 4.26.17 , **FBAR** Examination Procedures, published in May

2008.

The number of **FBAR** filings for 2003 was almost 205,000. In April 2003, the IRS was delegated authority to investigate, assess and collect **FBAR** penalties. Since 2003, **FBAR** filings have increased nearly 60% to more than 322,000 for 2007. An April 2002 U.S. Treasury Report to Congress indicated there may have been as many as one million U.S. taxpayers required to file the **FBAR** in any given year, and recent news articles refer to IRS investigations that identified foreign banks that appear to be helping taxpayers avoid taxes by concealing foreign bank accounts and assets.

These reports suggest a significant number of foreign bank accounts are not being reported on **FBAR** Form TD F 90-22.1, as required by 31 U.S.C. § 5314 (a). **An FBAR is required, for each calendar year, if a U.S. person has a financial interest in or signature authority, or other authority over one or more foreign financial accounts with an aggregate value greater than \$10,000 at any time during the year. A U.S. person includes corporate officers, partners, members of a trust and others associated with a trust, as well as the corporation, partnership or trust that has an interest in or authority over the foreign accounts. Likewise, an FBAR is generally required to be filed by both the entity and individuals.**

It is critical that LMSB examiners conduct inquiries during Title 26 examinations, to determine:

1. The existence of foreign bank accounts and whether an **FBAR** is required,
2. Whether the records relating to the accounts are maintained,
3. If the foreign accounts are properly included in taxpayer's financials and U.S. tax returns, and
4. Whether, based on a good-faith determination, identified **FBAR** violations are in furtherance of an apparent Title 26 income tax violation.

If there is an apparent Title 26 income tax violation, the examiner must secure signed concurrence from the Territory Manager on Form 13535, **FBAR** Related Statute Memorandum, before beginning any separate Title 31 **FBAR** examination. For Territory Manager responsibilities see IRM 4.26.17.2 **FBAR** Examination Procedures-Related Statute Memorandum and IRM 4.26.14.2 , Disclosure and Related Statute Test.

As part of the risk analysis, income probe, and inspection of related returns in the Corporate Executive Compliance Initiative, examiners should consider whether **FBAR** requirements are met. It is recommended that examiners identify corporate executives and/or partners and others associated with the taxpayer entities that have an interest in and/or authority over foreign accounts and trace any income that should be reported on the executive returns. You can access the Currency and Banking Retrieval System (CBRS) to determine whether the entities and related executives have filed the required **FBARs**. **The examiner should not ask the taxpayer or related individuals about FBARs unless and until a related statute memorandum has been secured from the Territory Manager and filed with the Detroit Computing Center to open a Title 31 FBAR case.**

LMSB Foreign Resident Compliance examinations generally relate to taxpayers who live and work abroad or who have connections to a foreign country. It is therefore especially important that examiners ensure that foreign bank accounts are properly included in taxpayers' financials and U.S. tax returns, and pursue the violation of **FBAR** requirements when appropriate. Foreign Resident Compliance examiners should utilize the **FBAR** Penalties: Post 10/24/04: Non-BSA Examiners Lead Sheet when investigating whether taxpayers have met their responsibilities regarding **FBAR**.

Civil and criminal penalties for non-compliance with **FBAR** filing requirements are severe. Civil penalties for a non-willful violation can range up to \$10,000 per violation. Civil penalties for a willful violation can range up to the greater of \$100,000, or 50 percent of the amount in the account at the time of the violation. Criminal penalties for violating the **FBAR** requirements while also violating certain other laws can range up to a \$500,000 fine or 10 years imprisonment, or both. Civil and criminal penalties may be imposed together. However, no penalty will be assessed if there is reasonable cause for not filing the **FBAR** and the taxpayer may qualify for a lesser penalty amount under IRS mitigation guidelines.

LMSB examiners should follow IRM 4.26.17, **FBAR** Examination Procedures, except as follows:

1. If, as a result of an examiner's findings, a penalty exceeding \$10,000 is proposed, the case must be reviewed by LMSB Division Counsel. Contact the **FBAR** contact, David Farhat, at (202) 283-8626 or via e-mail at David.M.Farhat@lircounsel.treas.gov.
2. If an **FBAR** penalty is proposed by an LMSB Foreign Resident Compliance examiner on an SBSE taxpayer, the examiner will submit the **FBAR** case file to an SBSE Counsel Area **FBAR** Coordinator for review and written advice. A current listing of Area Coordinators can be accessed on the SBSE Counsel Contacts web page at: <http://counsel.web.irs.gov/sbse/admin/>.

Attached is a job aid for examiners that lists the minimum procedures for **FBAR** compliance checks and penalty cases. Please cascade this memorandum throughout your organization. Additional information on **FBAR** can be accessed through the LMSB website at http://lmsb.irs.gov/hq/pqa/Post-filing/pfa_FBAR_Home.asp.

If you have questions, please contact Team Manager Amy Liberator at (330) 253-7341. Field personnel may contact Senior Program Analyst Sid Weissend at (615) 250-5131.

Attachment

Attachment

FBAR Audit Tool

ARE YOU ASKING THE RIGHT QUESTIONS?

Form TD F 90-22.1 is required to be filed when:

1. The subject is a US person,
2. The US person had (a) financial account(s),
3. The financial account was in a foreign country,
4. The US person had a financial interest in or signatory or other authority over the foreign financial account(s), and
5. The aggregate amount(s) in the account(s) valued in dollars exceeded \$10,000 at any time during the calendar year.

Appropriate audit techniques during a Title 26 examination include:

1. Review Schedule N (Form 1120), line 6A to determine whether the taxpayer acknowledged the

existence of a foreign financial account.

2. Look for indicators of foreign activity, such as filing Form(s) 5471, foreign transfers on bank statements, foreign issued credit cards, use of foreign money transmitters or any significant activity involving entities outside of the US.

If a Form TD F 90-22.1 was required to be filed, determine if the form was filed by querying the Currency Banking and Retrieval System (CBRS). If the form was filed, and the records required by the **FBAR** instructions and 31 C.F.R. 103.32 were retained, no further action is necessary.

If the form was not filed, you must obtain a related statute determination from the Territory Manager, before working the **FBAR** case. A Related Statute Memorandum (RSM - Form 13535) should be prepared, demonstrating that the apparent failure of the taxpayer to report the foreign financial account(s) was in furtherance of a Title 26 violation.

Once the related statute determination is approved, the examiner will:

1. Copy the RSM and forward the copy to the Detroit Computing Center (DCC) at:

Internal Revenue Service Detroit Computing Center PO Box 33113 Detroit, MI
48232-0113

2. Establish a **FBAR** case file, separate from the income tax case file. Include the original RSM in the case file.

3. Note in the activity record when the **FBAR** Monitoring Document (FMD – Form 13536) is received from the DCC and place it in the case file.

After gathering all the facts, the examiner will make a determination concerning violations and penalties, as follows:

1. If no **FBAR** violation is found, write a summary memorandum.

2. If Letter 3800, Warning Letter Respecting **FBAR** Violations (without penalty), is appropriate; issue the letter, secure a delinquent Form TD-F 90.22-1 and write a summary memorandum.

3. If a **FBAR** penalty is proposed on a regular LMSB taxpayer, prepare Letter 3709 and Form 13449, as well as a summary memorandum. If the penalty being proposed exceeds \$10,000, forward the case file to David M. Farhat, Senior LMSB Attorney, for review and written advice. David's e-mail address is: DAVID.M.FARHAT@IRSCOUNSEL.TREAS.GOV. When approved by Counsel, issue the Letter 3709 and the Form 13449.

4. If a **FBAR** penalty is proposed by an LMSB Foreign Resident Compliance (FRC) examiner on a SBSE taxpayer, prepare Letter 3709 and Form 13449, as well as a summary memorandum. If a penalty is being proposed, the examiner will submit the **FBAR** case file to an SBSE Counsel Area **FBAR** Coordinator, for review and written advice. A current listing of Area Coordinators can be accessed on the SBSE Counsel Contacts web page at: <http://counsel.web.irs.gov/sbse/admin/>. When approved by Counsel, issue the Letter 3709 and the Form 13449.

If the taxpayer agrees with the penalty and signs the Form 13449, secure the delinquent **FBAR**(s), and solicit payment.

If the taxpayer disagrees with the penalty, wait 30 days to see if the taxpayer appeals the finding. If no written protest is received, the penalty is assessed.

If the taxpayer presents a written appeal and there is no related Title 26 case or the related Title 26 case is agreed, forward the case file to Appeals. Note on the transmittal letter that the case is an **FBAR** category case in the Appeals Coordinating Issue Program.

If the related Title 26 case is unagreed, the examiner, manager and Appeals office will discuss holding the **FBAR** case until the Title 26 case is ready to close to Appeals.

Finally, complete the **FBAR** Monitoring Document and close the case to the DCC through the manager.

Resources:

- **FBAR** intranet website http://lmsb.irs.gov/hq/pqa/Post-filing/pfa_FBAR_Home.asp
- IRM 4.26.16 , **FBAR** Law & Exam Requirements (New 7/2008)
- IRM 4.26.17 , IRS Exam Procedures (Pub. 1/2007, and revised 5/2008)

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