

CROSS BORDER INDIVIDUAL MATTERS

30TH ANNUAL INSTITUTE ON
CURRENT ISSUES IN INTERNATIONAL TAXATION

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## DISCLAIMER

This presentation and the views expressed therein reflect the unofficial, individual views of the government participants, and do not necessarily represent Department of Justice or IRS policy.

## *CURRENT INTERNATIONAL TAX LANDSCAPE*

- Data leaks and Whistleblowers are Revealing Potential Tax Crimes
- Push for Entity Transparency & Disclosure of Beneficial Owners
- Countries Calculating Respective Tax Gaps and Pursuing Revenue
- Substantial Increase in Automatic and Specific Exchange of Information
- Global Voluntary Disclosure Programs in Advance of CRS
- Due Diligence Standards for Financial Institutions and Gatekeepers
- Global and Extraterritorial Civil and Criminal Enforcement Efforts

# AGENDA

- Immigration and Expatriation – planning, strategies, residency and estate issues
- Coming Into Compliance – OVDP and Other Options
- The Latest Developments in FBAR Penalties
- Civil Offshore Tax Enforcement Tools
- Increased Cooperation among Foreign Jurisdictions
- Criminal Offshore Tax Enforcement Update

# Immigration

## Tax Implications of Moving to the United States

- No automatic basis step-up upon entry
- Pre-immigration tax planning (income and transfer) is critical for individuals and families temporarily or permanently relocating to the United States
- Three principal categories of U.S. tax considerations:
  - U.S. federal income tax considerations;
  - U.S. federal estate tax, gift tax and generation-skipping transfer tax considerations; and
  - State and local income (and, potentially, other) tax considerations

# Immigration

KYC – Know Your Client

Family

Assets

Business

Citizenship, Residence & Domicile of All Family Members

Investment Objectives & Diversification

Tax and non-tax objectives

# Immigration

## Overall Objectives

- Minimize U.S. and Home Country taxes
  - Consult with local counsel
  - Consider period without tax residence or with interim residence
  - Least aggregate tax in both countries & minimize/avoid double taxation
- Coordinate tax and estate plan with non-tax issues
  - Family relationships
  - Cash flow
  - Access to assets
  - Understand U.S. financial disclosure and other relevant laws
- Maximize protection from creditors
- Address spousal rights, if any

## U.S. Income Tax Residency – Resident Aliens – IRC § 7701(b)

- Green Card Test
  - Lawfully Received a Green Card, and
  - Status has not been Revoked (or admin/judicially determined abandoned)
    - Rescission or Abandonment of Green Card status must be Affirm. Recognized
    - Green Card Holder does not lose U.S. tax status for leaving U.S. and allowing Green Card to Expire/become Invalid without Affirm. Abandonment
- Substantial Presence Test
  - Physically Present in the U.S. for 183 days in calendar year, or
  - At least 31 days during CY, and satisfying three-year lookback rule:
    - Number of days present in U.S. in current CY, *plus*
    - 1/3 of days present in U.S. in preceding CY, *plus*
    - 1/6 of days present in U.S. in second preceding CY, *equals or exceeds* 183 days
  - Presence of no more than 121/days/year prevents resident status under SP test

## Avoiding U.S. Income Tax Residency

### Excluded Days

- “Exempt Individual” – foreign govt-related, teacher or trainee (2 years), student (5 years subject to extension), professional athlete temp. in U.S. to compete in charity event (only when competing, not training or promotion)
- Intent to leave to U.S. but unable to do so due to medical condition that arose in U.S. – days where individual intended to be in U.S. not covered by exception
- Travel between two foreign ports – present in U.S. less than 24 hours (Reg. § 301.7701(b)-3(d)), time in U.S. must be substantially related to transit (waiting for flight, etc.)
- Must file Form 8843 – Statement for Exempt Individuals and Individuals with a Medical Condition

## Avoiding U.S. Income Tax Residency

### Closer Connection Exception – IRC § 7701(b)(3)(B)

- Present in the U.S. on fewer than 183 days during year, and
- Has a tax home in a foreign country, and
- Has a closer connection to such foreign country than to the U.S. for the entire year
- Provided that:
  - No application for adjustment of status pending
  - No steps are taken to apply for status as a lawful permanent resident of the U.S.
- Must file Form 8840

# Avoiding U.S. Income Tax Residency

## Treaty Tie-Break Election Triggers

- A dual resident may be able to claim treaty benefits to avoid classification as a U.S. resident for U.S. federal income tax purposes
- Income tax treaties contain a “tie-breaker” provision (exclusive residence)
  - Location of permanent home or, if permanent home in both countries, where personal & economic relations are closer (center of vital interests)
  - Location of habitual abode
  - Nationality/citizenship
  - Competent authorities
- Treaty foreign residents are taxed as NRAs (but as residents for other purposes including CFC rules, compliance requirements, etc.)
- Must file Form 1040NR and attach Form 8833 (if no tax liability, then Form 8833 must be filed with IRS Service Center)

## Avoiding U.S. Income Tax Residency

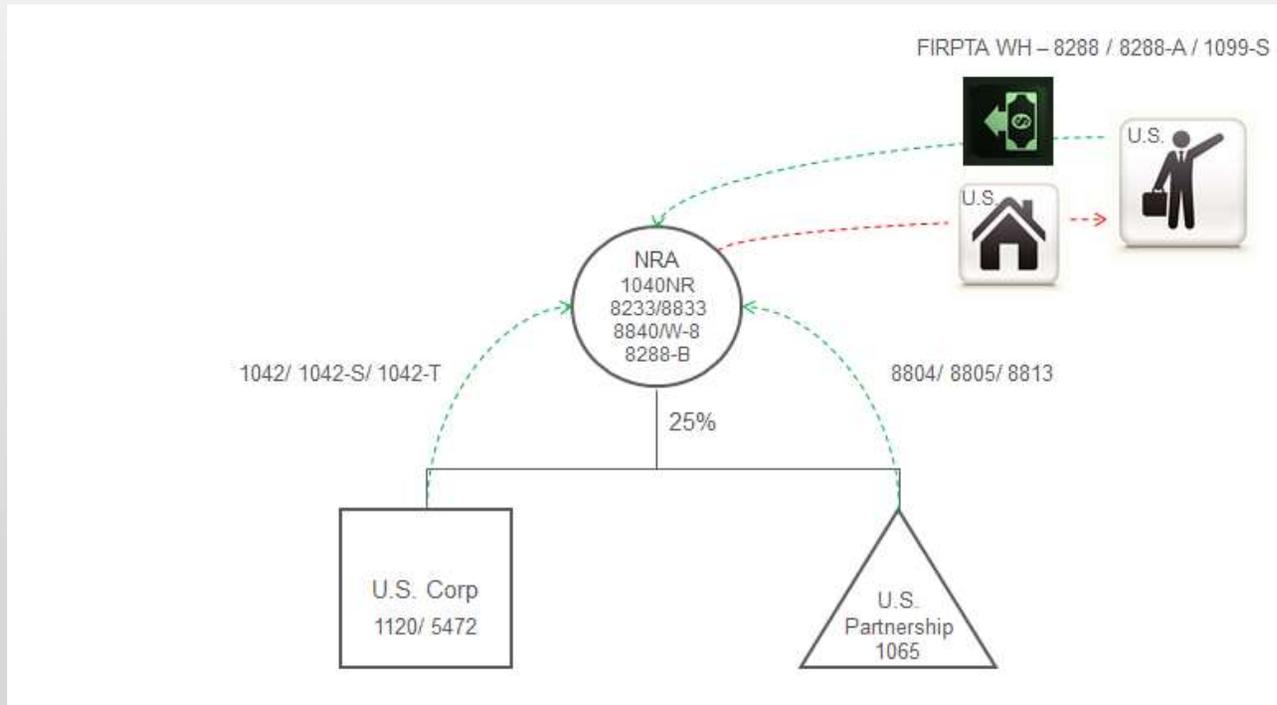
### Treaty Tie-Break Election Triggers (Continued)

- Green card holder also ceases being lawful permanent resident when “commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country” and notifies the IRS of “the commencement of such treatment” without waiving “the benefits of such treaty applicable to residents of the foreign country”
- Thus, green card holder that makes treaty tie-break election is not treated as resident of US for year of election
- Also, tie-break can trigger expatriation in year of election, if the individual has been a resident for 8 of the prior 15 years
- IRC § 877A(g)(2)(B)

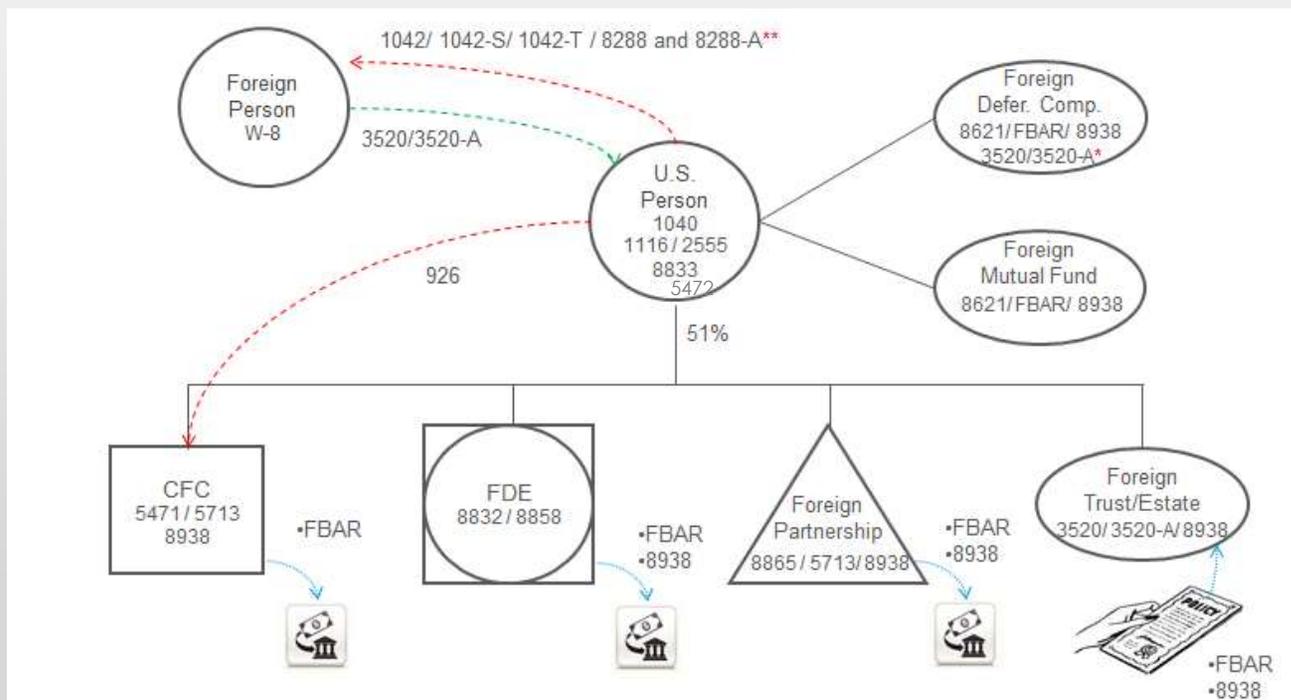
## Residency Begins When?

- Green card test, not the substantial presence test – first day in the calendar year on which individual is present in U.S. as a lawful permanent resident
- Substantial presence test – the first day during the calendar year on which individual is present in U.S.
- Both – the earlier of the applicable dates
- *De Minimis Exception*
  - Not exceeding in the aggregate 10 days:
    - Tax home in a foreign country, and
    - A closer connection to such foreign country
  - Days need not be consecutive, but may not exceed in the aggregate 10 days
  - No days in a continuous period of more than 10 days may be excluded
  - Only for purposes of determining the residency starting date (does not apply for purposes of the substantial presence test)

# INTERNATIONAL TAX FILINGS FOR NONRESIDENT ALIENS



# INTERNATIONAL TAX FILINGS FOR U.S. CITIZENS AND TAX RESIDENTS



# Estate Planning

## U.S. Federal Income Tax of Trusts, Grantors & Beneficiaries

### *Foreign trusts v Domestic trusts – IRC § 7701(a)(30)(E)*

- Domestic if both: **Court test** – “a court within the U.S. is able to exercise primary supervision over the administration of the trust” **and Control test** – “one or more U.S. persons have the authority to control all substantial decisions of the trust”

### **Grantor trusts (GT) (transparent) v. non-grantor trusts (NGT)**

- Domestic NGT – generally taxed as a U.S. individual, subject to a deduction for “distributable net income” (“DNI”)
- Foreign NGT – generally taxed as a NRA; *i.e.*, the trust is taxed only on its ECI & certain other types of U.S.-source income
- U.S. persons receiving distributions from income of a *U.S.* NGT – generally taxed on such amounts under general rules of § 662 (*see* Reg. § 1.672(f)-1(a)(1))
- Distributions of accumulated income & gains from *foreign* NGT – special taxation under “throwback rules” – §§ 665-668 (generally do *not* apply to domestic trusts, since 1997)

# Estate Planning

## U.S. Federal Income Tax of Trusts, Grantors & Beneficiaries

### Grantor trusts (GT)

- Trust generally is a GT if grantor retains certain powers over interests in the trust – IRC §§ 671-677 (e.g. grantor or spouse are beneficiaries unless consent of adverse party required)
- GT rules apply to a foreign trust only to the extent that they result in amounts being currently taken into account in computing the income of a U.S. person – IRC § 672(f); thus, where grantor is foreign, the typical GT rules of §§ 671-677 do not apply to cause GT status
- Exceptions – IRC § 672(f)(2):
  - Revocable trust- absolute power to revest, exercisable only by grantor (can provide for consent of another only if related or subordinate & subservient to grantor)
  - Only amounts (income and corpus) distributable during lifetime of grantor are amounts distributable to the grantor or the spouse of the grantor
  - Certain trusts established to pay compensation and certain trusts in existence as of September 19, 1995 (“grandfather rule”)

## Review and Coordinate Global Estate Plan

- Review/Create wills
- Review/Create trusts
- Review/Create health care directives/living wills
- Review/Create powers of attorney
- Review funeral and burial instructions
- Review marital property agreements

# Planning Strategies

## Key Issues to Consider

- U.S. “residency” has substantial U.S. tax consequences
- Usually beneficial to avoid U.S. residency where possible
- Look to closer connection exception, excluded days, treaties
- If residency is anticipated, pre-planning is essential

# Planning Strategies

## U.S. Estate, Gift, and Generation Skipping Transfer Taxes

- U.S. citizens and residents – worldwide basis (combined \$5,450,000 gift and estate tax exemption)
- Nondomiciled, non-citizens (NDNCs) – only with respect to transfers of property located or deemed located in the United States (“U.S.-situs assets”):
  - U.S. gift tax does not apply to transfers of intangibles by a nonresident alien regardless of situs, *e.g.*, shares of stock in U.S. corporations
  - Limited credit of \$13,000, effectively exempts first \$60,000; tax imposed on decedent’s taxable U.S. estate at usual estate tax rates (now 40%)
  - Some transfer tax treaties provide more generous rules

# Planning Strategies

## U.S. Situs Assets

- Real estate located in the United States
- Ownership interests in U.S. companies
- Tangible property (including cash) located in the United States
  - Exemption for cash in US bank deposit account (but *not* brokerage account)
- Debt obligations issued by U.S. persons (but not certain portfolio debt obligations, if interest would qualify under IRC § 871(h))

# Planning Strategies

## Estate Tax Planning – Avoiding Domicile

- Domicile is determined based on all facts and circumstances – Minimize risk of U.S. domicile where possible/appropriate
- If not domiciled, minimize direct holding of U.S.-situs assets:
  - Consider transferring all or part of U.S.-situs (for US real estate, consider FIRPTA) assets to foreign corporation or partnership prior to relocation to the United States; may be income tax issues to consider (e.g., CFC/PFIC)
  - Consider acquiring, through a life insurance trust, term life insurance policy to protect against any possible estate tax exposure as to U.S. situs assets
  - Nonrecourse debt
- Consider application of transfer tax treaties

# Planning Strategies

## Gifts

- Gifts made outright and free of trust
  - Must consider home country issues
  - Should be done prior to move to the U.S.
- Gifts made in trust or in a similar entity

# Expatriation

- Expatriation cases at record high
- 5411 cases reported in 2016 up from <1000 before 2011
- Process has remained largely unchanged since July 2007, but fees increased from \$450 to \$2,350 (>500%)
- Potential exit tax
- Wealth and tax liability thresholds, exemptions for young adults & dual citizens
- Exception for people born with dual citizenship and who expatriate when tax resident in country of dual citizenship
- Need to be tax compliant (often combined with streamlined filing procedures)

## Case Studies

### Pre-Immigration Planning

- A, a nonresident, intends to move to the United States. A owns FC, a foreign entity that is not a per se corporation for U.S. tax purposes. What planning might A consider?

# Case Studies

## Planning for the Next Generation

- B, a foreign HNW individual, has three children, C, D, and E.
  - C moved to the United States and became a U.S. citizen.
  - D travels to the United States frequently but has not become a U.S. tax resident.
  - E lives abroad and has minimal contacts with the United States.
- B wholly owns many foreign entities and would like those foreign entities to be transferred to her children upon her death.
- What U.S. tax issues should B and her family office be thinking about?

# Case Studies

## S Corporation Status

- A wealthy U.S. family holds its investments through an S corporation.
  - One of the family members, F, a U.S. citizen, announces to the family that he intends to marry an Italian woman, G, who he met on his overseas travel.
- What tax concerns should the family have?

# Offshore Enforcement Activities Options for Coming Into Compliance

## Summary of Options for Coming Into Compliance

|                                                      | Offshore Voluntary Disclosure Program                                                  | Streamlined Filing Compliance Procedures                                                  |                                                                                     | Delinquent FBAR Procedure                                                                       | Delinquent International Information Return Procedure                                                                       |
|------------------------------------------------------|----------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|
|                                                      |                                                                                        | U.S. Persons Living Outside the United States                                             | U.S. Persons Living Inside the United States                                        |                                                                                                 |                                                                                                                             |
| Taxpayers for whom the compliance option is designed | Bad actors                                                                             | Persons living outside the United States who were not aware of their U.S. tax obligations | Non-willful actors                                                                  | Persons not seeking treatment under OVDP or Streamlined Procedures but who failed to file FBARs | Persons not seeking treatment under OVDP or Streamlined Procedures but who failed to file international information returns |
| Penalty terms                                        | Miscellaneous Title 26 offshore penalty of 27.5% in lieu of other applicable penalties | No Penalties                                                                              | Miscellaneous Title 26 offshore penalty of 5% in lieu of other applicable penalties | No automatic penalties; taxpayer provides statement of why late                                 | No automatic penalties; taxpayer provides statement of reasonable cause                                                     |
| Covered period                                       | 8 years                                                                                | 3 years for income tax returns; 6 years for FBARs                                         | 3 years for income tax returns; 6 years for FBARs                                   | Up to taxpayer                                                                                  | Up to taxpayer                                                                                                              |
| CI protection                                        | Yes                                                                                    | No                                                                                        | No                                                                                  | No                                                                                              | No                                                                                                                          |
| Closing agreement                                    | Yes                                                                                    | No                                                                                        | No                                                                                  | No                                                                                              | No                                                                                                                          |

NOT TO BE USED OR CITED AS PRECEDENT.

# U.S. Voluntary Disclosures Internal Revenue Service

- **Voluntary Disclosure Practice – IRM 9.5.11.9 (12-02-2009)**
  - Eligibility – legal source income only
  - Pre-clearance letters
  - Requirements – truthful, timely, and complete
  - Triggering events:
    - Initiation of IRS civil audit or criminal investigation of taxpayer
    - Receipt of information from third party (e.g., informant, other governmental agency, or the media) alerting IRS to taxpayer's noncompliance
    - Initiation of IRS civil audit or criminal investigation directly related to specific liability of taxpayer
    - IRS acquires information directly related to specific liability of taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena)
  - Benefits – no guaranteed immunity, but IRS will not refer to DOJ for prosecution of tax crimes if taxpayer satisfies requirements

# U.S. Voluntary Disclosures Internal Revenue Service

- **Offshore Voluntary Disclosure Program**
  - Eligibility – legal source income only
  - Pre-clearance letters (must include foreign asset information)
  - Requirements – truthful, timely, and complete
    - Same triggering events as IRM 9.5.11.9
    - Service of John Doe summons or group treaty request does not bar every taxpayer that falls within the class or group
    - Appeal of foreign tax administrator decision authorizing release of account information to IRS and fails to notify U.S. Attorney General
    - IRS may determine a certain taxpayer group that have/had accounts at specific financial institution will be ineligible due to U.S. action regarding that institution
  - Benefits – IRS will not refer to DOJ for prosecution if taxpayer satisfies requirements, limited lookback (8 years), alternative to the statutory passive foreign investment company calculations, reduced penalties, streamlined filings, Closing Agreement

# State Voluntary Disclosures

- Multistate Voluntary Disclosure Program (Multistate Tax Commission)
  - Address potential tax liability in multiple jurisdictions
  - Represented by National Nexus Program staff of the MTC at no charge
  - Confidential until Taxpayer enters into VDA
  - Taxpayer must file returns, pay tax, and register
  - Penalty (and possibly interest) waiver and limited look-back period
- Online Marketplace Seller Voluntary Disclosure Initiative
  - Remote sellers who use marketplace provider/facilitator (i.e., Amazon)
  - Designed for sellers to register and start collecting and paying over sales tax
  - 18 participating states – ended on October 17, 2017
  - Waiver of all past liabilities (limited exceptions)
- One state at a time approach
  - Often based on relationships between representatives and tax authorities
  - More flexible, less conflicts than COST
  - Higher cost of compliance
- Examples of current voluntary disclosure programs
  - New York • Maryland
  - Michigan • Georgia
  - California • Virginia

# International Voluntary Disclosure Programs

- **United Kingdom** – avoid *increased* penalties (penalty can be up to 200% for unreported offshore income)
- **France** – not available to taxpayers who intentionally evaded or engaged in complex fraud, limited look-back period, interest reduced, no waiver of penalties
- **Italy** – avoid criminal prosecution, pay tax, interest & reduced penalties, limited-look back
- **Australia** – reduced penalties depending on timing of disclosure, no need to admit liability
- **Canada** – new in 2018 – general (no sophisticated taxpayers) and limited programs; not available for illegal source income, persons in receivership or bankruptcy, corporation with gross revenue over \$250M in 2 of last 5 years, issues relating to transfer pricing adjustments or penalties, and applications that depend on agreement made at discretion of the Canadian competent authority under a tax treaty
- **Singapore** – applies to income tax, GST, withholding tax and stamp duties, taxpayer must disclose before IRAS contact, eliminate or reduce penalties (penalty can be up to 400% of unreported tax with willful intent), depending on timing of disclosure and nature of conduct

See OECD Update on Voluntary Disclosure Programmes (2015)

# Alternatives to Voluntary Disclosures

- Qualified amended returns
  - 26 U.S.C. § 6664, Treas. Reg. § 1.6664-2(c)(3)
  - Revenue Procedure 1994-69
  - Eligibility – Triggering events
  - Effect – reduction or elimination of penalties
- Payment or deposit without disclosure
  - 26 U.S.C. § 6603
  - Revenue Procedure 2005-18
  - Effect
  - Field Attorney Advice 20171801F
- Future compliance only
  - Benefits
  - Consequences
  - Limitation issues

# Civil International Tax Enforcement Efforts

# Internal Revenue Service Civil International Tax Enforcement Efforts

- LBI Campaigns Relating to Offshore Accounts
  - New forms or letters
- Policies regarding Taxpayer Interviews during Audits
- Document requests and Administrative Summons
- FATCA Information and Data Analytics
- NRA Withholdings

# Internal Revenue Service Civil International Tax Enforcement Efforts

- FBAR Penalties
  - Assertion of Non-willful and Willful Penalties
  - Administrative Appeals Pre-Assessment
  - Administrative Appeals Post-Assessment
  - Calculation Errors
  - Administrative Collection Efforts
  - Referrals to DOJ for Suits to Collect

U.S. Department of Justice  
Civil International Tax Enforcement Efforts  
FBAR Penalty Cases Filed by U.S. and Taxpayer

- 2014 - 7 cases
- 2015 - 17 cases
- 2016 - 27 cases
- 2017 - 52 cases

## FBAR Developments

### Recent and Pending Litigation – Willful Intent Standard

- *Bedrosian v. United States*, No. 2:15-cv-05853 (E.D. Penn.), decided 9/20/17
  - Taxpayer was businessman who, in the 1970s, opened up a savings account a bank ultimately acquired by UBS
  - In 2005, UBS approached the taxpayer with a proposal to lend him money and convert his savings account into an investment account
  - As a result, the taxpayer had 2 accounts but testified that he considered them one account
  - Taxpayer moved the funds to a different Swiss bank in 2008
  - Taxpayer did not tell his accountant about the account until mid-1990s, when accountant advised the taxpayer he had been breaking the law but could not “unbreak the law” and should take no action
    - The accountant died in 2007 and the taxpayer disclosed the account to a new accountant
    - 2008 return reported a foreign financial account in Switzerland, but the FBAR listed only one of the accounts
    - Taxpayer ultimately went to his personal lawyer, who advised him to file amended returns, which were eventually audited

## FBAR Developments

### Recent and Pending Litigation – Willful Intent Standard

- *Bedrosian v. United States*, No. 2:15-cv-05853 (E.D. Penn.), decided 9/20/17
  - Taxpayer argued that, in order for the government to sustain a willful FBAR penalty, it must show that actions amounted to a voluntary, intentional violation of a known legal duty, the standard applied in criminal tax cases
  - Government argued that liability for the willful penalty arises where the taxpayer knowingly or recklessly fails to file an FBAR
    - *See United States v. Williams*, No. 10-2230 (4<sup>th</sup> Cir. 2012) and *United States v. McBride*, No. 2:09-cv-00378 (D. Utah 2012)
  - The court concluded that willful intent “is satisfied by a finding that the defendant knowingly or recklessly violated the statute. The government need not provide improper motive or bad purpose.”
    - “Willful blindness” satisfies the standard

## FBAR Developments

### Recent and Pending Litigation – Willful Intent Standard

- *Bedrosian v. United States*, No. 2:15-cv-05853 (E.D. Penn.), decided 9/20/17
  - The court concluded that willful intent “is satisfied by a finding that the defendant knowingly or recklessly violated the statute. The government need not provide improper motive or bad purpose.”
    - “Willful blindness” satisfies the standard, including where the taxpayer made a “conscious effort to avoid learning about the reporting requirements”
    - “Reckless disregard” satisfies the standard, i.e., an action entailing “an unjustifiably high risk of harm that is either known or so obvious that it should be known”
  - Government can meet standard:
    - “Through inference from conduct meant to conceal or mislead sources of income or financial information” and may use
    - “Circumstantial evidence and reasonable inferences drawn from the facts because direct proof of the taxpayer’s intent is rarely available.”

## FBAR Developments

### Recent and Pending Litigation – Willful Intent Standard

- *Bedrosian v. United States*, No. 2:15-cv-05853 (E.D. Penn.), decided 9/20/17
  - With respect to the facts at issue in the case, however, the court concluded that the taxpayer was not willful
    - The court stated “it is not enough to simply read the black letter definition of the term [willful]—knowing or reckless violation of a statutory duty—in a vacuum; rather, disposition of the case requires a fact- and context-specific inquiry into Bedrosian’s actions.”
      - “[H]is actions were at most negligent”
      - Court contrasted the facts of the case with the facts of other willful FBAR cases

## FBAR Developments

### Recent and Pending Litigation – Reasonable Cause

- *Jarnagin v. United States*, 15-cv-01534 (Fed. Cl.) (pending)
  - Facts: Taxpayers (husband and wife) did not report Canadian bank account on FBARs and answered no to question 7a on Schedule B
    - IRS audited the taxpayers' returns and ultimately imposed the \$10,000 nonwillful FBAR penalty for each year under exam, for each taxpayer
    - Taxpayers and government both moved for summary judgment on application of nonwillful FBAR penalty
  - Nonwillful FBAR violations are subject to an exception under 31 U.S.C. § 5321(a)(5)(B)(ii), which requires that:
    - “The violation was due to reasonable cause,” and
    - “The amount of the transaction or the balance in the account at the time of the transaction was properly reported.”

## FBAR Developments

### Recent and Pending Litigation – Reasonable Cause

- *Jarnagin v. United States*, 15-cv-01534 (Fed. Cl.) (pending)
  - Taxpayers concede an FBAR violation but argue that the reasonable cause exception applies
    - CPA knew about account; international tax expertise is not required
    - Reporting prong should essentially be ignored
  - Government argues:
    - Taxpayers failed to exercise ordinary care and prudence in reviewing tax returns and reliance on accountants was not reasonable
    - Reporting prong “requires an accountholder to have made the United States aware of the existence of the foreign account”

## FBAR Developments

### Recent and Pending Litigation – Excessive Fines

- *United States v. Bussell*, No. 16-55272 (9<sup>th</sup> Cir.), decided 10/27/17 (unpublished opinion)
  - Facts: Taxpayer held funds through a foreign bank account in the name of a foreign entity and ultimately moved the funds to a personal account at UBS. The income was not reported on Form 1040 and the account was not reported on an FBAR. The IRS imposed the 50% willful penalty.
  - In the district court, the taxpayer stipulated that she had willfully failed to disclose her interest.
  - The taxpayer then appealed to the Ninth Circuit on a variety of grounds, including that the penalty violated the Excessive Fines Clause of the Eight Amendment.
    - The court rejected all arguments. With respect to the Excessive Fines Clause argument, the court stated: “the assessment against her is not grossly disproportional to the harm she caused because Bussell defrauded the government and reduced public revenues. See *United States v. Mackby*, 339 F.3d 1013, 1017–18 (9th Cir. 2003). Therefore, Bussell has failed to carry her burden to establish that the penalty is grossly disproportional to her offense.”
    - The taxpayer also argued that her account information was gathered in violation of the U.S.-Swiss tax treaty, an argument the court rejected because the taxpayer did not show that the treaty “creates an enforceable right.”

# U.S. Department of Justice

## Civil International Tax Enforcement Efforts

- Petitions to Authorize Issuance of John Doe Summons
  - Targeting unidentified taxpayers violating the internal revenue laws
- Domestic summons enforcement
  - Obtaining information regarding foreign financial accounts and assets
- Bank of Nova Scotia summons enforcement
  - U.S. entity in possession/control of information/documents located outside U.S.
- Collection litigation for assets abroad?
  - Levy on U.S. branch of a Foreign Financial Institution, 26 CFR 301.6332-1(a)(2)
  - Tax Treaties w collection assistance – Mutual Collection Assistance Request
  - Customs Order or Prevent Departure Order, 22 C.F.R. §§ 46.2(a), 46.3(h)  
(prevents non-U.S. citizen exiting U.S. pending resolution of a collection matter)
  - Writ *Ne Exeat Republica*, 26 USC § 7402(a), 28 USC § 1651
  - Suit to Repatriate Property, 26 USC §§ 7402, 7403

## Automatic Exchange of Information Designed to Level the Playing Field

- FATCA – Intergovernmental Agreements (IGAs) (113 jurisdictions as of September 2017, 294,174 foreign financial institutions registered as of August 25, 2017)
  - Reporting for Individuals (8938) – 2012 (2011 tax reporting) – disclosure of foreign financial accounts and assets
  - Entity registration for Financial Institutions – May 2014
  - Reporting – FFI's in non-IGA countries – March 2015 (Account Balance)
  - Reporting – FFI in IGA countries – Sept 2015 (Account Balance)
  - Reporting expanded in 2017 – includes “foreign proceeds”
- OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (Common Reporting Standards) (CRS) (94 jurisdictions committed to begin exchanging information in 2017 and 2018)

# Criminal Offshore Enforcement Efforts

## IRS CI International Metrics

|                                                         | <b><u>FY2015</u></b> | <b><u>FY2016</u></b> | <b><u>FY2017<br/>(Thru<br/>8/31/17)</u></b> |
|---------------------------------------------------------|----------------------|----------------------|---------------------------------------------|
| <b><u>INTERNATIONAL INVESTIGATIONS</u></b>              |                      |                      |                                             |
| <b>Field Office Inventory</b>                           | <b>290</b>           | <b>286</b>           | <b>365</b>                                  |
| <b>Subject Criminal Investigations Initiated</b>        | <b>186</b>           | <b>221</b>           | <b>270</b>                                  |
| <b>Completed International Investigations</b>           | <b>286</b>           | <b>311</b>           | <b>234</b>                                  |
| <b>Indictments</b>                                      | <b>166</b>           | <b>187</b>           | <b>201</b>                                  |
| <b>Publicity Rate</b>                                   | <b>85.8%</b>         | <b>81.8%</b>         | <b>86.4%</b>                                |
| <b>% Direct Investigative Time - International</b>      | <b>10.5%</b>         | <b>12.0%</b>         | <b>13.2%</b>                                |
| <b>-% International Cases to Overall CI Initiations</b> | <b>4.8%</b>          | <b>6.5%</b>          | <b>9.4%</b>                                 |
|                                                         |                      |                      |                                             |
|                                                         |                      |                      |                                             |
|                                                         |                      |                      |                                             |
|                                                         |                      |                      |                                             |
|                                                         |                      |                      |                                             |

# INTERNATIONAL TAX ENFORCEMENT GROUP

- Multinational effort to address the increasingly global nature of criminal tax and financial crime.
- Data-driven target selection will identify and prioritize the best possible cases and ensure efficient use of resources.
- Influence the global regulatory and legislative framework to anticipate and address evolving criminal methodologies.

# ATTACHÉ RESPONSIBILITIES

- Field Office Case Support
- Foreign Government and Law Enforcement Agency Contacts
- Sources of Information/Confidential Informants
- Assist with Tax Treaty, Tax Information Exchange Agreement (TIEA), and Mutual Legal Assistance Treaty (MLAT) Requests
- Spontaneous Disclosures
- Special Investigative Techniques
- International Fugitives
- Enforcement Operations
- Training for Foreign Jurisdictions

# U.S. Department of Justice Criminal Tax Enforcement Efforts

- Statutes
  - Titles 18 and 26: Tax evasion, false returns, conspiracy
  - Title 31: Willful failure to file FBAR, Filing false FBAR
- Investigations often involve prosecutors from TAX and USAO
- Frequent use of Title 31 subpoenas
- Mining data from Swiss Bank Program, cooperators, OVDP taxpayers, whistleblowers, data leaks, treaty partners, etc.
- Sentences
  - 2009-2015 – probationary sentences except in rare cases
  - 2016 – courts began to impose incarceration and increased monetary fines

# U.S. Department of Justice Criminal Tax Enforcement Efforts

- The Swiss Bank Program continues.....
  - Participating banks continue to cooperate with ongoing and new investigations
  - Banks that did not participate in or withdrew from SBP are coming forward
  - Financial institutions and entities (other than banks) are cooperating
  - Tax Division and IRS CI continue to receive and analyze data
  - Potential civil matters sent by DOJ to IRS LBI for audit consideration
  - Potential criminal matters sent by DOJ to IRS CI for consideration and referrals
  - DOJ and LBI are working to ensure assessment and collection of FBAR penalties where taxpayers agreed to penalty in plea agreements or willful failure to file/filing of false FBAR was established in plea or at trial
  - Tax Division and IRS CI are reviewing certain streamlined submissions based on initial indicators of false statements or omissions

# U.S. Department of Justice Offshore Resolutions

- 2014: Bank Leumi Group deferred prosecution agreement
- 2015: Finacor non-prosecution agreement
- 2016: Bank Julius Baer deferred prosecution agreement
- 2016: Cayman National Securities Ltd. and Cayman National Trust Co. Ltd. guilty pleas
- 2017: Prime Partners non-prosecution agreement

# U.S. Department of Justice Offshore Bank Investigations and Prosecutions

- Extraordinary fines paid by banks:
  - UBS \$780,000,000
  - Credit Suisse \$2,600,000,000
  - Bank Leumi \$270,000,000
  - Bank Julius Baer \$547,250,000
- Over 30 bankers and financial advisors have been indicted.
  - Many indicted remain fugitives.
  - Some fugitives have recently surrendered – Credit Suisse banker Susanne Rüegg Meier (guilty plea)

# U.S. Department of Justice

## Offshore Account Holder Prosecutions

Efforts to identify and prosecute recalcitrant foreign bank account holders continue:

- *United States v. Masud Sarshar* (C.D. CA) – Businessman with \$21 million+ of unreported income in undeclared accounts in Israel; guilty plea: 2 years' jail, \$8.4 million restitution, \$18.2 million FBAR penalty
- *United States v. Marc Mani* (C.D. CA) – Plastic surgeon concealing \$1.28 million of unreported income in undeclared Dubai account; guilty plea
- *United States v. Saul Hyatt* (D.N.J.) – \$1.5 million in unreported income from sales of duty-free alcohol & cigarettes hidden in Panamanian account; guilty plea
- *United States v. Teymour Khoubian* (C.D. CA) – ~\$20 million in unreported accounts in Germany and Israel; indictment

# QUESTIONS?

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