

OPINION

Advice for taxpayers with undeclared UBS Swiss bank accounts

By Terry Philip Segal and Michael M. Mustokoff



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MUSTOKOFF

At present, up to 19,000 American taxpayers who have undeclared Swiss bank accounts run a substantial risk of criminal prosecution or heavy civil tax penalties.

For decades, Swiss banks and Swiss bank secrecy laws have permitted Colombian drug dealers, African dictators and other international crooks, as well as legitimate United States taxpayers, to maintain numbered Swiss bank accounts whose disclosure is a crime under Swiss law.

For American taxpayers (many of whom established the Swiss bank accounts to evade U.S. taxes) who have undeclared accounts at Union Bank of Switzerland (UBS), times are changing.

Terry Philip Segal is special counsel at Duane Morris in Boston and a former assistant U.S. attorney in charge of federal criminal tax prosecutions. Michael M. Mustokoff, a partner at Duane Morris, is the former chief of the Philadelphia District Attorney's Economic Crime Unit. The authors wish to acknowledge the article "Foreign Bank Secrecy Laws — Making Amends" by Robert Fink and Bryan Skarlatos in the Sept. 3, 2008, issue of the New York Law Journal, which was helpful in providing a framework for the preparation of this piece.

On June 30, 2008, the IRS requested that a federal judge in Miami issue a "John Doe" summons to UBS requiring it to identify *all* U.S. taxpayers who had UBS Swiss bank accounts from 2002 to 2007, and for whom UBS did not file with the IRS the mandatory Form W-9 (Request for Taxpayer Identification Number and Certification).

In an affidavit in support of this request, IRS agent and offshore compliance officer Dan Reeves painted a disturbing picture of hundreds of millions of dollars of taxes being evaded by U.S. citizens by their failure to provide UBS with Form W-9 so it could submit to the IRS Form 1099 listing reportable income of American taxpayers' Swiss bank accounts.

According to Reeves, this tax evasion scheme was accomplished, often with the help of UBS personnel, by American taxpayers who prepared false and misleading IRS Form W-8BEN (Certificate of Foreign Status of Beneficial Owner for U.S. Tax Withholding) falsely claiming that sham offshore entities owned the Swiss bank accounts:

"Because it was made to appear as though non-United States taxpayers owned the accounts, UBS would not submit Form 1099 reporting income earned on the offshore accounts. By concealing the United States taxpayers' ownership and control over the assets in the offshore accounts, UBS assisted these United States taxpayers evade the reporting and payment of their income taxes."

In his affidavit, Reeves explained how Bradley Birkenfeld, a former UBS banker who recently pleaded guilty to conspiring to defraud the IRS, assisted Igor Olenicoff, a billionaire U.S. real estate developer, in evading paying \$7.2 million in taxes by helping Olenicoff



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We believe that if a taxpayer satisfies the IRS voluntary disclosure provisions, he or she will not be criminally prosecuted for evading taxes on legitimate Swiss bank income not reported on the tax return.

coff illegally conceal \$200 million of assets in offshore accounts:

"According to Birkenfeld, Olenicoff, with UBS's assistance, formed a Bahamian corporation and fraudulently completed an IRS Form W-8BEN to make it appear as though the corporation was the beneficial owner of an offshore account that he had with UBS. To this and other bogus entities, Olenicoff transferred \$60 million, as well as a 147-foot yacht. Because it was in the name of a foreign entity, UBS did not report to the Internal Revenue Service any payments made to the account, and Olenicoff was able to refrain from reporting the income secure in the knowledge that UBS would maintain the traditional secrecy of Swiss accounts. In December 2007, Olenicoff pleaded guilty to a criminal count of filing a false 2002 tax return for omitting income earned from the offshore assets.

"Based on what I have learned from Birkenfeld and from UBS's website, it appears that UBS offered, throughout the years addressed by the 'John Doe' summons, undeclared offshore accounts to United States taxpayers. In a document found on its own website, UBS suggested putting a 'structure in place' between the beneficial owner and the bank in order to avoid disclosure of their beneficial ownership

of the account to the Internal Revenue Service. In short, UBS, in plain language, suggests using a nominee entity as a means of avoiding the reporting requirements of the U.S. tax laws.”

Voluntary disclosure

On July 1, 2008, the U.S. District Court in Miami approved the IRS request for the summons to UBS for the list of its American account holders. UBS is now wrestling with whether to turn over to the IRS all the names of 19,000 Americans who have undisclosed accounts at their Swiss branches in light of Swiss law prohibiting such disclosures.

It is important to note that it is not illegal for an American to have a Swiss bank account. It is a crime, however, for an American taxpayer to fail to check “yes” in a box on Schedule B of Form 1040 indicating the taxpayer has foreign bank accounts in excess of \$10,000.

Schedule B also requires taxpayers with foreign bank accounts to annually file Form TDF 90-22.1 (Foreign Bank Account Report, or FBAR). The FBAR form is due on or before June 30 of the calendar year following the year in which the taxpayer had the foreign bank account.

On Oct. 1, The New York Times reported that UBS has begun turning over to the IRS the names of American UBS account holders who committed tax fraud by creating sham offshore entities as owners of their accounts and then falsely filing Forms W-8BEN (Certificates of Foreign Status of Beneficial Owner).

For purposes of this article, “tax fraud” is perjury on a tax return or causing a bank, i.e., UBS, to submit a false statement to the IRS indicating that a sham foreign trust, not an American citizen, is the true owner of the Swiss bank account.

Swiss law makes disclosure of client names a crime unless Swiss authorities believe the bank client has committed a serious crime, i.e., tax fraud or money laundering.

Switzerland, unlike America, does not consider tax evasion (willfully attempting to evade payment of taxes) a crime. The fact that UBS appears to be turning over to the U.S. the names of bank clients who set up accounts in the names of offshore sham entities seems to indicate that the Swiss view such conduct as tax fraud, and those American taxpayers who set up Swiss accounts falsely listing sham offshore entities as owners could face American charges of tax fraud (i.e., perjury on Schedule B or causing UBS to file a false document with the IRS) and possibly tax evasion (willfully failing to report income generated from undeclared Swiss bank accounts or depositing in Swiss accounts unreported income).

In our opinion, however, it is far more problematic that UBS will voluntarily turn over to the IRS the names of American taxpayers who did not commit tax fraud when they opened accounts in their true names. For UBS and other Swiss banks to turn over such information would seriously undermine the rationale for the existence of secret Swiss bank accounts and could seriously threaten the very profitable secrecy-focused Swiss banking industry.

Law-abiding American taxpayers who set up Swiss bank accounts in their real names, would, however, be well-advised to make a timely voluntary disclosure to the IRS, file amended tax returns reflecting income earned in Swiss bank accounts and also file the appropriate FBARs.

Under the current IRS Voluntary Disclosure Practice (Internal Revenue Manual Section 9.5.3.1.2.1), a voluntary disclosure will be considered timely if it is received (i) be-

fore the IRS starts an investigation of the taxpayer concerning the specific liability of the taxpayer; and (ii) before the IRS receives information relating to the taxpayer’s non-compliance from a third party or from another criminal enforcement action.

Also, the taxpayer’s voluntary disclosure has to be truthful, and the proceeds of any unreported income cannot be from criminal activity. The taxpayer must also agree to pay all taxes, interest and penalties.

Based on our professional experience, we believe that if a taxpayer satisfies the IRS voluntary disclosure provisions, he or she will not be criminally prosecuted for evading taxes on legitimate Swiss bank income not reported on the tax return.

If UBS voluntarily turns over or is eventually ordered to turn over to the IRS the names of all 19,000 Americans who set up undeclared Swiss bank accounts, not just the much smaller number they are apparently turning over that set up accounts in the names of phony offshore entities, many American taxpayers could face criminal prosecution for tax evasion, tax fraud or up to a 75 percent fraud penalty.

To eliminate the risk of criminal prosecution and reduce the severe civil penalties related to undisclosed Swiss bank account income, we strongly urge taxpayers who set up Swiss bank accounts in their correct names with legally earned income to immediately hire competent counsel to approach the IRS Criminal Investigation Division (CID) and make a voluntary disclosure before the chance to avoid criminal prosecution is eliminated by the IRS first contacting the taxpayer.

If there is going to be a parade, it is always better to get out in front of it.

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