

Source: Daily Tax Report: News Archive > 2015 > February > 02/25/2015 > Federal Tax & Accounting > Tax Evasion: No Willful Conduct Definition for Streamlined Offshore Disclosure Program, Official Says

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**Tax Evasion****37 DTR G-11****No Willful Conduct Definition for Streamlined Offshore Disclosure Program, Official Says**

By Alison Bennett

Feb. 24 — The Internal Revenue Service won't provide any further definition of what it considers "willful" or "non-willful" behavior for taxpayers hoping to enter the streamlined version of the offshore voluntary disclosure program, an agency official said.

"There's not going to be anything further on that," John C. McDougal, a senior special trial attorney in the IRS Office of Chief Counsel, said during a Feb. 24 American Bar Association webcast. The webcast raised a host of other issues, including whether taxpayers will receive acknowledgment of their filings, the role of the preclearance process, and others.

Taxpayers have to make a signed certification to the IRS that their conduct wasn't willful in order to qualify for the program, which allows little to no penalty for those who disclose their offshore assets.

With "a vast body of case law" out there offering parameters for what courts have considered willful conduct, "to summarize that in a way that would be helpful would be very difficult," McDougal said. Examples would also be tough to write, he said, because "any time we try to draw a line, there are going to be challenges."

**Up to Practitioners**

Instead, it's up to tax practitioners to help their clients decide whether to assert they weren't willful, McDougal said. "Practitioners have to go on their sense of the situation," he said. For taxpayers, the question is, "Are you nervous about the prospect of being prosecuted or having to pay one of the larger penalties?" the IRS senior attorney said. "If you're not, then you should go in the streamlined program."

He pointed to language in the original document setting out the streamlined program. It defines non-willful conduct as either conduct due to negligence, inadvertence, or mistake, or conduct resulting from a good-faith misunderstanding of the law. "If you want to go into streamlined, you have to certify that your conduct falls into one of those categories," McDougal said.

Panelist Scott Michel, a member of Caplin & Drysdale, said he agrees that there is "a body of evidence as to what the IRS thinks is willful. The absence of guidance is what it is, but there is plenty of guidance."

**Program Going Well**

Also speaking on the webcast, IRS Director of International Individual Compliance David W. Horton said so far, the program is going relatively well. However, the agency is still seeing issues with incomplete submissions and taxpayers who aren't providing good explanations as to why their conduct was non-willful.

The event was hosted by the ABA Section of Taxation, the Criminal Justice Section, the Section of International Law, and the Center for Professional Development.

In response to questions from panel co-moderator Charles Rettig, managing partner at Hochman Salkin Rettig Toscher & Perez PC, McDougal said the size of the account does matter when the IRS is considering submissions for the streamlined program and the agency will look carefully at larger accounts, but "it's not determinative. We're going to be looking at all the facts and circumstances and you should be looking at all the facts and circumstances."

Rettig also asked whether the IRS has any plans to formally acknowledge submissions into the streamlined program in a manner similar to that given if taxpayers go into the broader offshore voluntary disclosure program, which offers protection from criminal prosecution in exchange for a higher penalty of 27.5 percent.

**No Acknowledgment**

Horton said no, explaining that the streamlined program is "a process" similar to the way IRS handles other taxpayers filing tax returns, and taxpayers shouldn't expect any acknowledgment.

Panelist Jeffrey A. Neiman, a partner with Marcus, Neiman & Rashbaum LLP, asked whether taxpayers could take any comfort in the fact that the IRS has cashed the checks they have sent in along with their program submission and

**BNA Snapshot**

**Development:** IRS isn't offering any set guidelines on what it would consider "willful" conduct that would disqualify taxpayers for streamlined version of offshore voluntary disclosure program.

**Takeaway:** It is up to practitioners to decide what is best for their clients, official says.

whether this could be taken as an indication that someone has looked at the case.

Horton said this is "a normal processing function that we would do no matter who the taxpayer is. If you write a check we're going to cash a check. This is true of anyone that files a return with a payment."

Asked whether there is some mechanism where taxpayers who have filed in the streamlined program can request an audit, Horton said, "There is no way to request an examination, nor will there be. There is no closure in the streamlined process. It is a process—a streamlined filing procedure based on the circumstances of the taxpayer."

### **Quiet Returns**

Rettig also asked about the IRS's current view of "quiet returns," where taxpayers simply file amended returns without going into the OVDP or the streamlined program or otherwise coming forward.

"We can't stop anybody from filing an amended return," McDougal said. "If you're not worried about negligence or delinquency penalties, by all means file an amended return." However, he cautioned, "we're looking at amended returns for people who should be in either one of the programs or should be examined."

Sharing questions from webcast participants, panel co-moderator Kathryn Keneally, chair of civil and criminal tax litigation for the global tax group at DLA Piper LLP, asked whether a participant in the broader OVDP would be taking a risk by going into the streamlined program.

IRS senior attorney McDougal said, "If you go into streamlined, you have to leave OVDP. If you come into streamlined, you lose the protections that you would have under OVDP. You have to choose one or the other."

Keneally, former assistant attorney general for the Tax Division at the Department of Justice, asked if the IRS might view a taxpayer as willfully stating he or she was non-willful in certain circumstances. McDougal said if the taxpayer puts all the facts related to the case in the submission, he or she likely would be protected from being prosecuted for making a false statement.

### **Questions on Preclearance**

A major topic of discussion during the webcast was the question of preclearance, a process taxpayers generally go through before being accepted into the OVDP.

Horton said while taxpayers technically can go through preclearance and "then turn around and do streamlined," this is creating problems for the IRS.

"If a taxpayer is non-willful, we don't encourage taxpayers to go through preclearance," he said, stressing it doesn't provide any protection from criminal prosecution down the road. "We have concerns about what it's doing to our system," he said. "We're not encouraging this practice at all. It's undercutting our resources."

### **Coming Forward**

Neiman said he is encouraging his clients to go through preclearance because, for one reason, in order to be eligible for the streamlined program, they can't be under audit or investigation. This can change very quickly with many banks now being investigated. Some taxpayers may view preclearance as a way to tell the government that they tried to come forward, he said, but Horton stressed "it was not designed for that purpose."

Keneally said preclearance is now taking longer because the IRS is getting so much information from so many different sources.

In another question raised by the webcast participants, she asked if taxpayers would still be eligible to come into the streamlined program if they have been rejected for admission into the OVDP. Horton said, "Non-willful is non-willful. If the taxpayer is non-willful there is nothing keeping them from going into streamlined."

### **Fear of Penalties**

Another audience question, Keneally said, is whether a taxpayer's fear of the higher penalties in the OVDP would be considered an acceptable reason for a delay in coming forward and applying for the streamlined program. McDougal said that would give him "reason for pause," particularly if a taxpayer hasn't been filing Reports of Foreign Bank and Financial Accounts (FBARs) in the first place, and continues not to file them out of fear of penalties.

Keneally asked what taxpayers should do if they want to file a streamlined certification for someone who is deceased, particularly in cases where money has been inherited that is "old and cold" and has been sitting in a foreign account for a long time.

"What you certify is what you find out through your investigation," McDougal said. "If you don't know the reason the money was offshore, then you can't say it wasn't willful. You can only certify what you know."

### **Reaction**

In comments provided to Bloomberg BNA Feb. 24 following the webcast, James Mastracchio, partner and co-leader of the tax controversy and litigation team at Baker & Hostetler LLP, responded to the comments made by McDougal on the government's decision not to provide further guidance on the definition of willful or non-willful conduct.

He said there is a genuine need for guidance for taxpayers and their advisers who are requesting transitional relief, adding that there doesn't appear to be a set standard applied to the decision of what is willful versus non-willful or what is "willful blindness."

"We are receiving inconsistent results on identical facts for taxpayers seeking transitional relief," he told Bloomberg BNA. "The case law is narrow with respect to willfulness in the FBAR context and any discussion of willful blindness gets far afield of FBAR and income tax filings quickly."

Mastracchio said, "I think a list of factors that everyone could consider on both sides of the table to properly address willfulness and willful blindness in transitional relief and streamlined cases would be extremely beneficial to everyone."

### **Ongoing Investigations**

Panelists on the webcast also painted a picture of the current state of IRS and Justice Department investigations and prosecutions of taxpayers hiding money offshore and the banks where they keep their funds.

Neiman emphasized that "people with undisclosed offshore accounts are being prosecuted and account information is being disclosed."

After six years of criminal tax enforcement, he said, it appears the government is continuing to target situations where taxpayers are using offshore companies and other "layering" structures to conceal their assets. It's easier for the government to assert willful behavior in these circumstances, he said, noting that "The U.S. government seems to care more about money that was in the U.S. and ended up offshore."

He said there are a large number of cases involving "hot banks" with UBS Group AG and HSBC as examples of a trend. Neiman said tax losses don't seem to be "all that important," with the IRS and the DOJ more focused on schemes to conceal funds.

The government is intensely focused on searching out criminal activity, he said. "You have a lot of activity, a lot of cases," he said on the webcast.

Panelist Michael Pasano, an attorney with Carlton Fields Jorden Burt, said an example of this is the Justice Department's prosecution of Baruch Fogel, a California doctor who pleaded guilty Feb. 2 to willful failure to report an account at Bank Leumi Le-Israel Ltd.

Caplin's Michel described the Justice Department's ongoing work in Switzerland, where many banks have entered a quasi-voluntary disclosure program to turn over information on account holders to the U.S. Michel said due to current constraints on the information that can be provided, "Swiss bank secrecy still exists," but is increasingly limited in scope.

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