

Whistleblower Referrals Leading To CI, DOJ Investigations

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The increased arsenal of tools available to the federal government in combating offshore tax evasion has made its efforts stealthier and less predictable to practitioners and taxpayers, a panel of tax controversy practitioners said November 9.

New tools include data mined from voluntary disclosures, cooperation by taxpayers and bankers, and notably, information obtained from whistleblowers. Thomas E. Bishop, assistant special agent in charge, IRS Criminal Investigation division in New York, called the 2006 whistleblower law a “game changer” for the IRS’s efforts to combat offshore evasion.

Speaking at the American Bar Association Section of Taxation international tax enforcement conference in New York, Bishop said CI is investigating individuals based on information provided by whistleblowers.

Sandra Brown, assistant U.S. attorney and tax division chief (Central District of California), said the Justice Department has investigations underway because of information provided by whistleblowers. That information is regularly provided to the government, she said.

Brown said that although people tend to picture the jilted ex-spouse as the whistleblower who provides information on individual taxpayers, that view is antiquated. Business partners and associates are providing information as well, she said, adding, “Those who lie with dogs know where the fleas are.”

Business partners and associates are providing information on individual taxpayers, Brown said, adding, ‘Those who lie with dogs know where the fleas are.’

Kevin M. Downing of Miller & Chevalier, who was formerly with the DOJ Tax Division and who participated in the prosecution of Swiss bank UBS, said that unlike the SEC’s whistleblower law, the IRS’s version allows a whistleblower to collect an award even if convicted of a felony, albeit with

some exceptions. “I think over the next few years, it’s going to spawn a lot of cases for the IRS, both civilly and criminally,” he said. (For prior coverage of UBS whistleblower Bradley Birkenfeld, see *Tax Notes*, Sept. 17, 2012, p. 1359, *Doc 2012-18996*, or *2012 TNT 177-1*.)

Information from whistleblowers, along with other tools used by the government, creates a situation in which practitioners can no longer predict the next wave of enforcement, said Charles P. Rettig of Hochman, Salkin, Rettig, Toscher & Perez PC. Practitioners used to be able to mine their own data to predict those enforcement efforts, but that’s changed, he said.

Scott D. Michel of Caplin & Drysdale agreed, citing subpoenas recently issued by the U.S. attorney’s office for the Southern District of New York to account holders of Bank Frey & Co. AG, a Swiss bank. Those subpoenas essentially “came out of the blue,” with no inkling by practitioners that the bank was even on the government’s radar, he said.

Although the cost-effectiveness of the Foreign Account Tax Compliance Act can be debated, the law will make it more difficult for U.S. citizens to get foreign bank accounts, Downing said. For banks, having undeclared U.S. accounts is “way too expensive,” he said.

‘A lot of banks do not want to deal with U.S. account holders anymore,’ Rettig said.

If a foreign bank drops a U.S. account holder, it may be difficult for that person to find a new foreign bank, Downing said. “A lot of banks do not want to deal with U.S. account holders anymore,” Rettig said.

Brown said another important tool the government has is the jurisprudence that has been developed on required records subpoenas for some foreign bank account report cases. The Ninth, Seventh, and Fifth circuit courts of appeal have all held that there is no Fifth Amendment right available to taxpayers who refuse to turn over records of foreign accounts when issued a subpoena. That case law has been criticized by some members of the tax bar, who argue that being forced to hand over the records is unconstitutional.

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“That’s a huge area. It’s a tool the government has,” Brown said. Instead of requesting that information through a treaty or a mutual legal assistance treaty, the government can issue the subpoena directly to the subject of the investigation, she said. ■