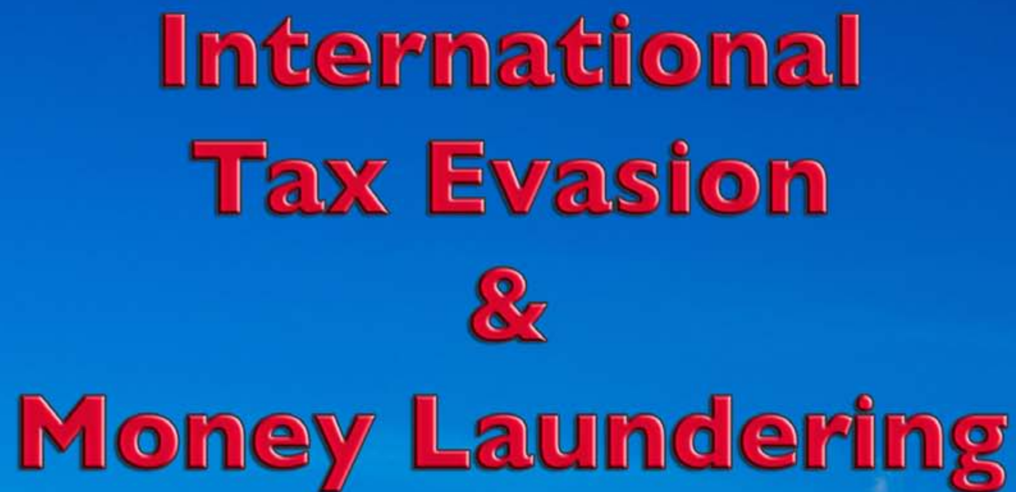

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Other Books by Gary S. Wolfe:

Asset Protection 2013: The Gathering Storm

Offshore Tax Evasion: IRS Offshore Voluntary Disclosure Program

Offshore Tax Evasion: IRS Tax Compliance FATCA/FBAR

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Table of Contents

Introduction

Chapter 1 - International Tax Evasion & Money Laundering

Chapter 2 – Why Tax Evasion is a Bad Idea: UBS & Wegelin Bank

Chapter 3 – U.S. Law: Tax Evasion & Money Laundering

Chapter 4 – IRS Tax Evasion: Offshore Accounts

Chapter 5 – IRS Tax Evasion: Willfulness Defense

Chapter 6 – Tax Evasion & the U.S. Mail

Chapter 7 – Offshore Tax Evasion: File Leaks Expose Secrets of the Rich

Chapter 8 – Offshore Tax Evasion: Recent Cases

Conclusion

About The Author

Introduction

International Tax Evasion & Money Laundering are synergistic crimes. “Tax Evasion” proceeds (i.e. unpaid tax due) are transformed into “respectable financial assets”:

1. Land
2. Home/apartments
3. Cars
4. Art
5. Jewelry
6. Yachts
7. Private planes
8. Stocks & Bonds
9. Hedge Funds
10. Investment Partnerships
11. Movies/TV Shows
12. Sound Recordings
13. Casinos
14. Vineyards
15. Hotels
16. “Fashion Houses”

The tax evasion proceeds, earned illegally, once invested, become part of the “world economy” generating “more profits.”

The expression “Money Laundering” was reputedly originated by Al Capone, who bought a chain of Chicago laundries, “sanitary cleaning shops” which were used as a “front” for the money Capone earned from the illegal sale of alcohol during prohibition. When asked how he got so rich, Capone said, “people are washing more clothes than ever.”

Capone forgot to file a tax return, to report his illegal income and he went to jail for income tax evasion. Historically, money laundering has been used “to wash illegal money” from:

1. Drug dealing
2. Political bribes
3. Terrorist financing
4. Companies concealing profits (or losses) from investors
5. Tax evasion

For hundreds of years illegally earned money, and its “tax cheating” proceeds (i.e. untaxed earnings) were deposited in numbered, anonymous accounts in tax havens. In 2013, a “tipping point” has been reached, world-wide governments starved” for tax revenues, have established mutual collaboration efforts to “out tax cheats.”

The most prominent is the U.S.-Swiss Tax Enforcement Agreement of August 2013 which affects approximately 300 small Swiss banks, who have agreed to disclose U.S. tax payers “tax cheats” with undisclosed Swiss bank accounts, untaxed earnings, and unreported income while paying a substantial fine of up to 50% of the US. Taxpayers' Swiss bank deposits. In exchange, the 300 Swiss banks will escape U.S. criminal prosecution by the U.S. Department of Justice. However, 14 of the biggest banks in Switzerland including: Credit Suisse and Julius Baer are currently under U.S. criminal investigation and have not been include in this “tax amnesty.”

In 2013, international “tax cheats” that use tax evasion proceeds to launder money face their final chapter. The long, sordid history of international tax evasion and money laundering are “coming to an end.”

Chapter 1
International Tax Evasion, Money Laundering, & Other Crimes

International tax evasion has been the “Sport of Kings” for centuries. Cloaked in secrecy, done surreptitiously, no one could ever prove it. The “Super-rich” (i.e. the top 1%) get away with “tax cheating” and used their “tax cheating proceeds” to buy assets; e.g., real estate, boats, planes, cars, diamonds and art (all of which may constitute “money laundering”).

The willful tax cheating by the super-rich may be “tax treason” defined: the betrayal of a trust, treachery; the offense of attempting by overt acts to overthrow the government of the state to which the offender owes allegiance.

So why do tax cheats get away with treason? Why do governments all over the world let the richest people cheat on their taxes and commit “tax treason”? What is the bottom line to tax treason? Is it that billions of people around the world suffer and live without adequate nutrition, housing, clothing, health care and education? Who is responsible for this tax mess?

With the proliferation of the Internet as an information database, after centuries of secrecy, the truth is coming out. Transparency is coming of age, and for the super-rich tax cheats, their days appear numbered.

Consider Recent Events in Spain and Africa

In Spain, there are 1,600 cases involving embezzlement, tax evasion, kickbacks and Swiss bank accounts, including: the former treasurer of Spain’s ruling party, indicted, the former head of the country’s Supreme Court resigned in disgrace. And now, Spain’s Princess, Cristina, could land in jail and topple King Juan Carlos and the Spanish monarchy.

In April 2013, Princess Cristina was indicted on charges of complicity in fraud, tax evasion, money laundering and embezzlement, the first member of a European royal family to be charged in a serious crime in centuries.

The case revolves around her husband, Duke of Palma, Inaki Urdangarin, who is accused of fraud, tax evasion, forgery and the embezzlement of $7.8 million from regional governments through inflated contracts via their non-profit organization, Institute Noor.

Judge Jose Castro oversaw the Princess’ indictment, saying she gave her consent to her husband’s “shady deals”. A specially appointed anti-corruption prosecutor requested the indictments be dropped. On May 7, 2013 an appeals court ruled to dismiss the case in a preliminary judgment. Judge Castro is likely to pursue another indictment.

In Africa on 5/10/13, a 120 page Africa Progress Report was issued stating $63 billion is lost annually in Africa through tax evasion, corruption, secret business deals, more than all the money coming into Africa through aid and investment. Despite Africa's surging economic growth, fueled by a global resources boom, poverty and inequality have worsened.

Kofi Annan, the former U.N. Secretary General, who heads the panel that wrote the report, stated:

"It is unconscionable that some companies, often supported by dishonest officials, are using unethical tax avoidance, transfer pricing and anonymous company ownership to maximize their profits while millions of Africans go without adequate nutrition, health and education." The report stated:

"Revenues that could have been used to impact lives have instead been used to build personal fortunes, finance civil wars and support corrupt and unaccountable political elites. Revenue losses on this scale cause immense damage to public finance and to national efforts to reduce poverty. Some political elites continue to seize and squander the revenues generated by natural resources, purchasing mansions in Europe or the U.S. or building private wealth at public expense.

In the U.S., tax evasion is a felony (under Internal Revenue ("Code") Code section 7201) with a penalty of up to five years in prison. In addition, the crime of tax evasion includes other crimes for which a U.S. taxpayer may be prosecuted, including:

1. Obstruct Tax Collection. Under Code section 7212, a penalty of up to three years in prison;

2. Conspiracy to Impede Tax Collection. Under 18 U.S.C. §371, a "Klein Conspiracy" in which two or more persons agree to "impede" IRS tax collection, with a penalty of up to five years in prison;

3. Filing a False Tax Return. Under Code section 7206(1), up to three years in prison;

4. "FBAR" Violation. Willful violation re: disclose foreign aggregate accounts over $100,000 up to ten years in jail. 31 U.S.C. Sec. §5322(b),

If federal prosecutors throw the book at tax cheats, they may face over 25 years in prison.

Tax evasion by itself is punishable by over 25 years in prison. In addition, separate crimes may include: money laundering, wire fraud and mail fraud (each of which are separate felonies punishable by 20 years plus, in prison). So if a tax cheat commits tax evasion, money laundering, wire fraud and mail fraud, their maximum penalties may be over 85 years in prison (with an additional 10 years if the violation affects a financial institution).

For U.S. persons who are involved with international tax evasion (i.e. they collaborate with tax cheats from other countries helping those international tax cheats commit tax evasion and launder money), they may be held liable for money laundering, a separate offense, since foreign tax evasion is a predicate offense, a Specified Unlawful Activity ("SUA"); i.e. a foreign crime, which subjects the U.S. person to penalties for money laundering.

In the *Pasquantino* case, (96 AFTR 2d 2005-5392 (2005), the U.S. Supreme Court determined that a foreign government (i.e. Canada) has a valuable "property right" in collecting taxes (in Pasquantino, "excise taxes"), The Supreme Court held that international tax evasion (i.e. taxes due to a foreign government) is a "Specified Unlawful Activity ("SUA"), which is both a predicate offense for money laundering (i.e. it is a "foreign crime"), and is a violation of the wire fraud statute (18 U.S.C. Sec. 1343) (i.e. the uncollected Canadian excises were "property" for purposes of the "fraud" element in the "wire fraud statute"). In *Pasquantino,* the U.S. Supreme Court held that the defendant's failure to pay taxes inflicted economic injury on Canada "no less than had they embezzled funds from the Canadian treasury. (Defendants) used interstate wires to execute a scheme to defraud a foreign sovereign of tax revenues. Their offense was complete the moment they executed the scheme inside the U.S., the wire fraud statute punishes the scheme, not its success.

International tax and estate planning may lead to tax evasion (and additional crimes: money laundering, mail fraud, wire fraud) if the U.S. taxpayer either fails to pay tax due to federal, state or foreign governments. The U.S. taxpayer may be culpable for violation of U.S. wire fraud laws, money laundering laws or mail fraud laws, which may lead to asset forfeiture.

Money laundering is the disguise of the nature or the origin of funds. It includes the transmutation of tax evasion proceeds into personal assets or 3rd party distributions (to family, friends, and others).

Income tax deficiencies (i.e. failure to pay tax due) which create "tax cheating" proceeds, when used to purchase assets or make investments may subject the taxpayer to separate felonies:

- Tax Evasion (failure to pay the tax due);

- Money Laundering. The use of proceeds from a specified unlawful activity, i.e. tax evasion, to purchase or make investments in assets which transmute the original illegal tax-cheating proceeds into another asset;

- Mail Fraud. The use of the postal system to effectuate a scheme to defraud. 18 U.S.C. Sec. 1341;

- Wire Fraud. The use of the telecommunications facilities to effectuate a scheme to defraud. 18 U.S.C. Sec. 1341.

Money Laundering

Money laundering may be linked to tax evasion. A violation of the money laundering statutes includes a financial transaction involving the proceeds of a specified unlawful activity ("SUA") with the intent to either:

1. Promote that activity;

2. Violate IRC Sec. 7201 (which criminalizes willful attempts to evade tax);

3. Violate IRC Sec. 7206 (which criminalizes false and fraudulent statements made to the IRS).

The tax involved in the transaction (and which is avoided) may be any tax: i.e. income, employment, estate, gift and excise taxes (See: U.S. Dept. of Justice, Criminal Tax Manual, Chapter 25, 25.03(2)(a).

Under the money laundering statutes, the IRS is authorized to assess a penalty in an amount equal to the greater of the financial proceeds received from the fraudulent activity, or $10,000 (under 18 U.S.C. Sec. 1956(b)), the authority is granted by statute to the U.S. not the IRS, and is enforced either by a civil penalty or a civil lawsuit.

Violations of statutes for mail fraud, wire fraud, and money laundering are punishable by monetary penalties, civil and criminal forfeiture. (See 18 U.S.C. section 981 (a)(1)(A) which permits property involved in a transaction that violates 18 U.S.C. sections 1956, 1957 and 1960 to be civilly forfeited).

Civil forfeiture statutes include:

1. 18 U.S.C. Sec. 1956, which outlaws the knowing and intentional transportation or transfer of monetary funds derived from specified criminal offenses. For Sec. 1956 violations, there must be an element of promotion, concealment or tax evasion;

2. 18 U.S.C. Sec. 1957, which penalizes spending transactions when the funds are contaminated by a criminal enterprise;

3. 18 U.S.C. Sec. 1960, which penalizes the unlicensed money transmitting business.

Under 18 U.S.C. Sec. 981(b)(2), seizures are made by warrant in the same manner as search warrants. Under 18 U.S.C. Sec. 981(b)(1), the burden of proof is by a preponderance of the evidence. The property may be seized under the authority of the Secretary of the Treasury when a tax crime is involved.

Under 18 U.S.C. Sec. 982(a)(1)(A), if the offense charged is a violation of the Money Laundering Control Act, and the underlying specified unlawful activity is mail or wire fraud, courts may order criminal forfeiture of funds involved in the activity on conviction.

The U.S. Dept. of Justice Tax Division policy requires U.S. attorneys to obtain Tax Division approval before bringing any and all criminal charges against a taxpayer involving a violation of the Internal Revenue Code. Absent specific approval, additional criminal charges for wire fraud, mail fraud and money laundering would not normally be included (U.S. Dept. of Justice Criminal Tax Manual, Chapter 25, 25.01). If the additional criminal charges are approved, the taxpayer risks having the trust assets seized or forfeited.

Regarding asset seizure, the U.S. government may seize assets pursuant to a violation of the money laundering laws. In addition, the IRS has authority for seizure and forfeiture under Title 26. Under IRC Sec. 7321, any property that is subject to forfeiture under any provision of Title 26 may be seized by the IRS.

Code section 7301 allows for the IRS to seize property that was removed in fraud of the Internal Revenue laws. Code section 7302 allows the IRS to seize property that was used in violation of the Internal Revenue laws.

In the case of transfer of funds to an offshore trust, it can trigger a violation of U.S. money laundering laws and lead to asset forfeiture. For example, tax counsel may recommend a tax planning strategy, and provide instructions by telephone, email or U.S. mail, which include client's transfer of funds pursuant to tax counsel's instructions. These combined actions may trigger a violation of U.S. money laundering laws and lead to asset forfeiture.

Tax Counsel, Tax Evasion (and Money Laundering) Offshore Trusts

A U.S. taxpayer's failure to comply with U.S. tax law may implicate tax counsel in tax evasion. The IRS or the U.S. Dept. of Justice may allege that tax counsel aided and abetted the client in evading U.S. tax, if tax counsel:

1. Aided and assisted the U.S. taxpayer in the submission of materially false information to the IRS; Code § 7206(2), or

2. Assisted the client in removing or concealing assets with intent to defraud. Code § 7206(4).

For a U.S. taxpayer's transfer of assets to an offshore trust, despite receiving U.S. tax counsel's tax compliance recommendations, the U.S. taxpayer fails to comply with U.S. tax law, and tax counsel fails to ensure ongoing tax compliance, tax counsel may be implicated in money laundering.

If the U.S. taxpayer's tax noncompliance includes: tax evasion and transfer of the "tax evasion proceeds" to the offshore trust by wire transfer or U.S. mail, the transfer of funds may be classified by the IRS/U.S. Dept. of Justice as wire fraud or mail fraud, both of which are "specified unlawful activities" under the Money Laundering Control Act (18 U.S.C. Sec. 1956 and 1957), the U.S. taxpayer and their tax counsel may be criminally prosecuted for violation of the money laundering statutes.

Specified Unlawful Activities are listed in 18 U.S.C. section 1956(c)(7). SUAs are the predicate offenses for money laundering and come in three categories:

1. State crimes;
2. Federal crimes; and
3. Foreign crimes.

If the U.S. client transfers funds to an offshore trust under a tax counsel's tax-planning strategy and the U.S. tax client is not in compliance with U.S. tax laws (despite tax counsel's recommendations) then tax counsel may be exposed to IRS penalties:

1. Code section 6694 imposes civil penalties on tax preparers;

2. Code section 7212 imposes criminal penalties for interfering with the administration of the Internal Revenue laws.

Chapter 2
Why Tax Evasion is a Bad Idea: UBS and Wegelin Bank

In America, a country that fought a revolution over taxes, tax evasion is a bad idea. U.S. taxpayers with undisclosed offshore accounts with unreported income face "double jeopardy": civil tax fraud (with no statute of limitations) and criminal tax evasion (with a six-year statutes of limitation). Severe financial penalties and jail sentences await those U.S. taxpayers who get caught "cheating on their taxes."

Tax evasion has never been a good idea. In this article, I'll discuss Wegelin and the UBS Bank cases to make that point.

The UBS Case

UBS, Switzerland's largest bank, became "the first crack in the Swiss Banking System" when, on February 18, 2009, they entered into a deferred prosecution agreement with the U.S. Department of Justice (DOJ). Under the agreement, UBS agreed to pay a $780 million fine and turn over the names and account information of 285 U.S. account holders who were not reporting their foreign financial accounts, the assets held in these accounts, nor the income from the assets (held in these accounts). On February 19, 2009, the U.S. Dept of Justice filed a civil suit seeking to force UBS disclosure of up 52,000 accounts held by U.S. taxpayers. On August 19, 2009, UBS and the U.S. DOJ entered into a settlement agreement in which an additional 4,450 accounts of non-compliant U.S. taxpayers were disclosed. A parallel agreement was signed on August 19, 2009 between the U.S. and Swiss government, based on the existing U.S.-Switzerland Double Taxation Treaty, which was approved by the Swiss Parliament on June 17, 2010. On October 22, 2010, the U.S. DOJ agreed to dismiss its criminal prosecution against UBS because UBS complied with its obligations.

In total, UBS paid $780 million in fines, and turned over 4,735 U.S. taxpayers, suspected of tax evasion to the U.S. government. These U.S. taxpayers with Swiss bank accounts at UBS who failed to disclose the accounts, the account assets and the income (from the account assets) violated multiple U.S. tax compliance filing requirements as follows:

- Form 1040 Individual Tax Returns: Annual reporting of worldwide income;

- Report of Foreign Bank and Financial Account, "FBAR" (Form TDF 90-22.1). Annual disclosure of foreign bank and financial accounts in which the U.S. taxpayer has a financial interest in, or signatory authority over any financial accounts in a foreign country, if the total value of such accounts exceeds $10,000 at any time during the calendar year. Signature Authority is defined as the authority (either alone or in tandem with another individual) to control the disposition of assets, funds or money held in a financial institution account, by delivery of written or oral instructions, directly to the financial institution which holds the account. The U.S. taxpayer must file the FBAR,

disclose the foreign account on Form 1040/Schedule B (Part III: Foreign Accounts and Trusts) and report all income earned on the foreign account on Form 1040;
- Form 8938: "Specified Foreign Financial Assets" to disclose foreign financial assets in excess of $50,000 (Form 8938 is attached to Form 1040). The filing of Form 8938 (with Form 1040) does not relieve U.S. taxpayers of the requirement to file the FBAR (Form TDF 90-22.1) if the FBAR filing is otherwise due. For those U.S. taxpayers who established UBS accounts, with the assistance of tax advisors, under 18 USC 371, both the taxpayer and the tax advisors may be held liable for conspiracy to defraud the U.S. A conspiracy to defraud the U.S. for taxes due is known as a Klein Conspiracy. The U.S. government must prove that there was an agreement by 2 or more persons to impede the IRS, and each participant knowingly, willfully and intentionally participated in the conspiracy.

A U.S. taxpayer's failure to report their worldwide income, disclose foreign financial accounts over $10,000, disclose foreign financial assets over $50,000, which appears to be the case for the 4,735 U.S. taxpayers with UBS accounts, subjects these U.S. taxpayers to significant civil and criminal penalties as discussed herein.

Civil and Criminal Penalties

U.S. taxpayers face civil and criminal tax penalties when they:

- Fail to report worldwide income on their tax returns (Form 1040);
- Fail to report foreign financial accounts, in which they have a financial interest or have signatory authority, account value over $10,000 (Form TDF 90-22.1); and/or
- Fail to report foreign financial assets, in which they have an ownership interest, assets over $50,000 (Form 8938).

U.S. Taxpayers include:
- U.S. citizens;
- U.S. "Green Card" holders;
- U.S. resident aliens in the U.S. for 183 days in one year, or 122 days per year over 3 consecutive years.

U.S. taxpayers must file annual U.S. income tax compliance
- Form 1040: report worldwide income;
- Form TDF 90-22.1 (FBAR): report foreign financial accounts (value over $10,000.)
- Form 8938: report foreign financial Assets with value over $50,000, in which they have an ownership interest.

U.S. taxpayer foreign assets must be reported under the "FBAR" filing (foreign financial accounts over $10,000) and the FACTA filing for foreign assets over $50,000. These foreign assets must also be reported under Form 1040 Schedule B.

Form 8938 (reporting specified foreign financial assets) must be attached to tax return/Form 1040. Filing Form 8938 does not relieve U.S. income tax residents of obligation to file FBAR (Form TDF 90-22.1) if FBAR filing is otherwise due.

Criminal Penalties
Unreported income, undisclosed foreign financial accounts and undisclosed foreign financial assets subject U.S. taxpayers to criminal penalties.

Unreported Income

- Internal Revenue Code ("Code") section 7201, Tax Evasion (Willful Evasion of Tax): up to 5 years in prison; fine up to $100,000 (individual); $500,000 (corporation);

- Code section 7212, Obstruct (Impede Tax Collection): up to 3 years in prison, a fine of up to $5,000;

- 18 U.S.C. § 371, Conspiracy to Impede Tax Collection (separate charge of impeding): up to five years in prison;

- Code section 7203, Failure to File Tax return: Up to one year in prison; a fine of up to $25,000 (individual); $100,000 (for corporation);

- Code section 7206(1), Filing a false tax return: Up to 3 years in prison and a fine of up to $250,000.

FBAR Violation
31 U.S.C. §5322(b) and 31 C.F.R. §103.59(c): willful violation up to 10 years in jail and a $500,000 fine.

Foreign Account Tax Compliance Account (FATCA) Form 8938
Taxpayers who fail to file Form 8938, report an asset or have an underpayment of tax may be subject to criminal penalties.

Civil Penalties

FBAR (Willful Failure To File)
Civil penalty is the greater of $100,000 or an annual penalty of 50% of the greatest amount in the account. The 50 percent penalty is imposed for each year there is no FBAR filed for the foreign financial account, so if the FBAR is not filed for 4 years, the penalty is 200% of the highest account balance (e.g., if the highest account balance is $1 million, the penalty for four years of non-FBAR filing, is $2 million).

FATCA (Form 8938)
Taxpayers who fail to file Form 8938, fail to report an asset, or have an underpayment of tax may be subject to civil penalties.

A 40 percent accuracy-related penalty for underpayment of tax distributable to an undisclosed foreign financial asset understatement, or a 75 percent fraud penalty for underpayment of tax due to fraud.

Unreported Income: Civil Tax Fraud
- Code section 6651(f), Fraudulent Failure to File Tax Return: Maximum penalty of 75% of the amount of the unpaid tax;

- Code section 6663(d), Fraudulent Tax Return (Unreported Income): Maximum penalty of 75% of the amount of the unpaid tax;

- Code section 6662(b)(1)-(5): Accuracy-Related Penalty. Penalty of 20% of the unpaid tax;

- Code section 6663(c): Spousal Liability. On a joint tax return, both spouses are subject to joint and several liability for the entire tax liability. The civil fraud penalty applies only to the spouse responsible for the tax underpayment attributable to fraud;

- Code section 6651(a)(2): Failure to pay tax shown as due on a tax return penalty of up to a maximum of 25% of unpaid tax.

- Code section 6651(a)(3): Unpaid tax not shown as due on a return (i.e., unreported income) penalty of up to a maximum of 25% of unpaid tax. Offsetting Penalties: Under code section 6651(c)(1), the amount of the penalty for failure to file is reduced by the amount of the penalty for failure to pay (the amount shown on a return for any month for which both penalties apply). Under Code section 6651(a)(3), there is no offset for the penalty for failure to pay tax not shown as due on a return (i.e., unreported income);

- No credit is allowed against the civil fraud penalty for any criminal fines paid for income tax evasion and conspiracy to defraud the United States.

U.S. Taxpayers Swiss Bank (Wegelin)

On January 4, 2013, Wegelin & Co., Switzerland's oldest bank (est. 1741), which had $25 billion under management, pled guilty in a New York court to helping Americans evade their taxes. Wegelin agreed to pay a $57.8 million fine to U.S. authorities, forfeit an additional $16.2 million held in a U.S. account (total fines/forfeiture: $74 million) and "cease to operate as a Bank". In 2012, in a separate civil lawsuit by the U.S., the judge entered a default judgment against the Bank when it failed to appear, ordering it to forfeit $16.2 million held in the U.S. account.

Wegelin admitted to allowing more than 100 American citizens (who are from UBS) to hide $1.2 billion in undeclared assets from the IRS for almost 10 years. Wegelin became the first foreign bank to plead guilty to tax evasion charges in the U.S.

Previously, UBS agreed to pay a $780 million fine related to tax evasion charges, disclose the details of nearly 5,000 U.S. account holders, but they neither pleaded nor were found guilty. Instead, UBS and U.S. prosecutors had a deferred prosecution agreement, with the fine being paid in exchange for the charges being dropped.

U.S. Attorney Preet Bharara said it was "a watershed moment in our efforts to hold to account both the individuals and the banks — wherever they may be in the world — who are engaging in unlawful conduct that deprives the U.S. Treasury of billions of dollars of tax revenue." He also stated:

There is no excuse for wealthy Americans flouting their responsibilities as citizens of this great country to pay their taxes, and there is no excuse for foreign financial institutions helping them to do so.... Wegelin became a haven for U.S. taxpayers seeking to circumvent the tax code by hiding their money in secret offshore accounts, and the bank willfully and aggressively jumped in to fill a void that was left when other Swiss banks abandoned the practice due to pressure from U.S. law enforcement. Today's guilty plea is a watershed moment in our efforts to hold to account both the individuals and the banks — wherever they may be in the world — who are engaging in unlawful conduct that deprives the U.S. Treasury of billions of dollars of tax revenue. We will continue our efforts until this practice is eliminated in its entirety."

Otto Bruderer, Managing Partner at Wegelin, admitted that between 2002-2010, Wegelin sheltered U.S. clients from tax while aware that its conduct had been "wrong". Mr. Bruderer further admitted that "assisting tax evasion was common practice in Switzerland."

Under the proposed plea agreement, entered by Otto Bruderer on behalf of Wegelin and Co., Wegelin entered a plea to a single count of conspiring to commit tax evasion. The technical language of the charge is "willfully and knowingly would and did defraud the U.S.A. and the IRS for the purpose of impeding, impairing, obstructing and defeating the lawful government functions of the IRS."

Sentencing

In *U.S. v. Wegelin & Co., et al*., U.S. District Court for the Southern District of New York, Case No. 12-CV-00002, on March 4, 2013, U.S. District Judge Jed Rakoff ordered Wegelin & Co., the oldest Swiss private bank, to pay $22 million in fines, $20 million in restitution, over $15 million in forfeitures in addition to over $16 million in previous forfeitures, amounting to a total over $74 million, as well as a period of probation.

Judge Rakoff questioned whether the size of the settlement appropriately reflected the extent of the wrongdoing, saying there was a "funny tension" between the U.S. Department of Justice's decision not to seek the maximum $40 million fine and its assertion Wegelin acted with "extreme willfulness."

"Not much pain there, is there?" said Judge Rakoff.

U.S. taxpayers, who used Swiss Bank accounts to hide unreported U.S. income and annual earnings from those accounts, face a myriad of civil and criminal tax penalties. The “spotlight” may now shine on these U.S. taxpayers who committed tax evasion because 13 other Swiss Banks are under IRS investigation, including:

- Credit Suisse, with over 1 trillion dollars in total assets, another trillion dollars in clients’ money;

- HSBC Holdings, P.C., who paid a $1.5 billion fine for laundering drug money (and other offenses);

- Basler Kantonalbank;

- Julius Baer;

- Nine other local, central Swiss banks.

Wegelin ceased to function as a Swiss Bank in 2011, selling off its core Swiss and other non-U.S. businesses in January 2011, to protect non-U.S. clients from the legal battle “fall out.” The sale left Wegelin responsible only for its American clients. In February 2012 Wegelin, as an institution, was indicted by U.S. authorities and later declared a fugitive from justice when the Bank’s executives failed to appear in a U.S. court (the three Wegelin bankers, Michael Berlinka, Urs Frei and Roger Keller, are still fugitives). Wegelin had previously vowed to fight the charges, claiming that because it only had branches in Switzerland, it was bound only by its home country’s banking laws, not by U.S. law. The Bank’s guilty plea ensured their demise. Wegelin told U.S. taxpayers their undeclared accounts would not be disclosed to the U.S. authorities because the bank had a long tradition of secrecy and unlike UBS, had no offices outside of Switzerland and was less vulnerable to U.S. law enforcement.

To further the goals of the conspiracy from 2002-2011, Wegelin took steps including:
- Opening and servicing undeclared accounts for U.S. taxpayer-clients in the names of sham corporations and foundations formed under the laws of Liechtenstein, Panama and Hong Kong (and other jurisdictions) to conceal clients’ identities from the IRS;

- Wegelin and Company accepted documents falsely declaring that the sham entities were the beneficial owners of certain accounts, when in fact the accounts were beneficially owned by U.S. taxpayers;

- U.S. taxpayers maintain Wegelin accounts (undeclared), using code names and numbers to minimize references to the actual names of the U.S. taxpayers on Swiss Bank documents;
Wegelin Bank ensured that account statements and other mail were not mailed to U.S. clients in the U.S.; they were instead sent to U.S. taxpayer clients’ personal e-mail accounts, to reduce risk of detection by law enforcement;

- Wegelin issued checks drawn on, and executing wire transfers to, its U.S. correspondent bank accounts for the benefit of U.S. taxpayers with undeclared accounts at Wegelin (and at least two other Swiss banks);

- Wegelin separated the transfers into batches of checks or multiple wire transfers in amounts that were less than $10,000 to reduce the risk that the IRS would detect the undeclared accounts;

- Wegelin used its correspondent bank accounts at UBS to help U.S. taxpayers with undeclared accounts repatriate money that they had hidden in Wegelin;

- U.S. taxpayers asked Wegelin to issue and send their checks drawn on Wegelin's correspondent bank accounts, and that represented funds held in their bank accounts at Wegelin;

- Wegelin permitted at least two other Swiss banks to issue checks drawn on its correspondent bank account for the benefit of U.S. taxpayers holding undeclared accounts at these other banks;

The sheer volume of transfers in Wegelin's correspondent bank accounts served to conceal the repatriation of money from U.S. taxpayers' undisclosed accounts at Wegelin and other banks.

On January 3, 2013, Otto Bruderer admitted:

"From about 2002-2012, Wegelin agreed with certain U.S. taxpayers to evade the U.S. tax obligations of these U.S. taxpayer clients who filed false tax returns with the IRS." "In furtherance of its agreement to assist U.S. taxpayers to commit tax evasion in the U.S., Wegelin, among other things, opened and maintained accounts at Wegelin in Switzerland for U.S. taxpayers who did not complete Form W-9 tax disclosure forms to report their income to the IRS."

Bruderer admitted that Wegelin and Company knew the U.S. taxpayers were creating non- W-9 accounts at Wegelin and Company in order to evade their U.S. tax obligations in violation of U.S. law, he stated: "Wegelin intentionally opened and maintained non W-9 accounts for U.S. taxpayers" with the knowledge, that by doing so, Wegelin and Company was assisting these taxpayers in violating their legal duties and that "Wegelin was aware that this conduct was wrong."

For U.S. taxpayers, although under the Fifth Amendment they cannot be forced to incriminate themselves, the courts have held that offshore banking records fall within the required records exception. The Ninth Circuit in *In re: Grand Jury Investigation M.H.*, 648F.3d 1067 (9th Cir. 2011, *cert, denied,* 133 S.Ct. 26 (2012) compelled an offshore account holder to produce account data even if it was self-incriminating.

Jeffrey Neiman, a former U.S. federal prosecutor, stated: "It is unclear whether the bank was required to turn over American clients who held secret Swiss bank accounts. What is clear is that the Justice Department is aggressively pursuing foreign banks who have helped Americans commit overseas tax evasion."

James Mastracchio, of Baker Hostetler's National Tax Controversy Practice stated:

"This is an unprecedented plea by a foreign institution subjecting itself to U.S. jurisdiction ... as the global banking community becomes FATCA controversy compliant - particularly for those foreign institutions operating in countries with inter-governmental agreements - transparency and the sharing of information will continue with U.S. and by agreement and in practice, such that FFI will be under greater pressure to make unprecedented agreements to follow U.S. law and regulations. This plea does provide an example of what might become the normal relations between the U.S. and FATCA-compliant jurisdictions."

Tax Evasion And Money Laundering

U.S. taxpayers who hide money in Swiss bank accounts, and their tax advisors who assist them, may be held liable for tax evasion, conspiracy and money laundering.

In the *Wegelin* case, for the first time a Swiss Bank has pled guilty to a felony; i.e., conspiracy to commit tax evasion. Wegelin facilitated tax fraud by accepting deposits from U.S. taxpayers who did not pay income tax on the earnings (i.e. interest) from the bank accounts. The U.S. taxpayers relied on "Swiss Banking Secrecy" (i.e. the U.S. taxpayers did not disclose their Swiss income or the assets in the accounts, which earned the income, "hiding behind" Swiss Banking Secrecy) the knowledge that the Swiss Bank, Wegelin, would not disclose either the assets in the accounts or the income from the accounts.

As Wegelin director Otto Bruderer stirringly admitted, Swiss banking practices "profit" by committing tax fraud. Swiss Banks entice foreign (i.e. US and other) investors to establish Swiss Bank accounts, which accounts are maintained secretly listing "nominee owners", (i.e. corporations, trusts, limited liability corporations and third party individuals). The income from the Swiss Bank accounts is unreported and the banks do not disclose the actual account owner's country of tax residence, rendering them not subject to tax reporting or payment of tax in their country.

In the U.S., under "Klein Conspiracy," if two or more parties intentionally impede the IRS from collection of tax, they are liable for conspiracy to commit tax fraud, which is a felony (with a five-year prison sentence). The object of the conspiracy, the unlawful activity (tax evasion) is a predicate offense for a second felony, money laundering (i.e. a specified unlawful activity).

By Wegelin director Otto Bruderer admitting that Swiss Banks intentionally commit tax evasion, by shielding client accounts from reporting taxable income, his admission is

evidence of willfulness (i.e. the U.S. taxpayer “intentionally” committed tax fraud) which makes the U.S. taxpayer and the bank criminally liable for tax evasion, conspiracy and money laundering, tax crimes which are subject to severe civil and criminal penalties.

IRS Summons

On January 29, 2013, Judge Pauley directed the IRS to issue a summons requiring the Swiss Bank, UBS, to produce information about U.S. taxpayers who were trying to evade U.SD. income taxes by holding accounts at other Swiss banks that did business with UBS;
Judge Pauley entered an order on 1/28/13 authorizing the IRS to require UBS to produce records on U.S. taxpayers with accounts at Swiss Bank Wegelin and other Swiss banks that used Wegelin’s U.S. correspondent account at UBS;

Judge Pauley’s order would enable U.S. authorities to determine the identity of U.S. taxpayers who hold or held interests in financial accounts at Wegelin and other Swiss financials that used Wegelin’s UBS account.

Chapter 3
Tax Evasion and Money Laundering

"Money Laundering" is the disguise of the nature or the origin of funds. The predicate offenses (known as Specified Unlawful Activities; i.e. "SUA"), under the Money Laundering Control Act (18 U.S.C. Sec. 1956 and 1957) include: state tax evasion, federal tax evasion and foreign tax evasion.

A U.S. Taxpayer (or Foreign Taxpayer) may be held liable for Tax Evasion if:
- They willfully fail to pay a tax due.
- They willfully fail to file a tax return due.
- They willfully file a false or fraudulent tax return.

U.S. Taxpayers (and tax advisors) implicated in U.S. tax evasion face separate felonies for tax evasion and money laundering. Foreign Taxpayers, who commit Foreign Tax Evasion, may implicate U.S. tax advisors in money laundering felonies, for the foreign client transfer of funds, which involve the U.S. tax advisors.

For both U.S. and Foreign Taxpayers, undisclosed foreign accounts, may be the depository accounts used to commit tax evasion, including:

Taxpayer failure to pay tax, file tax returns, or file false (fraudulent) tax returns for the original funds (which are the source of the proceeds used to fund the foreign accounts).
Taxpayer failure to pay tax, file tax returns, or file false (fraudulent) tax returns for the earnings, on the assets held in the undisclosed foreign accounts

Depending upon the counsel's role in taxpayer's non-compliance, counsel may be held liable for aiding and abetting the client in tax evasion. Counsel may be held liable for:

- Aiding and assisting in the submission of materially false information to the IRS (IRC Sec. 7206(2).

- Assisting the client in removing or concealing assets with intent to defraud (IRC Sec. 7206(4).

Under *Pasquantino*, 96 AFTR 2d 2005-5392 (2005), the U.S. Supreme Court held that a foreign government has a valuable property right in collecting taxes (in this case Canadian excise taxes), and that right may be enforced in a U.S. court of law. Counsel who advise on international tax issues could be viewed as interfering with a foreign government's right to collect taxes. In this case, taxpayer used interstate wiring to execute a scheme to "defraud a foreign sovereign of tax revenue" (both wire fraud and tax evasion, two separate predicate offenses for foreign money laundering).

Under *Pasquantino*, international tax evasion is deemed a "Specified Unlawful Activity," which is a predicate offense for money laundering.

“Klein Conspiracy Prosecution”

Under 18 U.S.C. Sec. 371 it is a crime for two or more persons to conspire to commit an offense against the U.S. Under Klein an agreement by two or more persons to impede the IRS with each participant knowingly, willfully and intentionally participating in the conspiracy.

International Estate Plan

Tax counsels who advise a client on an international estate plan, may subject themselves to liability. Once the estate plan is in place, a client’s subsequent actions may lead to U.S. or foreign tax evasion; e.g., violation of U.S. money laundering, wire fraud or mail fraud laws.

If a Tax Attorney forms entities (e.g. Trust, Limited Liability Company, Corporation) sends instructions to a client via telephone, email, U.S. Mail, and a client transfers funds pursuant to counsel’s instructions, it may lead to tax evasion, a predicate offense (an “SUA”), which can trigger a violation of U.S. money laundering laws.

After the entities are formed, and despite receiving tax compliance guidance from counsel, the client fails to comply with the tax law, and counsel fails to ensure ongoing full tax compliance, the client may be held liable for both tax evasion and money laundering. If so, tax counsel may be subject to civil and criminal penalties:
- IRC Sec. 6694: civil penalties imposed on tax preparers.
- IRC Sec. 7212 (criminal penalties imposed for interfering with the administration of the internal revenue law).

U.S. Financial Reports

U.S. financial institutions file Currency Transaction Reports (CTR) and Suspicious Activity Report (SAR) with the Detroit Computing Center (uploaded at the IRS Currency Banking and Retrieval System database at the IRS/DCC).

The combined CTR/SAR currency transaction reports provide a paper trail (i.e. a “road map”) for the IRS Criminal Investigation Division (“CID”) investigation of “financial crimes” (i.e. tax evasion and money laundering).

A Currency Transaction Report (CTR) is filed by financial institutions that engage in a currency transaction in excess of $10,000.

A Suspicious Activity Report (SAR) is filed on transactions involving at least $5,000 that the financial institution knows, suspects, or has reason to suspect the money was derived from illegal activities. The SAR is also filed when transactions are part of a plan to violate federal laws and financial reporting requirements.

IRS Audits

Under a civil tax audit, the IRS may obtain evidence that may be illegal under criminal proceedings (e.g., Fifth Amendment defenses, objections to “tainted evidence”). With tax evidence obtained from the civil tax audit, the IRS (with the U.S. Attorney) may initiate criminal proceedings.

U.S. Taxpayers with unreported foreign bank accounts (and income) are subject to IRS civil tax audits with civil penalties (monetary penalty, only) and criminal tax prosecution (monetary penalty and jail).

The IRS, under a civil tax audit:
May summon evidence, which support culpability for a crime (e.g., tax evasion) and civil penalties (e.g., 75% fraud penalty).

May trigger investigation into money laundering (i.e., when U.S. Taxpayers attempt to repatriate funds from undisclosed foreign bank accounts, they may be liable for money laundering).

Use evidence obtained under a civil tax audit to support a subsequent criminal prosecution (including culpability for 3rd party co-conspirators for obstructing tax collection and conspiracy).

Tax Conspiracy

18 U.S.C.A. §371 is the Federal Statute for conspiracy which provides that: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $ 10,000 or imprisoned not more than five years, or both."

Tax Conspiracy offenses include: willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, of a false or fraudulent return, affidavit, claim or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document).

Tax Conspiracy offenses include: willfully failing to pay any tax or make any return (other than a return required under authority of Part III of Subchapter A of Chapter 61) at the time or times required by law or regulations; for offenses described in Sections 7206(1) and 7207 relating to false statements and fraudulent documents.

Offenses for tax conspiracy arise under Section 371 of Title 18 of the United States Code (Conspiracy), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

If an individual or individuals charged with committing any of the offenses articulated above, are outside the United States or are fugitives from justice, within the meaning of Section 3290 of Title 18 of the United States Code, the Statute of Limitations is tolled.

Money Laundering

When individuals attempt to repatriate into the United States, the funds contained in the undisclosed foreign bank accounts, they may be liable for money laundering. Individuals who maintain foreign bank accounts where disclosure of said bank accounts is not revealed pursuant to law, and who would be culpable under the various offenses recited above, may be liable for money laundering (specifically 18 U.S.C. 1956 and 1957, which is part of the Money Laundering Control Act of 1986).

18 U.S.C 1956 penalizes individuals who knowingly and intentionally transport or transfer monetary proceeds from specified unlawful activities. While the funds reposing in the foreign bank accounts may have been derived from lawful activities conducted within or without the United States by American citizens, the various violations of the Internal Revenue Code and the conspiracy statute, could well subject individuals to charges of money laundering.

If in fact the unreported bank accounts contained funds derived from unlawful activities, it may subject individuals to not only violations of Federal statutes but California statutes as well (e.g., California Penal Code §§ 182 and 186.10, which deal with conspiracy and money laundering).

Undisclosed Offshore Accounts: Records Subpoenas

At the California Tax Bar November 2012 Conference, San Diego speaker Kevin M. Downing (Miller Chevalier, Washington, D.C.) former lead U.S. Attorney prosecuting UBS, advised of new subpoena rules for Foreign Accounts which are undisclosed by U.S. taxpayers.

Once a records subpoena is served, there is no 5th Amendment right not to produce records, no production immunity.

If U.S. taxpayer does not have records, they must get records from the Foreign Financial Institution (i.e., undisclosed offshore account).

A refusal to comply with the records subpoena can result in the U.S. taxpayer being put in jail, with the account subject to an annual 50% penalty (of the highest account balance) under the “FBAR” rules. The U.S. government will not tolerate U.S. taxpayer’s “stonewalling” (the incarceration and penalty have been affirmed by the 5th Circuit, the 7th Circuit and the 9th Circuit Court of Appeals).

Civil and Criminal Tax Fraud: Burden of Proof (Evidentiary Standards)

The U.S. taxpayer's exposure to civil penalty/criminal prosecution for unreported income and undisclosed foreign financial accounts is a "double-edged" sword with dual civil/criminal:

- Evidentiary Standards of Proof;

- Statute of Limitations;

- Collateral Estoppel Issues

If the IRS first institutes a civil tax audit, they may summons evidence, which may support both a civil penalty (e.g. fraud) and criminal culpability (e.g. tax evasion). The evidence from the civil tax audit may then be used for a subsequent criminal prosecution of the same U.S. taxpayer.

Civil and criminal tax deficiencies may differ:

Criminal violations are charged only against the tax deficiency that results from fraud.

Civil tax deficiency includes all tax due on the tax returns (i.e. "evaded income and deductions adjustments).

Under a civil tax audit, the IRS may obtain evidence that may be illegal under criminal proceedings (e.g. Fifth Amendment defenses objecting to "tainted evidence") tax evidence obtained from the civil tax audit may enable the IRS (i.e. the U.S. Attorneys to initiate criminal proceedings against the taxpayer).

Criminal tax fraud requires a higher standard of proof than civil tax fraud. The government must prove "beyond a reasonable doubt" that the defendant is guilty of criminal tax fraud.

In civil tax fraud, the burden of proof required is a preponderance of the evidence (also termed "by clear and convincing evidence") which is a lower evidentiary standard).

A criminal tax decision of a court or jury will bind a civil tax decision, but a civil tax decision does not bind a criminal tax decision.

Collateral Estoppel

When criminal tax proceedings are followed by civil tax proceedings, the legal doctrine of collateral estoppel may apply. This doctrine provides that an issue necessarily decided in a previous proceeding (the first proceeding) will determine the issue in a

subsequent proceeding (the second proceeding) but only as to matters in the second proceeding that were actually presented and determined in the first proceeding.

A conviction for criminal tax evasion collaterally estops the taxpayer from contesting the existence of tax fraud for purposes of the civil tax fraud penalty (i.e. 75% of the unpaid tax) because a finding of criminal tax fraud (beyond a reasonable doubt) establishes proof of civil tax fraud (by clear and convincing evidence).

Acquittal of criminal tax evasion does not collaterally estop the government from proving civil tax fraud (by clear and convincing evidence). The criminal acquittal may establish that proof of fraud did not exist beyond a reasonable doubt, but that does not mean that proof of fraud by clear and convincing evidence does not exist.

Unreported Income (Undisclosed Foreign Bank Accounts)

U.S. taxpayers with unreported income and disclosed foreign financial accounts are subject to IRS civil tax audits with civil tax penalties (monetary penalty only) and criminal tax prosecution (monetary penalty and jail).

The U.S. taxpayer’s tax records may include evidence, which supports culpability for a crime (e.g. tax evasion) and civil tax penalties (e.g. 75% fraud penalty).

Statutes of Limitation

Civil and criminal tax proceedings have different statutes of limitation.

Civil Tax Fraud - For civil tax fraud (i.e. unreported income/undisclosed foreign bank accounts), there is no statute of limitations. The tax can be assessed at any time.

Criminal Tax Evasion - For criminal tax evasion (i.e. unreported income) the criminal statute of limitations is only on the prosecution of the crime of tax evasion, (not the assessment of the tax owed).

Offenses arising under the Internal Revenue laws generally have a 3-year period of limitation for prosecution (IRC Sec. 6531).

When the prosecution is for the offense of willfully attempting in any manner to evade or defeat any tax, the statute of limitations is 6-years (i.e. unreported Income).

IRC Sec. 6531(1): for offenses involving the defrauding or attempting to defraud the United States (whether by conspiracy or not, and in any manner);

IRC Sec. 6531(2): for the offense of willfully attempting in any manner to evade or defeat any tax;

IRC Sec. 6531(3): for the offense of willfully aiding or assisting in the preparation of a false or fraudulent tax return.

IRC Sec. 6531(4): for the offense of willfully failing to pay any tax or make any tax return.

IRC Sec. 6531(5): for offenses relating to false statements and fraudulent documents under IRC Sec. 7206(1) and Sec. 7207.

IRC Sec. 6531(8): for offenses arising under 18 U.S.C. 371, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax.

Under IRC Sec. 6531, the 6-year statute of limitations shall be tolled, while the U.S. taxpayer who committed the offenses is outside the United States.

Form 8938

Under Form 8938 (Statement of Specified Foreign Financial Assets):

A 3-year statute of limitations for failure to report a specified foreign financial asset or failure to file Form 8938;

A 6-year statute of limitations for U.S. taxpayer’s failure to include in gross income an amount relating to specified foreign financial assets and the amount omitted is more than $5,000.

Chapter 4
IRS Tax Evasion – Offshore Accounts

Under Treasury Department Circular #230 (Rev. 8/11), Title 31 Code of Federal Regulations, Subject A, Part 10 (published June 3, 2011), Section 1021 requires a tax practitioner who knows that the client has not complied with U.S. revenue laws, or made an error or omission in a tax return, to promptly advise the client of the fact of such non-compliance, error or omission and the consequences under the Internal Revenue Code and Treasury Regulations.

Under Circular #230, Section 1022, a practitioner must exercise due diligence in preparing and filing tax returns.

For U.S. taxpayer offshore accounts, in order to ensure U.S. taxpayer IRS compliance, the tax practitioner should confirm the following, prior to filing a client's tax returns:

Offshore Accounts: Tax Compliance Issues
1. Original source of proceeds?

2. How was the money earned?

3. Were the proceeds reported for tax purposes? If so, what tax year?

4. Was the fund transfer of the original proceeds from the U.S. sent directly to the offshore account?

5. Were there any intermediary transfers to third party banks or accounts? (If so, dates, accounts).

6. Total amount in each account (highest balance/each tax year).

7. Regarding the offshore account, did you file FBARs? Yes/No:
a. Every year?
b. Accounts over $10,000?
c. Did you own the account?
d. What was the name on the account?
e. Did you have signatory authority over the account?

8. Regarding offshore accounts, did you disclose the account on Form 1040/Schedule B, Part III, No. 7?

9. For foreign financial assets over $50,000, did you file Form 8938 for each tax year?

10. For financial assets over $50,000, did you purchase these assets with funds from the offshore account? If not, what was the source of funds for these purchases?

Civil Penalty Issues

1. Civil Tax Fraud (75% of tax due) (no statute of limitations).

2. Underpayment of Tax (25% of tax due).

3. For voluntary disclosures, under the IRS Offshore Voluntary Disclosure Program (2012), the values of foreign accounts and other foreign assets are aggregated for each year and the penalty is calculated during the period covered by the voluntary disclosure. Under the 2012/IRS Voluntary Disclosure, total penalties of up to 85% of unpaid tax, and 27.5% of highest balance total foreign bank accounts/foreign assets as follows:
a. Failure to File a Tax Return (IRC Sec. 6651(a)(1), up to 25% tax due.
b. Failure to Pay Tax (IRC Sec. 6651(a)(2), up to 25% tax due.
c. Accuracy Related Penalty (IRC Sec. 6662), a 40% penalty for tax underpayment attributable to undisclosed foreign financial asset understatement.
d. Title 26 Penalty – 27.5% highest aggregate balance of foreign bank accounts, entities and assets.

IRS/Criminal Penalty Issues

U.S. taxpayers with undisclosed offshore bank accounts and unreported income face criminal charges for:

1. Tax Evasion (IRC 7201), five years in jail, $25,000 fine;

2. Filing False Tax Return (IRC Sec. 7206(1)), three years in jail, $250,000 fine;

3. Failure to File Tax Return (IRC Sec. 7203), one year in jail, $100,000 fine;

4. Willful failure to file FBAR or Filing False FBAR (31 USC Sec. 5322), ten years in jail, fines up to $500,000 with related civil penalty the greater of $100,000 or 50% of the total balance of the foreign account per violation (IRC Sec. 5321(a)(5).

Chapter 5
IRS Tax Evasion – Willfulness Defense

U.S. taxpayers, who fail to file tax returns or pay taxes due, face a felony for willful evasion of tax (IRC Sec. 7201). U.S. taxpayers, particularly international investors who are classified as U.S. taxpayers, under either the “Substantial Presence Test” or “Green Card Test”, often defend their tax non-compliance by stating that they were “unaware of the law”.
Under U.S. tax law, “ignorance of the law is no excuse” (in Latin: ignorantia juris non excusat). The legal principal is that a person who is unaware of a law may not escape liability for violating that law because they were unaware of its content.

U.S. Model Penal Code Section 2.02(9) states that knowledge that an activity is unlawful is not an element of an offense unless the statute creating the offense specifically makes it one.

For federal tax evasion, willfulness is required. This legal position was enshrined in Cheek v. U.S., (1991) 498 U.S. 192, which stated that in a federal criminal tax case, a taxpayer’s “good faith” belief that he was not required to file tax returns would negate the ‘intent element’ of the crime of tax evasion (however, the defendant Cheek was held to not have a “good faith belief” and was convicted by the jury; i.e., the final arbiter of the evidence) and served a year and a day in jail.

On the issue of intent, the jury may consider “willful blindness”; i.e. the defendant willfully, knowingly and intentionally concealed the truth from himself, so that the defendant “intentionally” committed a tax crime.

Chapter 6
Tax Evasion and the U.S. Mail

UBS and Beda Singenberger

Beda Singenberger of Zurich Switzerland, who ran Sinco Treuhand, a wealth management and tax advisory business in Switzerland, disclosed a list of U.S. clients (hiding money in Switzerland) in the mail, which was retrieved by U.S. authorities.

Over an eleven-year period, Singenberger helped sixty people in the U.S. hide $184M in secret offshore accounts under colorful names; i.e., “Real Cool Investments” and “Wanderlust Foundation”. His client list included details: client residences, their Swiss banks and the ways they hid accounts from the IRS. The U.S. government is “mining the list” which has already ensnared three “tax cheats”.

1. Jacques Wajsfelner, an 83-year old exile from Nazi Germany, who pled guilty to hiding $5.7M from the IRS, sentenced to three months house arrest.

2. Michael Candle, a retired U.S. Army surgeon, who held an inheritance via a Lichtenstein foundation, which had an account at a now-defunct Swiss Bank, Wegelin Bank, pled guilty in New York on December 21, 2012, and awaits sentencing.

3. Cancer researcher Michael Reiss, who pled guilty.

Since 2008, U.S. prosecutors have charged at least 86 people in their crackdown on offshore tax evasion including two dozen bankers, lawyers and advisors. An additional 38,000 Americans have sought to avoid prosecution by entering into the IRS Voluntary Disclosure Program.

Beda Singenberger was charged in New York federal court in July 2011 with conspiracy to “cheat the IRS”. He is accused of managing, opening and transferring accounts for U.S. clients. He visited U.S. clients, delivering cash from their undeclared accounts or taking cash back to deposit in Switzerland. A client in New York banked with UBS for a half-century and had a $74M account, while another client in California banked with UBS (which held $47M).
To date, Singenberger has not made an appearance in U.S. court. Switzerland does not have an extradition treaty with the U.S.

Chapter 7
Offshore Tax Evasion: File Leaks Expose Secrets of the Rich

On April 4, 2013 the Digital Journal, The Guardian and Spiegel online reported that an informational network of journalists (15 month research project), 86 journalists from 46 countries, working with a nonprofit organization, The International Consortium of Investigative Journalists (including media firms: UK: The Guardian and the BBC; France: Le Monde; U.S.: Washington Post) reported a total of 2.5 million secret files of companies and nationals in 170 countries, including 140,000 individuals who placed their money in tax havens (documents investigated over a period of close to thirty years).

In the "largest data leak in history", the data exposed 120,000 letterbox entities, offshore accounts for politicians, celebrities, weapons dealers, oligarchs and financiers.

The ICIJ study estimated:

1. $1.6 Trillion a year from global proceeds of financial crimes flows to offshore havens;

2. Up to $32 Trillion is stashed away in offshore havens (roughly equivalent to the size of the U.S. and Japan's economies combined);

3. Assets managed by the world's 50 largest 'private banks", which provide access to offshore financial services for high net-worth clients, grew from $5.4 Trillion in 2005 to more than $12 Trillion in 2010.

According to the ICIJ report, the names revealed include: American professionals, relatives and friends of African and Asian depositors (including Ferdinand Marcos in the Philippines and Robert Mugabe in Zimbabwe), Wall Street swindlers, global arms dealers and Eastern European, Russian and Asian billionaires. The offshore financial institutions provide financial secrecy to help rich people dodge taxes, facilitate official corruption to exacerbate the widening gap between the poor and rich world-wide.

The offshore financial providers and their clients hide funds through multi-layered global structures consisting of multiple companies, foundations and financial products. Offshore financial services' appoint "sham" officers, directors and shareholders, proxies who serve as stand-ins when the real company owners don't want their identities known. The report identified a cluster of 28 "sham directors" who served as on-paper representatives of more than 21,000 companies, with individual directors representing as many as 4,000 companies each. These "nominees" rent out their names for the real owners to hide behind.

The report stated: "A well-paid industry of accountants, middlemen and other operatives has helped offshore patrons shroud their identities and business interests, providing shelter in many cases to money laundering or other misconduct…this involves many of the world's top banks including UBS, Clariden and Deutsche Bank who aggressively

worked to provide their customers with secrecy-cloaked companies in offshore hideaways."

Offshore tax evaders include an array of government officials and rich families from the UK, Canada, U.S., India, Pakistan, Indonesia, Iran, China, Thailand and former Communist states.

The data seen by The Guardian shows that their secret companies are based mainly in the British Virgin Islands.

Sample offshore owners named in the leaked files include:

- Jean-Jacques Augier, Francois Hollande's 2012 election campaign co-treasurer, launched a Cayman Islands-based distributor in China with a 25% partner in a BVI company. Augier says his partner was Xi Shu, a Chinese businessman.

- Mongolia's former finance minister, Bayartsogt Sangajav, set up "Legend Plus Capital Ltd." with a Swiss bank account, while he served as finance minister of the impoverished state from 2008 to 2012. He says it was "a mistake" not to declare it, and says "I probably should consider resigning from my position".

- The president of Azerbajan and his family. A local construction magnate, Hassan Gozal, controls entities set up in the names of President Ilham Aliyev's two daughters.

- The wife of Russia's deputy prime minister, Olga Shuvalova's husband, businessman and politician Igor Shuvalov, has denied allegations of wrongdoing about her offshore interests.

- A senator's husband in Canada, lawyer Tony Merchant, deposited more than [U.S.] $800,000 into an offshore trust. He paid fees in cash and ordered written communications to be "kept to a minimum".

- A dictator's child in the Philippines: Maria Imelda Marcos Manotoc, a provincial governor, is the eldest daughter of former President Ferdinand Marcos, notorious for corruption.

- Spain's wealthiest art collector, Baroness Carmen Thyssen-Bornemisza, a former beauty queen and widow of a Thyssen steel billionaire, who uses offshore entities to buy pictures.

- U.S.: Offshore clients include Denise Rich, ex-wife of notorious oil trader Marc Rich, who was controversially pardoned by President Clinton on tax evasion charges. She put $144M into the Dry Trust, set up in the Cook Islands.

- It is estimated that up to $32 Trillion acquired by wealthy individuals could lie in offshore accounts. The UK-controlled BVI has been the most successful among the mushrooming secrecy havens that cater for them.

Chapter 8
Offshore Tax Evasion: Recent Cases

Two recent cases demonstrate the great risk attendant to the IRS Offshore Voluntary Disclosure Program (2012-forward) ("OVDP").

In the Bank Leumi case, dozens of U.S. taxpayers with accounts at Bank Leumi were in 2013 peremptorily disqualified from the IRS OVDP without explanation. The IRS has recently reversed this position and according to tax counsels have readmitted the disqualified U.S. taxpayers. Although the various tax counsels appear satisfied with the IRS reversal of position their "sighs of relief" fail to address the dangers of the OVDP:

1) As of the 2012 OVDP a 27 1/2% penalty based on the value of the undisclosed offshore assets (in addition to the original income tax due plus interest plus penalties of up to 70% of the tax due.)

2) Waiver of Constitutional Protections against: self-incrimination (5th amendment), unreasonable search and seizure (4th amendment), excessive fines (8th amendment).

These "trifecta" of constitutional protections disappear once a U.S. taxpayer enters the IRS OVDP disclosing: their names, social security numbers, undisclosed income, undisclosed assets, names of the advisors/colleagues/3rd parties who facilitated their "offshore tax evasion."

It is a risky strategy to voluntarily contact the IRS to disclose multiple tax crimes (felonies which if prosecuted may lead to over 25 years in jail with additional 20 year sentences for each instance of money laundering, wire fraud, mail fraud, total jail time over 85 years, if the prosecutor "throws the book" at the taxpayer. If you commit federal crimes, is it advisable to go to the U.S. Attorney to confess your crimes and beg for leniency? If not, then why confess federal tax crimes to the IRS (who may refer the case to the U.S. Attorney since the taxpayer's voluntary disclosure has neither transactional or use immunity).

In the case of Ty Warner (founder of Beanie Babies Toys), a member of the Forbes 400 Richest Americans, with an estimated $2.6 billion net worth), he entered the IRS OVDP only to be rejected (for unknown reasons).

The risk for Ty Warner is best exemplified by his recently disclosed IRS settlement $53 million for 2002 taxes (on unreported income from undisclosed UBS/Swiss Bank accounts). Ty Warner has agreed to pay $53million on an unreported $3.1 million in income which tax would have been $885k (nearly 60x the amount of the original tax due). In addition, he faces charges of criminal tax evasion, with up to a 5 year jail sentence (he awaits arraignment).

The $53 million in settlement was due to imposition of a 50% "FBAR" penalty on the $93 million he held in his UBS Swiss Bank account.

Conclusion

For those U.S. Taxpayers (income tax residents i.e. “green card holders,” “substantial presence test” i.e. 183 days in 1 year, 122 days per year over 3 years, or U.S. citizens), the days of “hiding assets” offshore are coming to an end.

In the case of Ty Warner, he has pleaded guilty to tax evasion and as of this writing is awaiting sentencing.

So as the expression goes, “What’s the end game?”

For those U.S. Taxpayers who are “tax cheats” with undisclosed offshore accounts, untaxed earnings and unreported income, if billionaires are not safe from the IRS, are you?

As Bob Dylan once said, “Its all over now, baby blue.”

About the Author

Gary S. Wolfe received his Juris Doctorate from Loyola Law School in 1982, where he was President of the Tax Law Society.

From 1982 through the present, Gary has been in private practice in Beverly Hills and Los Angeles.

Gary is an international tax attorney representing clients for IRS audits, international tax planning, and asset protection.

Previously, Gary was the managing partner of a tax and business law firm, which represented Fortune 500 companies (IBM, ITT) and financial institutions (Sterling Bank, First Charter Bank.) Gary now provides case management for international litigation. In 1997, Gary completed the Team Beverly Hills civic leadership training.

From 1997-1999 Gary was Vice-President and Member of the Board of Trustees of The Greystone Foundation, Beverly Hills, California.

From 1995-2001, Gary was the Chief Financial Officer and a Member of the Board of Directors of the Le Faubourg Honore Homeowners Association, Beverly Hills, California. Since 2004, Gary has been conducting private seminars throughout California on the IRS, International Tax and Asset Protection.

Gary is an international tax expert and a nationally published tax author. In 2013 he published articles in the ABA (ALI-CLE) publication: The Practical Tax Lawyer (Winter, 2013 Edition), “U.S. Tax Planning for Passive Investments,” (Spring 2013 Edition), “Why U.S. Tax Evasion is a Bad Idea (UBS/Wegelin Bank),” and in the Summer 2013 Edition he published 2 articles:

1) “International Tax Planning for U.S. Exports (IC-DISC)” (with Ryan Losi, CPA)

2) “International Tax Evasion, Money Laundering, and Other Crimes”

In the Autumn 2013 Edition of the ABA/The Practical Tax Lawyer he will be publishing 2 articles:

1) “EB-5 Visas (Immigrant Investor Visas)” (with Mark Ivener, Esq.)

2) “Offshore Hedge Funds and Reinsurance” (with Allen Walburn, Esq.)

Other Books by Gary S. Wolfe:

Asset Protection 2013: The Gathering Storm

Offshore Tax Evasion: IRS Offshore Voluntary Disclosure Program

Offshore Tax Evasion: IRS Tax Compliance FATCA/FBAR

For more information please see website:
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