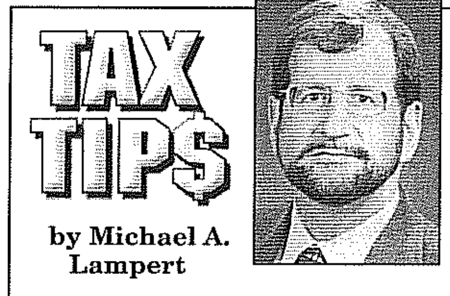
Offshore accounts, Treasury regs and other tips



by Michael A. Lampert

Tip #1: Offshore accounts/ voluntary disclosure

New FBAR form and filing procedures. In addition to whatever income tax return and schedules may need to be filed, clients with ownership or control of foreign financial accounts in the aggregate exceeding $10,000 must file an FBAR (Report of Foreign Bank and Financial Accounts) by June 30. There are no extensions. This form is not part of the income tax return, nor is it sent to the same address. In 2013 the Financial Crimes Enforcement Network (FinCEN) changed the FBAR form for 2014 (due this past June 30) and forward. The form number is now Form 114 (superseding form TD F 90-22.1). It is available only online. Tax preparers who are registered to file the form can still do so for their clients.

Change to the Offshore Voluntary Disclosure Program (OVDP). In the spring 2011 issue of *The Elder Law Advocate*, I discussed the requirements for reporting ownership or control of foreign financial accounts, the increased enforcement by the United States and many foreign governments and the programs to voluntarily disclose previously unreported accounts if you were not already discovered. The current version of the OVDP, in most cases, is to obtain a criminal clearance, file eight years of amended returns, pay the additional tax, plus interest and regular (domestic) penalty, and pay a composite offshore penalty of 27.5 percent (up from 25 percent in 2011) of the highest offshore balance during the eight years. For many clients this was and is a great deal, allowing them to avoid criminal prosecution, to have reasonable certainty of the result and to pay a much lower penalty than the law allows. For some clients, however, the 27.5 percent penalty was unduly harsh and perhaps even discouraged them from coming forward.

Recently the IRS announced a revised, streamlined program requiring only three years of amended returns and six years of FBARs with a composite offshore penalty of 5 percent of the highest year-end balance. However, the taxpayer must certify that non-compliance was due to non-willful conduct. The challenge is determining what is non-willful (including willful blindness), keeping in mind that there is not only the risk of audit with the streamlined program, but there is also no criminal prosecution clearance. This means that if the IRS disagrees that the client was non-willful, the client is at risk of not only a much higher penalty (and more years of amended tax returns, interest and penalty), but the client is also at risk for criminal prosecution. To make matters worse, because there is no criminal preclearance, if the case turns criminal, the client has admitted to the actions and has provided evidence! As an added incentive to enter more promptly either the streamlined or "regular" OVDP program, the penalty rises to 50 percent if the foreign financial institution is included on a list issued by the IRS (basically once a foreign financial institution exchanges significant information with the IRS). That list is growing rapidly.

It is especially important that these cases be carefully reviewed. In addition to evaluating the eligibility for and the benefits and risks of the streamlined program, the regular OVDP is still available with some protection against criminal prosecution. In addition, current cases need to be carefully reviewed to see if they can or should utilize the new guidelines.

I continue to see cases from elder lawyers and elder clients. In some of these cases, the client still is too scared to address the situation or even disclose it to the attorney. While there are different ways to handle these cases, with the geometrically increasing information exchange by foreign financial institutions and governments with the IRS, the net, with its potentially onerous penalties, is tightening.

Tip #2: Circular 230 final regulations issued—finally!

In September 2012, the Treasury issued proposed changes to Circular 230, the rules governing practice before the IRS. Final regulations were finally issued, effective June 12, 2014.

There were changes and clarification in multiple areas. They include:

Negotiation of taxpayer checks. Circular 230 prohibits tax preparers/ practitioners from negotiating taxpayer checks. The Service clarified that this prohibition does not apply to an individual acting solely in the capacity of a trustee of a trust or an administrator/executor of an estate because that person is acting as the taxpayer, not as the taxpayer's representative. This clarification does not help elder law attorneys acting in dual capacities if they are acting as tax practitioners.

General standards of competence. The final regulations clarify that competence requires the "appropriate level of" knowledge, skill, thoroughness and preparation necessary for the matter in which the practitioner is engaged.

It was noted that the competence standard does not apply to actions that are outside the scope of Circular 230. There is only one competency standard under Circular 230, and the same standard applies to all practitioners, regardless of the practitioner's status as an attorney, CPA, enrolled agent or other practitioner. The competency standard in Circular 230 is nearly identical to the standard in the Model Rules of Professional Conduct for attorneys, but unlike the Model Rules, it applies to all individuals subject to Circular 230, not just attorneys.

General Circular 230 compliance. Practitioners before the IRS are subject

to discipline for violations of all aspects of Circular 230. This includes meeting the practitioners' own tax filings and tax payments. In my own tax controversy practice, I see attorneys who have not filed multiple years of required business and personal tax returns and that have not paid the tax due.

Reliance on other professionals. Practitioners may reasonably rely on other professionals. However, such reliance is prohibited when the practitioner knows or reasonably should know that the other person is not competent or lacks the qualifications to provide the advice. Likewise, reliance is not reasonable when the other person has a conflict of interest. This provision is very helpful for elder lawyers addressing tax issues who obtain assistance from qualified tax attorneys, CPAs, appraisers and the like.

Written advice and email footers. Perhaps the most well known and anticipated changes were to the written advice rules. The new regulations remove the separate provision for covered opinions (tax shelter type opinions).

Now there is one rule for written advice. Gone are the technical requirements of what must be in the written advice that caused attorneys to avoid anything tax related, even if the attorney was qualified to deal with the issue. The new rule states that the scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other appropriate facts and circumstances, are factors in determining the extent to which the relevant facts, application of the law to those facts and the practitioner's conclusion with respect to the law and the facts must be set forth in the written advice. The practitioner may consider these factors in determining the scope of the written advice. Further, the determination of whether a practitioner has failed to comply with the requirements of Circular 230 will be based on all facts and circumstances, not on whether each requirement is addressed in the written advice.

The operative provision is reasonable. This is a big change and makes it easier and more reasonable to issue advice on tax matters. For example, an elder lawyer can explain in a small estate the step up (or down) of basis at death rule without writing a lengthy "tax opinion" and without saying that the client cannot rely on the very advise for which the client is paying.

The IRS also has been urging practitioners to remove the "pursuant to Circular 230" notice on emails. The IRS and senior representatives of the Office of Professional Responsibility have stated that not only is the notice not necessary, it is not even accurate.

The Service also made clear that written advice does not include continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on federal tax matters, such as presentations at tax professional organization meetings. Including contact information on a continuing education presentation provided solely for the purpose of enhancing professional knowledge, without more, does not convert an educational presentation into an item of written tax advice governed by the final regulations. However, presentations marketing or promoting transactions will not be considered to be provided solely for the purpose of enhancing practitioners' professional knowledge on federal tax matters.

So, get the Circular 230 email disclaimers off your emails!

Tip #3: Report name change before client files taxes

Did your client change names? Did your client's dependent have a name change? If the answer to either question is yes, be sure your client notifies the Social Security Administration (SSA) before filing a tax return with the IRS (but don't file late!).

This is important because the name on the tax return must match SSA records. If the names do not match, the taxpayer is likely to get a letter from the IRS about the mismatch. And if the taxpayer expects a refund, this may delay when he or she will get it. Be sure to have your client contact SSA if:

- He or she got married or divorced and changed names.
- A dependent your client claims had a name change. For example, this would apply if your client adopted a child and that child's last name changed.

File Form SS-5, Application for a Social Security Card, with the SSA to let the agency know about a name change. You can get the form on SSA.gov, by calling 800/772-1213 or at an SSA office. Form SS-5 can be filed at an SSA office or by mail. The new card will have the same social security number (SSN) as before but will show the new name.

If your client has an adopted child who does not have a SSN, use a temporary adoption taxpayer identification number (ATIN) on your client's tax form. Your client can apply for an ATIN by filing Form W-7A, Application for Taxpayer Identification Number for Pending U.S. Adoptions, with the IRS. Get the form on IRS.gov or by calling 800-TAX-FORM (800/829-3676).

Tip #4: Medical care and marijuana

With the increase in state-level medical marijuana legalization across the country and even in Florida to some extent, there are many legal, tax and ethical issues faced by lawyers when representing clients in this area. (I have an overview outline available upon request.) There is one tax aspect that may be of particular application to elder lawyers.

Subject to certain limitations and after meeting certain thresholds, medical expenses for medical care are income tax deductible. To summarize Internal Revenue Regulation § 1.213-1, the term "medical care" includes the diagnosing care, mitigation, treating or preventing of disease. However, the regulation continues by stating "amounts expended for illegal operations or treatments are not deductible." While medical marijuana may be legal in many states, it is still a Schedule 1 drug and, therefore, illegal federally. This makes the cost, at least for now, not deductible at the federal level.

Michael A. Lampert, Esq., *is a board certified tax lawyer and past chair of The Florida Bar Tax Section. He regularly handles federal and state tax controversy matters, as well as exempt organizations and estate planning and administration.*