ABA Section of Taxation
2014 May Meeting

Civil & Criminal Tax Penalties

May 10, 2014

Panel

- **Mr. Ian M. Comisky**, Partner, Blank Rome LLP, Philadelphia, PA

- **Mr. Robert S. Fink**, Partner, Kostelanetz & Fink, LLP, New York, NY

- **Mr. Larry A. Campagna**, Shareholder, Chamberlain, Hrdlicka, White, Williams, & Aughtry, Houston, TX

- **Ms. Paula Junghans**, Partner, Zuckerman Spaeder, LLP and former Assistant Attorney General, U.S. Department of Justice, Tax Division, Washington, D.C.

- **Mr. Nathan Hochman**, Partner, Bingham McCutchen, LLP and former Assistant Attorney General, U.S. Department of Justice, Tax Division, Los Angeles, CA

- **Mr. Bruce Zagaris**, Partner, Berliner, Corcoran & Rowe, LLP, Washington, D.C.
Problem 1

You are sitting in your office on a bright, sunny day lamenting the fact that the U.S. offshore voluntary disclosure program is in its third iteration and clients are not coming in like they used to. There is a knock at your door (this attorney has walk-in hours from 7 a.m. to 9 p.m. on Wednesdays). A potential client, a nice young man, introduces himself and states that you were recommended highly. He proceeds to describe himself as a U.S. citizen who has been living outside the United States and who operates several businesses. He informs you that he is married and has two wonderful children. He states that he never filed accurate U.S. returns and has never filed any other reporting forms that may have been due to the U.S. He also informs you that he was told recently by his bank of something new called FATCA and he needs advice on what to do with his money.
Questions

A. Can you represent him?

B. Do you need additional information before you can accept the engagement?
Problem 2

You determine to accept the engagement for the client who asks you, as a first step, to contact the foreign bank. You do so and you are put in touch with the compliance officer for the bank who informs you that the bank is debating about whether to register as something called a Foreign Financial Institution (“FFI”), or instead to just “officially abandon” any U.S. customer or any U.S. owned entity and exclude them as customers from the bank.
Questions

A. What are the advantages to the bank of registering as an FFI?

B. What are the disadvantages to the bank in registering as an FFI?

C. May you offer suggestions to the banker about whether or not to register?
Problem 3

The client returns to you a month later and informs you that the bank has tentatively decided to register as an FFI. The bank has informed the client that starting July 2014, they will have an obligation to turn over certain information with respect to U.S. customers and U.S. owned entities and U.S. owned trusts. The client asks you for advice with respect to his offshore accounts and where he should move his funds.
Problem 4

Unhappy with the initial advice provided by the U.S. attorney, the client next directly contacts the compliance officer of the foreign bank. The compliance officer sends him to an attorney offshore who states that all accounts should be closed before June 30, 2014, the money given to a non-U.S. person and states that the money can be returned by the non-U.S. person after July 1, 2014 with the client filing a U.S. gift tax type reporting form known as a Form 3520. The client returns to the bank and the compliance officer responds that as long as the accounts are closed and new accounts opened after July 1, 2014, it would not “affect” the bank.
Questions

A. Was this the proper advice for the attorney to give?

B. Was this proper advice for the compliance officer to give?

C. If the general counsel for the bank learned of this response by his compliance officer, what would be his obligations?

D. Does the general counsel need to consult an outside counsel for the bank knowledgeable in FATCA or other U.S. law?

E. Has the banker jeopardized the bank irreparably?
Problem 5

The client then returns to his U.S. lawyer and states that the foreign located U.S. lawyer has provided this advice to him and it sounded just fine to him but he wanted your opinion before proceeding.

A. Do you continue with the client?

B. What advice may you give the client?

C. Do the wife and the children need separate counsel?
Problem 6

The client then contacts you the next week and says that he has now heard again from the foreign bank and its compliance officer. The bank apparently has now decided not to opt into FATCA and not to be considered a registered FFI. The bank has told the client that as a non-registered FFI “no one will ever know,” and the bank will never reveal the true nature of his accounts. The client informs you that the bank has, in turn, informed him that if he needs money from the account, the bank will arrange to provide checks out of a correspondent bank account that the bank maintains at another foreign bank which in turn has a correspondent account with a U.S. banking institution.
Questions

A. What advice do you give your client with respect to keeping his funds in the non-registered foreign bank?

B. May you give advice to the wife? What advice should the wife’s counsel provide to her?

C. If you represent a foreign bank as outside counsel, what advice do you give to the foreign bank and what risks are they running with their proposed course of conduct?

D. If you are the compliance officer for the U.S. correspondent bank, what are your obligations and what issues arise for the U.S. bank?
Problem 7

The client returns the next week and informs you that he has received a call from the foreign bank that all of its assets in the domestic correspondent account have been frozen.

A. What can the domestic attorney do now?

B. What does counsel for the U.S. bank do now?

C. What does counsel for the foreign bank do now?