What's Your Client's Criminal Exposure on His Undeclared Foreign Bank Account?

By Edward Robbins, Jr., Steven Toscher and Dennis Perez

Edward Robbins, Jr., Steven Toscher and Dennis Perez provide guidance to evaluate a taxpayer's criminal exposure on his or her undeclared foreign bank account or foreign assets.

> I don't know why I'm coming into this program. I know 200 people here in town with foreign accounts like mine, and they're not coming in.
>
> — Conflicted taxpayer upon entering the 2012 OVDI Program

This taxpayer was exaggerating, but he likely knows 20 similarly situated taxpayers who have elected to wait out the IRS.[1] So who is making the smart move? Below, we attempt to give the practitioner some guidance to evaluate such a taxpayer's real world criminal tax exposure, given the taxpayer's particular facts, and whether that exposure justifies going into the 2012 OVDI to eliminate that criminal exposure.

Background

On January 9, 2012, the IRS announced its third amnesty program called the 2012 Offshore Voluntary Disclosure Program (2012 OVDP). The IRS reported collecting more than $4.4 billion from the two previous international amnesty programs, the 2009 Offshore Voluntary Disclosure Program (2009 OVDP) and 2011 Offshore Voluntary Disclosure Initiative (2011 OVDI). In all, the IRS received 33,000 voluntary disclosures from the 2009 OVDP and 2011 OVDI, which closed on September 9, 2011. The 2012 OVDI has attracted hundreds of additional taxpayers coming forward to get their "stay out of jail card" in exchange for paying taxes and interest and some rather draconian civil penalties. The requirements of the 2012 OVDI program are similar to the earlier two programs, just more expensive.[2] In a nutshell, the 2012 OVDP provides:

1. A penalty framework requiring taxpayers to pay a penalty of 27.5 percent of the highest aggregate balance in the foreign bank accounts during the eight full tax years prior to the disclosure (the "foreign bank account penalty"). In addition, the penalty base is increased by the value of the taxpayer's foreign assets involved in any way in tax non-compliance (the "foreign asset penalty").[3] That is up from 25 percent in the 2011 OVDI, and 20 percent in the 2009 OVDP.
2. The taxpayers must file all original and amended tax returns and include payment of back-taxes and a 20-percent accuracy related penalty on the additional taxes, plus interest on the back taxes and penalties. Needless to say, the amended returns must be complete and accurate, so beyond reporting the foreign accounts and assets, the taxpayer must straighten out any other tax non-compliance on the original tax returns.[4]
3. As under the prior programs, taxpayers who feel the penalty is disproportionate may opt instead

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to be examined by the IRS. A non-willful foreign bank account violation penalty is $10,000 per year and not a percentage of the unreported amount but can only be achieved by the taxpayer opting out and exposing himself to a higher penalty which could go as high as 50 percent per year. Note that there is no mechanism for the IRS to enforce its "foreign asset penalty," absent the taxpayer's consent under the OVDP.

A taxpayer with undisclosed foreign bank accounts/ assets having no need for a "stay out of jail card" would want to enter the program only if he concluded that the civil settlement under the 2012 OVDP was attractive. While there are many situations in which this would be the case, the most important reason to enter the program is the amnesty from criminal prosecution afforded by the 2012 OVDP. Which brings us to the topic of this article: What's your client's criminal exposure on her undeclared foreign bank account or foreign assets?

The Three Tax Crimes the Prosecutors Are Looking For

Attorney Jack Townsend has created a handy summary of the offshore bank tax prosecutions, to date.[5] The government has used one or more of the following three tax charges in approximately one hundred offshore bank tax prosecutions. The elements of the three criminal tax offenses used by the government may be found in the likely jury instructions for these crimes:

Filing a False Tax Return

JURY INSTRUCTIONS

FILING FALSE TAX RETURN

(Code Sec. 7206(1)[6]

The defendant is charged in the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

- First, the defendant made and signed a tax return for the year [ ] that he knew contained false information as to a material matter;
- Second, the return contained a written declaration that it was being signed subject to the penalties of perjury; and
- Third, in filing the false tax return, the defendant acted willfully.

Willful Failure to File an FBAR

JURY INSTRUCTIONS

WILLFUL FAILURE TO FILE AN FBAR

(31 USC §§ 5314 and 5322(a) and 31 CFR §1010.350 (formerly 103.24)[7]

The defendant is charged in the indictment with willful failure to file a Report of Foreign Bank Account and Financial Accounts ("FBAR") (Form TD F 90-22.1) with the Department of the Treasury, in violation Sections 5314 and 5322(a) of Title 31, and Title 31 Code of Federal Regulations, Section 1010.350. In order for the defendant to be found guilty of this offense, the government must prove each of the following elements beyond a reasonable doubt:

- First, the defendant was a United States person;
- Second, the defendant had a financial interest in or signature or other authority over any foreign financial accounts, including bank, securities, or other types of financial accounts, in a foreign country;
- Third, the aggregate value of these financial accounts exceeded $10,000 at any time during the calendar year; and
- Fourth, the defendant willfully failed to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR").

Klein Conspiracy

JURY INSTRUCTIONS

KLEIN CONSPIRACY

(18 USC §371)[8]

The defendant is charged in the indictment with conspiracy to defraud the Internal Revenue Service. In order for the defendant to be found guilty of this conspiracy, the government must prove each of the following elements beyond a reasonable doubt:

- First, [beginning on or about _____ and ending on or about ______] there was an agreement between two or more persons to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department, by deceit, craft, trickery, or means that are dishonest, in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes;

- Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
- Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

General Observations About These Three Tax Crimes

Criminal tax fraud cases differ from other criminal cases and from civil tax cases. In a conventional criminal case, the existence of the crime is usually a foregone conclusion: A bank has been robbed or someone has been stabbed. The government need only prove who did it. In a criminal tax case, the government faces the difficult task of proving the existence of the tax crime, which always turns on the defendant's subjective intent or knowledge. Criminal tax cases also differ from civil tax cases. In civil tax cases, the government and the taxpayer argue over money or technicalities. In a criminal tax case, the government publicly accuses the defendant of committing a crime, with the possibility of time in prison. A key distinction between civil and criminal fraud lies in the burden of proof. In a criminal case, as shown in the jury instructions above, the prosecution must prove each element of the crime beyond a reasonable doubt; a difficult standard to meet. Prosecutors find criminal tax fraud cases difficult to prove. However, once the government goes through the monumental effort to put a tax case together, the case becomes difficult to defend.

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Criminal Tax Deficiency

The most important factor in any criminal tax case is a criminal tax deficiency, that is, an additional tax due and owing. This is so, even though the law does not include a tax deficiency a necessary element of the three tax crimes discussed here. Only tax evasion, found at Code Sec. 7201, has a tax deficiency as an element of the crime. To date, the government has not used this charge in the foreign bank prosecutions.

The tax charge they use, Code Sec. 7206(1) (signing a false return), simply requires that the false item on the return be material. The jury must decide whether any alleged false statement was material as the indictment uses that word. The law deems a statement on a tax return as material if it is necessary for a correct computation of the tax due or if it has a natural tendency to influence or impede the IRS in ascertaining the correctness of the tax declared or in verifying or auditing the taxpayer's returns. In theory, a material false statement could have no effect on the calculation of the tax liability, as when a taxpayer lies about whether he or she has signature authority over a foreign bank account. Indeed, a violation of Code Sec. 7206(1) could theoretically even involve an over reporting of income and tax, because the crime entails a false statement on the return.

Although, the Klein conspiracy and the willful failure to file an FBAR do not require a criminal tax deficiency, for obvious reasons, the government usually does not prosecute a taxpayer unless it has evidence of a substantial criminal tax deficiency sufficient to put the taxpayer in jail. The unofficial rule of thumb is a $40,000 criminal tax deficiency total for all years being prosecuted. With a $40,000 tax loss, the defendant faces jail time, even if he or she pleads guilty.[9]

Criminal Intent

The second key element in a tax crime is the intent of the defendant. In practice, it is unusual for the prosecutor to have direct evidence of a tax defendant's willfulness. Rather, the prosecutor must prove willfulness indirectly, by pointing to specific instances of the taxpayer's behavior indicating willfulness. These specific instances are commonly referred to as "badges of fraud." Ultimately the jury will be asked to look into the mind of the taxpayer to determine whether the taxpayer intentionally violated the applicable criminal statute, which is referred to in criminal tax parlance as, "a known legal duty." If the government can show the jury enough "badges of fraud," the taxpayer's criminal intent can be demonstrated circumstantially. A badge of fraud, by itself, can be an innocent error or an anomalous legitimate transaction. However, when there is a frequency or pattern in the occurrence of a badge of fraud, or when combined with a number of other badges of fraud, there is circumstantial evidence of "tax fraud."

Note that Code Sec. 7206(1) and 31 USC §§ 5314 and 5322(a) relating to the willful failure to file an FBAR both include the element of "willfulness." Willfulness has been defined by the courts in criminal tax cases as a "voluntary, intentional violation of a known legal duty."[10] The Ninth Circuit has explained that "[w]illfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."[11] In a criminal FBAR case, *Sturman,* the Sixth Circuit applied the tax law definition of willfulness in determining whether a defendant violated the FBAR reporting requirements, holding that the "test for statutory willfulness is voluntary, intentional violation of a known legal duty."[12] The IRS's interpretation of willfulness in the Internal Revenue Manual suggests that "willful" carries the same meaning in the FBAR context as in the criminal tax context. It states that for application of the FBAR willfulness penalty, "the test for willfulness is whether there was a voluntary, intentional violation of a known legal duty."[13] It explains that willfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements.[14]

The Klein conspiracy does not have a similar willfulness element. Rather, all the Klein conspiracy requires is that the taxpayer intentionally enter the conspiracy and utilize deceit, craft or trickery, or at least by means that are dishonest.[15] The taxpayer does not have to know that he has a legal duty not to defraud the IRS, but the taxpayer does need to act dishonestly. In this sense, the Klein conspiracy may be easier for the government to prove than the other two crimes because of the vagueness of what constitutes a Klein conspiracy.

The Remaining Elements of These Crimes

The remaining elements of these three crimes are mostly "no brainers" for the prosecutors to prove. For example, to prove that the taxpayer made and signed a return, the prosecutor need only point to what appears to be the taxpayer's signature on the return and cite Code Sec. 6064, which provides that the fact that an individual's name is signed to a return is *prima facie* evidence for all purposes that the return was actually signed by him. Similarly, to prove that return contained a written declaration that it was being signed subject to the penalties of perjury, the prosecutor need only point to the jurat on a return beneath the signature space stating that the taxpayer is signing the return under penalty of perjury.[16]

Shorthand Formula for a Criminal Offshore Bank Account Tax Case

Thus, a criminal offshore bank tax fraud case focuses on two critical factors:

1. A substantial criminal tax deficiency; and
2. The badges of fraud, *i.e.*, provable acts of concealment usually (but not always) concerning the non-reporting of the foreign bank account.[17]

The criminal tax case becomes stronger for the government as the tax deficiency increases and becomes more evident. The government's criminal tax case also strengthens with the number of badges of fraud it can prove.

Government's Standard of Review for a Criminal Tax Case

The standard underlying review of criminal tax matters for the U.S. Department of Justice, Tax Division to authorize prosecution, requires that the government:

1. Have evidence supporting a *prima facie* case; and
2. Have a reasonable probability of conviction. [18]

The standard is a trial standard. The entire case is investigated, reviewed and processed with a view toward winning a conviction at trial. If the government has a *prima facie* case, that is, minimal evidence supporting a jury's findings on each element of the crime, then the government would survive the taxpayer's motion to dismiss, and the case would proceed to the jury.[19] Then, if there is a reasonable probability that the government prosecutor's closing argument will persuade the jury to convict, the prosecution will be authorized.

Application of the Shorthand Formula to a Typical Offshore Bank Case

Assume a basic undisclosed foreign bank case.

1. Taxpayer has a successful business with a history of filing individual income tax returns.
2. Taxpayer is the owner of and signatory on an undisclosed foreign bank account which he inherited from his father 10 years earlier. Money in the account originally came from the father's liquidating of his foreign assets over a number of years. The account now contains approximately $1 million and earns interest at the average rate of two percent.
3. Taxpayer has never deposited or withdrawn any significant money from the account.
4. Taxpayer receives no statements on the account per his father's arrangement with the foreign bank, but the taxpayer has visited the foreign bank, from time to time, when he was in Switzerland, to review the statements for his account and to withdraw small amounts of spending money for dinner, wine and hotel.
5. Taxpayer timely files his individual income tax returns without disclosing the bank or the interest earned on the account on Schedule B. Taxpayer checks the box on Schedule B "no" where it asks if he has a foreign bank account. Taxpayer does not identify Switzerland as the location of his foreign bank account. Taxpayer has never filed an FBAR.
6. The government has all of the taxpayer's records pertaining to his foreign bank account, and the government has the taxpayer's original individual income tax returns for the last 10 years. The IRS supplied the government with a certified certificate of non-filing of the FBAR for the taxpayer.

Question: How attractive is this case for criminal prosecution?

- Substantial Criminal Tax Deficiency: The government appears to easily satisfy this factor of our shorthand formula. The bank records will prove two percent unreported interest income every year on a $1 million deposit. That is $20K per year over 10 years or $200K unreported income. At 35 percent, the taxpayer has a $70K tax deficiency. In states having a state income tax, if the prosecutors want to be real aggressive, they can increase this criminal tax deficiency with the state tax loss.[20] In another unpleasant twist to these cases, the USSG provides for a two point enhancement where foreign bank accounts are used in the tax fraud.[21] These two points have the effect of increasing the criminal offense level by the equivalent of doubling the tax loss.[22]
- Badges of Fraud:[23] Turning to our second and last factor, the government appears to easily satisfy this factor of our shorthand formula—at least on its face. The government can argue that:
  1. The taxpayer lied when he signed his return under penalty of perjury that it was true and correct.
  2. The taxpayer lied when he failed to report on Schedule B that he had interest income from a foreign bank account.
  3. The taxpayer lied when he checked the box "no" on Schedule B, failing to disclose that he had a foreign bank account.
  4. The taxpayer lied when he failed to disclose on Schedule B, the foreign country where his foreign bank account was located.
  5. The taxpayer intentionally failed to file the FBAR, even though he was required to file.
  6. The taxpayer knew he was required to file an FBAR, because he was alerted to the FBAR requirement by the information on Schedule B.
  7. The taxpayer concealed $1 million in income producing assets and over $70K in unreported income from the IRS by hiding the assets and the income in a secret bank account.
  8. The taxpayer never told his tax return preparer about his secret foreign bank account.
  9. The taxpayer never sought any independent legal advice about how he should properly handle his secret foreign bank account.

To get an idea of how the above badges of fraud could be presented at trial, imagine your client taking the stand and being subjected to a 30-minute cross examination on these issues by a skilled prosecutor. It would not be pretty. So how do you know criminal tax fraud in these undisclosed foreign bank cases when you see it? It is criminal tax fraud if the taxpayer has given the government enough of the "badges of fraud" so that the prosecutor can look the jury in the eye and argue that this erroneous item on the tax return, which in other circumstances might well just lead to a civil adjustment, is the result of fraudulent intent.

We should point out that this case can get a lot worse for this taxpayer with the addition of just a few more unfavorable facts:

1. The taxpayer maintained his account in the name of a shell foreign corporation or foreign trust.
2. The taxpayer, with the collusion of the foreign bank, held the account in the name of an imaginary person or entity.
3. The taxpayer, with the collusion of the foreign bank, set up a standby letter of credit or some other similar loan arrangement with the U.S. branch of the foreign bank so the taxpayer could, in effect, use the money in his foreign bank account as collateral for a loan without bringing it into the United States.
4. The taxpayer told the foreign bank to hold his bank statements and not send them to him in the United States.
5. The taxpayer skimmed taxable income off his business and sent it to the foreign account without reporting it to the IRS.
6. The taxpayer survived an earlier IRS civil examination by lying to the IRS about his foreign bank account.

The list goes on. The point is that, in the hierarchy of criminal tax cases, these unreported foreign bank cases are relatively easy to prosecute. The tax returns and the bank records, without further evidence, go a long way to providing the government with a substantial criminal tax number and numerous badges of fraud.

The Taxpayer's Audit Lottery Argument: The Government Will Never Get To Me

Too many taxpayers believe that the government will never get to them, either because the government will never find out about the taxpayer or they will never be able to prove the case—or even if the government does find out, they will be able to escape unscathed. Given the limited resources the government employs to detect and prosecute tax crimes, that belief may be rational, but it is very dangerous.

But why would a taxpayer risk his or her freedom and financial life and play such a dangerous lottery, especially where the government has offered a way out under its OVDI program—a painful way out, yes—but certainly more palatable than a criminal prosecution and possible conviction and incarceration. The argument becomes even less rational when you realize the additional governmental resources being devoted to international tax compliance and the additional tools being developed and employed every day, which make the chance of detection and prosecution more real.

Taxpayers who think they can wait until they hear the IRS getting closer to their bank may fall into the same trap that the holders of UBS foreign bank accounts did in 2009. These UBS customers were told over and over again by the Swiss bankers, "Don't worry. Swiss bank secrecy is impenetrable. The U.S. government will never be able to obtain the information." And they never did, until UBS decided it needed to save its own corporate life and turned over the names and bank account information of thousands of U.S. taxpayers.

The waiting game is a dangerous one to play. The Assistant Attorney General of the Tax Division of the Department of Justice recently publicly stated that taxpayers waiting for some advance warning that the IRS was getting close to their bank to come forward could very well be *too late*. The Department of Justice is working on investigations regarding foreign banks which are not yet public, and when it becomes public, it may be too late for a taxpayer to take advantage of the voluntary disclosure policy.[24]

Endnotes

[1] Maybe this reflects the difference between the $100 billion annual loss estimated by U.S. the Senate and the $4.4 billion actually collected under the 2011 OVDI and 2009 OVDP. *See* U.S. Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Tax Haven Banks and U.S. Tax Compliance, Staff Report (July 17, 2008). The Report cites several studies by tax experts to support the $100 annual billion tax gap.

[2] Details of the 2012 OVDP are at www.irs.gov/uac/2012-Offshore-Voluntary-Disclosure-Program.

[3] For example, if the taxpayer owns an income producing apartment in Paris worth $20 million and fails to report that enterprise to the IRS, the penalty base is increased by $20 million.

[4] Taxpayers whose off-shore accounts or assets do not surpass $75,000 in a calendar year covered by the new OVDI will qualify for a lower rate penalty. A few taxpayers will be eligible for five percent or 12.5 percent penalties; these remain the same in the new program as in the 2011 OVDI.

[5] See http://federaltaxcrimes.blogspot.com/p/offshore-charges-convictions.html.

[6] Code Sec. 7206(1)—Fraud and False Statement

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return ... which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be guilty of be guilty of [an offense against the United States].

[7] Title 31, United States Code, Section 5314 states as follows:

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial

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agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the. legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe —

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

Title 31, United States Code, Section 5322(a) states as follows:

A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

Title 31, Code of Federal Regulations, Section 1010.350 states as follows:

Each United States person having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Commissioner of the Internal Revenue for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons.

[8] 18 USC §371—Conspiracy to Defraud the United States (Klein Conspiracy). If two or more persons conspire ... to defraud the United States ... 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 guilty of [an offense against the United States].

[9] *See* United States Sentencing Commission, Guidelines Manual (USSG), Part T—Offenses Involving Taxation and the Sentencing Table (2012).

[10] *J.L. Cheek,* SCt, 91-1 USTC ¶50,012, 498 US 192, 111 SCt 604; *P. Pomponio, rev'g and rem'g CA per curiam*, SCt, 76-2 USTC ¶9695, 429 US 10; *C.J. Bishop,* SCt, 73-1 USTC ¶9459, 412 US 346, 93 SCt 2008.

[11] *J.R. Bishop,* CA-9, 2002-2 USTC ¶50,488, 291 F3d 1100.

[12] *D.A. Sturman*, CA-6, 951 F2d 1466, 1476 (1991) (internal quotation marks omitted).

[13] IRM 4.26.16.4.5.3 at ¶ 1 (July 1, 2008).

[14] IRM 4.26.16.4.5.3 at ¶ 5 (July 1, 2008).

[15] *P.S. Caldwell*, CA-9, 989 F2d 1056 (1993).

[16] Although with the widespread electronic filing of tax returns there are a number of unanswered questions here.

[17] It is theoretically possible for the government to prosecute these three crimes without a tax deficiency. However, in the unreported foreign bank cases, it would be the unusual case where the government would do so.

[18] The standards underlying review of criminal tax matters for authorization of prosecution are set forth in the *Principles of Federal Prosecution* and require evidence supporting a *prima facie* case and a reasonable probability of conviction. *See* USAM 9-27.220. Note the standard is "reasonable probability," not a "substantial" or "significant," or "more likely than not" probability, rather a "reasonable probability."

[19] See Federal Rule of Criminal Procedure, Rule 29.

[20] State tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG §1B1.3 and may be included in the calculation of the base offense level in appropriate cases. *Inclusion of State Tax Loss in Tax Loss Computation for Federal Tax Offenses under the Sentencing Guidelines* (12/4/98), Memo from AAG (Tax) to all federal prosecutors

[21] USSG §2T1.1, note 4.

[22] *See* Tax Table at USSG §2T4.1.

[23] In a Code Sec. 7201 tax evasion case, the Supreme Court gave us the classic list of badges of fraud: keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. *M.R. Spies*, SCt, 43-1 USTC ¶9243, 317 US 492, 63 SCt 364. Former IRM 940 still contains the most complete and useful summary of the badges of fraud. The badges from IRM 940 pertinent to our undeclared foreign bank case are:

(1)Omitting specific items of income when similar items are included, for example, reporting a $50 dividend from XYZ Corp., but failing to report a $1,000 dividend from ABC Corp.

(2)Omitting entire sources of income, for example, working as a bartender for the entire year, but failing to report any income derived from tips.

(3)Making unexplained deposits in the taxpayer 's bank account, for example, reporting total gross receipts of $50,000 to the IRS, but having deposits totaling $100,000.

(6)Concealing bank accounts and other property, for example, putting bank accounts and other property in the name of corporations that are mere shells, or in the names of minor children.

(7)Repeatedly failing to deposit receipts to taxpayer 's business account even though that is contrary to normal practices in the industry, for example, owning a vending machine business and failing to deposit all of the receipts in the bank account.

(8)Failing to file a tax return for several years although substantial amounts of taxable income were received.

(9)Covering up sources of income by false description of the source.

(14) Keeping two or more sets of books or no books.

(15) Making false entries or alterations on the books and records, backdating documents, or preparing false invoices.

(16) Failing to keep adequate records, especially if put on notice by the IRS as a result of a prior audit.

(17) Concealing records or refusing to make certain records available.

(21) Attempting to hinder an examination of the taxpayer, for example, failing to answer pertinent questions or repeatedly canceling appointments. (The practitioner may also wear this badge.)

(22) Destroying books and records, especially after an examination was started and without a plausible explanation of the reason for destruction.

(23) Diverting a portion of business income into a personal bank account.

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(24) Exhibiting a lack of cooperation.
(25) Too quickly agreeing (in person or through the practitioner) to adjustments and showing undue concern about immediate closing of the case.
(28) Altering records.

[24] See 2012 TNT 205-1 *Some Offshore Account Information Uncovered by DOJ Not Yet Made Public* (10/23/2012); TMP, Tax Crimes, No. 636-3rd at ¶ IV.E; FATCA, Code Secs. 1471-1474.