

SHOULD NONSIGNING TAXRETURN PREPARER RULES BE APPLIED TO TAX HAVEN BANKS?

*James D. Taylor, Economics/Accounting, Claremont McKenna College,
500 E. 9th St, Claremont, Ca. 91711, 909-607-3455, jtaylor@cmc.edu*

In June 2008, former UBS AG employee Bradley Birkenfeld pled guilty to conspiracy to assist Igor Olenicoff, a California billionaire real estate developer, to evade U.S. tax by concealing \$200 million in undisclosed accounts in Switzerland and Liechtenstein. Birkenfeld told prosecutors that UBS and many of its U.S. clients conspired to avoid disclosure of information reporting on the income from their Swiss accounts. These accounts amounted to approximately \$100 billion in assets and generated approximately \$1 billion per year in revenue for the bank. Even though Mr. Birkenfeld cooperated with federal prosecutors, on August 21, 2009 he was sentenced to forty months in federal prison for his role in the pervasive tax fraud. His time in prison, however, might be a small price to pay for the eventual millions he stands to collect from the various whistleblower provisions provided by federal statute.

The investigation resulting from Birkenfeld's initial disclosure culminated in February 2009 with a deferred prosecution agreement by UBS when it admitted to a single count of conspiracy to impede or defraud the Internal Revenue Service. The Swiss bank agreed to stop servicing U.S. clients with undeclared accounts and agreed to pay \$780 million in fines, penalties, interest and restitution. The criminal complaint alleged that roughly 60 Swiss bankers traveled to the U.S. on a frequent basis during 2004 to service U.S. clients with assets worth \$100 billion on deposit in Switzerland with UBS. The Swiss bankers advised their U.S. customers on how to structure their investments to avoid disclosure to the IRS. These and other practices contributed to a culture of secrecy and deception that enabled UBS clients to use the bank's services to evade U.S. taxes, dodge creditors, and ignore court orders. Of these 20,000 U.S. clients, the IRS alleged 17,000 U.S. taxpayers wrongfully concealed their identities and the existence of their ownership interests in the UBS accounts in Switzerland. These U.S. clients failed to supply UBS with the required IRS reporting information (ie, social security numbers) and UBS declined to provide these clients with the required IRS Forms 1099 which would have reported its U.S. client's earnings to the client and the IRS.

As part of the February 2009 deferred prosecution agreement, UBS agreed to turn over to the IRS the names of 4,450 U.S. clients. The IRS has given all taxpayers until October 15, 2009 to file corrected returns reporting the income not previously reported from offshore tax haven bank accounts. These taxpayers will pay penalties amounting to 50% of the total sums held in the foreign bank accounts which had not been included in income in an earlier year. If taxpayers do not step forward and admit their wrongdoing by the deadline, criminal penalties (jail time) will be added to the stiff 50% civil penalty. We should expect to see many captains of American society marched off to federal prison in coming months!

My proposal is to look at the application of the various nonsigning tax return preparer penalties to these tax haven banks. Any person who prepares a substantial portion of an income tax return is a "preparer" of that return. ***A person who provides advice with respect to the existence, characterization or amount of an entry on a return is a preparer if the entry constitutes a substantial portion of the return.*** A preparer who

signs the return is referred to as a “signing preparer”. One who just provides advice regarding a substantial item contained in the tax return is referred to as a “nonsigning preparer”, subject to the same rules and regulations as the “signing” preparer.

If the offshore tax haven banks have provided advice to U.S. clients about treatment of bank accounts at their institutions and said advice is inaccurate, or just plain wrong, could the IRS apply the various tax return preparer accuracy penalties to these banks?

The current high profile discussions in the national press of offshore tax haven banks have *not* considered the potential penalties applicable to these banks if the IRS were to successfully argue that the banks were, in fact, “nonsigning” tax return preparers of their U.S. clients’ tax returns. Such an application of the tax return accuracy penalties could result in substantial additional tax penalties these banks may have to pay.