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MARCH 2023

WORTH FIGHTING ABOUT

The accompanying *Tax & Business Alert* contains an article on page 3 entitled "Have a Foreign Account? File an FBAR." As many of you will recall, any U.S. person with a financial interest in (or signature or other authority over) any foreign bank account must file a Report of Foreign Bank and Financial Accounts (FBAR). The law provides for a $10,000 penalty for a non-willful violation and a minimum $100,000 penalty for a willful violation. The law's direct purpose is to catch tax cheats and, consequentially, drug dealers, terrorists etc. There have been a number of FBAR tax cases in recent years in which the IRS has assessed excessive (our opinion) penalties for a citizen's "unwillful disregard" (i.e., innocent mistake) that resulted in a failure to file an information return and for which there was no discernible harm to the government.

On February 28, 2023, and subsequent to the writing of the above mentioned article, the Supreme Court issued its opinion in the *Bittner* case, settling the issue of how to compute the correct penalty for nonwillful failure to file annual FBAR forms.

Alexandru Bittner immigrated to the United States at a young age in 1982. He first worked as a dishwasher, later as a plumber, and became a naturalized U.S. citizen. In 1990, after the fall of communism in Romania, he returned to his home nation and began a business career but retained his United States citizenship. He did not realize that his overseas financial accounts, even while he lived abroad, still required him, beginning with 2007, to keep the U.S. government appraised of these accounts. In 2011, Mr. Bittner, after returning to the United States, learned of his reporting obligation for the years of 2007 through 2011. He engaged an accountant to help him prepare the required reports. For the five-year period, Mr. Bittner was involved with 272 foreign accounts. The IRS penalized Mr. Bittner $10,000 per account ($2,720,000) rather than $10,000 per report ($50,000).

The Bank Secrecy Act (BSA) imposes a maximum $10,000 penalty for nonwillful violations of the law. Thus, the question for the Court was: is a single "violation" the failure to file an annual report or is it each failure to report an account that should have been included in the single annual report?

The Court stated that "under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly'

(*Continued on reverse*)

against the government and in favor of individuals." Following that rule and what the Court said was "a dose of common sense," the Court concluded "here requires us to favor a per-report approach that would restrain BSA penalties over a per-account theory, which would greatly enhance them."

It is interesting to note that this case did not follow the usual liberal and conservative split. Justice Neil Gorsuch wrote the majority opinion (5-4) and was joined by Justices Ketanji Jackson, Samuel Alito, Brett Kavanaugh, and Chief Justice John Roberts. Justice Amy Barrett filed a dissenting opinion in which Justices Thomas, Sotomayor, and Kagan joined.

It is chilling, at least to us, to learn that a Supreme Court case was required to prevent the IRS from imposing a civil penalty of $2,720,000 for the nonwillful violation of failing to file five required annual reports. It reminds us that eternal vigilance is not only the price of liberty, it is also necessary to protect one's assets from unreasonable financial penalties for innocent oversights.

TAX SEASON REMINDERS

Tax Return Data – Soon. As always, tax preparers will appreciate and benefit from receiving complete (or nearly complete) individual income tax data as early as possible. Early receipt of all data (or all but a missing Schedule K-1, etc.) allows time for more thoughtful preparation and diminishes the hazards of the rush to completion of the last days of the season. Many taxpayers with complex returns, brokerage accounts with histories of corrected information forms, late K-1s, etc. will be well served by an extension of time to file until October 16, 2023. Extensions of time to file do not, in our experience, prejudice the return in any way. An extension, however, does not extend the time to pay. Accordingly, early submission of the data for computation of the estimated amount to be paid, if any, with the automatic extension will be helpful. For most individual income tax returns, the furnishing of all or almost all of the data by mid-March will allow the orderly preparation of a well-considered return. In instances where almost all of the data is not available by mid-March and for most complex returns, automatic extensions are often the best choice.

IRA and HSA Contributions – April 18, 2023. Taxpayers making individual retirement account (Roth IRA and traditional IRA) or health savings account (HSA) contributions for 2022, and who have not already done so, will need to make the contributions on or before April 18, 2023. April 18, 2023 is the last available date for a 2022 contribution even if the taxpayer obtains an extension of time to file the 2022 individual income tax return.

The maximum contribution to an IRA (Roth or traditional) for 2022 is $6,000 for those below age 50 and $7,000 for those age 50 or above at December 31, 2022. We, of course, encourage early contributions to tax-deferred accounts for those certain of their eligibility. For 2023, the maximum IRA contributions are $6,500 for those below age 50 and $7,500 for those age 50 or above at December 31, 2023.

The maximum HSA contribution for a single person for 2022 is $3,650 and for a family is $7,300. Those 55 or older can add, for 2022, an additional $1,000. For 2023, the maximum for a single person increases $200 to $3,850. For a family for 2023, the maximum is $7,750. For those 55 and over, the 2023 limits are increased by $1,000 for both single and family.

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Tax & Business Alert

MARCH 2023

SECURE 2.0 LAW MAY MAKE YOU MORE SECURE IN RETIREMENT

A new law was recently signed that will help Americans save more for retirement, although many of the provisions don't kick in for a few years. The Setting Every Community Up for Retirement Enhancement 2.0 Act (SECURE 2.0) was signed into law on December 29, 2022. SECURE 2.0 is meant to build on the original SECURE Act of 2019, which made major changes to the required minimum distribution (RMD) rules and other retirement provisions.

Here are some of the significant retirement plan changes and when they'll become effective:

- **The age for beginning RMDs is going up.** Employer-sponsored qualified retirement plans, traditional IRAs and individual retirement annuities are subject to RMD rules. They require that benefits start being distributed by a specific beginning date. Under the new law, the age used to determine distributions increases from age 72 to age 73 starting on January 1, 2023. It will then increase to age 75 starting on January 1, 2033.
- **There will be higher "catch-up" contributions for 401(k) participants ages 60 through 63.** Currently, participants in certain retirement plans can make additional catch-up contributions if they're age 50 and older. The limit on catch-up contributions to 401(k) plans is $7,500 for 2023. Secure 2.0 will raise the 401(k) plan catch-up contribution limits to the greater of $10,000 or 150% of the regular catch-up amount for individuals ages 60 through 63. The higher amounts will be indexed for inflation after 2025. This provision will take effect for taxable years beginning after December 31, 2024. (There will also be increased catch-up amounts for SIMPLE plans.)
- **Tax-free rollovers will be allowed from 529 accounts to Roth IRAs.** SECURE 2.0 will permit beneficiaries of 529 college savings accounts to make direct trustee-to-trustee rollovers from a 529 account in their names to their Roth IRAs without tax or penalty. Several rules apply. This provision is effective for distributions after December 31, 2023.

NON-RETIREMENT PLAN PROVISION

There are also some parts of the law that aren't related to retirement plans, including a change to Achieving a Better Life Experience (ABLE) accounts. Tax-exempt ABLE programs are established by states to assist individuals with disabilities.

Currently, in order to be the beneficiary of an ABLE account, an individual's disability or blindness must have occurred before age 26. SECURE 2.0 increases this age limit to 46, which will make more people eligible to benefit from an ABLE account. This provision is effective for tax years beginning after December 31, 2025.

- **"Matching" contributions will be permitted for employees with student loan debt.** The new law will allow an employer to make matching contributions to 401(k) and certain other retirement plans with respect to "qualified student loan payments." The result of this provision is that employees who can't afford to save money for retirement because they're repaying student loan debt can still receive matching contributions from their employers into retirement plans. Taxpayers can receive these matching contributions even if they aren't contributing to their own retirement accounts. This will take effect starting after December 31, 2023.

JUST THE BEGINNING

These are only some of the many provisions in SECURE 2.0. Contact us if you have any questions about your situation. ■

CAN YOU DEDUCT THE COSTS OF A SPOUSE ON A BUSINESS TRIP?

If you own a company and travel for business, you may wonder whether you can deduct all the costs of having your spouse accompany you on trips. It's possible, but the rules are restrictive.

First, your spouse must be your employee. If that isn't the case, then even if your spouse has a bona fide business purpose for making the trip with you, you won't likely qualify to deduct all of his or her travel costs. In fact, this requirement prevents tax deductibility in most cases.

A SPOUSE-EMPLOYEE

If your spouse *is* your employee, then you can deduct travel costs if his or her presence on the trip serves a bona fide business purpose. It isn't enough for your spouse to merely be "helpful" in incidental ways, such as by typing your meeting notes. Your spouse's presence must serve a necessary business purpose.

In most cases, a spouse's participation in social functions, for example as a host or hostess, isn't enough to establish a business purpose. That is, if his or her purpose is to establish general goodwill for customers or associates, this is usually insufficient. Further, if there's a vacation element to the trip (for example, if your spouse spends time sightseeing), it will be more difficult to establish a business purpose for his or her presence on the trip. On the other hand, a bona fide business purpose exists if your spouse's presence is necessary to care for a serious medical condition that you have.

If these tests are satisfied in relation to your spouse, the normal deductions for business travel away from home can be claimed. These include the costs of transportation, meals, lodging, and incidentals such as dry cleaning and phone calls.

A NON-EMPLOYEE SPOUSE

Suppose your spouse's travel doesn't satisfy these requirements. You may still be able to deduct a

substantial portion of the trip's costs. This is because the rules don't require you to allocate 50% of your travel costs to your spouse, but only any *additional* costs you incur for him or her. For example, in many hotels the cost of a single room isn't that much lower than the cost of a double. If a single would cost you $150 a night and a double would cost you and your spouse $200, the disallowed portion of the cost allocable to your spouse would only be $50. In other words, you can write off the cost of what you would have paid traveling alone.

To prove your deduction, ask the hotel for a room rate schedule showing single rates for the days you're staying.

If you drive your own car or rent one, the whole cost will be fully deductible even if your spouse is along. Of course, if public transportation is used, and for meals, any separate costs incurred by your spouse won't be deductible.

Contact us if you have questions about this or other tax-related topics. ■

HAVE A FOREIGN ACCOUNT? FILE AN FBAR

Any U.S. person with a financial interest in, or signature or other authority over, any foreign financial accounts must file a Report of Foreign Bank and Financial Accounts (FBAR), subject to conditions. That is, if the aggregate value of the foreign financial accounts exceeds $10,000 at any time during the calendar year, the individual must file an FBAR by April 15 following the calendar year. Let's explore more of the pertinent details.

PERSONS AND ACCOUNTS

A "U.S. person" is generally a U.S. citizen, including a child. However, he or she may be an individual who's a resident alien of the United States, District of Columbia, Native American lands (as defined in the Indian Gaming Regulatory Act), or the Territories and Insular Possessions of the United States.

Also qualifying as a U.S. person is an entity — including a corporation, partnership, trust or limited liability company — organized or formed under federal law or the law of any state, the District of Columbia, U.S. Territories and Insular Possessions, and Native American tribes.

A "foreign financial account" is a financial account located outside the United States. This includes the states themselves as well as the District of Columbia, U.S. Territories and Insular Possessions, and Native American land.

Note: An account maintained with a branch of a U.S. bank that's physically located outside of the United States is a foreign financial account. An account maintained with a branch of a foreign bank that's physically located inside of the United States isn't a foreign financial account.

WHAT DEFINES INTEREST

A U.S. person has a financial interest in a foreign financial account if that person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the U.S. person or another person.

Financial interest may also exist if the owner of record or holder of legal title is one of several listed entities. These include entities controlled by the U.S. person or an agent, nominee, attorney, or someone acting in another capacity on behalf of the U.S. person.

PENALTY AMOUNTS

Civil penalties for non-willful violations can exceed $10,000 per violation, adjusted for inflation. For willful violations, civil penalties can range up to the greater of $100,000, adjusted for inflation, or 50% of the amount in the account at the time of the violation. Contact us for more information. ■

RECONSIDERING YOUR PERSONAL EMERGENCY FUND

Back in 2020 when the COVID-19 pandemic first hit, many people's emergency funds were suddenly put to the test — assuming there was a fund at all. Now, three years later, and presumably with the benefit of some hindsight, you might want to reconsider your rainy-day savings. You've probably heard that, to guard against an emergency, you need to save enough to cover three to six months of living costs. But this rule isn't as straightforward as it may sound.

An emergency cushion is indeed important — and it's certainly better to be conservative rather than cavalier when estimating your financial requirements. However, believe it or not, there may be a danger to saving too much in certain savings vehicles. For example, if you put away substantially more than you'll reasonably need in a low-interest savings account, you may lose money to inflation over time. Plus, you might miss out on opportunities to invest those funds in tax-advantaged retirement accounts or other assets.

Instead of blindly following a rule of thumb, tailor your emergency savings to your financial situation.

A smaller emergency fund may suffice if, for instance, your spouse has a reasonably secure job, you have relatives who can provide financial assistance in a pinch, or there's reason to believe that you'd be able to find other work quickly if you lost your job. Conversely, if you're the sole breadwinner or you simply have a low tolerance for risk, a bigger emergency fund may be appropriate. Our firm can help you find the right balance. ■

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