NEW YORK
CITY BAR

COMMITTEE ON PERSONAL INCOME TAXATION

JOHN J. GENOVA
CHAIR
799 BROADWAY, SUITE 229A
NEW YORK, NEW YORK 10003
TEL: 212-475-2595
Fax: 212-475-2596
john@genovataxlaw.com

JACK TRACHTENBERG
SECRETARY
GRACE BUILDING
1114 AVENUE OF THE AMERICAS
40TH FLOOR
NEW YORK, NY 10017
Phone: (212) 389-5000
Fax: (212) 389-5099
Jack.Trachtenberg@sutherland.com

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Mr. Steven T. Miller
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Mr. Miller:

We are members of the Personal Income Taxation Committee at the New York City Bar. We write to you concerning the Internal Revenue Service's recent disqualification of taxpayers who had previously been accepted into the IRS's Offshore Voluntary Disclosure Program ("OVDP").

Based on public reports, it appears that the total number of taxpayers directly affected by the disqualification seems to be relatively few -- about 50 or so who held unreported accounts at Bank Leumi in Israel. However, the incident has received attention in the mainstream media and among practitioners. The implications for the IRS are much broader than those taxpayers directly affected and are likely to have a much greater impact on the OVDP which has been an overwhelming success.

The Offshore Voluntary Disclosure Initiative ("OVDI") began in 2009 with strict rules and procedures concerning the disclosure of offshore accounts. Since that time, the rules and procedures have been enhanced and publicized on the IRS's website. IRS agents have had to remain within the strictures of the program, which has created uniformity.

The program gives practitioners the option of pre-clearing their clients to ensure that a client was "cleared to make an offshore voluntary disclosure"

and would not be prevented from doing so because they had presumably been selected for audit or the government was aware from another source of the client's offshore account. *See Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers*, FAQ 23. After being pre-cleared, a taxpayer prepares and submits to the IRS's Lead Development Center the standard Offshore Voluntary Disclosure Letter, which requires the taxpayer to submit detailed information about the foreign bank account(s) being disclosed, including the amount and source of the funds in the account(s). *See* FAQ 24. Within 45 days of the IRS's receipt of the completed letter, the IRS notifies the taxpayer if he or she has been preliminarily accepted into the program or if acceptance was being declined. The standard Preliminary Acceptance Letter informs the taxpayer that "acceptance is conditioned upon the information provided being and remaining truthful, timely and complete" and that the taxpayer "must fully cooperate with the IRS in determining the correct and appropriate tax liability and pay or make arrangements to pay in full any tax, interest and penalties determined by the IRS to be applicable." In such a case, "a voluntary disclosure may result in prosecution not being recommended." After receipt of such a letter, a taxpayer has 90 days to submit (i) amended tax returns and delinquent (or amended) FBARs; (ii) consent forms extending certain statutes of limitations; (iii) completed foreign account or asset statements; (iv) payment of the additional tax and interest owed with a 20% accuracy related penalty and (v) a worksheet calculating the miscellaneous penalty owed. *See* FAQ 25. Sometime thereafter, a revenue agent is assigned to the taxpayer's case, reviews the submission materials and issues a Form 906, which because of the clarity underlying the program, is rarely disputed.

Because the IRS has been clear about how the program works, practitioners have advised their clients of the costs and substantial benefits associated with entering the program. And because practitioners have recommended the program to many clients with offshore accounts, the program has been and continues to be a remarkable success for the IRS. By the end of 2012, the number of taxpayers who participated in the OVDP climbed to 38,000 and the IRS collected $5.5 billion in back taxes, penalties and interest. *See 2012 Annual Report To Congress by the Taxpayer Advocate* at 144. Indeed, because of the certainty practitioners were able to provide their clients more taxpayers have used the OVDI and OVDP to come into compliance than the over fifty year history of the voluntary disclosure program.

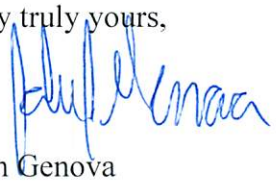
The IRS's disqualification of taxpayers who were previously accepted into the OVDP and in some cases had provided detailed information to the IRS in reliance on their "pre-clearance" to participate in the program, will inevitably affect the ongoing success of the OVDP as a whole. Thus, by reversing its pre-clearance and preliminary acceptance of these taxpayers, the IRS has undermined the ability of practitioners to advise their clients with certainty as to how the program works. In fact, the Model Rules of Professional Responsibility governing the conduct of attorneys requires attorneys to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See* Rule 1.4 *Client-Lawyer Relationship- Communication.* Attorneys will now have to advise their clients and prospective clients that they may be disqualified from participating in the OVDP even after they were admitted into the program and disclosed detailed information about their foreign bank account(s). This information will lead some (if not many) clients to hesitate (or decline) to come forward with additional disclosures. Moreover, the IRS's failure to abide by the "rules of the road" in connection with the OVDP may affect the willingness of taxpayers to make voluntary disclosures relating to non-compliance outside the offshore account area.

The disqualification was apparently caused by a lack of communication between the IRS (which pre-clears and accepts taxpayers into the OVDP) and the Department of Justice, which presumably had the taxpayers' names prior to the taxpayers being pre-cleared for the program. Assistant Attorney General Kathryn Keneally's comments to *Forbes* last month that the disqualified taxpayers would be treated with "fairness," in any determination by DOJ to prosecute, is insufficient at best and injects an aspect of arbitrariness that is inconsistent with the principal benefits of the program: clarity and certainty. Moreover, any attempt by the DOJ to prosecute such taxpayers will undoubtedly be subject to motions relating to the conduct of the IRS and DOJ, including motions to suppress information provided by the taxpayer after he/she had received "pre-clearance" to participate in the OVDP. Additionally, the IRS has not indicated how those disqualified taxpayers will be treated from a civil penalty perspective: whether they are eligible for the single 27.5% miscellaneous penalty currently applicable in the OVDP.

To resolve the situation and restore the integrity of the OVDP, we urge the IRS (a) to readmit the disqualified taxpayers into the program, subject to the conditions set forth in the guidelines published on the IRS's website; and (b) to institute new safeguards to avoid such a situation from occurring again. Finally, we would appreciate the inclusion of a description of the proposed safeguards on the IRS's website and submit that providing such information will enable tax practitioners to appropriately advise clients seeking to rectify past non-compliance regarding the benefits of making a voluntary disclosure and to reassure those clients regarding the minimal risk of being disqualified from the program after admission. These steps are critical so that the OVDP continues to have vitality.

If you have any further questions or wish to discuss this issue with our Committee, please contact us by letter or our Chair John Genova at 212-475-2595. Thank you.

Very truly yours,



John Genova
Chair, The Personal Income Taxation Committee[1]

[1] The principal authors of this letter are Fran Obeid and Jeremy Temkin. Helpful comments were received from other members of the Association of the Bar of the City of New York Personal Income Taxation Committee. One member of the Committee has recused himself from voting on this letter since he works for a firm that represents clients who were recently disqualified from the Program. A second member is employed by IRS Office of Counsel and takes no position.