



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
ATLANTA, GA 30308

WAGE AND INVESTMENT DIVISION

MAR 2 9 2011

Form 8938 comment

Ms. Jane A. Bruno, J. D.
1082 Vintner Boulevard
Palm Beach Gardens, FL 33410

Dear Ms. Bruno:

I am responding to your inquiry dated February 2, 2011, to the Commissioner of the Internal Revenue Service, Douglas H. Shulman. You provided comments concerning Form 8938, Statement of Foreign Financial Assets.

I am forwarding your correspondence to the Assistant Secretary of the Treasury for Tax Policy who develops and reviews policy, legislation, regulations, revenue rulings, revenue procedures, and other published guidance dealing with all aspects of federal income tax law.

Your correspondence will be brought to the attention of the appropriate officials for consideration during the Office's discussions of the issue or as part of an ongoing review of federal tax law. However, extraordinary workloads and limited resources often preclude substantive responses to, or even acknowledgement of, your letter.

Thank you for your comments. If you need further assistance, please call me at (267) 941-4669 or Ms. Worner, Identification Number 0530024760, at (267) 941-4651.

Sincerely,

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for P. J. Bazick
Field Director, Accounts Management,
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February 2, 2011

Received by the
Commissioner's Correspondence
Office

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Dear Commissioner Shulman:

I have been a tax practitioner for over 20 years, serving mostly Americans living overseas. During that time I have worked with countless people trying to make a living and raise a family in very different surroundings from that of most Americans who have never lived abroad. Virtually every client I have worked with sincerely wants to satisfy his or her US tax obligation, even though few will use services or receive benefits from the United States government. That is why I am enormously troubled by the new tax form 8938, Statement of Foreign Financial Assets.

In my view, this form takes everything that is wrong with Treasury Form 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), and makes it much worse. I have already commented to the Commissioner of the IRS, the President, the Secretary of Treasury and a number of Congressmen—none of whom bothered to respond—on the FBAR. However, I believe it is worthwhile to re-visit those comments in the context of this new form.

- (1) Confusing and overwhelming—It is widely acknowledged that the FBAR and accompanying instructions are difficult to understand and harder to comply with—which accounts need to be reported, how does one get a "maximum" value for the year, etc. Many tax preparers are not comfortable offering advice because, even as professionals, they are not really sure what is included or not—especially when it comes to foreign retirement accounts and pension plans.

And now comes Form 8938 that requires information if the taxpayer has any interest in a foreign financial account, a foreign stock or security, a foreign financial instrument or a foreign entity. This covers virtually every possible financial interest any one could have—whether there is a present interest or not and whether the taxpayer could actually access the funds or not (as with retirement plans). AND it is in addition to TDF 90-22.1 so not only is there a

duplication of effort, but it is not clear how much overlap there is or if the forms are looking for different things. I would note that as I write this the instructions for the form have not been released (it is February), even though it has been published that the form is required to be filed for the 2010 tax year. This is irresponsible and unfair to the taxpayers.

(2) Intrusive and out of the scope of duties— What makes this form even more troublesome is that the IRS (and Congress) don't even pretend this is about collecting revenue. The form requires only that financial information be given –it is not a form to report taxable income. It has always been my understanding that the purpose of the Internal Revenue Service is to collect tax on reported income—not to start collecting financial details and then investigating whether the proper amount of income has been reported. Even on its face it is unrealistic to think that conclusions about the veracity of income reported can be gleaned from knowing the highest balance in a given account. It is entirely possible that a taxpayer could move money through an account—for example from a savings account for a child's college fees to a checking account to pay those fees—without actually earning any income on those monies. But this form, that has to be attached to the taxpayer's return, may give the impression the taxpayer has a large amount of funds when really he has moved money through different accounts—for reasons that are not the business of the IRS. A taxpayer living in the US is not asked these questions. What justifies asking them of Americans living overseas?

(3) Penalties—Several of my clients are finding out the hard way about what it meant to join the "Voluntary Compliance" program initiated a couple of years ago so taxpayers could "come clean" on not filing the FBAR. One client, who had no idea she even needed to file the FBAR because she had been living in Africa, has now paid a UK firm nearly half a year's salary in fees to represent her—and has not even gotten the bill yet from Treasury for her penalty. This type of scenario is occurring over and over as taxpayers finally hear about the filing requirements, try to do the right thing, and get burdened with large fees for professional advice and IRS penalties. It is creating not only financial, but emotional havoc. These penalties cannot motivate taxpayers to do something they didn't even know they had to do—so their only function is to punish taxpayers for NOT doing that something—long after the fact. It is a sorry state of affairs when the United States cannot collect enough money to operate without resorting to fear tactics and punishment of a sector of the American population that has little voice or representation by virtue of living outside our borders.

I will close with the following comments:

- Most Americans living overseas are just making a living and are NOT trying to keep taxable income from the reach of the IRS by hiding it in foreign bank accounts.
- For those Americans who set out to evade tax in this way the Treasury Department should explore other ways of finding and punishing them besides this heavy-handed approach that impacts too many innocent taxpayers. It is not unlike punishing the whole class because one kid was caught cheating.
- More effort should be made to educate Americans overseas about their tax filing obligations—perhaps re-open some of the overseas IRS offices or otherwise make the rules more available.
- Finally, if information gathering is now the new role of the IRS, then make the form AND instructions clear and concise enough that the average taxpayer can comply—LISTEN to the comments of American Citizens Abroad, the New York Bar Association, and all the other organizations and individuals that have put huge amounts of time and effort into proposing ways to improve this process.

Thank you for your attention to my concerns.

Sincerely,



Jane Bruno