International Law Views

April 19, 2017

ShulmanRogers.com

Contact Us

Find Us on Facebook

In This Issue ….

International Practice Spotlight:

Michael J. Fellerman

Michael Fellerman represents U.S. business entities and individuals seeking to invest or conduct business abroad as well as foreign business entities and individuals seeking to invest or conduct business in the U.S. In connection with such representation, he frequently works with U.S. foreign taxation rules, including the various Subpart F rules contained in the Internal Revenue Code that tax income even if it has not yet been repatriated to its beneficial owners.

Mr. Fellerman advises clients on the best way to structure inbound (investments in the U.S. by foreigners) and outbound (investments by U.S. persons in foreign countries) business and investment ventures for tax and business purposes. Mr. Fellerman regular advises clients on cross-border mergers and acquisitions as well as real estate investment.

More Information

International Law Views is a collaborative publication of the International Practice Group at Shulman Rogers.

Shulman Rogers unites in one firm a wide variety of experience and resources to provide comprehensive, seamless, and focused legal representation to our foreign and domestic clients, whether businesses or individuals.

The resulting synergies and complementary skills let us help industry leaders and successful individuals navigate both the expanding global economy and an international lifestyle.

For more information please consult our website at www.shulmanrogers.com, call us at (301) 230-5200, or email us at info@shulmanrogers.com.

He guides clients through the complicated international tax withholding and reporting rules as well as other compliance matters.

Further, Mr. Fellerman will conduct treaty analysis and any other research necessary for clients to achieve the most tax efficient structure (while maintaining a foreign clients' privacy if desired). His recent accomplishments in this regard include:

- Submitted first-of-its kind Withholding Certificate application requesting exemption from FIRPTA (Foreign Investment in Real Property Tax Act) withholding for foreign company selling farm land to large home builder in Maryland. The sale consists of a transfer of 29 lots over 22 months. PSA stipulated that Lots must be finished prior to transfer. Proposed formula to IRS to take into basis yet to be expended funds so that client could use otherwise withheld funds to finish lots.

- Represented Middle Eastern Company located in non-treaty country invest in property located in Texas. Utilizing a BVI company and the Portfolio Interest Exemption, Mr. Fellerman structured a multi-layered Debt and Equity transaction and drafted all documents of exchange.

- Advised Irish conglomerate and closed purchase of 14 units of an upscale NY Hotel utilizing limited partnerships (tax advice re federal, state, city, international, sales, hotel and other taxes).

- Instituted and structured International Master Feeder Fund designed to achieve capital appreciation through trading in the energy derivatives markets with a concentration in natural gas. Advised client on all tax issues including in regard to carried interest, partnership matters, taxation of members, allocations, 1256 contracts, 988 elections, deductibility of losses ("at risk" rules and PAL), fees, fund expenses, investment interest, CFC and PFIC analysis, 754 elections withholding obligations and reporting obligations. Drafted tax section of both domestic and offshore PPMs. Mr. Fellerman has counseled many other international hedge funds trading in currencies and commodities.

- Formed Fund, with international investors, intended to invest in commercial mortgaged-backed pass through securities (long and short positions). Drafted LP agreement concentrating on capital contributions, distributions, tax allocations, valuations, and treatment of profits interests (83(b) elections); conducted treaty analysis, advised on portfolio interest, FDAP withholding; attribution rules,1446 withholding, Federal Filings and State and Local implications.

'Cause I'm The Taxman, Yeah

Unlike the income tax systems of most countries, the United States requires all U.S. citizens and resident aliens (i.e., green card holders) to report on U.S. income tax returns all income, even if earned or otherwise received outside of the United States. Even though U.S. income tax on foreign-sourced income may be reduced, or even eliminated, by credits for income tax paid to foreign countries, it is critical that the foreign-sourced income be properly reported on U.S. income tax returns. Not only do U.S. taxpayers with foreign income have to report that income on their U.S. income tax returns, they also must answer in the affirmative a question on Schedule B that asks whether the taxpayer "had a financial interest in or signature authority over a financial account (such as bank account, securities account, or brokerage account) located in a foreign country." This question must be answered in the affirmative even if the account generated no income. If the balance in the foreign accounts exceeded $10,000 at any time during the year, the taxpayer must also file a Foreign Bank Account Report (FBAR).

In the past, banks and investment advisers in some foreign countries encouraged U.S. taxpayers to set up accounts that were designed to remain undisclosed to U.S. tax authorities. Because of the scope of this problem, U.S. tax authorities instituted a program in 2009 to aggressively locate and pursue penalties against U.S. taxpayers with undisclosed foreign income. If the failure to comply with U.S. tax laws was willful, criminal as well as civil penalties could be imposed on the offending taxpayer, with the penalty amount being far in excess of the value of the foreign accounts.

At the same time that it began to take more aggressive enforcement action, the Internal Revenue Service (IRS) instituted the Offshore Voluntary Disclosure Program (OVDP), which allowed taxpayers to make voluntary disclosures of unreported income and avoid exposure to criminal prosecution and reduced potential civil penalties. Under the OVDP, all income taxes on undisclosed income over the prior six to eight years have to be paid together with a nonpayment penalty and a FBAR penalty equal to a specified percentage of the highest balance in the taxpayer's foreign bank accounts (ranging from 20% in 2009 to 27.5% currently). This program treated taxpayers who acted willfully and those who were not willful the same, although taxpayers who believed they acted nonwillfully could seek reduced penalties. The IRS has generally taken a very broad view of what constitutes willfulness; simply filing a return without paying sufficient attention to the disclosure requirements could well be seen as willful action.

In June of 2014, the IRS announced an expanded program for U.S. taxpayers whose failure to report foreign income was not willful. Taxpayers filing under the Streamlined Filing Compliance Procedures must file returns (or amended returns) for the prior three years for which foreign source income had not been reported and pay any tax due on the unreported income, as well as file any FBARs that had not been filed for the prior six years. In a dramatic change from the OVDP, penalties were eliminated for taxpayers residing outside of the U.S. and were reduced to 5% of the highest foreign account balance for taxpayers residing in the U.S. The Streamlined Procedures require far less documentation and delay than the OVDP and do not subject taxpayers to increased chance of audit. Perhaps even more significantly, the Procedures employ a much more lenient definition of willfulness, which should enable most U.S. taxpayers who had previously failed to comply with foreign income and account reporting obligations to bring themselves into compliance without being subject to harsh penalties.

If you or someone you know has a matter related to reporting overseas financial accounts or international income tax issues, please call or write Shulman Rogers and mention **Bob Canter**.

Robert B. Canter
(301) 230-5220
rcanter@shulmanrogers.com

When I'm Sixty-Four . . .

The growing international mobility of families, the increasing value of retirement assets, and the complexity of international divorces, with their competing courts and laws, means difficult pension division cases will surely multiply in coming years. When combined with the already high rate of divorce, the technical rules that govern retirement assets, and the wide variety of different retirement plans available, the result is an abundance of pitfalls, traps, and tripwires for the unwary.

The first problem stems from the many different factual situations that can arise. For example, a couple might have U.S.-based retirement assets but need to divorce in another country. Similarly, a couple might have foreign retirement assets and yet get divorced in the United States. Or maybe both parties have retirement assets from two different countries – for a total of four – and divorce in yet another country. And of course, as everywhere in the law, if it can be imagined, it will happen sooner or later.

A second problem arises because the law that governs whether and how retirement assets can be divided upon divorce may be different from the law that governs the divorce. For example, the type of ERISA-qualified retirement assets widely held in the U.S. (think 401k, profit-sharing, or defined benefit plans) can only be divided at divorce by a special court order called a QDRO. This special court order must be "made pursuant to a State domestic relations law," where state is defined as one of the 50 United States plus the District of Columbia and certain enumerated territories. In other words, a UK or French or Spanish or Canadian divorce that purports to divide such an asset, even if it includes the proper wording, likely will be rejected by the retirement plan administrator. And of course, this same problem exists in reverse – a U.S. court order that purports to divide a UK (or French or Spanish or Canadian or other country) retirement benefit may be given little or no effect in that country.

Another problem comes from the variety of different retirement benefits available. Just in the U.S., we have the ERISA-qualified plans; IRA's – simple, SEP, and Roth; federal, state and local government plans; and military retirement plans, not to mention international organization plans, stock option plans, Restricted Stock Units, and other sophisticated private employer plans. And don't forget social security, annuities, and life insurance. Even the classic retirement plans have different payout options, including return of investment, lump sum payouts, pre-retirement death benefits, and survivor spouse benefits. And each other country has its own cornucopia of retirement benefits, many with universal government-sponsored retirement benefits, typically governed by country specific laws.

Yet another consideration is which court has the power to divide the retirement asset and which country's law the court will use to make the division, in a divorce where nobody lives anymore in the country where the retirement assets were earned. And the parties might live in different countries from each other, each of which might be able to divorce them.

Then at some point, inevitably, tax issues, currency issues, and bank transfer issues must be considered.

Finally, the situation – and the available options – can be very different depending on whether the divorcing couple can count on cooperation from one another or whether instead every issue will require a fight over what outcome can be forced through the courts.

In case the conclusion is still not obvious, these cases demand a high degree of attention to detail, extensive knowledge of the relevant factors, and often input from competent lawyers in at least two different countries. Creative and unorthodox solutions are the norm, and difficult choices part of the everyday process when international families need to divide fairly valuable retirement assets upon divorce.

If you, or someone you know, has a matter related to this article or any international divorce issues, please call or write Shulman Rogers and mention **Hadrian N. Hatfield**.

Hadrian N. Hatfield
(301) 230-6575
hhatfield@shulmanrogers.com

Money, It's a Crime

U.S. civil and criminal authorities have been particularly aggressive in investigating and prosecuting potential violations of the Foreign Corrupt Practices Act. There are few areas of corporate and securities law in which the SEC and the Department of Justice have been more unified. This coordinated approach has resulted in record fines against corporations and criminal prosecutions of individuals. And, because such investigations are complex and, almost by definition, multi-national, the associated expense, distraction, and opportunity costs represent an additional penalty, even in situations where the investigation fails to uncover substantial wrong-doing.

The "pro-business" and "de-regulatory" philosophy advanced by the new U.S. administration has caused some commentators to suggest that there may be some pull-back in this aggressive approach. Anti-corruption compliance programs need to be multi-dimensional, detailed and expansive, and carry significant costs. U.S. companies, some argue, could be more competitive were this burden reduced.

We are optimistic that governmental authorities may approach FCPA enforcement without quite the edge that they have demonstrated in the past. We do not recommend, however, that any such regulatory pull-back change fundamentally the approach that companies and individual corporate directors, officers and employees apply to anti-corruption issues. There are several reasons:

(1) Vigorous anti-corruption programs are becoming a global standard

The world has changed. Investors recognize that corruption is a transaction cost and that corporations that minimize such costs may, in fact, have a competitive advantage. As capital formation has globalized, governments in the developing world have gravitated towards more rigorous anti-corruption efforts. Thus, the U.S., U.K. and E.U. approach to anti-corruption compliance has become at least an aspirational standard for the governments of many developing countries. A pull-back by U.S. authorities, therefore, may not provide much assurance for companies doing business in these countries.

(2) Anti-corruption programs reflect sound business practices

Modern business is information-intensive. Sound business decisions require that the right information gets to the right decision maker in a timely manner. Well-designed information systems also are essential to anti-corruption programs. The FCPA originated with the insight that companies that are making corrupt payments to foreign officials do not maintain accounts labeled "bribery fund," so that those corporations' books and records must be misstated. A company that maintains appropriate controls over its assets and disbursements already has in place the structure of a sound anti-corruption program.

(3) Tone at the Top

"Tone at the Top" may sound like a simplistic concept, but regulators take it seriously. Strong corporate managers ensure that the organizations that they supervise reflect their priorities. Managers should prioritize ethical standards as sound business. If they do so, they create an environment in which anti-corruption processes are simply an aspect of a healthy, profitable enterprise.

(4) Training is essential

Anti-corruption procedures are not self-enacting. Corporations must train their employees on these procedures. Most well-run corporations have effective training programs in place. As in other areas described above, such corporations already have the mechanisms necessary to support their anti-corruption programs.

In sum, the greatest motivation for a corporation to design and implement an effective anti-corruption program is that doing so reflects – and builds upon – sound business practices. Corporations may welcome regulatory pull-back in this area, but the best run corporations will remain vigilant.

If you or someone you know has a matter related to this article or an issue involving anti-corruption compliance programs, FCPA enforcement or other SEC, DOJ or other regulatory compliance or enforcement issues, please call or write Shulman Rogers and mention **Paul Huey-Burns**.

Paul Huey-Burns
(301) 945-9241
phuey-burns@shulmanrogers.com