Insight
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ENTERTAINMENT LAW

Non-Citizen Celebrities Could Face New Financial Scrutiny

By Daniel J. Scott

For some time now, the U.S. Treasury has required each United States person who has a financial interest in or signature authority over foreign financial accounts (including bank accounts, brokerage accounts, mutual funds, debit and prepaid credit cards or other types of financial accounts) with an aggregate value exceeding $10,000 at any time during the calendar year to report such accounts by filing a Form TD F 90-22.1 — Report of Foreign and Financial Accounts (commonly referred to as an FBAR) on or before June 30 of the succeeding year. In years past, a "United States person" was defined in the FBAR instructions simply as "(1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust." Thus, for example, business managers with signature authority over foreign financial accounts of their clients must file an FBAR if, as is typically the case, the aggregate value of those accounts exceeds $10,000 at any time during the year. In addition, foreign entertainers and athletes who are green card holders and, therefore, resident for U.S. income tax purposes, have traditionally been required to file an FBAR reporting their foreign financial accounts.

Due to recent changes to the FBAR, however, the class of people subject to the foreign bank account reporting requirements has substantially expanded. Under the new FBAR, a "United States person" is defined as "a citizen or resident of the United States, or a person *in and doing business in* the United States" (emphasis added). Therefore, nonresident aliens and foreign entities who are "in and doing business in" the United States must now file an FBAR disclosing all foreign financial accounts (if the aggregate value of such financial accounts exceeds $10,000 at any time during the calendar year). So, when is a person "in and doing business in" the United States for FBAR purposes? The answer is unclear, and from the guidance thus far released by the IRS, this new requirement could have a serious impact on entertainers and athletes.

While the revised FBAR provides a new definition of "United States person," it does not provide a definition of "in and doing business in" the United States. The most recent guidance provided by the IRS on the subject states: "Whether a person is considered, for FBAR purposes, to be in and doing business in the United States is determined based on an analysis of the facts and circumstances of each case. Generally, for these purposes, a person is not considered to be in and doing business in the United States unless that person is conducting business within the United States on a regular and continuous basis.

> An entertainer or athlete who is neither a citizen nor resident of the United States may nevertheless have to file a [Report of Foreign and Financial Accounts].

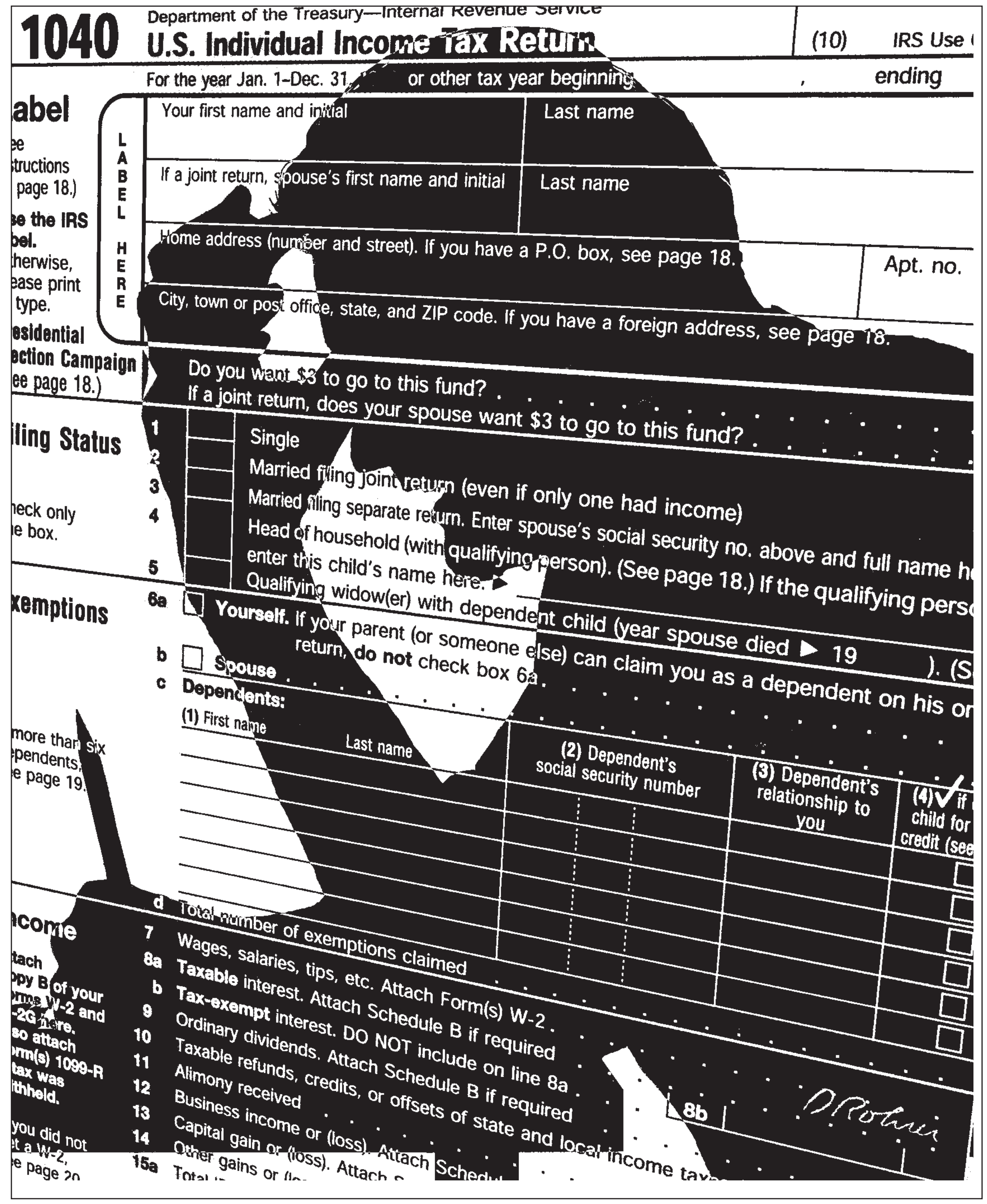
Accordingly, persons who are merely visiting the United States are not in and doing business in the United States for FBAR reporting purposes. Also, persons who sporadically conduct business in the United States are not in and doing business in the United States for FBAR reporting purposes."

The IRS also provides some examples of people who are not considered to be "in and doing business in" the United States for FBAR reporting purposes. Among the examples are "Artists, athletes, and entertainers who are not citizens of the United States and who only occasionally come to the United States to participate in exhibits, sporting events, or performances." Therefore, an entertainer or athlete who is neither a citizen nor resident of the United States may nevertheless have to file an FBAR disclosing all of his or her foreign financial accounts if he or she *regularly and continuously* comes to the United States to participate in exhibits, sporting events, or performances. Exactly when the IRS considers and entertainer or athlete to be "occasionally" as opposed to "regularly" visiting the United States remains to be seen.

Suppose, for example, that X, a nonresident noncitizen of the United States, is an international singing sensation and embarks on a tour of the country each year, performing to sold-out stadiums. Assume also that, although spending a significant amount of time in the United States touring, X does not satisfy the "substantial presence" test and is not, therefore, resident for U.S. federal income tax purposes. As a result, X will be subject to U.S. federal income tax only on her U.S. source income. Under a literal reading of the new FBAR requirements, X may have to disclose her foreign financial accounts to the U.S. government or risk the civil and/or criminal penalties that may apply for her failure to file the FBAR.

The same problem arises with noncitizen athletes who are not resident in the United States for income tax purposes, but who travel here to participate in sporting events on a regular basis. Take, for example, the international golf or tennis superstar who is not a citizen of the United States. Each year that athlete will likely compete in sporting events and tournaments that take place in the United States, yet they may not be resident for U.S. income tax purposes — does the new FBAR require such athletes to now disclose all of their foreign financial accounts? As unfair as it may sound, a strict reading of the new instructions would suggest that they may indeed have to file an FBAR.

The clock is ticking. Entertainers and athletes required to file an FBAR have less than a month to do so, as the forms must be received by June 30. Failure to file can result in civil penalties of up to the greater of $100,000 or 50 percent of the amount in the foreign account at the time of the violation, as well as criminal prosecution resulting in fines of up to $500,000 and 10 years' imprisonment. Subject to some exceptions, the types of accounts that a person must disclose include any foreign account of which such person is the owner of record or in which a person is acting as an agent, nominee or otherwise on his behalf, over which such person has signature authority or can exercise power comparable to signature authority, that is owned by a corporation or partnership in which such person owns more than 50 percent of the shares or voting power (in the case of a corporation), or more than 50 percent of the profits or capital (in the case of a partnership), and that is owned by a trust in which such person has a beneficial interest in more than 50 percent of the assets or receives more than 50 percent of the income.



With the Obama administration cracking down on offshore tax havens and perceived abuses in the international banking arena, the IRS will most certainly closely scrutinize the disclosure of foreign financial accounts. While there is additional guidance rumored to be on its way from the IRS, there is little time to wait. Most practitioners agree that, given the current climate surrounding offshore accounts, clients should err on the side of caution and file an FBAR disclosing their foreign financial accounts, unless they are reasonably certain they are not required to. The last thing any entertainer or athlete wants or needs is negative publicity, and even the appearance of an attempt to evade taxes or related reporting can cause a person to lose favor with the public, which can be detrimental to his or her career. Therefore, it is imperative that entertainers, athletes and their professional advisers ensure that all U.S. reporting requirements are fully and timely met.

Lastly, for taxpayers who were previously unaware of the requirement to file an FBAR but who have fully reported any taxable income from such accounts and have paid any taxes owed, the IRS will permit such taxpayers to file delinquent FBARs by Sept. 23 without imposing a penalty. In addition, for clients who have not fully reported their offshore income, the IRS has recently been promoting a voluntary disclosure program that enables taxpayers to disclose any unreported offshore income and pay any taxes owed while reducing the risk of criminal prosecution for noncompliance.

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