

FBAR; Read Before Signing; Reporting 4-H Income and Attorney-Client Privilege

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Overview

One of the things that my law students learn shortly into a new semester is that agricultural law covers a wide array of topic matters and will address many areas of the law that they have yet to be exposed to. That is on display in today' blog article.

Post-death FBAR penalties, reading contracts, proper reporting of 4-H Fair income, and a limitation on the attorney-client privilege – these are the topics of today's post.

FBAR Penalties Post-Death

In recent years some American farmers have started farming operations in foreign countries, particularly in South America. For these farmers, a provision of the Bank Secrecy Act is important, and the penalties are harsh if the rule is violated.

If you have a foreign account containing \$10,000 or more, you must report it to the IRS by the annual tax filing deadline. In a *United States v. Gaynor, No. 2:21-cv-00382-JLB-KCD, 2023 U.S. Dist. LEXIS 157733 (M.D. Fla. Sept. 6, 2023)*, a surviving spouse inherited her husband's foreign bank and investment accounts when he died in 2003. She didn't learn about the accounts for some time and, as a result, didn't make the required filings with the financial crimes network – a branch of the IRS. She eventually got everything reported. When she died in 2021, the IRS came after the estate for almost \$20 million in penalties for a willful failure to file the required forms for several years. But the court said her failure to file wasn't willful. So, the estate escaped having to pay the enormous amount.

If you have farming activities outside the U.S. and have foreign bank accounts, make sure you file Form FinCen 114 and report those accounts each year to the IRS. The penalties can be huge – especially if the failure to file was willful. And, they can be imposed on your estate post-death.

If this reporting requirement might apply to you, ask your tax professional about it.

The Necessity of Reading Contracts Before Signing

I am sure you have heard it said that you shouldn't sign anything before reading it. We've all violated that rule in some fashion. Most of the time, there might not be any consequences, but sometimes those consequences can be significant. That's especially true when it comes to financial documents. In a recent case, a farmer consolidated loans with a local bank in return for a 30-year installment



note. Or so he thought. Actually, the note said that he had 30 years to pay it off with annual payments unless the bank decided to demand payment in full at any time. He didn't read that part. He also thought the interest rate was a fixed 4.25 percent, but that was only for the first five years. After that the rate became variable. He signed the note and the associated paperwork and was current on the payments through the first three years, when the bank demanded payment in full in 14 days.

Local banks don't normally sell these types of instruments on a secondary market. That should be a tip that you won't get a long-term fixed rate. What happened in this situation was that the bank was looking at recently submitted financials and determined that while the farmer was able to make the current annual payment, that wouldn't be the case when the interest rate became a much higher variable rate. So, the bank called the loan.

That left the farmer with limited options – either pay the note in full immediately, get the bank to sign a forbearance agreement and get a loan from another bank with better terms, mediate the dispute or file Chapter 12 bankruptcy. None of those are great options.

Make sure you read and understand what you sign. The legal consequences of not doing so can be significant.

Proper Reporting of 4-H Fair Sale Income

Members of 4-H clubs or FFA Chapters often raise livestock as part of the educational program. When that livestock is sold at the end of the fair, what are the tax issues that are involved?

When a 4-H or FFA animal is sold after the fair, the net income should be reported on the other income line of the 1040. It's not subject to self-employment tax if the animal was raised primarily for educational purposes and not for profit and was raised under the rules of the sponsoring organization. It's also not earned income for "kiddie-tax" purposes. But, if the animal was raised as part of an activity that the seller was engaged in on a regular basis for profit, the sale income should be reported on Schedule F. That's also true if the 4-H or FFA member has other farming activities. By being reported on Schedule F, it will be subject to self-employment tax.

There are also other considerations. For example, if the seller wants to start an IRA with the sale proceeds, the income must be earned. Also, is it important for the seller to earn credits for Social Security purposes?

Raising livestock as a 4-H or FFA project can provide valuable life-lessons in responsibility. By understanding the tax rules associated with the project sales, it can also teach a valuable lesson in business.

Crime-Fraud Exception to the Attorney-Client Privilege

Communications between an attorney and client are protected by the attorney-client privilege. But if the legal advice given leads to you engaging in an illegal or fraudulent activity, the advice may not be protected, and serious consequences could result. I'll be back in a moment to discuss.



Normally, communications with your attorney are protected from disclosure. But an exception applies if your attorney provides legal advice that leads to you committing a fraudulent act or crime. *See, e.g., United States v. Zolin, 491 U.S. 554 (1989)*. For the rural attorney the exception can come up in bankruptcy planning as well as estate planning where asset protection is involved. There are legitimate strategies to utilize, but others are not and can be challenged as fraudulent or illegal. This area of the law requires careful attention to detail both by the attorney and the client and the rules can be complex.

Make sure you get sound planning advice from your attorney and maybe have a second set of eyes in the firm look over a proposed plan. If you are working with a solo practitioner, get permission to have the plan reviewed. The law does allow a degree of asset protection when it comes to estate planning as well as farm bankruptcy. But it must be done properly. If you get good advice and don't follow it, you could end up in serious legal trouble and maybe even as a target of a grand jury investigation.

Those would not be pleasant experiences.

Conclusion

There are many ways that the law intersects agriculture. Again, this just is a brief sample of some of the ways.

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