

How is the Miscellaneous Offshore Penalty Calculated Under the Streamlined Domestic Procedures?

The miscellaneous offshore penalty is equal to 5 percent of the *highest* end-of-year aggregate balance of the taxpayer's foreign financial assets that are subject to the penalty during the years in the covered tax return period and the covered FBAR period. How is the highest end-of-year aggregate balance determined? By tallying the year-end account balances and year-end asset values for all of the foreign financial assets subject to the penalty for each of the years in the covered tax return period and the covered FBAR period and selecting the *highest* end-of-year aggregate balance from among those years.

When is a foreign financial asset subject to the 5-percent miscellaneous penalty? A foreign financial asset is subject to the 5-percent offshore penalty if at least one of the following conditions exists:

- (1) The asset should have been, but was *not*, reported on a Form 8938 for that year; and/or
- (2) The asset was properly reported for that year, but gross income from the asset was *not* reported in that year.

Reducing these two conditions to their simplest form leads to the inescapable conclusion that compliance is required not just on the asset disclosure front but also on the failure to report income front – even when the asset is properly reported – in order to avoid the 5% miscellaneous offshore penalty. For example, if a foreign bank account is properly disclosed on an FBAR and Form 8938, but the interest income generated by that account is *not* included on the Form 1040 for the year in question, then the value of that bank account must be included in the 5% miscellaneous offshore penalty base.

The term, “foreign financial assets” includes any one of the following:

- a. Financial accounts held at foreign financial institutions;
- b. Financial accounts held at a foreign branch of a U.S. financial institution;
- c. Foreign stock or securities not held in a financial account;
- d. Foreign mutual funds; and

e. Foreign hedge funds and foreign private equity funds.

Under the Streamlined Domestic Offshore Procedures, eligible taxpayers need only pay the miscellaneous offshore penalty. They are not subject to accuracy-related penalties, information return penalties, or FBAR penalties.