Litigating the FBAR Penalty in District Court and the Court of Federal Claims.

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As a result of the IRS's campaign against taxpayers who hide assets overseas and fail to report income from offshore accounts, the long-dormant FBAR penalty has become a potent weapon in the IRS's arsenal. IRS agents examining taxpayers who made quiet disclosures or failed to report income from offshore accounts have been told to be "aggressive,"[25] leading to the assertion of one or more 50% willfulness penalties under 31 USC §5321(a)(5)(C).[26]

The only reported decisions in which the courts reached the merits of an FBAR penalty assessment have been ones brought in district courts by the Government to reduce a penalty assessment to judgment.[27] The Tax Court has held it has no jurisdiction over the FBAR penalty.[28] A bankruptcy court held that an FBAR penalty cannot be discharged in bankruptcy.[29] Several articles have been written about the litigation of the FBAR penalty, focusing on the published decisions.[30] This could lead one to conclude that a person against whom an FBAR penalty has been assessed cannot file a lawsuit to seek a judicial determination of her liability for the penalty. In the author's view, such a belief is wrong. Under both the Tucker Act and the Little Tucker Act, the Court of Federal Claims and federal district courts, respectively, have jurisdiction over a cause of action for illegal exaction brought by a person who has paid only a portion of an FBAR penalty assessment.

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[25] Comment by Supervisory Revenue Agent at International Tax Compliance Roundtable panel at the 2013 Annual Meeting of the California Tax Bar & the California Tax Policy Conference.

[26] In *United States v. Zwerner* (SD FL No. 13-cv-22082-CMA), the Government filed suit to collect 50% FBAR willfulness penalties that had been assessed for four year.

[27] *United States v. Williams*, 2012 U.S. App. LEXIS 15017 (4th Cir. 2012), rev'g 2010 U.S. Dist. LEXIS 90794 (E.D. Va. 2010); *United States v. McBride*, 2012 U.S. Dist. LEXIS 161206 (D. Utah 2012).

[28] Williams v. Commissioner, 131 T.C. 54 (2008).

[29] *United States v. Simonelli*, 614 F.Supp.2nd 241 (D. CT 2008). Under Bankruptcy Code (11 USC) § 502 and Bankruptcy Rule 3007, a debtor or any party in interest can object to any claim. If a claim for an FBAR penalty is filed in a bankruptcy case, the debtor can file an objection to the FBAR penalty and obtain a judicial ruling on her liability.

[30] *See*, e.g., Toscher and Strachan, "Proving Willfulness in Civil FBAR Cases," April 2013 *Los Angeles Lawyer* 15; Sheppard, "Third Time's the Charm: Government Finally Collects 'Willful' FBAR Penalty in Williams," Dec. 2012 *Journal of Taxation* 319, and "Government Wins Second Willful FBAR Penalty Case: Analyzing What McBride Really Means to Taxpayers With Unreported Foreign Accounts," Apr. 2013 *Journal of Taxation* 187; Ciraolo, "The FBAR Penalty: What Constitutes Willfulness," May 2013 *Maryland Bar Journal* 38.

Background of the FBAR Civil Penalty

On October 26, 1970, Congress passed the Bank Secrecy Act as Pub. L. 91-508. One little noticed provision required the filing of reports and the maintenance of records. As codified in 31 USC §5314(a), it states:

> (a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:
>
> (1) the identity and address of participants in a transaction or relationship.
>
> (2) the legal capacity in which a participant is acting.
>
> (3) the identity of real parties in interest.
>
> (4) a description of the transaction.

This provision is the statutory authority for the requirement that U.S. persons with foreign accounts totaling over $10,000 to annually file Form TD 90-22.1, the FBAR.[31]

Originally, there were no civil penalties that could be imposed for failure to comply with §5314(a) and the regulations promulgated under that section. This was rectified in 1986, when Congress added subsection (a)(5) to 31 USC §5321.[32] As originally enacted, §5321(a)(5) authorized the imposition of a penalty for a willful violation of §5314. The maximum penalty for failing to file a report was the greater of the balance in the account at the time of the violation (not to exceed $100,000) or $25,000.

In 1992, the Department of Treasury issued Treasury Directive 15-41, which delegated to the IRS the authority to investigate (but not enforce) potential violations of §5314(a). The Financial Crimes Enforcement Network or FinCen's enforcement of civil penalties under the directive was lackadaisical. In its 2002 Report to Congress under §361(b) of the USA Patriot Act, the Treasury Department reported that between 1993 and 2002, the IRS had referred only twelve cases to FinCen to determine whether to impose a civil penalty under §5321(a)(5). Only two penalties were imposed. In four of the cases, FinCen issued warning letters. It took no action in the remaining six cases.[33]

In an effort to increase FBAR compliance, in April, 2003, the IRS and FinCen entered into a memorandum agreement under which FinCen delegated the authority to enforce the FBAR penalty to the IRS.[34] The following year, as part of the American Jobs Creation Act of 2004, Congress amended the penalty provisions of 31 USC §5321(a)(5).[35] The amendment provided for a penalty for a non-willful violation of §5314 of up to $10,000 unless the violation was due to reasonable cause and "the amount of the transaction or the balance in the account at the time of the transaction was properly reported."[36] In the case of a "willful" violation, the maximum penalty that can be imposed is the greater of

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[31] Section 5314 is the statutory basis for the cases holding that the required records exception applies to foreign bank accounts.

[32] Pub. L. 99-570, §1357(c) (1986).

[33] See Department of Treasury, *Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act* (April 26, 2002), at p. 9, available at http://www.fincen.gov/news_room/rp/reports_coressng.html.

[34] IR 2003-48; see http://www.irs.gov/uac/IRS-and-FinCEN-Announce-Latest-Efforts-to-Crack-Down-on-Tax-Avoidance-Through-Offshore-Accounts.

[35] Pub. L. 108-357, §821.

[36] 31 USC §5321(a)(5)(A), (B).

$100,000 or 50% of the balance in the account at the time of the violation for "a failure to report the existence of an account or any identifying information required to be provided with respect to an account." There is no reasonable cause exception for a willful violation.[37]

Following on the heels of the conviction of Igor Olenicoff for filing a false return,[38] the UBS deferred prosecution agreement,[39] and the IRS's serial offshore voluntary disclosure initiatives, there has been an increased emphasis on imposing both criminal and civil sanctions against persons who hide assets in offshore financial accounts. As explained below, a person against whom an FBAR penalty has been assessed can file a complaint in either district court or the Court of Federal Claims to challenge her liability.

The Tucker Act and the Little Tucker Act

There are two prerequisites for a person to maintain an action against the United States. First, the court must have subject matter jurisdiction. Second, there must be a waiver of sovereign immunity. The Tucker Act[40] and the Little Tucker Act[41] give the Court of Federal Claims and the United States district courts, respectively, jurisdiction to hear cases for money damages against the Government. The Tucker Act vests the Court of Federal Claims with jurisdiction over:

> ... any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[42]

The Little Tucker Act vests the United States district courts with jurisdiction over:

> any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort....[43]

The Tucker Act and the Little Tucker Act not only vest the courts with jurisdiction; they are also waivers of sovereign immunity over claims for money damages against the United States where the claimant can "demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. Mitchell*, 463 U.S. 206, 216-217 (1983), quoting *United States v. Testan*, 424 U.S. 392, 400 (1976). Thus, the question is whether the statutes or regulations upon which the claim is founded "create the substantive rights to monetary damages" against the United States. *Mitchell, supra*, 463 U.S. at 218.

The history of the Tucker Act and the Little Tucker Act was outlined by the Supreme Court recently in *United States v. Bormes*, 133 U.S. 12 (2012):

> Sovereign immunity shields the United States from suit absent a consent to be sued that is "unequivocally expressed." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); some

[37] 31 USC §5321(a)(5)(C), (D).
[38] Case No. SA CR 07-227-CJC (C.D. CA); see, http://www.ocregister.com/articles/olenicoff-572767-ocregister-court.html.
[39] The text of the UBS deferred prosecution agreement is available at http://www.google.com/ url?sa=t&rct =j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.justice.gov%2Ftax%2FUBS_Signed_Deferred_Prosecution_Agreement.pdf&ei=zYrJUvzKJdHtoAS2JQ&usg=AFQjCNFPIN2zM391Il7Bd4BvuGbpcSWmiQ&bvm=bv.58187178,d.cGU.
[40] 28 USC §1491.
[41] 28 USC §1346(a)(2).
[42] 28 USC §1491.
[43] 28 USC §1346(a)(2).

internal quotation marks omitted). The Little Tucker Act is one statute that unequivocally provides the Federal Government's consent to suit for certain money-damages claims. *United States v. Mitchell*, 463 U.S. 206, 216 (1983) *(Mitchell II)*. Subject to exceptions not relevant here, the Little Tucker Act provides that "district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims," of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §1346(a)(2). The Little Tucker Act and its companion statute, the Tucker Act, §1491(a)(1), do not themselves "creat[e] substantive rights," but "are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009).

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The Court of Claims was established, and the Tucker Act enacted, to open a judicial avenue for certain monetary claims against the United States. Before the creation of the Court of Claims in 1855, see Act of Feb. 24, 1855 (1855 Act), ch. 122, *§1*, 10 Stat. 612, it was not uncommon for statutes to impose monetary obligations on the United States without specifying a means of judicial enforcement.[fn3] As a result, claimants routinely petitioned Congress for private bills to recover money owed by the Federal Government. See *Mitchell II*, *supra*, at 212 (citing P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 98 (2d ed. 1973)). As this individualized legislative process became increasingly burdensome for Congress, the Court of Claims was created "to relieve the pressure on Congress caused by the volume of private bills." *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962) (plurality opinion). The 1855 Act authorized the Court of Claims to hear claims against the United States "founded upon any law of Congress," *§1*, 10 Stat. 612, and thus allowed claimants to sue the Federal Government for monetary relief premised on other sources of law. (Specialized legislation remained necessary to authorize the payments approved by the Court of Claims until 1863, when Congress empowered the court to enter final judgments. See Act of Mar. 3, 1863 (1863 Act), ch. 92, 12 Stat. 765; *Mitchell II*, *supra*, at 212-214 (recounting the history of the Court of Claims)).

Enacted in 1887, the Tucker Act was the successor statute to the 1855 and 1863 Acts and replaced most of their provisions. See Act of Mar. 3, 1887 (1887 Act), ch. 359, 24 Stat. 505; *Mitchell II*, *supra*, at 213-214. Like the 1855 Act before it, the Tucker Act provided the Federal Government's consent to suit in the Court of Claims for claims "founded upon . . . any law of Congress." 1887 Act *§1*, 24 Stat. 505. *Section 2* of the 1887 Act created concurrent jurisdiction in the district courts for claims of up to $1,000. The Tucker Act's jurisdictional grant, and accompanying immunity waiver, supplied the missing ingredient for an

> action against the United States for the breach of monetary obligations not otherwise judicially enforceable.

The Supreme Court in *Bormes* held that given the specific statutory scheme for damages contained in the Fair Credit Reporting Act ("FCRA"), the Little Tucker Act did not vest the district court with jurisdiction over a claim for damages against the United States for alleged violations of the FCRA.

The Court of Appeals for the Federal Circuit (like its predecessor, the U.S. Court of Claims) has long recognized two types of non-contract damage claims that are cognizable under the Tucker Act: "that under which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum, and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Eastport S.S. Corp. v. United States*, 372 F.2nd 1002, 1007 (Cl. Ct. 1967).

In *Testan v. United States*, 424 US 392 (1976), the Supreme Court approved the assertion of Tucker Act jurisdiction in cases where the plaintiff seeks the return of money that was alleged to have been illegally paid to the Government. In rejecting the plaintiffs' claim that they were entitled to an award of back pay due to the Government's failing reclassify them, the *Testan* Court stated:

> [T]he Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. at 607, 372 F.2d at 1009; *Mosca v. United States,* 189 Ct.Cl. 283, 290, 417 F.2d 1382, 1386 (1969), *cert. denied,* 399 U.S. 911 (1970). We are not ready to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.

424 U.S. at 401-402.

The Federal Circuit detailed what is needed for a plaintiff to maintain an illegal exaction claim in *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005):

> An "illegal exaction," as that term is generally used, involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). The classic illegal exaction claim is a tax refund suit alleging that taxes have been improperly collected or withheld by the government. *See, e.g., City of Alexandria v. United States,* 737 F.2d 1022, 1028 (Fed. Cir. 1984). An illegal exaction involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution. *See, e.g., Casa de Cambio Comdiv,* 291 F.3d at 1363. The Court of Federal Claims ordinarily lacks jurisdiction over due process claims under the Tucker Act, 28 U.S.C. §1491, *see Murray v. United States,* 817 F.2d 1580, 1582 (Fed. Cir. 1987), but has been held to have jurisdiction over illegal exaction claims "when the exaction is based upon an asserted statutory power." *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1573 (Fed. Cir. 1996); *see also Eastport,* 372 F.2d at

1008 (Court of Claims had jurisdiction over exaction "based upon a power supposedly conferred by a statute"). To invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by "necessary implication," that "the remedy for its violation entails a return of money unlawfully exacted." *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369, 1373 (Fed. Cir. 2000) (concluding that the Tucker Act provided jurisdiction over an illegal exaction claim based upon the Export Clause of the Constitution because the language of that clause "leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy").

See also *New York Life Ins. Co. v. United States*, 118 F.3rd 1553 (Fed. Cir. 1997) (holding that the Court of Federal Claims had jurisdiction over an action for return of a deposit of tax where the IRS failed to make a timely assessment; the refund claim provisions did not apply because the taxpayer was seeking the recovery of a tax deposit and not the refund of a tax payment).

Applicability of the Tucker and Little Tucker Acts to the FBAR Penalty

The Court of Federal Claims has pointed out, "[t]he prototypical illegal exaction claim is 'a tax refund suit alleging that taxes have been improperly collected or withheld by the government,'" *Kipple v. United States*, 102 Fed. Cl. 773, 777 (2012) (quoting *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)). A person can maintain a cause of action for illegal exaction by alleging that he paid money to the federal government and seeks the return of all or a part of that sum because it was "improperly paid, extracted or taken from the claimant in contravention of the Constitution, a statute or regulation." *Briggs v. United States*, 564 F.Supp. 2nd 1087, 1092 (ND CA 2008) (allegations that a tax refund had been improperly offset to collect a debt was sufficient to state a cause of action under the Little Tucker Act).

A person who has paid money towards an FBAR assessment and who claims that the assessment was illegal is seeking to recover an illegal exaction from the Government. She can, therefore, maintain an action to recover the payment in either district court (if the amount the plaintiff seeks to recover is $10,000 or less) or the Court of Federal Claims. Because the FBAR penalty is not a tax but, instead, a civil penalty under Title 31, the rule in *Flora v. United States*, 362 U.S. 145 (1960) (holding that to maintain an action for refund of income tax under title 26, a taxpayer had to pay the full amount of the tax plus any penalties and interest) would not apply. That the rule in *Flora* is inapplicable is illustrated by several recent decisions of the Court of Federal Claims.

In *Ibrahim v. United States.* 112 Fed. Cl. 333 (2013), the plaintiff filed an income tax return for 2011 that reported an overpayment and claimed a refund, based in part on the earned income credit. After the IRS notified the plaintiff that he was not eligible for the credit as claimed, he filed an amended return that claimed a refund. The IRS approved a refund of $1,962. Instead of issuing a check to the plaintiff, the IRS offset it against an education loan because the social security number of the loan recipient, Grant K. Anderson, matched the plaintiff's social security number. Under 31 U.S.C. §3720A, a federal agency owed a past-due debt by any person may notify the Treasury, which can then offset any tax refund owed the person against the debt pursuant to 26 U.S.C. §6402(d).

Ibrahim claimed that he was not the loan recipient but, instead, was the victim of identity theft. Thereafter, the IRS then reversed its determination that the taxpayer was entitled to the refund it had issued and assessed $533 in additional tax plus interest. The plaintiff thereupon filed a suit in the Court of Federal

Claims for the return of the funds that had been applied to the education loan. The Government moved to dismiss on the ground that under *Flora v. United States*, 362 US 145 (1960), a taxpayer may not maintain a refund suit unless he has paid in full the taxes, penalties and interest assessed for that year. The Court granted in part and denied in part the Government's motion.

Because the plaintiff was proceeding *pro se*, the Court liberally construed his pleadings as containing a cause of action for illegal exaction, over which the Court had jurisdiction under the Tucker Act, 28 USC §1491. Under Claims Court jurisprudence, a person invoking its "jurisdiction based on an illegal exaction must demonstrate that 1) the exaction was directly caused by a misapplication of a statute, and 2) the remedy implicit in the statute is the return of the funds." The Court noted that, under 26 USC §6402(g), a suit to recover a refund that had been offset against another debt is not considered to be an action for tax refund.

The plaintiff claimed that the Government misapplied the refund offset statute because it applied the refund to a debt that he did not owe, since he was not the loan recipient and the Department of Education misapplied 31 USC §3720A when it used his refund to pay the debt of another person. The Court had previously held that §3720A implicitly requires a monetary remedy because absent a monetary remedy, a litigant has no recourse to recover . . . income tax refunds unlawfully offset." Because the Court viewed the complaint as containing a cause of action for illegal exaction due to the offset of the tax refund, it denied the motion to dismiss. To the extent that the complaint was a tax refund claim, the motion was granted.

In *Kipple*, *supra*, the plaintiff's tax refund was offset against a student loan the government claimed he owed. The plaintiff brought a *pro se* action in the Court of Federal Claims to recover the amount offset, alleging that there was no legally enforceable debt owed to the government. The Court held that it had jurisdiction under the Tucker Act because the plaintiff alleged an illegal exaction.

A person can maintain an illegal exaction claim without waiting for the Government to offset a tax refund or other payment against an assessment. As the Court of Claims put it in *Clapp v. United States*, 117 F. Supp. 576, 580 (1954), an illegal exaction has occurred when "the Government has the citizen's money in its pocket." See also *Suwanee S.S. Co. v. United States,* 279 F.2d 874, 876 (1960) (ship owner may recover payment illegally exacted as a condition of receiving permission to sell ship to a foreign purchaser).

Because the *Flora* rule does not apply to nontax cases, a person against whom an FBAR penalty is assessed can pay a small portion of the assessment. Because there are no statutory or regulatory prerequisites for maintaining an action to recover the payment, there is no need to file a refund claim. The period of limitations for bringing an action under the Tucker Act and the Little Tucker Act is six years after the right of action accrues.[44] There is no right to a jury trial in the Court of Federal Claims. There is also no right to a jury trial for an action to recover money from the Federal government.[45] A person is entitled to a jury trial in an action by the Government to impose liability for a civil penalty.[46] Thus, if an action is brought in district court to recover $10,000 or less paid towards a FBAR penalty and the government counterclaims

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[44] 28 USC §§2401(a), 2501. Although this article does not address whether a person can maintain an action for declaratory relief or an injunction to challenge an FBAR penalty assessment, it should be noted that the period of limitations for bringing an action under the Administrative Procedures Act is also the six-year period contained in 28 USC §2401(a). *Wong v. Doar*, 571 F.3d 247, 263 (2nd Cir. 2009); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991).

[45] 28 USC §2402 provides that there is no right to a jury trial in an action against the United States in district court except for a tax refund suit.

[46] *Tull v United States*, 481 US 412 (1987) a defendant was entitled to a jury trial under the Seventh Amendment in an action by the US to impose a civil penalty for violation of the Clean Water Act, since it was an action to collect a debt.

for the unpaid balance, the plaintiff can demand trial by jury.

Some Practical Considerations

This brings us to some practical considerations. While a person can sue to recover payments made toward an FBAR assessment, a major question is when to do so. Because an FBAR assessment is not a tax, the Government's enforcement mechanisms are limited to those under the Federal Debt Collection Act ("FDCA").[47] The collection methods available to the government under the FDCA are:

a) Administrative offset
b) Tax refund offset
c) Federal salary offset
d) Non-federal employee wage garnishment
e) Referral to a private collection contractor
f) Referral to a federal agency operating a debt collection center
g) Reporting delinquencies to a credit rating bureau
h) Litigation and foreclosure.[48]

Unless it obtains and records a judgment, the Government does not have a lien against property of the debtor. Its only recourse is through federal offset or non-government employee wage garnishment (which is limited to 15% of the person's take home pay).[49] A taxpayer who is not an employee would not be subject to the wage garnishment provisions. The time period during which the Government can bring an action to collect the penalty is two years from the assessment date.[50] If it fails to do so, its collection remedies are limited to those outlined in §3711(g)(9)(A)-(G) (that is, all remedies other than litigation and foreclosure).

The first consideration should be the strength of your client's case. This will require obtaining and evaluating all of the evidence surrounding the failure to file FBARs, including a) the opening and maintenance of the offshore accounts, b) any failure to report income from the offshore accounts, c) the preparation of the client's income tax returns and d) the client's communications with tax professionals concerning the offshore accounts.

If you determine your client has a viable defense to imposition of the penalty, you next have to consider whether it is reasonable to bring an action within two years of the assessment date, or wait to see if the Government files a suit to collect the penalty. Unless your client has a strong defense to liability, it is probably advisable to delay bringing an action until after the two year period of limitation because if an action is filed before the running of the two year period of limitations, it is likely that the Government will counterclaim for the unpaid balance.

Conclusion

We are still in the early stages of FBAR litigation. With the IRS's current emphasis on increasing compliance by taxpayers with offshore accounts, there will be an increased use of the willful FBAR penalty against taxpayers who were noncompliant and did not enter into the offshore voluntary disclosure initiative. If a client is facing potential willful penalties, it is essential that the practitioner conduct a thorough investigation in order to develop as compelling a case as possible. Regardless of whether there is a right to sue to recover a partial payment towards an FBAR penalty, it is in the best interests of the client to convince the IRS during either exam or appeal that the willful penalty does not apply or that the case is appropriate for settlement.[51]

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[47] 31 USC §§3701 *et seq.*
[48] 31 USC §3711(g)(9)(A)-(H).
[49] 5 USC §5514(a) (Federal salary offset); 31 USC §3720D(b) (non-government employee wage garnishment.
[50] 31 USC §5321(b)(2).

[51] If a taxpayer enters into a closing agreement with the IRS fixing the amount of the penalty, she will not be able to successfully maintain an action to recover the penalty. If a revenue agent proposes the assessment of an FBAR penalty, the taxpayer has a right to appeal to the IRS Office of Appeals, which has authority to settle the penalty if the appeal is pre-assessment. If the appeal is post-assessment, an FBAR assessment "in excess of $100,000 cannot be