Practitioners Balk at Potential DOJ Willful FBAR Argument

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By Andrew Velarde

Practitioners are disturbed by a possible legal stance of the Justice Department in the latest dust-up over foreign bank account reporting, which would negate reliance on a professional as a defense to willful penalties.

Tax Notes talked with two practitioners following filings of a joint pretrial statement and proposed jury instructions in *Dadurian* that seemingly advanced that stance on the part of the government. Later filings on August 15 that came in after those conversations appear to be taking a slightly softer stance. How exactly the case will be argued at trial remains to be seen, however.

"The government is pushing the envelope," Steven Toscher of Hochman Salkin Toscher Perez PC said. "While most of the courts have untethered willfulness in FBAR cases from its traditional meaning, a taxpayer's good faith — including reliance on a professional — has always been considered a defense to willful penalties."

In June the U.S. District Court for the Southern District of Florida denied summary judgment for Daniela Dadurian, who is facing a $2.7 million liability for failing to file FBARs for accounts owned by herself, her mother, and several foreign entities after she failed to convince the court that there's no evidence of willfulness regarding five of the accounts at issue.

The Justice Department has alleged that Dadurian had financial interest in or signatory authority over several foreign accounts — some with maximum balances of over $2 million in some years — but indicated on her 2007 to 2010 tax returns that she did not have such interest or authority. According to the complaint, while Dadurian had filed FBARs for Swiss and German accounts before 2007, she failed to tell Anthony Caruso, her tax return preparer for the years at issue, about her foreign assets. The defense, however, asserts that she did not willfully fail to report her accounts because she relied on her tax attorneys' advice that she did not need to disclose them.

As explained by the district court in its summary judgement order, under 31 U.S.C. section 5321(a)(5), reasonable cause is not a defense to willful FBAR violations. The court further noted that reliance on a professional may constitute reasonable cause for underpayments of tax.

The Authorities

Despite the order, the issue of whether professional reliance is a valid defense to willful FBAR penalties is now moving forward, with a pretrial conference in *Dadurian* scheduled for August 16 and a jury trial to follow on August 19.

The July 26 joint pretrial statement lists the issue as one of six remaining that require a court determination on the law. Proposed jury instructions further illustrate the dispute, with the government citing 31 U.S.C. section 5321(a)(5)(B)(ii) and asking that the jury be instructed: "If the United States proves that Daniela Dadurian acted willfully, Dadurian may not claim as a defense, and you shall not consider, that she relied upon the advice she received from accountants, lawyers, or other professionals."

Toscher, however, was unconvinced.

"The only citation is the code section, and such a reading runs counter to years of jurisprudence of what constitutes willful conduct. Very little in the statute is a model of clarity," Toscher said. "If I go to a lawyer and he or she advises that I have no FBAR obligation, that seems to go pretty far in demonstrating good faith and a lack of willfulness."

Caroline D. Ciraolo of Kostelanetz & Fink LLP said the argument that taxpayers cannot avail themselves of good-faith reliance on a qualified adviser "flies in the face of decades of clear administrative guidance and judicial precedent," citing section 1.6664-4(b)(1).

Under *Cheek v. United States*, 498 U.S. 192 (1991), "an intentional violation of a known legal duty" constitutes willfulness. And the Supreme Court held in *United States v. Boyle,* 469 U.S. 241 (1985), that "when an accountant or an attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice."

Furthermore, Ciraolo cited *Neonatology Associates, P.A. v. Commissioner*, 299 F.3d 221 (3d Cir. 2002), the case often used by courts as the standard for reliance on professional advice, for the requirements needed to meet a reasonable reliance defense. That includes a competent professional with sufficient expertise, a taxpayer providing the necessary and accurate information to the adviser, and a good-faith reliance by the taxpayer on the adviser's judgment, she summarized.

Reliance on a professional has been the subject of litigation in the willful FBAR context as well, including in *Bedrosian v. United States*, No. 17-3525 (3d Cir. 2018). In *Bedrosian* the Third Circuit held that recklessness occurs when a taxpayer ought to have known that the filing requirement was not met or could have found out easily.

"If a taxpayer attempts 'to find out' about their reporting obligations by consulting with competent and qualified advisers in an effort to comply with the law, provides all relevant information, and follows the advice given, there simply is no basis to find that the taxpayer acted recklessly or willfully," Ciraolo, former head of the Justice Department Tax Division said.

Ciraolo also pointed to *Kimble v. United States*, No. 1:17-cv-00421 (Fed. Cl. 2018), for support. In that case the Court of Federal Claims held that a "no" answer on Question 7(a) on Schedule B to the presence of foreign accounts and a failure to ask **the taxpayer's accountant for advice was reckless.**

"It appears that the government is arguing [in *Dadurian*] that simply because the IRS asserted willful FBAR penalties, the taxpayer is barred from arguing reliance. This is nonsensical," Ciraolo said, arguing that if good-faith reliance on an adviser can be established, neither willful nor non-willful FBAR penalties should be imposed. "To find

otherwise would be to usurp congressional authority by essentially writing the non-willful penalty out of the statute in cases involving reliance and imposing strict liability for willful FBAR penalties any time a taxpayer seeks the advice of a competent and qualified adviser, provides all relevant information, relies in good faith, and follows the advice only to find that the advice was incorrect."

The government's August 15 brief states that it "objects to Defendant's proposed jury instruction regarding advice of tax professionals because it suggests that, in the event the jury finds reliance, that would constitute a complete defense and would end the willfulness inquiry," while arguing it is a multifactor inquiry. The taxpayer asserts in its brief "that the Government objects to the characterization of reliance upon the advice of tax professionals as a 'defense' to willful FBAR Penalties," while the parties agree that professional reliance can be evidence of non-willful behavior.

Crossing the Rubicon

Much to the chagrin of practitioners, several courts have already held that recklessness can lead to an inference of willful blindness, which is sufficient to find willfulness. But the Justice Department's argument in *Dadurian* could be a bridge too far, according to Toscher.

"The government has had an impressive string of victories which had fueled pushing the limits. They are pushing way too far here, and if the issue is squarely presented for a court's determination, the government will eventually lose," Toscher said.

Ciraolo also argued that by advancing its position, the Justice Department would be ignoring the purpose of the Bank Secrecy Act, which requires FBARs. Its purpose is to require records with "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism," 31 U.S.C. section 5311 states.

"If the government starts imposing penalties on individuals or entities who try to comply with our very complex tax and reporting obligations by seeking out and following the advice of competent and qualified professionals, we've crossed the Rubicon. That is beyond the pale," Ciraolo said.

In *United States v. Dadurian,* No. 9:18-cv-81276, the taxpayer is represented by Jeffrey A. Neiman and Derick Vollrath of Marcus, Neiman & Rashbaum LLPJustice DepartmentMary Apostolakos HerveyJohn P. Nasta