The Eighth Amendment Limits on FBAR Penalties—Common Sense Limitations Becomes a Legal Reality

By Steven Toscher and Michel R. Stein

Steve Toscher and Michel R. Stein continue their examination the Offshore Voluntary Disclosure Program and the imposition of FBAR penalties.

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Approximately eight years ago, we were faced with a difficult problem for a client regarding his exposure to the then recently enacted increased penalty for the failure to file a Foreign Bank Account Reporting form or so-called "FBAR." The client had recently pled guilty to having willfully filed a false tax return by checking the box "No" on Schedule B where it asked whether the taxpayer had a financial interest or signatory authority over a foreign bank account.

The government sought taxpayer consent to very large civil FBAR penalties. This was before the government's adoption of insisting that in most FBAR related criminal pleas, the taxpayer agrees to one 50% willfulness penalty. The problem was potential exposure to multiple year 50% penalties and the fact that the client did not want to agree to a very large civil willfulness penalty. As defense counsel, how does one defend a civil willfulness penalty where the client had already pled guilty to filing a false income tax return checking the box "No?" Admittedly, while the question of whether the income tax return was incorrect was theoretically different than "willfully" failing to file the FBAR form (this was before the law evolved to "recklessness"), as a practical matter, it became a question of how many angels can you get on a head of a pin? It seemed ugly and at this stage back in 2010, the government was threatening multiple year FBAR penalties which could, depending upon the statute of limitations, rise to 300% of the account balance. Enter the Eighth Amendment to U.S. Constitution and its application to potentially limit the Internal Revenue Service ("IRS") in asserting FBAR penalties.

In the December 2009–January 2010 issue of this publication, our firm published an article setting forth why the Eighth Amendment to the U.S. Constitution did in fact limit the ability of the IRS to assert these draconian

STEVEN TOSCHER is a Principal with Hochman, Salkin, Rettig, Toscher & Perez, P.C., in Beverly Hills, California. **MICHEL R. STEIN,** Esq., is a Principal with Hochman, Salkin, Rettig, Toscher & Perez, P.C., in Beverly Hills, California.

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penalties.[1] We thought the argument was sound and made sense, but as any advocate, we were waiting for the so-called other shoe to drop with the government opposing our viewpoint. Instead what happened, was that common sense prevailed. The IRS and the Department of Justice ("DOJ"), which have been charged with the enforcement of these provisions, has recognized, implicitly in their enforcement of the statute, that the Eighth Amendment does provide a limitation to the amount of FBAR penalties. The limitation had been recognized not because a court had to tell the government there was a limitation; rather, because the government itself recognized in its administration of the statute and its litigation strategy that there was such a limitation.

The IRS has come a long way in increasing tax compliance for foreign assets, but it will undoubtedly continue to seek penalties and fines for those choosing to be out of compliance.

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In this article, we revisit the Eighth Amendment's limitations and developments since 2010 both in terms of administrative practice and litigation which, in our judgment, confirms the Eighth Amendment's limitation on the assertion of the FBAR penalty.

Background

Over the last 10 years, international tax enforcement has become a high priority for the IRS and Department of Justice both as an outgrowth of the globalization of the U.S. economy and the realization that taxpayer compliance with our international tax regime is in need of improvement.[2] The compliance problem is attributable to a number of factors, including: The breadth and complexity of the U.S. tax regime which imposes income tax on transactions that occur beyond our borders; the difficulty of enforcing compliance where documents, people, and information are outside the United States; and what might be referred as a historical and ingrained attitude of many taxpayers when it comes to disclosing their offshore transactions—what happens overseas should stay overseas.

Congress attempted to increase compliance with international reporting in 2004 by drastically increasing the penalties imposed on U.S. taxpayers who "willfully" fail to report the existence of their foreign financial accounts.[3] U.S. taxpayers are required to report the existence of certain foreign financial accounts on their federal income tax returns and are also required to file a *Report of Foreign Bank and Financial Account*—FinCEN Form 114, formally known as TD F 90-22.1, and disclose the details of the account (hereinafter "FBAR").[4] The disclosure requirement is separate and apart from the duty to report and pay tax on the income earned on the account.

Failing to disclose an offshore account can subject a taxpayer to severe penalties. There are three separate monetary penalties authorized for FBAR reporting violations: (1) criminal fines for willful violations; (2) civil penalties for willful violations; and (3) civil penalties for non-willful violations.[5] The statute authorizes the stacking of a civil and criminal fine for the same violation.[6] Prior to the recent legislation under the Jobs Act of 2004,[7] the civil penalty for willful violations could be up to $100,000 per violation. Notwithstanding the fact that few, *if any,* penalties were ever imposed for violations during the almost 40-year history of the reporting requirement, Congress increased the civil penalty for willful violations to an amount up to the greater of $100,000 or 50 percent the balance in the account at the time of the violation.[8]

The legislative provision amending the FBAR penalties originated in the Senate and only included the addition of a penalty for non-willful reporting violations. Only in the Conference Committee was the increased penalty for willful violations added to the legislation. The legislative history to the 2004 Jobs Act provides *no rationale* for increasing the willful FBAR penalty from a maximum of $100,000 to an amount up to 50% of the foreign bank account. The legislative history focuses entirely on adding a penalty of up to $10,000 for non-willful FBAR reporting violations. As noted in the Senate Report:

> "The Committee understands that the number of individuals involved in using offshore bank accounts to engage in abusive tax scams has grown significantly in recent years. For one scheme alone, the IRS estimates that there may be hundreds of thousands of taxpayers with offshore bank accounts attempting to conceal income from the IRS. The Committee is concerned about this activity and believes that improving compliance with this reporting requirement is vitally important to sound tax administration, to combating

terrorism, and to preventing the use of abusive tax schemes and scams. Adding a new civil penalty that applies without regard to willfulness will improve compliance with this reporting requirement."[9]

It appears Congress was concerned with taxpayers not complying with their foreign reporting obligations and took the legislative leap to conclude that increasing the penalty, to what amounts to draconian levels, would fix the problem. It has certainly sent a chilling message for the non-compliant taxpayer—but what Congress did not consider were the constitutional limits on imposing excessive penalties in an effort to change taxpayer behavior—limits which go back to the origins of our republic and protections which were born out of the excessive fines imposed by the unlimited power of the King. Fortunately, we have a Constitution which limits the government's ability to punish—including limitations on draconian financial penalties for even willful non-compliance with the laws.

Excessive Fines Clause of Eighth Amendment

The Excessive Fines Clause of the Eighth Amendment to the Constitution—by requiring that any fine including the FBAR penalty—be "proportionate" to the conduct it seeks to punish, provides real limitations on the Government's ability to impose an excessive FBAR penalty. The case law developed under the *Excessive Fines Clause* also provides a meaningful structure, through a proportionality analysis, of how the IRS must exercise its discretion in imposing the FBAR penalty, in order to avoid running afoul of the Constitution by imposing the type of excessive penalties which the Eighth Amendment sought to banish to medieval English history.

The *Eighth Amendment* provides:

"*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*"

The Supreme Court has explained that the *Excessive Fines Clause* "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'"[10] "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."[11] "The touchstone of the constitutional inquiry under the *Excessive Fines Clause* is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[12]

The Forfeiture Cases

The applicability of the *Excessive Fines Clause* to the FBAR penalty can be found in the case law applying the clause to the Government's efforts to forfeit property connected with criminal activity. While the Supreme Court has interpreted the *Excessive Fines Clause* on only a few occasions over its more than 200-year history, these cases indicate that a civil penalty or forfeiture is unconstitutional if the penalty or forfeiture is at least in part "punishment" and that punishment is grossly disproportionate to the conduct which the penalty is designed to punish.

> *Any punishment, however, must fit the crime and the civil penalty must be proportionate to the conduct involved.*

The Supreme Court considered the *Excessive Fines Clause* in *Austin*, where it held that the Clause applied to certain forfeitures by the federal government. In *Austin,* the Supreme Court held that the *Excessive Fines Clause* applied to forfeitures of property under 21 USC §§881(a)(4) and (a)(7), and remanded for a determination of whether the forfeiture was excessive.[13]

The Supreme Court made clear that to come within the ambit of the *Excessive Fines Clause*, the forfeiture could in part serve a remedial purpose; it was only necessary for the forfeiture to be in part punishment. In evaluating whether the *Excessive Fines Clause* applied, the Supreme Court explained: "We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the *Excessive Fines Clause*. We, however, must determine that it can only be explained as serving in part to punish."[14] The Court evaluated the history of forfeiture as well as the particular forfeiture statutes at issue, and found punishment to be an aspect of these forfeitures. For instance, there was an innocent owner defense, and the relevance of the culpability of the owner made the statutes look more akin to punishment.[15]

While *Austin* dealt with forfeitures and not a fine or penalty such as the FBAR penalty, the label is not what is determinative—what counts is whether the imposition of the penalty has a punitive element to it—and one can have no doubt that an FBAR penalty equal to 50% of the taxpayer's foreign bank account will be punitive in most

factual situations under any reasonable understanding of word punishment.

Having determined that the Excessive Fines Clause could apply to a forfeiture in *Austin,* the Court took the next step in *Bajakajian* and found that if a forfeiture was so disproportionate to the conduct sought to be punished that it was indeed unconstitutional. In *Bajakajian*, the Supreme Court held that forfeiture of $357,144, under 18 USC §982(a)(1), in connection with a criminal conviction for willfully failing to report that he was transporting more than $10,000 out of the United States in violation of 31 USC §5316(a)(1)(A), violated the 8th Amendment's excessive fines clause.[16] "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[17] "Although the Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of [Bajakajian]'s $357,144.[18] "[F]ull forfeiture of [Bajakajian]'s currency would be grossly disproportional to the gravity of his offense."[19]

The IRS has the discretion under the statute to insure the penalty imposed fits the conduct involved and should insure discretion is exercised consistent with the Excessive Fines Clause of the Constitution.

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In many cases the application of the 50% FBAR penalty could be disproportionate to the conduct sought to be punished and should suffer the same fate as the forfeiture in *Bajakajian.* For example, assume an individual willfully[20] failed to report the existence of a foreign bank account with a balance of $2 million dollars and for which there was unpaid tax of $150,000. The IRS could assert a penalty of up to 50% of the account balance for each year in which there was a willful failure. Assuming the IRS asserted a penalty of 50% for one year—or a penalty of $1 million dollars, the penalty seems grossly disproportionate to the conduct sought to be punished—this is especially so if the taxpayer was also required to pay a civil fraud penalty on the unpaid tax which was evaded.

In determining that the forfeiture was excessive in *Bjakajian*, the Supreme Court compared the penalty structure under the Federal Sentencing Guidelines to determine how the law viewed the seriousness of the offense. The Supreme Court determined that under the Guidelines, the period of incarceration was five months and the fine was up to $5,000 and that a forfeiture of $347,000 was disproportionate under the 8th Amendment. The Supreme Court affirmed the lower courts determination that a forfeiture of $15,000 and a $5,000 fine was proportionate and constitutional.

Halper

The Supreme Court's decision in *Halper* lends support to the conclusion that the willful FBAR penalty constitutes punishment and is subject to the proportionality limitations.[21] Like the constitutional inquiry pursuant to the *Excessive Fines Clause,* analysis under the *Double Jeopardy Clause* also distinguishes between sanctions that constitute punishment and those that do not. In *Halper*, the Supreme Court held that where the amount of the fine bears no rational relation to the government's loss, the fine constituted punishment that unconstitutionally violated the *Double Jeopardy Clause* when imposed subsequent to a criminal conviction for the same act.[22] The Court found that imposition of a fine in excess of $130,000 to be sufficiently disproportionate when compared to the government's costs of approximately $16,000.[23] Although *Halper* was largely disavowed for purposes of *Double Jeopardy* analysis in *Hudson*,[24] it is still viable on how the Court evaluates whether a civil penalty constitutes punishment for constitutional purposes. *Halper* was largely overruled by *Hudson* because the Supreme Court determined that the *Double Jeopardy Clause* limited successive prosecutions—not successive punishments.[25] Indeed, in Justice Breyer's concurrence in *Hudson*, he noted that, "the Court in *Halper* might have reached the same result through application of the constitutional prohibition of "excessive fines."[26]

The Tax Penalty Cases

The constitutionality of a tax penalty and whether it constitutes punishment has been before the Supreme Court before—but not in the context of the *Excessive Fines Clause*. The seminal case with regard to the civil fraud penalty and whether it constituted punishment was *Helvering v. Mitchell*.[27] Although *Mitchell* was a *Double Jeopardy* case, the Court's analyzed whether the civil fraud penalty was punishment (thus implicating the Double Jeopardy Clause) or purely remedial in character and not punishment. In finding that the civil fraud penalty was remedial in character, the Court stated:

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court. … They are provided primarily as a safeguard for the protection of the revenue and reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.[28]

The Government will be hard pressed to demonstrate that the 50% FBAR penalty for "willful" failures is anything but punishment—especially where it is imposed in addition to the civil fraud penalty applied to the understatement of income tax. Moreover, the Supreme Court's subsequent punishment analysis in *Austin* and *Bajakajian* suggests that *Mitchell*'s punishment analysis has been undermined and that *Mitchell* is limited to tax penalties imposed under the Internal Revenue Code and is not applicable to a forfeiture imposed because of a Title 31 violation or a penalty imposed under Title 31—like the FBAR penalty.

Even with respect to tax penalties, a number of courts have revisited the application of "punishment analysis" in the wake of *Austin*, and have "recognized that…it is now possible for forfeitures and fines in civil cases to be regarded as punitive exactions, thus implicating the [*Excessive Fines Clause*]."[29] The taxpayers in *McNichols*, *Thomas*, and *Little* each challenged the civil penalty imposed under the Internal Revenue Code (Title 26) as punishment under the *Excessive Fines Clause*. The courts of appeals all suggested that the *Excessive Fines Clause* must be considered, but found that the imposition of these civil tax penalties did not violate the *Excessive Fines Clause* in those cases because "the additions to tax at issue in [these] case[s] are purely revenue raising because they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so."[30] The Fourth Circuit in *Thomas* explained that the penalty, being based on the Taxpayer's individual tax deficiency, essentially protects the penalty from being excessive.[31] "If the addition to tax is always calculated as fifty percent of the tax deficiency … the sanction could not be excessive as to one person, but not excessive as to another."[32]

Application to FBAR Penalties

The rationale surrounding the *Excessive Fines Clause* is equally applicable to the FBAR context.

In order to be subject to the *Excessive Fines Clause*, the FBAR penalty for willful reporting violations must, at least in part, be punishment.[33] If it is solely remedial it is not subject to the *Excessive Fines Clause*.[34] Like in *Austin*, the lack of culpability of the owner was a defense to forfeiture under those statutes, the civil FBAR penalty that provides that 50% of the account to be taken demands willfulness on the part of the taxpayer. This *mens rea* component in both the forfeiture statutes and the FBAR civil penalty is consistent with punishment.[35]

The FBAR civil penalty for willfulness has much more in common with the penalty for the reporting offense in *Bajakajian* than with the civil penalties in the tax cases. In *Bajakajian*, like application of the FBAR penalty, the penalty is simply based on how much currency the individual happened to have in his suitcase or bank account—which may have little to do with the culpability of the taxpayer.

In the context of a willful FBAR violation, an individual who failed to report $10,000,000 would be subject to a penalty of $5,000,000, whereas an individual who committed the same violation, but only had $1,000,000 in the bank would be penalized $500,000. Unlike the tax penalty held to be constitutional in *Mitchell* because of its correlation to the tax loss involved, the willful FBAR penalty has no correlation to the amount of the Government's tax loss and suffers the same constitutional problem as the forfeiture in *Bajakajian.*

Since the willful FBAR penalty is at least in part punishment, the Supreme Court's proportionality analysis under the Excessive Fines Clause (and the Double Jeopardy Clause) should be applied in determining whether the penalty is excessive and therefore unconstitutional.

"The touchstone of the constitutional inquiry under the *Excessive Fines Clause* is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[36] The standard, as articulated by the Supreme Court, is: "[A] punitive forfeiture violates the *Excessive Fines Clause* if it is grossly disproportional to the gravity of a defendant's offense."[37] In finding the forfeiture grossly disproportional to the gravity of *Bajakajian's* offense, the Court stated: "Respondent's crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it."[38] Also, the "violation was unrelated to any other activities" and "[he] does not fit into the class of persons for whom the statute was principally designed: He is not a money launder, a drug trafficker, or a tax evader."[39] In addition, the maximum sentence that could have been imposed on Bajakajian was six months with the maximum fine being $5,000.[40]

The lower courts have been applying the Supreme Court's proportionality analysis in an effort to place some constitutional limit on the Government's ability to make excessive forfeitures. For example, in *Varrone*,[41] in an opinion written by Judge (now Justice) Sotomayor, the following *Bajakajian* factors were used in evaluating the amount of the forfeiture:

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[1] "the essence of the crime" of the [defendant] and its relation to other criminal activity,

[2] whether the [defendant] fit into the class of persons for whom the statute was principally designed,

[3] the maximum sentence and fine that could have been imposed, and

[4] the nature of the harm caused by the [defendant's] conduct.

Following *Bajakajian,* the Congress amended the statute governing forfeitures to include a proportionality analysis. Title 18, Section 983(g) provides:

"(g) Proportionality.

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution."

The Excessive Fines clause has found its way into at least one decision pertaining to FBAR related cases.

In *Bussell*,[42] the district court acknowledged that the Excessive Fines Clause of the Eighth Amendment can apply to a willful FBAR penalty, finding that the FBAR penalty is punitive and therefore constitutes a "fine." After determining on summary judgment that the defendant violated the FBAR statute and did so willfully, the court evaluated whether the willful FBAR penalty imposed by the Government was an excessive fine in violation of the Eighth Amendment excessive fines clause. We note that the Government asserted only one 50% penalty. Following the factors in *Bajakajian*, the district court in *Bussell* considered the following factors in conducting the required proportionality inquiry: (1) the nature and extent of the crime and whether the violation was related to other illegal activities; (2) the other penalties that may be imposed for the violation; and (3) the extent of the harm caused.

(1) Nature and Extent of Crime

In *Bussell*, the court held that this factor did not favor either the Government or the taxpayer, because (1) while tax evasion is not as serious as some crimes that ultimately trigger civil forfeiture actions, the Bank Secrecy Act was targeted at tax evaders and (2) the taxpayer did not carry her burden of showing that the money at issue was derived from a lawful source. The court in *Bussell* noted that where the money at issue was derived from a lawful source and not connected to other illegal activities, stronger Eighth Amendment protections are triggered.

(2) Other Penalties that May Be Imposed

In *Bussell*, the court ultimately held that the amount of the FBAR penalty was unconstitutional, because it exceeded the maximum civil penalty provided under statute for the violation of the willful FBAR statute. The court accordingly reduced the FBAR penalty from $1,221,806 to $1,120,513.[43]

(3) Harm Caused

In *Bussell*, the court distinguished *Bussell* from *Bajakajian* on the basis that in *Bussell*, there was a tax loss to the public whereas in *Bajakajian* the only harm was the loss to the Government of the information that the money at issue had left the country. Therefore, for this factor, the harm caused by the tax deficiency alleged by the Government must be considered in evaluating the proportionality of this harm to the penalty. In *Bajakajian*, the Supreme Court concluded that there was no inherent proportionality in the forfeiture at issue in that case, explaining: "It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $ 12,000 out of the country in order to purchase drugs."[44]

IRS Restraint to FBAR Penalty

To its credit and implicitly recognizing the Eighth Amendment limitations to excessive FBAR penalties, the IRS has exercised self-restraint in the context of FBAR penalties.

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Initially, the IRS promulgated mitigation guidelines in the Internal Revenue Manual to promote consistency and guide its agents in administering the FBAR penalty.[45] The mitigation guidelines were originally developed before the increase in the amount of the willful penalty to up to 50 percent of the unreported account and, while updated, do not take into account how excessive the FBAR penalty can be on large accounts in comparison to the conduct—the tax loss—sought to be punished–an analysis required by the Constitution. The mitigation guidelines only provide relief with respect to accounts of up to a maximum of $1 million. Account holders in excess of that amount can be penalized of up to the full extent of the statute.

However, the most significant change in this area relates to Interim Guidance Memorandum for FBAR penalties, SBSE-04-05-150-0025, released on May 5, 2015, which places restraints on power of IRS Examiners. The Interim Guidance has since been incorporated into the Internal Revenue Manual (IRM).[46]

The statutory FBAR penalty provisions only establish *maximum* penalty amounts, leaving the IRS to determine the appropriate FBAR penalty amount below that threshold based on the facts and circumstances of each case. In this regard, IRS examiners are instructed to use their best judgment when proposing FBAR penalties, taking into account all the available facts and circumstances of a case.

For cases involving willful violations over multiple years, IRS examiners will recommend a penalty for each year for which the FBAR violation was willful. Assuming six years is still open under the statute of limitations, the IRS examiner could assert a total penalty of 300 percent of the amount of the account. Notwithstanding the large potential penalty, examiners are now instructed that in most cases, the total penalty amount for all years under examination *will be limited to 50 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination*. In such cases, the penalty for each year will be determined by allocating the total penalty amount to all years for which the FBAR violations were willful based upon the ratio of the highest aggregate balance for each year to the total of the highest aggregate balances for all years combined, subject to the maximum penalty limitation in 31 USC §5321(a)(5)(C) for each year.

Examiners may recommend a penalty that is higher or lower than 50 percent of the highest aggregate account balance of all unreported foreign financial accounts based on the facts and circumstances. The new IRS guidance however provides *that in no event will the total willful penalty amount exceed 100 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination.* The new guidance places a very important limitation on the examining agent's ability to assert these draconian penalties.

Before release of the guidance, multiple-year, 50-percent willful FBAR violations were a real possibility and not uncommon. Even more significant, the mere threat of the imposition of multiple penalties would force many taxpayers to accept a settlement to avoid financial devastation. For example, in *Zwerner*,[47] the IRS imposed four willful penalties, only to have three willful penalties sustained in jury trial. In this case, the assessed FBAR penalties upheld by the jury aggregated $2,241,809 on an offshore account that had an apparent high balance of $1,691,054 during the years at issue.

Multiple-year, maximum penalties are unnecessarily punitive. To redress unfairness, and likely in recognition that the imposition of multiple year FBAR penalties could run counter to Excessive Fines Clause of the Eighth Amendment, the new Guidelines attempt to make the FBAR penalties more proportional to the tax offense committed. In almost all FBAR-related cases, the amount of unreported income tax obligation pales in comparison to the potential FBAR penalties that could potentially be imposed. By restricting the agent's ability to impose multiple-year penalties, the IRS is attempting to adhere to constitutional limitations and avoid the appearance of Government overreach.

The Watered-down Willfulness Standard

Over the last 10 years, the Government in litigation has pressed for the watering down or weakening of the standard of willfulness that must be found to sustain the willful FBAR penalty. While the IRS' original position was that "willful" meant what we would ordinarily think it means—the violation of a known legal duty, the Government has pressed for a lesser standard of culpability—"recklessness"—as sufficient to apply the willful FBAR penalty. The Court's have in large part been receptive to the Government's position.

The debate and litigation concerning the proper standard of culpability will continue—but what we point out is that as the culpability standard for applying the willful FBAR penalty is weakened, this will present issues of the application of the Excessive Fines Clause. T-taxpayer culpability is one of the touchstones to the application of the Excessive Fines Clause. Where there is a lesser

culpability—proportionality will require a lower penalty. The punishment should fit the crime and reckless behavior has always been viewed in the law as deserving a lesser consequence.

Conclusion

The IRS has come a long way in increasing tax compliance for foreign assets, but it will undoubtedly continue to seek penalties for those choosing to be out of compliance. Any punishment, however, must fit the crime and the penalty must be proportionate to the conduct involved. The IRS has the discretion under the statute to insure the penalty imposed fits the conduct involved and should insure discretion is exercised consistent with the *Excessive Fines Clause* of the Constitution. To its credit, the IRS has shown some restraint in applying the statute and due regard to our Constitution. That is a good thing.

ENDNOTES

1 See *When Penalties Are Excessive—The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty,* Steven Toscher and Barbara Lubin, Journal of Tax Practice & Procedure, December 2009–January 2010, at 69. This present article is adapted from that piece, and the authors would like to acknowledge Barbara Lubin for her contribution.

2 Beginning in 2009, the IRS has run four successful Offshore Voluntary Disclosure Programs (OVDP) for which more than 56,000 taxpayers have used one of the programs to comply voluntarily. See IR-2018-52 (March 13, 2018). In addition, 65,000 additional taxpayers have come into compliance under the IRS' Streamlined filing Compliance Procedures. All told, those taxpayers paid a total of $11.1 billion in back taxes, interest and penalties.

3 The FBAR reporting requirement is part of the Bank Secrecy Act, 31 USC §5311 *et seq.* For a more detailed discussion of the FBAR reporting requirements, penalties, procedures and defenses, see Steve Toscher and Michel R. Stein's articles: *FBAR Enforcement Is Coming!* J. Tax Practice & Procedure, Dec. 2003–Jan. 2004; Toscher and Stein, *FBAR Enforcement—An Update,* J. Tax Practice & Procedure, Apr–May 2006; Toscher and Stein, *FBAR Enforcement—Five Years Later*, J. Tax Practice & Procedure, June–July 2008. Toscher and Stein, *FBAR Enforcement, Appeals and Collection Procedures in the Post-Amnesty World,* J. Tax Practice & Procedure, Dec.–Jan. 2012, at 61; and Toscher and Stein, *The Continuing Evolution of FBAR Enforcement*, J. Tax Practice & Procedure, Apr.–May. 2016, at 49.

4 31 USC §5321(a)(7)(D).

5 31 USC §5321(a)(5)(C).

6 *See* 31 USC §5322 and 31 USC §5321(a)(5).

7 American Jobs Creation Act of 2004 (P.L. 108-357).

8 31 USC §5321(a)(5)(C).

9 Senate Committee Report (S. Rep. No. 108-192, P.L. 108-357).

10 *Austin*, 509 US 602, 609–610 (1993) (citations omitted).

11 *Austin* at 610 (citing *Halper*, 490 US 435,447–448 (1989)).

12 *Bajakajian*, 524 US 321, 334 (1998) (citing *Austin* at 622–623).

13 *Austin*, 509 US 604.

14 *Id.* at 610.

15 *Id.* at 619.

16 524 US 324.

17 *Id.* at 334.

18 *Id.* at 329.

19 *Id.* at 324.

20 For purposes of the 8th Amendment analysis, we can assume the Government can establish that the failure to file the FBAR was willful and even that the taxpayer was convicted of a felony for his or her failure to file the form and to evade the tax on the income from the account.

21 *Halper,* 490 US 435 (1989).

22 *Halper*, 490 US 448–449.

23 *Id.* at 452.

24 *Hudson*, 522 US 93 (1997).

25 *Hudson* at 95–96.

26 *Hudson* at 116 (Breyer's concurrence).

27 *Helvering v. Mitchell*, SCt, 38-1 USTC ¶9152, 303 US 391, 58 SCt 630.

28 *Id.* at 401.

29 *Thomas*, CA-4, 95-2 USTC ¶50,439, 62 F3d 97, 99. *See, also, Little*, CA-9, 97-1 USTC ¶50,207, 106 F3d 1445; *T.H. McNichols*, CA-1, 94-1 USTC ¶50,005, 13 F3d 432.

30 *Little*, *at* 1454 (citations omitted).

31 *Thomas* at 103.

32 *Id.*

33 *See Austin* at 610, 618 note 12.

34 *Id.*

35 *See Austin* at 619.

36 *Bajakajian*, 524 US 334 (citations omitted).

37 524 US 334.

38 524 US 337.

39 524 US 338.

40 524 US 338.

41 *Varrone*, CA-2, 2012-1 USTC ¶50,112, 554 F3d 327.

42 *Bussell*, CD-CL, 2015 US Dist. LEXIS 175952.

43 See also *Beecroft*, CA-9, 825 F3d 991 (vacating a $107 million criminal forfeiture penalty under the 8th Amendment on the grounds that it vastly exceeded the otherwise available penalties under the law, notwithstanding the fact the defendant was convicted of conspiring in an extensive mortgage-fraud conspiracy causing over $50 million of harm).

44 *Bajakajian*, 524 US 339.

45 See IRM Sec. 4.26.16.6.6 (11-06-2015) (Mitigation).

46 See IRM Sec. 4.26.16 (11-06-2015) (Material Changes (8)).

47 *Zwerner*, S.D. Fla., No. 1:13-cv-22082, 5/28/14.

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