

F.B.A.R. ASSESSMENT AND COLLECTIONS PROCESSES: A PRIMER

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Tags

Tax Controversy
F.B.A.R.

With the June 30th deadline fast approaching and the recent cases addressing F.B.A.R. penalties, we thought it would be useful to provide a primer on F.B.A.R. assessment and collections processes.

BACKGROUND

In general, a U.S. person having a financial interest in, or signature authority over, foreign financial accounts must file an F.B.A.R. if the value of the foreign financial accounts, taken in the aggregate and at any time during the calendar year, exceeds \$10,000.

The F.B.A.R. must be filed electronically by June 30 of the calendar year following the year to be reported. No extension of time to file is available for F.B.A.R. purposes.

Failure to file this form, or filing a delinquent form, may result in significant civil and/or criminal penalties:

- A non-willful violation of the F.B.A.R. filing obligation can lead to a maximum penalty of \$10,000. If reasonable cause can be shown and the balance in the account is properly reported, the penalty can be waived.²⁸
- In the case of a willful violation of the filing obligation, the maximum penalty imposed is the greater of \$100,000 or 50% of the balance in the account in the year of the violation.²⁹
- Criminal penalties apply only when the failure to report the foreign account is willful. Depending on the context and the scope of the willful violation, the criminal penalties can go as high as a combination of a fine of \$500,000 and imprisonment for up to ten years.³⁰

²⁸ 31 United States Code (“U.S.C.”) §5321(a)(5)(A), (B).

²⁹ 31 U.S.C. §5321(a)(5)(A), (C).

³⁰ 31 U.S.C. §§5322(a); 5322(b); 18 U.S.C. §1001.

ASSESSING THE PENALTY

Pursuant to a Memorandum of Agreement between the Internal Revenue Service (“I.R.S.”) and the Financial Crimes Enforcement Network (“FinCEN”), FinCEN delegated the authority to assess the F.B.A.R. penalty to the I.R.S.³¹ Thus, the issue may arise during a standard income tax audit.

STATUTE OF LIMITATIONS

The statute of limitation (“S.O.L”) to assess a civil F.B.A.R. penalty is six years from the due date of the F.B.A.R. or from the date of the I.R.S.’ request for records.

The S.O.L. to file a suit for the collection of an assessed civil F.B.A.R. penalty is two years from the date of assessment or the date any judgment becomes final in any criminal action with respect to which the penalty is assessed.³²

Absent any action brought within this two-year period, the Government may offset payments in order to collect the F.B.A.R. penalty. According to the I.R.M., the S.O.L. for this latter option is 10 years from the date of assessment or the date any judgment becomes final in any criminal action with respect to which the penalty is assessed.³³ However, many, including tax practitioners and certain I.R.S. officials, have noted that there is no S.O.L. with respect to the collection of debt under 31 U.S.C. §3716(e)(1).

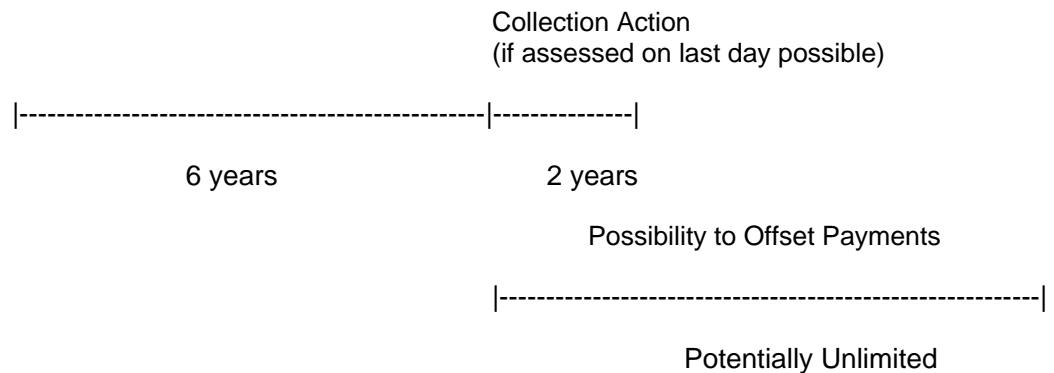
The collection methods available include (a) administrative offsets, (b) tax refund offsets, (c) federal salary offsets, (d) non-federal employee wage garnishments, (e) debt referrals to private collection contractors, debt collection center, as well as the reporting of delinquencies to credit reporting agencies.

The S.O.L. for criminal penalties is five years from the date the offense is committed.³⁴

³¹ 31 Code of Federal Regulations (“C.F.R.”) §1010.810(g).
³² 31 U.S.C. §5321 (b)(2).
³³ 31 U.S.C. §3711(g)(A)-(H).
³⁴ 18 U.S.C. §3282.

The following diagram illustrates the S.O.L. timeframe for civil penalties:

Assessment of Civil Penalty



THE PROCESS

If the potential violation is discovered in a Title 26 examination (*i.e.*, in a federal income tax context), the examiner must first have the Territory Manager sign a Related Statute Memorandum (R.S.M.). This allows the examiner to be able to use the F.B.A.R. related information discovered in the Title 26 examination in compliance with Section 6103 of the Internal Revenue Code of 1986 as currently in effect (the “Code”). No R.S.M. is necessary if the potential violation is discovered under a Bank Secrecy Act examination.

After conduct of the examination, the examiner explains his or her conclusion in a Summary Memorandum.

- If no violation was discovered, the examination is closed;
- If a violation was discovered but no penalty is asserted, a warning letter is issued and the examination is closed;
- If the examiner concludes that a violation occurred and assesses penalties, an internal procedure must be followed, including a potential referral to Criminal Investigation, the rendering of legal advice by the appropriate SB/SE Counsel Area F.B.A.R. Coordinator and the issuance of a 30-day letter to the filer (if recommended by Counsel).
 - If the taxpayer agrees to the civil penalties, the penalties are paid and the case is closed.
 - F.B.A.R. penalties are eligible for Fast Track Settlement only if the F.B.A.R. 30 day letter, Letter 3709 has not been issued to the taxpayer.

“Penalties may be mitigated under the I.R.M. It is unclear, however, whether the procedures under the I.R.M. are being followed by all examiners, and, even if so, whether those rules are being applied consistently...”

- If the taxpayer disagrees to the assessment of the civil penalties, the taxpayer has 45 days to appeal. The case is then forwarded to Appeals³⁵ in a pre-assessment procedure.
- If the taxpayer does not appeal, the penalties are assessed and the collection process can begin (in this scenario, post-assessment Appeals is still available to the taxpayer).³⁶
- Post-assessment Appeal will be handled on priority basis. These cases need to be completed within 120 days from the date the Appeals office is assigned to the case.³⁷
- Post-assessment F.B.A.R. cases in excess of \$100,000 (excluding interest) cannot be compromised by Appeals without approval of the Department of Justice (“D.O.J.”).³⁸
- Alternative Dispute Resolution (A.D.R.) rights or Post Appeals Mediation (P.A.M.) rights are not available to taxpayer in a post-assessment Appeals procedure.³⁹

Penalties may be mitigated under the I.R.M. It is unclear, however, whether the procedures under the I.R.M. are being followed by all examiners, and, even if so, whether those rules are being applied consistently, which is one of the stated intents behind those procedures. As noted above, courts have held that the I.R.M. does not provide substantive rights to the taxpayer.

ENFORCEMENT

The Federal Debt Collection Procedure Act also known as F.D.C.P.A.⁴⁰ provides three remedies for enforcing civil judgments: (1) execution, (2) garnishment and (3) installment payment orders.

Judgment for F.B.A.R. penalties must be collected under F.D.C.P.A., 28 U.S.C. 3001-3308. Here, the courts can issue any other writs under 28 U.S.C. §1651 to support these remedies. In order to enforce a judgment under any of these remedies, the government must prepare a notice to the debtor for service by the clerk of the court. The notice advises the debtor that property has been seized, identifies debt owed, prescribes potential exemptions, explains procedure and time (20 days) to request a hearing, and gives notice of intent to sell the property. In

³⁵ Unless less than 180 days remain on the assessment S.O.L. and the taxpayer does not agree to an S.O.L. extension. In that case, the penalty will be assessed and the post-assessment Appeals procedure is available to the taxpayer.

³⁶ 31 CFR 5.4; 31 CFR. Part 900.

³⁷ I.R.M.8.11.6 (October 28, 2013).

³⁸ 32 U.S.C. §3711(a)(2) and 31 CFR §902.1(a), (b).

³⁹ I.R.M.8.11.6 (October 28, 2013).

⁴⁰ 31 U.S.C. §3711(g)(9).

addition, the government may use other collection tools, such as sale of property, sale of stocks, bonds, notes and securities.⁴¹

JURISDICTIONAL ISSUES

According to the Tax Court, the Tax Court is a court of limited jurisdiction and can only exercise jurisdiction to the extent expressly provided by Congress.⁴² In addition, the provision under which F.B.A.R. penalties are asserted is under Title 31 and therefore it does not fall within the Tax Court's jurisdiction.⁴³

The taxpayer may be able to file a complaint in either in District Court or the Court of Federal Claims to challenge the assessed penalty under the Tucker Act (and the Little Tucker Act), as many tax practitioners have noted, or wait until the U.S. attempts to collect the debt.⁴⁴

A taxpayer has six years to bring his civil action,⁴⁵ but there is no right to a jury trial for an action to recover money from the Federal Government in a non-tax refund setting.⁴⁶ However, when the Government counterclaims for the unpaid balance, the plaintiff has the right to trial by jury.⁴⁷

BANKRUPTCY

At least one court has held that F.B.A.R. penalties are not dischargeable in bankruptcy.⁴⁸ The court based its rationale on the fact that the F.B.A.R. penalty is not a tax or tax penalty, which is an exception to nondischargeability of fines. The Court stated:

A debt may be discharged if the debt is for one of two kinds of "tax penalties." Defendant argues that his debt is dischargeable under this exclusion. In order to be a tax penalty, the FBAR penalty would have to be linked in some way to an underlying tax. For Defendant's argument to have any viability, the FBAR itself would have to be a tax. The FBAR is a document, not a tax.

⁴¹ 28 U.S.C. §§2001(a); 2001 (b).

⁴² *Breman v. Commissioner*, 66 T.C. 61 (1976).

⁴³ *Williams v. Commissioner*, 131 T.C. No 6.

⁴⁴ 28 U.S.C. §1491; 28 U.S.C. §1346; 28 U.S.C. §1345. See, e.g., Horowitz, *Litigating the FBAR Penalty in District Court and the Court of Federal Claims* (2014), available at: <http://taylorlaw.com/wp-content/uploads/2014/03/Article-Litigating-the-FBAR-March2014.pdf>.

⁴⁵ 28 U.S.C. §§2401; 2501.

⁴⁶ 28 U.S.C. §§2401; 1346.

⁴⁷ *Tull v. United States*, 481 U.S. 412 (1987).

⁴⁸ *Simonelli*, 102 AFTR 2d 2008-6577 (D. Conn. Sept. 30, 2008).