

FBAR - LITIGATION ASPECTS

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Background

- An F.B.A.R. is a form used to report certain foreign financial accounts.
- The F.B.A.R. must be filed electronically on FinCEN Form 114.
- No extension of time to file available.
- Failure to file may result in civil and/or criminal penalties.

Penalties for Non-Filing

Civil Penalties

- **Non-Willful:**
 - Maximum penalty of \$10,000.
 - Showing of reasonable cause can waive penalty.
- **Willful:**
 - The maximum penalty is the greater of \$100,000 or 50% of the balance in the account in the year of the violation.

Criminal Penalties

- **Highest exposure:**
 - A fine of \$500,000; and
 - Imprisonment for up to ten years.

Statute of Limitations / Collections

- Civil Penalty – Statute of Limitation (“S.O.L.):
 - Time to Assess: six years from the date of the relevant F.B.A.R. violation.
 - Collection Phase (after assessment):
 - Two years to file a suit for the collection of an assessed civil penalty from the date of assessment, or the date any judgment becomes final in any criminal action with respect to which the penalty is assessed.
 - There is no S.O.L. with respect to the collection of debt under 31 U.S.C. 3716 (e)(1).
 - *But* in I.R.M. 8.11.6.3 (11-01-2011) the I.R.S indicates a limit of 10 years to collect the F.B.A.R. penalty from the date of assessment, or the date any judgment becomes final in any criminal action with respect to which the penalty is assessed.
- Criminal
 - 5-years from filing date.

Appeals Process

- Pre-Litigation:
 - Pre-Assessment:
 - Fast Track Settlement.
 - Alternative Dispute Resolution.
 - Appeals.
 - Post Assessment Appeals:
 - No Alternative Dispute Resolution.
 - Appeals reviews it on a priority basis.
 - Cases in excess of \$100,000 (excluding interest) become claim of the Department of Justice.

Litigation

- Litigation

- If the taxpayer does not agree then he may litigate by making payment of some or all the penalty.
- Depending on the penalty exposure, the taxpayer may consider not acting and waiting for the I.R.S.' two-year S.O.L. to run out.
- The Court of Federal Claims and the United States District Courts would have jurisdiction.
 - The United States Tax Court has held that it does not have jurisdiction. See *Williams v. Commissioner*, 131 T.C. No 6 (2008).

- Bankruptcy

- At least one court has held that F.B.A.R. penalties are not dischargeable. *Simonelli*, 102 AFTR 2d 2008-6577(D. Conn. Sept. 30, 2008)
 - Rationale – not a tax nor a tax penalty.

Example: *Zwerner*

- *United States v. Zwerner*, S.D. Fla., No. 1:13-cv-22082, 5/28/14.
 - Taxpayer has undisclosed accounts offshore held through entities.
 - Taxpayer mistakenly believes he entered into voluntary disclosure based on reliance on counsel.
 - Taxpayer amends returns and is audited.
 - I.R.S. assesses willful F.B.A.R. penalty for the period 2004-2007:
 - 2004 - \$723,762, assessed on June 21, 2011;
 - 2005 - \$745,209, assessed on August 10, 2011;
 - 2006 - \$772,838, assessed on August 10, 2011;
 - 2007 - \$845,527, assessed on August 10, 2011.

Example: *Zwerner*

- *United States v. Zwerner*, S.D. Fla., No. 1:13-cv-22082, 5/28/14.
 - Taxpayer refuses to pay.
 - U.S. files a complaint to collect 10 days before S.O.L. expires on first assessment.
 - Taxpayer makes several affirmative defenses, including, *e.g.*, based on equity, reliance on counsel, and lastly on the Eighth Amendment's prohibition against excessive fines.
 - After a jury trial, the jury finds 3 willful violations (2004-2006).
 - T.B.D.: whether the fines violate the Eighth Amendment.

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