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FBAR Penalty Relief

November 9, 2010

In *U.S. v. Williams* decided 9/01/2010 the U.S. District Court in the Eastern Dist of Virginia entered a decision in favor of the taxpayer rejecting the governments assertion of willfulness and finding in favor of the taxpayer who failed to file timely [Foreign Bank Account Reports, FBAR's](#) (Form TD 90-22.1). The case was one of "first impression" which means that the court found no appropriate legal standard to apply. Why would that be so?

There are several issues that this case addressed. First, the criminal tax issues. The taxpayer pled to criminal conspiracy criminal tax evasion for establishing and maintaining two offshore bank accounts into which he deposited over \$7,000,000 and earned over \$800,000 for the years in question. Second, as part of the plea he filed amended returns income tax returns (Form 1040X) and was required to file previously unfiled [FBAR's](#). Subsequently, [FBAR](#) penalties were assessed.

The procedural issues in this case are interesting. The court found that the procedure to contest an FABR penalty was unclear. The penalty itself is authorized under 31 U.S.C. §5321(b)(i) but the legal standard of review is not. The process of [FBAR](#) penalty assessment involves a Revenue Agent issuing a Notice of Proposed Assessment to the taxpayer. The taxpayer then disagrees with the proposed assessment and the U.S. then files an action in the U.S. District Court where the taxpayer resides to enforce collection.

In the Williams case the assessment claimed that Williams was "willful" in his failure to timely file [FBAR's](#). The government asserted that his guilty plea was sufficient to establish by a preponderance of the evidence that his actions were willful. The court disagreed. It found that the acts to which Williams pled were sufficient to establish the conspiracy and tax crime but that the government did not tie his crimes to a willful failure to make a foreign banking disclosure was fatal to its penalty case.

Williams will likely go up on appeal and the issue may be decided then or require legislative cure. The point to be drawn here is that while a taxpayer may have committed specified crimes and even pled to those crimes, there is a separate process to establishing that the taxpayer acted willfully in failing to file an [FBAR](#) and [FBAR](#) penalties can be resisted.

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