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Court Rejects Section 6751 Challenge and Upholds Multiple IRS Penalties

On February 28, 2019, the *United States Tax Court in Palmolive Building Investors, LLC v. Commissioner*[1] held that where the IRS asserts multiple penalties, section 6751(b)(1) does not require that the "internal determination" of all the penalties be made at the same time and by the same IRS employee. In *Palmolive Building Investors*, the IRS asserted four different penalties, which were all upheld in court. In addition, the court held that section 6751(b)(1) does not require supervisory approval be made on a particular document.

Background

Palmolive owns the Palmolive Building on North Michigan Avenue in Chicago, Illinois (the "building"). In 2004, Palmolive executed a conservation easement deed in favor of the Landmarks Preservation Council of Illinois ("LPCI"), a qualified organization within the meaning of section 170(h)(3). The stated purpose of the deed was to preserve the exterior perimeter walls of the building's facade. The deed obligated Palmolive and any subsequent owner of the building to maintain the facade in perpetuity. Palmolive asserts that at the time of the donation of the easement in 2004, the total value of the property was $257 million, of which 13 percent, i.e., $33.41 million, was attributable to the easement. On its Form 1065 ("U.S. Return of Partnership Income") for 2004, Palmolive claimed a charitable contribution deduction of $33.41 million for the facade easement contribution.

> "The Tax Court held that Section 6751(b)(1) does not require that the 'internal determination' of all the penalties be made at the same time and by the same IRS employee."

The IRS examined Palmolive's 2004 return and concluded that, for multiple reasons, the facade easement contribution deduction should be disallowed and that penalties should be imposed. As to the proposed penalties, IRS Agent Wozek prepared a Form 5701 ("Notice of Proposed Adjustment") with the caption "Accuracy Related Penalty (Gross Valuation Misstatements)". To the Form 5701, Agent Wozek attached a three-page Form 886A ("Explanation of Items") that proposed and justified a penalty for gross valuation misstatement under section 6662(h)(1), and an additional two-page Form 886A, with a heading titled "Alternative Position on Penalty," that proposed and justified a negligence penalty under section 6662(b)(1). The documents thus proposed two alternative penalties. Agent Wozek did not sign the documents. He

1 152 T.C. No. 4 (2019).

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gave the Form 5701 and its attachments to his immediate supervisor, Michael Lynch, and Mr. Lynch signed it on July 30, 2008.

30-day letter

In October 2008, Mr. Lynch sent Palmolive a 30-day letter. Attached to the letter was a Form 4605-A ("Examination Changes * * *"), which bore Agent Wozek's name and included the statement: "The gross valuation misstatement penalty per IRC 6662(h) is applicable * * *. See F886A-2". Also attached to the 30-day letter was the Form 886A justifying the penalty for gross valuation misstatement, but not the other Form 886A justifying the negligence penalty.

60-day letter

On May 11, 2009, the IRS sent to Palmolive a "60-day letter" (Letter 1827), proposing adjustments to its partnership return and giving Palmolive 60 days within which to file a protest and request a conference before the IRS Office of Appeals ("Appeals"). Attached to the 60-day letter was a Form 870-PT ("Agreement for Partnership Items * * *"), which contained a summary of the proposed adjustments to Palmolive's return. The "Remarks" on Form 870-PT's "Schedule of Adjustments" stated: "In addition, the penalty for gross valuation misstatement penalty under IRC section 6662(h) shall apply with respect to the full amount of the adjustment to charitable contributions."[2] This remark did not mention the negligence penalty. However, also attached to the 60-day letter was the Form 5701 signed by Mr. Lynch, with its two Forms 886A—one justifying the penalty for gross valuation misstatement and the other justifying the negligence penalty. In response to the 60-day letter, Palmolive submitted a protest and requested a conference before IRS Appeals.

While the case was under consideration in Appeals, Appeals Officer Trevor Holliday concluded that additional alternative penalties should be imposed. He prepared and signed a Form 5402-c ("Appeals Transmittal and Case Memo"), to which he attached a proposed FPAA, on the last page of which (a Form 886A) the penalties were described as follows:

> **Accuracy Penalty**
>
> Any underpayments of tax resulting from the adjustments and determinations above for the tax year ended December 31, 2004, are subject to the following accuracy related penalties imposed by I.R.C. section 6662:
>
> A 40% penalty for gross valuation misstatement under I.R.C. section 6662(a) and (h);
>
> Or, in the alternative,
>
> A 20% penalty due to negligence or intentional disregard of the rules and regulations, substantial understatement of tax, or a substantial valuation misstatement under I.R.C. section 6662(a) and 6662(b)(1), 6662(b)(2), or 6662(b)(3).3

Thus, the proposed FPAA determined all four penalties at issue here.

His immediate supervisor, Darren Lee, signed both the Form 5402-c (on a signature line preceded by the phrase "Approved by") and the proposed FPAA. The IRS issued the FPAA on July 28, 2014. In it, the IRS determined that Palmolive did not adequately substantiate the value of the contribution and that the deed did not meet the requirements of section 170. In the alternative, the IRS asserted that even if the contribution of the easement met those requirements, Palmolive did not establish that the easement had a value of $33,410,000. The FPAA asserted the four penalties that had been on Appeals Officer Holliday's proposal.

On October 1, 2014, Palmolive's petition was timely filed in the Tax Court.

Analysis

Section 6751(b)(1) provides:

> No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination * * * .

2 152 T.C. No. 4 at *3.

3 *Id.* at *4.

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Congress' purpose in enacting section 6751(b)(1) was to help ensure "that penalties [w]ould only be imposed where appropriate and not as a bargaining chip."[4] To comply with section 6751(b), the Commissioner must secure written supervisory approval for the penalty before issuing an FPAA to a partnership.[5] The parties agreed that the penalties at issue were subject to the requirements of section 6751(b)(1).

> "The court held that section 6751(b) does not require written supervisory approval on any particular form."

The parties stipulated the identities of the pertinent immediate supervisors—i.e., Mr. Lynch for Agent Wozek and Mr. Lee for Appeals Officer Holliday. Moreover, Palmolive did not dispute the authenticity of the two documents that the Commissioner asserted reflected the necessary approvals, i.e., Mr. Lynch's Form 5701 in July 2008 (approving the gross valuation misstatement penalty and, in the alternative, the negligence penalty) and Mr. Lee's Form 5402-c (approving two additional alternatives—the substantial understatement penalty and the substantial valuation misstatement penalty). Thus, the undisputed facts show that each of the four penalties at issue in this case were initially determined by an individual who obtained his supervisor's written approval before the penalty determination was communicated to Palmolive.

Palmolive argued that the penalties asserted did not satisfy the requirement of section 6751 because the penalties were not approved by the same IRS supervisor. The court acknowledged that Agent Wozek did not determine and Mr. Lynch did not approve the latter two penalties (substantial valuation misstatement and substantial understatement) in July 2008. Nonetheless, the court found that the undisputed facts show that those two penalties were first determined by Appeals Officer Holliday and approved by Mr. Lynch in June 2014 and that those two penalties were not communicated to Palmolive until after that approval. Section 6751(b)(1) includes no requirement that all potential penalties be initially determined by the same individual or at the same time.[6]

Next, Palmolive asserted that the IRS failed to comply with its own internal instructions in the Internal Revenue Manual section 20.1.5.1.4 (3), which makes the penalty determinations and approvals invalid. However, the court noted that "that it 'is a well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers.'"[7] On the issue of section 6751(b) compliance, the court found that the IRS's use of a form other than the one prescribed by internal administrative regulations does not preclude a finding that the supervisory approval requirement has been satisfied.[8] The court held that section 6751(b) does not require written supervisory approval on any particular form.[9] The court found that while it is true that Agent Wozek's name does not appear on the Form 5701 by which he solicited Mr. Lynch's approval, this fact was immaterial because Agent Wozek's declaration stated that, the Commissioner showed (and Palmolive did not dispute) that Agent Wozek "prepared the Forms 5701 * * * and 886A, * * * and gave it to * * * [his] immediate supervisor, Michael Lynch, for approval". What must be "in writing" to satisfy section 6751(b)(1) "is the supervisor's approval. The statute does not require any particular writing by the individual making the penalty determination, nor any signature or written name of that individual."[10]

Lastly, Palmolive argued that the substantial valuation misstatement penalty and the substantial understatement penalty, omitted from the July 2008 Form 5701 but asserted in the July 2014 FPAA, cannot be sustained because "[t]he FPAA represents the Commissioner's 'final determination' of penalties, not the 'initial

4 *Chai v. Comm'r*, 851 F.3d 190, 219 (2d Cir. 2017) (quoting S. Rept. No. 105-174, at 65 (1998), 1988-3 C.B. 537, 601), *aff'g in part, rev'g in part* T.C. Memo. 2015-42.

5 *Id.* at *63 (citing Chai v. Comm'r, 851 F.3d at 221-222).

6 152 T.C. No. 4 at *7.

7 *Id.* at *7, citing *Thompson v. Comm'r*, 140 T.C. 173, 190 n.16 (2013) (*quoting McGaughy v. Comm'r*, T.C. Memo. 2010-183, slip op. at 20).

8 *See PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193, 213 (5th Cir. 2018) ("The plain language of § 6751(b) mandates only that the approval of the penalty assessment be 'in writing' and by a manager").

9 *See Deyo v. United States*, 296 F. App'x 157, 159 (2d Cir. 2008) (requiring "only personal approval in writing, not any particular form of signature or even any signature at all").

10 152 T.C. No. 4 at *8.

determination.'"[11] But the court concluded that Palmolive's argument conflated the "initial determination" (in Appeals Officer Holliday's submission of the Form 5402-c) with the supervisory approval (by Mr. Lee's signing it and directing issuance of the FPAA). The court rejected Palmolive's argument because it reflected an imprecision: "Supervisory approval of these two penalties was reflected not by the issuance of the FPAA by 'CTF-OSC' (which took place on July 28, 2014) but rather six weeks earlier by Mr. Lee's June 13, 2014, signing of the Form 5402-c, by which he directed that the FPAA be issued."[12] Nevertheless, the court concluded that even if one views the FPAA itself as the act by which the supervisor approved the penalties reflected therein, it would satisfy section 6751(b)(1) as to any penalties that had first been "initial[ly] determin[ed]" in the then-recent Form 5701 proposing the FPAA. In such a circumstance, the written supervisory approval of the penalty would have been made "no later than the date the IRS issues the notice of deficiency * * * [or as here, the FPAA] asserting such penalty,"[13] and both the initial determination and the supervisory approval would have occurred before the FPAA was issued.

Accordingly, the Court concluded that the IRS complied with section 6751(b)(1), because each penalty at issue was "initial[ly] determin[ed]" and then approved in writing by a supervisor before being communicated to Palmolive.

Richard A. Nessler

Ninth Circuit Invalidates Third Party Summons

On February 26, 2019, in *J.B. v. United States*,[14] the U.S. Court of Appeals for the Ninth Circuit upheld a taxpayer's challenge to a third-party summons and held that IRS Publication 1 did not provide the taxpayers with reasonable advance notice to satisfy the requirements of section 7602(c)(1) because "a reasonable notice must provide the taxpayer with a meaningful opportunity to volunteer records on his own, so that third-party contacts may be avoided if the taxpayer complies with the IRS's demand."[15] The circuit court affirmed the district court's decision that held that "the advance notice procedure cannot be satisfied by the transmission of a publication about the audit process generally." *J.B.* is a significant taxpayer victory and is a notable exception to a line of cases where courts have held that IRS Publication 1 satisfied the pre-contact notice requirement.

Background and Procedural History

On July 25, 2013, the taxpayers received a letter in the mail from the IRS, indicating that they had been selected at random for a compliance research examination. The IRS letter instructed the taxpayers to contact a revenue agent at the IRS to discuss items on their 2011 tax return, as well as the "examination process." In the same mailing, the IRS enclosed a two-page notice entitled "Your Rights as a Taxpayer." The IRS refers to this notice as "Publication 1" or "The Taxpayer Bill of Rights." On the second page of the notice, under a heading entitled "Potential Third Party Contacts," the notice warns:

> Generally, the IRS will deal directly with you or your duly authorized representative. However, we sometimes talk with other persons if we need information that you have been unable to provide, or to verify information we have received. If we do contact other persons, such as a neighbor, bank, employer, or employees, we will generally need to tell them limited information, such as your name. ... Our need to contact other persons may continue as long as there is activity in your case. If we do contact other persons, you have a right to request a list of those contacted.

Two months later, in September 2013, the IRS requested documents. The taxpayers asked the IRS to excuse them from the audit because of poor health and the couple's advanced age. The IRS refused the couple's request for an exemption, leading the taxpayers to file a separate suit to stop the audit in the Northern District of California in May 2015.[16]

After filing suit, the IRS continued with its audit. In September 2015, the IRS issued a summons to the California Supreme Court seeking "copies of billing

11 *Id.*
12 *Id.*
13 *Id.*, citing *Chai v. Comm'r*, 851 F.3d at 221.
14 __ F.3d __ (9th Cir. 2019), 2019 WL 923717.
15 *Id.* at *1.
16 *See* No. CV 15-2138 (YGR) (N.D. Cal.).

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statements, invoices, or other documents ... that resulted in payment to" the taxpayers for the 2011 calendar year.[17] The second page of the four-page summons warned that the IRS had the power to "enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."[18] The penalties for noncompliance included a fine of "not more than $1,000" or imprisonment "not more than 1 year, or both, together with costs of prosecution."

The taxpayers did not learn that the IRS had issued the summons until after-the-fact, when the taxpayer's daughter, whom they had listed as a personal representative, received a notice of service of summons in the mail. In October 2015, the couple filed a petition to quash the summons in the Northern District of California.

The district court evaluated the taxpayers' petition under *United States v. Powell*,[19] which sets forth four requirements that the IRS must satisfy to enforce an administrative summons. Under *Powell*, the IRS must establish a prima facie case of good faith by showing that: (1) the underlying investigation is for a legitimate purpose, (2) the inquiry requested is relevant to that purpose, (3) the information sought is not already in the government's possession, and (4) the IRS followed the administrative requirements of the Internal Revenue Code.[20]

The district court concluded that the government had not satisfied the last *Powell* step. The IRS, it concluded, had not provided sufficient notice to the taxpayers that it would contact the California Supreme Court, in violation of section 7602(c)(1)'s requirement that the IRS provide "reasonable notice in advance" to the taxpayer. The district court rejected the IRS's argument that IRS Publication 1 provided sufficient advance notice, and instead concluded that "the advance notice procedure cannot be satisfied by the transmission of a publication about the audit process generally."[21] It then instructed that "advance notice should be specific to a particular third party," reasoning that "the implementing regulations contemplate notice for each contact, not a generic publication's reference that the IRS may talk to third parties throughout the course of an investigation."[22] The IRS appealed to the Ninth Circuit Court of Appeals.

Analysis

On review, the Ninth Circuit affirmed. The court acknowledged that section 7602(c) specifically prohibits third-party contacts unless advance reasonable notice is given to the taxpayer. The statute specifically provides:

> (c) Notice of contact of third parties.—
>
> (1) General notice.—An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.
>
> (2) Notice of specific contacts.—The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.
>
> (3) Exceptions.—This subsection shall not apply –
>
> (A) to any contact which the taxpayer has authorized;
>
> (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or
>
> (C) with respect to any pending criminal investigation.

The Ninth Circuit first looked to the meaning of the phrase "reasonable notice in advance" and concluded that the phrase in section 7602(c)(1) is not ambiguous. The Supreme Court has interpreted "notice" to mean "notice reasonably calculated, under all circumstances, to apprise interested parties" and "afford them an opportunity to present their objections."[23]

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17 2019 WL 923717 at *2.
18 *Id.*
19 *United States v. Powell*, 379 U.S. 48 (1964).
20 *Id.* at 57–58 .
21 2019 WL 923717 at *3.
22 *Id.*
23 *See, e.g., Jones v. Flowers*, 547 U.S. 220, 226 (2006).

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The court found that its interpretation of the phrase "reasonable notice in advance" is supported by the "specific context in which that language is used, and the broader context of the statute as a whole."[24] "Section 7602(a) allows the IRS to disclose information '[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person … or collecting any such liability,' I.R.C. § 7602(a), while § 7602(c) protects the taxpayer from unnecessary third-party contacts. As an exception to the general rule that taxpayer records are to be kept confidential, we construe § 7602(a) narrowly in favor of the taxpayer and § 7602(c) broadly as a protective measure."[25] Moreover, section 7602(c)(1) protects the taxpayer's reputational interest, because it gives the taxpayer a meaningful opportunity to resolve issues and volunteer information before the IRS seeks information from third parties, which would be unnecessary if the relevant information is provided by the taxpayer himself.

The IRS argued that section 7602(c)(1) cannot require the IRS to provide advance notice "specific to a particular third party," as the district court held, because that would render superfluous the post-contact notice provision, section 7602(c)(2), which requires the IRS to provide the taxpayer with a "record of persons contacted" after the contact is made. The Ninth Circuit rejected this claim for two reasons. First, the court did not interpret the statute to require the IRS to provide the taxpayer with a list of the people it may contact in advance. Rather, the court held that the statute requires reasonable notice in advance. What is reasonable depends on the facts. Second, the court said that "even if we required the IRS to provide the taxpayer with a list of people it may contact in advance, the IRS's argument nonetheless fails because the group of people covered by the advance notice provision, I.R.C. § 7602(c)(1), is larger than the group of people covered by the post-contact notice provision, I.R.C. § 7602(c)(2)."[26] The court concluded that "[b]ecause § 7602(c)(2) covers a different group of contacts, serves a different purpose than § 7602(c)(1), and has its own place in a comprehensive statutory scheme, interpreting § 7602(c)(1) as we do here does not render § 7602(c)(2) superfluous."[27]

"The Ninth Circuit held that Publication 1 did not provide the taxpayers with reasonable advance notice because a reasonable notice must provide the taxpayer with a meaningful opportunity to volunteer records on his own."

In addition, the court concluded that the timeline for the development of Publication 1 and related forms of notice further illustrates the implausibility of the IRS's insistence that Publication 1 provides "reasonable notice in advance" in all circumstances. Citing to out-of-circuit district court decisions, the IRS argued that the district court's decision in this case was an outlier because every court to have considered the issue has held that IRS Publication 1 satisfied the pre-contact notice requirement.[28] But the Ninth Circuit stated that "while courts have generally approved of Publication 1, several courts have recognized that § 7602(c)(1) requires a context-dependent inquiry, and have upheld Publication 1 only after evaluating the totality of the circumstances to determine whether the taxpayer received reasonable notice."[29] However, the court recognized that one result of adopting a context-specific rule may be to make it more difficult for IRS officers, and district courts, to determine whether section 7602(c)(1)'s advance notice requirement is satisfied in any given case. But, the court concluded that to the extent such an administrative problem develops, the responsibility lies with Congress, not the courts. The court could not

24 2019 WL 923717 at *4-5.

25 *Id., citing A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

26 2019 WL 923717 at *5.

27 *Id.* at *6, citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (explaining that it is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted))).

28 *Id.*, *citing Gandrup v. United States*, No. MC 14-123-SLR, 2014 WL 5861719, at *2 (D. Del. Nov. 12, 2014); *Gangi v. United States*, 2 F. Supp. 3d 12, 21 (D. Mass. 2014).

29 *Id.* at *8, citing *Clearwater Consulting Concepts, LLLP v. United States*, No. CV 2007-33, 2010 WL 2392107, at *7 (D.V.I. Mar. 31, 2010); *Thompson*, 2008 WL 4279474, at *5–8.

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"ignore the text of a statute that hinges the adequacy of notice on a determination of reasonableness."[30] Nor could the court "ignore the congressional mandate to provide taxpayers faced with a potential third-party summons with a meaningful opportunity to respond with the relevant information themselves so as to maintain their privacy and avoid the potential embarrassment of IRS contact with third parties, such as their employers."[31]

According, the Ninth Circuit held that Publication 1 did not provide the taxpayers with reasonable advance notice because a reasonable notice must provide the taxpayer with a meaningful opportunity to volunteer records on his own, so that third-party contacts may be avoided if the taxpayer complies with the IRS's demand.

Richard A. Nessler

Refund Suit Dismissed for Lack of Taxpayer's Signature

In February 2019, the Court of Federal Claims concluded that it lacked the authority to hear a case where the taxpayer had not signed his claim of refund (Form 843) and his attorney lacked the authority to sign on his behalf.[32] In *Wilson v. United States*, the taxpayer, Joseph Wilson, filed a complaint alleging that the IRS had erroneously and unlawfully imposed a 35% penalty against him for failing to timely report his status as the beneficiary of a foreign trust pursuant to Section 6048(b). Wilson argued that the operative Code section was Section 6048(c), which would only impose a 5% penalty for filing as an owner/grantor of a foreign trust. However, since Wilson's claim for refund was signed by his attorney-in-fact, the question before the Court was whether it had subject matter jurisdiction over the complaint.

The IRS had assessed a 35% penalty against Wilson pursuant to section 6677(a) for failing to file Form 3520 (*Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*). Wilson paid the penalty amount in June 2017 and filed Form 843 (*Claim for Refund and Request for Abatement*) in August 2017. Form 843 was signed solely by Wilson's attorney. Form 843 provides that an attorney may sign on behalf of the taxpayer provided that a properly completed Form 2848 (*Power of Attorney and Declaration of Representative*) is filed along with Form 843. The taxpayer and his attorney did prepare and file Form 2848; however, they had failed to complete certain sections of the form that specifically authorized the attorney with respect to additional acts, such as signing a return. If filled out improperly, the attorney would lack the authority to prepare and sign Form 843 on his behalf. Thus, the question arose as to whether the broad authorization of a signed Power of Attorney, without specific authorization for additional acts, allows an attorney to file a claim of refund, signed under penalties of perjury, on behalf of a taxpayer.

Section 7422(a) provides that no suit or proceeding shall be maintained in any court for any penalty claimed to have been collected without authority until a claim of refund had been duly filed with the Secretary of the Treasury.[33] Section 6532(a)(1) provides that no suit or proceeding pursuant to Section 7422(a) for the recovery of a penalty shall be begun before the expiration of six months from the date of the filing of the claim required by that Section unless the Secretary renders a decision prior to the expiration of such timeframe.[34]

The Court reasoned that since a refund claim is required to be signed under penalties of perjury, it is more akin to the filing of a return (which also is required to be signed under penalties of perjury) and other acts where there are heightened requirements when a representative is signing a document on behalf of a principal under penalties of perjury.[35] Here, the taxpayer had not met his burden of showing by a preponderance of the evidence that Form 2848 is a broad authorization that extends to the signing of a claim of refund.[36]

The taxpayer argued in the alternative that his refund claim qualified as an informal claim for refund and contended that the IRS recognizes the validity of informal claims even

30 *Id.* at 8-9.
31 *Id.*
32 *Wilson v. United States*, 123 AFTR 2d 2019-XXXX (Ct. Fed. Claim 2019).
33 26 U.S.C. § 7422(a).
34 26 U.S.C. § 6532(a)(1).
35 *Wilson*, 123 AFTR 2d at 6.
36 *Id.*

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though they are not submitted under penalties of perjury.[37] However, the Court disagreed, stating that the case cited by the taxpayer related to whether the doctrine could be used to satisfy the timeliness requirement of Section 6511.[38] A more analogous case to Wilson's situation was *Anuforo v. Commissioner*.[39] That case also involved a taxpayer that had not signed his refund claim prior to filing in court and had corrected the defect after filing. The court found for the IRS, holding that the "law does not confer subject matter jurisdiction . . . when the suit is commenced prior to the filing of valid Forms 843."[40]

Since the Court lacked subject matter jurisdiction, it was required to dismiss the case and was unable to reach the merits of Wilson's claim. Wilson, out of an abundance of caution, had also submitted an amended claim of refund in January 2019. However, the Court stated that as a general rule, jurisdiction must be determined as of the date the complaint is filed. The Court advised Wilson to re-file his claim for refund, wait the required six months, and then file a new complaint if his claim is rejected. At that point, the Court stated it would clearly have jurisdiction to act on the merits of his refund claim.

Sara Monzet

Court Upholds IRS Heightened FBAR Penalty

On December 27, 2018, the United States Court of Federal Claims in *Kimble v. United States*[41] ruled that the IRS did not abuse its discretion in assessing a heightened FBAR penalty when a taxpayer violated the FBAR reporting requirements. The court concluded that despite the taxpayer having no legal duty to disclose information to her accountant or to ask about IRS reporting requirements, her conduct was nevertheless "willful." Moreover, the Court rejected the recent holdings in two federal court cases, *Colliot*[42] and *Wahdan*,[43] that determined that the IRS may not assess a penalty greater than $100,000 for a FBAR violation committed after 2004.

Facts

Alice Kimble held foreign bank accounts in Switzerland and France which she failed to disclose on her annual federal tax returns. She also failed to file annual FBARs for the tax years 2003 to 2008. The balance in her foreign accounts as of 2008 exceeded $1.4 million. At that time, Kimble learned for the first time from an article in the *New York Times* that she had an obligation to disclose her foreign accounts. In April 2009, Kimble applied to the OVDP program and was accepted. In 2012, Kimble and the IRS negotiated a Closing Agreement that required amendments to her income tax returns for 2003 through 2008 to report undisclosed foreign income and pay the tax liability due. In addition, Kimble was required to pay a penalty of $377,000. However, Kimble did not pay the penalty and notified the IRS by letter in January 2013 of her decision to withdraw from the OVDP. Thereafter, the IRS sent Kimble a letter informing her that any opt-out from the OVDP would be irrevocable and might cause her to incur a higher penalty.

In 2013, the IRS began an examination of Kimble's FBAR filings for the 2007 calendar year. After an IRS Revenue Agent conducted an audit of her foreign held accounts, it was determined that Kimble's failure to file a FBAR for 2007 was "willful." Specifically, the IRS found: Kimble was required to file FBARs annually for many years but failed to do so; she qualified for mitigation, because she satisfied the four regulatory criteria; but her failure to file FBARs nevertheless was "willful." The IRS rejected Kimble's request to apply a "reasonable cause" standard, because her violation was "willful" and "the facts do not support that ordinary business care and prudence were exercised."[44] The IRS calculated the applicable penalty to be $697,229. On April 7, 2014, the IRS issued Letter 3709, advising Kimble that she owed a penalty of $697,229, pursuant to 31 U.S.C. § 5321(a)(5), for the willful failure to file a FBAR for 2007. Kimble paid the penalty and filed a refund suit in the United States Court of Federal Claims. Upon review, the court rejected Kimble's claims and upheld the penalty.

37 *Id.* at 7.
38 *United States v. Kales*, 314 U.S. 186, 194 (1941).
39 2007 WL 2695805 (D. Minn. Sept 10, 2007).
40 *Id.* at *3.
41 141 Fed Cl. 373 (2018).
42 2018 WL 2271381.
43 325 F. Supp. 3d 1136 (D. Colo. 2018).
44 141 Fed. Cl. at. 380.

Analysis

The parties stipulated that Kimble failed to file her FBAR for 2007 and filed cross-motions for summary judgment. The threshold question presented was whether Kimble willfully failed to file her FBAR for 2007.

The Government argued that summary judgment was appropriate to resolve "willfulness," because Kimble "(1) knew that she had funds in a Swiss bank account and in a French bank account; and (2) did not report her interest in the accounts on a timely FBAR, but despite that knowledge, falsely represented on her income-tax return that she had no foreign bank accounts."[45] In addition, Kimble: "manag[ed] her foreign accounts with the help of her Swiss bankers;" "did not maintain the account in her own name;" "hid the account from the United States by not investing in U.S. securities;" and "failed to tell her accountant that she had a foreign bank account."[46] Kimble responded that she never read her tax returns and had no knowledge of the FBAR rules or other federal tax reporting requirements. According to Kimble, the Government's interpretation of "willful" was overbroad, because every taxpayer who fails to file the FBAR does so willfully.

The Court of Claims noted that the United States Supreme Court has held that, since "willfulness is a statutory condition of civil liability," it is "generally taken[] to cover not only knowing violations of a standard, but reckless ones as well."[47] Therein, the United States Supreme Court defined "recklessness" as "violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known."[48]

The parties agreed to the following stipulated facts in this case:

- Kimble did not disclose the existence of the foreign account to her accountant until approximately 2010. Stip. ¶ 43.
- Kimble never asked her accountant how to properly report foreign investment income. Stip. ¶ 44.
- Kimble did not review her individual income tax returns for accuracy for tax years 2003 through 2008. Stip. ¶ 46.
- Kimble answered "No" to Question 7(a) on her 2007 income tax return, falsely representing under penalty of perjury, that she had no foreign bank accounts. Stip. ¶ 48.

In the court's judgment, stipulations ¶¶ 46 and 48 were sufficient proof that Kimble exhibited a "reckless disregard" of the legal duty under federal tax law to report foreign bank accounts to the IRS by filing a FBAR. The court further concluded that "although Plaintiff had no legal duty to disclose information to her accountant or to ask her accountant about IRS reporting requirements, these additional undisputed facts do not affect the court's determination that Kimble's conduct in this case was "willful."[49] For these reasons, the court determined, viewing the evidence in the light most favorable to Kimble, that there was no genuine issue of material fact that she violated 31 U.S.C. § 5314 and that her conduct was "willful."[50]

Because the court concluded that Kimble's conduct was willful, the court next addressed the question whether the IRS abused its discretion in assessing Kimble a civil penalty of $697,229. Kimble asserted that the IRS abused its discretion when it assessed a penalty for the 2007 FBAR violation, because (1) she was not the "sole beneficiary" of the Swiss account after her father's death, since she was a co-owner with her mother, (2) she did not have any personal connection to Switzerland, and (3) she did not "actively manage" the Swiss account. Thus, Kimble asserted that the IRS's assessment of the maximum penalty against her was an abuse of discretion, because the IRS did not adhere to regulations that set the maximum penalty of $100,000, and, the penalty assessed was an "excessive fine," in violation of the Eighth Amendment to the United States Constitution.

The court considered each of Kimble's claims, but rejected all of them. As to the ownership of the Swiss account, although the record evidences that Kimble was not the

45 141 Fed. Cl. at 383.
46 *Id.*
47 *Id.*. citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (holding that a "willful" violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681n, includes reckless conduct).
48 *Safeco*, 551 U.S. at 68 (internal quotations omitted); *see also Godfrey v. United States*, 748 F.2d 1568, 1577 (Fed. Cir. 1984) (holding in the context of federal tax law that "willful conduct" includes "a reckless disregard of an obvious and known risk that taxes might not be remitted").
49 141 Fed. Cl. at 386.
50 *See* 31 U.S.C. § 5321(a)(5) (2004); *see also* RCFC 56.

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"sole beneficiary" of the account, the court found that she represented that she was the sole beneficiary in an April 15, 2005 "Verification of the beneficial owner's identity." In addition, Kimble nevertheless failed to establish why being only a co-owner necessarily rendered the IRS's penalty assessment unlawful or an abuse of discretion.

As to Plaintiff's role in managing the Swiss account, the court noted that the parties stipulated that between 1998 and 2008, Alice Kimble met with Swiss representatives in New York at least six times and met with a bank representative in Switzerland at least once. Therefore, the IRS did not abuse its discretion in finding that Kimble was actively involved with the Swiss account.

Finally, the court held that Kimble was no longer entitled to be assessed a maximum civil penalty of $100,000, as set forth in 31 U.S.C. § 5321(a)(5) (2003). The court stated:

> On October 22, 2004, Congress enacted a new statute that increased the statutory maximum penalty for a "willful" violation to "the greater of [] $100,000, or [] 50 percent of the … balance in the account at the time of the violation." *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, 1586, § 821 (Oct. 22, 2004) ("Jobs Creation Act"). And, on July 1, 2008, the IRS issued I.R.M. § 4.26.16.4.5.1, that stated: "At the time of this writing, the regulations at [31 C.F.R. § 1010.820] have not been revised to reflect the change in the willfulness penalty ceiling." I.R.M. § 4.26.16.4.5.1. The IRS, however, warned that, "the statute [i.e., the Jobs Creation Act] is self-executing and the new penalty ceilings apply." I.R.M. § 4.26.16.4.5.1. Although, the Jobs Creation Act is inconsistent with 31 C.F.R. § 1010.820(g)(2), it is settled law that an agency's regulations "must be consistent with the statute under which they are promulgated." *United States v. Larionoff,* 431 U.S. 864, 873 (1977). Since the civil penalty amount for a "willful" violation in 31 U.S.C. § 5321(a)(5) (2003) was replaced with 31 U.S.C. § 5321(a)(5)(C)(i) (2004), the April 8, 1987 regulations are "no longer valid." *Norman*, 138 Fed. Cl. at 196.

The court refused to follow the holdings of two recent United States District Court cases determining that, although the IRS theoretically may assess a penalty greater than $100,000 for a FBAR violation committed after 2004, the IRS is still bound by the maximum penalty in the pre-2004 statute.[51] The court concluded that the reasoning of these cases conflicts with the decision of the United States Court of Appeals for the Federal Circuit in *Barseback Kraft AB v. United States*.[52]

"The court refused to follow the holdings of two recent United States District Court cases determining that, although the IRS theoretically may assess a penalty greater than $100,000 for a FBAR violation committed after 2004, the IRS is still bound by the maximum penalty in the pre-2004 statute."

For these reasons, the court determined, viewing the evidence in the light most favorable to Kimble, that the IRS did not abuse its discretion when it assessed a civil penalty against Plaintiff of $697,229, i.e., 50 percent of the balance in the Swiss account in 2007.

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51 *See Colliot*, 2018 WL 2271381 at *3; *United States v. Wahdan*, 325 F. Supp. 3d 1136, 1141 (D. Colo. 2018).

52 121 F.3d 1475 (Fed. Cir. 1997).

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Taxpayer Barred from Injunctive Relief

On January 2, 2019, a federal district court in *Advanced Refining Concepts, LLC v. United States* dismissed a taxpayer's claims seeking declaratory and injunctive relief and breach of contract claims against the United States related to the IRS' denial of fuel tax credits claimed on the sale of fuel that combined compressed natural gas with diesel fuel.[53] The decision of the district court highlights the very limited jurisdiction of the federal courts when a taxpayer pursues claims against the United States related to a claim for refund.

Factual Background

Advanced Refining Concepts ("ARC") created a new fuel that combines compressed natural gas with diesel fuel—what ARC calls GDiesel. The IRS imposes taxes on the sale of certain types of fuels; however, entities that deal in these fuels may register with the IRS to file claims for tax credits. Beginning in 2009, ARC applied to the IRS for both an "AM" and "S" designation, but each was denied. ARC continued to apply to the IRS for designations, and in February 2011, the IRS granted ARC three designations: "S"; "UV," and "X" which allowed ARC to claim and receive tax refunds. However, in 2014, the IRS revoked ARC's "S" registration, which had allowed ARC to sell red-dyed diesel fuel. The IRS also required ARC to repay the tax credits it had already received.

ARC repaid the credits, gave up its "S" designation, and applied for "AM" registration for an "alternative fuel." The IRS initially denied this "AM" designation, but just a few months later sent ARC notice that it had been approved. ARC then filed amended tax returns in order to obtain the tax credit lost from the "S" designation revocation. But ARC's claim was denied in September o2015 after the IRS found ARC's GDiesel was created using natural gas compressed at 700-1000psi; to qualify for the tax credit, the natural gas must have been compressed at 2800-3600psi.

53 __F. Supp.3d __ (2019), 2019 WL 93499

Following this denial, ARC chose to utilize the Fast Track Settlement process and sought mediation. The mediator recommended the IRS pay 80% of the tax credit amount ARC claimed. ARC agreed to the settlement and was informed the agreement would need to be approved by the IRS's Territory Manager. The mediator orally represented to ARC on October 30, 2015, that the settlement agreement had been approved. However, on November 2, 2015, ARC was informed that IRS superiors overruled the Territory Manager's approval, and denied the settlement. The claim was referred to IRS Appeals, which subsequently denied ARC's claim, finding GDiesel did not meet the requirements for the "AM" designation.

ARC's refund suit alleged five causes of action against the United States: (1) Refund of Federal Excise Tax pursuant to 26 U.S.C. § 7422 for denial of the "AM" tax credit; (2) Refund of Federal Excise Tax pursuant to 26 U.S.C. § 7422 for revocation of "S" designation and subsequent tax penalties; (3) declaratory judgement as to ARC's registration status and qualification of "AM" tax credit designation; (4) injunctive relief to enforce the terms of the Fast Track Settlement Session Report; and (5) breach of contract for denying the settlement after the Territory Manager had approved it. The United States moved to dismiss ARC's third, fourth, and fifth claims for lack of subject matter jurisdiction. The United States asserted a facial attack arguing that even if ARC's allegations are true, they are insufficient to invoke federal court jurisdiction.

District Court's Analysis

Any claim against the United States is subject to the general precept of sovereign immunity. Absent an express waiver of sovereign immunity by Congress, the federal courts lack subject matter jurisdiction to hear claims brought against the United States.[54]

Declaratory Relief

Federal courts have jurisdiction over claims for declaratory relief pursuant to the Declaratory Judgment Act ("DJA").[55] But the DJA specifically exempts courts from granting declaratory relief for actions involving federal taxes in order to protect the public fisc.[56] In considering ARC's

54 *See United States v. Mitchell*, 445 U.S. 535, 538 (1980).
55 28 U.S.C. § 2201.
56 28 U.S.C. § 2201(a).

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claim for declaratory relief, the district court noted *California by Deukmajan v. Regan,* where the Ninth Circuit stated that "[t]he purpose of the federal tax exception to the Declaratory Judgment Act is to protect the government's ability to assess and collect taxes free from pre-enforcement judicial interference, and to require that disputes be resolved in a suit for refund."[57]

To determine if ARC's claim for declaratory relief precluded judicial review, the court looked to the Anti-Injunction Act ("AJA"), where courts have held that if the AJA bars the suit, so does the DJA. In *Alexander v. Americans United, Inc.*,[58] the Supreme Court held that a taxpayer's injunction against the United States must be dismissed unless the taxpayer can satisfy that (1) the United States under no circumstances could succeed on the merits of the tax claim; and (2) the taxpayer has no other available legal remedy and will be irreparably harmed.[59] Applying the two-prong test, the court concluded that ARC "failed to show that under no circumstances will the government succeed." The court noted that the taxpayer had offered no evidence to refute the government's argument that ARC's GDiesel failed to meet the specific requirements for the tax credits. According to the court, the taxpayer also failed the second prong because it had an adequate and available remedy; taxpayer could pay the tax and file suit for a refund. Because the court concluded that it was prohibited from review under the AJA, judicial review was also prohibited under the DJA.

Injunction Relief

Taxpayer asserted, relying on the Administrative Practice Act ("APA"), that the government unequivocally waived sovereign immunity and must be enjoined and must comply with the terms of the IRS fast track report because the Session Report constituted a final agency action, and thus was reviewable under the APA. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[60] According to the taxpayer, because there was no other statute implicated here, the Session Report was a final agency action, and thus, the decision is reviewable under the APA. The court disagreed and found that the Session Report was not a final or binding agreement between the parties. The Fast Track Settlement Procedures provide that "[t]he signature of the parties on the FTS Session Report does not constitute a final settlement…. The taxpayer acknowledges that the Service may reconsider a proposed settlement, as reflected in a signed FTS Session Report, upon receipt of comments on the proposed settlement from the Joint Committee on Taxation."[61] According to the court, the provisions of the process articulate in clear concise language that the Session Report was not binding, and it is not final. Thus, the court held that the United States had not unequivocally waived sovereign immunity and dismissed taxpayer's injunction claim.

Breach of Contract

Taxpayer sued for breach of contract alleging that it settled $623,913 in damages resulting from the IRS' breach of the Session Report. Taxpayer asserted that it was not demanding money damages, but rather that it asserted a claim of specific performance to enforce a contract. To avoid the government's sovereign immunity defense (immunity shall not be waived for claims of money damages. 5 U.S.C. § 702), the taxpayer argued that it was not demanding money damages, but rather presented a claim to simply enforce a contract. The court disagreed.

In making this determination, the court looked to whether the actual relief resulting from review of the claim would be monetary.[62] Here, the court concluded that based on the plain language of the complaint, this claim was one for monetary relief. Therefore, the APA does not provide the proper waiver of sovereign immunity. However, even if the APA did provide for a waiver of sovereign immunity, the court held that the taxpayer had failed to state a claim for breach of contract because the settlement agreement between the parties was not a final, binding agreement. Therefore, because the Session Report was not binding, there was no breach when the IRS exercised its discretion to reject the settlement.

57 641 F.2d 721, 722 (9th Cir. 1981).
58 416 U.S. 752, 758 (1974).
59 *Id.* at 758; *Enochs v. Williams Packing*, 370 U.S. 1, 6-7 (1962).
60 *Id.* § 704.

61 2019 WL 93499 at *4.
62 *See Richardson v. U.S. Dep't of Health and Human Servs.*, 2018 WL 1569772, at * 2 (D. Nev. March 30, 2018) ("Ninth Circuit courts have consistently refused jurisdiction over claims when the actual relief resulting from [review of the equitable claim] would be monetary." (internal quotations omitted)).

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Finally, to the extent that a claim for breach of contract does exist, the district court stated that it lacked jurisdiction because the Court of Federal Claims has exclusive jurisdiction to decide this breach of contract claim on the merits.

For these reasons, the court dismissed the taxpayer's declaratory and injunctive relief and breach of contract claims.

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IRS Updates Adequate Disclosure Guidance

On December 20, 2018, the IRS issued Rev. Proc. 2019-9, [63] which covers the circumstances when a disclosure on a taxpayer's income tax return regarding an item or position is adequate to reduce the understatement of income tax under section 6662(d) for the substantial understatement aspect of the accuracy-related penalty. It also discusses when a disclosure is adequate to avoid the tax return preparer penalty under section 6694 for understatements due to unreasonable positions. The guidance applies to any income tax return filed on 2018 tax forms. Rev. Proc. 2019-9 does not apply with respect to any other penalty provisions.

If section 6662 applies to any portion of an underpayment of tax required to be shown on a return, an amount equal to 20 percent of the portion of the underpayment is added to the tax. The penalty rate increases to 40 percent in the case of gross valuation misstatements under section 6662(h), nondisclosed noneconomic substance transactions under section 6662(i), or undisclosed foreign financial asset understatements under section 6662(j). Section 6662(b)(2) applies to the portion of an underpayment of tax that is attributable to a substantial understatement of income tax.

There is a substantial understatement of income tax if the amount of the understatement exceeds the greater of (i) 10 percent of the amount of tax required to be shown on the return for the taxable year or (ii) $5,000.[64] Section 6662(d)(1)(B) provides a special rule for corporations. A corporation (other than an S corporation or a personal holding company) has a substantial understatement of income tax if the amount of the understatement exceeds the lesser of (i) 10 percent of the tax required to be shown on the return for a taxable year (or, if greater, $10,000) or (ii) $10,000,000. An understatement is the excess of the amount of tax required to be shown on the return for the taxable year over the amount of the tax that is shown on the return reduced by any rebate.[65] In the case of an item not attributable to a tax shelter, if the taxpayer has a reasonable basis for the tax treatment of the item, the amount of the understatement is reduced by the portion of the understatement attributable to the item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return.[66]

> "In general, this revenue procedure provides guidance for determining when disclosure by return is adequate for purposes of section 6662(d)(2)(B)(ii) and section 6694(a)(2)(B)."

General

In general, this revenue procedure provides guidance for determining when disclosure by return is adequate for purposes of section 6662(d)(2)(B)(ii) and section 6694(a)(2)(B). For purposes of this revenue procedure, the taxpayer

63 I.R.B. 2018-5, 335.

64 Section 6662(d)(1).
65 Section 6662(d)(2).
66 Section 6662(d)(2)(B)(ii).

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must furnish all required information in accordance with the applicable forms and instructions, and the money amounts entered on these forms must be verifiable. Pursuant to Rev. Proc. 2019-9, additional disclosure of facts relevant to, or positions taken with respect to, issues involving any of the items set forth below is unnecessary for purposes of reducing any understatement of income tax under section 6662(d)(except as otherwise provided in section 4.02(3) concerning Schedules M-1 and M-3), provided that the forms and attachments are completed in a clear manner and in accordance with their instructions.

For Schedule M-1 and all Schedules M-3, including those listed in (a)-(f) below, the information provided must reasonably apprise the Service of the potential controversy concerning the tax treatment of the item.

If the information provided does not so apprise the IRS, a Form 8275 or Form 8275-R must be used to adequately disclose the item.[67]

According to the IRS, combining unlike items, whether on Schedule M-1 or Schedule M-3 (or on an attachment when directed by the instructions), will not constitute an adequate disclosure.

Additionally, taxpayers that file Schedule M-3 (Form 1120), *Net Income (Loss) Reconciliation for Corporations with Total Assets of $10 Million or More*, may be required to complete Schedule B (Form 1120), *Additional Information for Schedule M-3 Filers.* Taxpayers that file the Schedule M-3 (Form 1065), *Net Income (Loss) Reconciliation for Certain Partnerships*, may be required to complete Schedule C (Form 1065), *Additional Information for Schedule M-3 Filers*.

When required, these schedules are necessary to constitute adequate disclosure:

a. Form 1065. Schedule M-3 (Form 1065), *Net Income (Loss) Reconciliation for Certain Partnerships*: Column (a), *Income (Loss) per Income Statement*, of Part II (reconciliation of income (loss) items) and Column (a), *Expense per Income Statement*, of Part III (reconciliation of expense/deduction items); Column (b), *Temporary Difference*, and Column (c), *Permanent Difference*, of Part II (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items); and Column (d), *Income (Loss) per Tax Return*, of Part II (reconciliation of income (loss) items) and Column (d), *Deduction per Tax Return*, of Part III (reconciliation of expense/deduction items).

b. Form 1120. (i) Schedule M-1, *Reconciliation of Income (Loss) per Books With Income per Return*. (ii) Schedule M-3 (Form 1120), *Net Income (Loss) Reconciliation for Corporations With Total Assets of $10 Million or More*: Column (a), *Income (Loss) per Income Statement*, of Part II (reconciliation of income (loss) items) and Column (a), *Expense per Income Statement*, of Part III (reconciliation of expense/deduction items); Column (b), *Temporary Difference*, and Column (c), *Permanent Difference*, of Part II (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items); and Column (d), *Income (Loss) per Tax Return*, of Part II (reconciliation of income (loss) items) and Column (d), *Deduction per Tax Return*, of Part III (reconciliation of expense/deduction items).

c. Form 1120-L. Schedule M-3 (Form 1120-L), *Net Income (Loss) Reconciliation for U.S. Life Insurance Companies With Total Assets of $10 Million or More*: Column (a), *Income (Loss) per Income Statement*, of Part II (reconciliation of income (loss) items) and Column (a), *Expense per Income Statement*, of Part III (reconciliation of expense/deduction items); Column (b), *Temporary Difference*, and Column (c), *Permanent Difference*, of Part II (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items); and Column (d), *Income (Loss) per Tax Return*, of Part II (reconciliation of income (loss) items) and Column (d), *Deduction per Tax Return*, of Part III (reconciliation of expense/deduction items).

d. Form 1120-PC. Schedule M-3 (Form 1120-PC), *Net Income (Loss) Reconciliation for U.S. Property and Casualty Insurance Companies With Total Assets of $10*

67 An item reported on a line with a pre-printed description, shown on an attached schedule or "itemized" on Schedule M-1, may represent the aggregate amount of several transactions producing that item (i.e., a group of similar items, such as amounts paid or incurred for supplies by a taxpayer engaged in business). In some instances, a potentially controversial item may involve a portion of the aggregate amount disclosed on the schedule. The Service will not be reasonably apprised of a potential controversy by the aggregate amount disclosed. In these instances, the taxpayer must use Form 8275 or Form 8275-R regarding that portion of the item.

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Million or More: Column (a), *Income (Loss) per Income Statement*, of Part II (reconciliation of income (loss) items) and Column (a), *Expense per Income Statement*, of Part III (reconciliation of expense/deduction items); Column (b), *Temporary Difference*, and Column (c), *Permanent Difference*, of Part II (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items); and Column (d), *Income (Loss) per Tax Return*, of Part II (reconciliation of income (loss) items) and Column (d), *Deduction per Tax Return*, of Part III (reconciliation of expense/deduction items).

e. Form 1120-S. Schedule M-3 (Form 1120-S), *Net Income (Loss) Reconciliation for S Corporations With Total Assets of $10 Million or More*: Column (a), *Income (Loss) per Income Statement*, of Part II (reconciliation of income (loss) items) and Column (a), *Expense per Income Statement*, of Part III (reconciliation of expense/deduction items); Column (b), *Temporary Difference*, and Column (c), *Permanent Difference*, of Part II (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items); and Column (d), *Income (Loss) per Tax Return,* of Part II (reconciliation of income (loss) items) and Column (d), *Deduction per Tax Return*, of Part III (reconciliation of expense/deduction items).

f. Form 1120-F. Schedule M-3 (Form 1120-F), *Net Income (Loss) Reconciliation for Foreign Corporations With Reportable Assets of $10 Million or More*: Column (b), *Temporary Differences*, Column (c), *Permanent Differences*, and Column (d), *Other Permanent Differences for Allocations to Non-ECI and ECI*, of Part II (reconciliation of income (loss) items) and Part III (reconciliation of expense/deduction items).

This revenue procedure applies to any income tax return filed on a 2018 tax form for a taxable year beginning in 2018 and to any income tax return filed on a 2018 tax form in 2019 for a short taxable year beginning in 2019.

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FBAR Filing Deadline Extended

In January 2019, the Financial Crimes Enforcement Network ("FinCEN") announced that it will extend the time for certain individual taxpayers to file a FBAR to April 15, 2020, regarding the filing requirement and its application to individuals with signature authority over, but no financial interest in, certain types of accounts.[68] The filing date is extended for individuals whose filing due date for reporting signature authority was previously extended by FinCEN Notice 2017-1.[69] The extension applies to the reporting of signature authority held during the 2018 calendar year, as well as all reporting deadlines extended by previous FinCEN Notices 2011-1, 2011-2, 2012-1, 2012-2, 2013-1, 2014-1, 2015-1, 2016-1, and 2017-1. The filing date remains unchanged for all other individuals with an FBAR filing obligation.

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68 FinCEN Notice 2018-1.

69 On December 22, 2017, FinCEN issued Notice 2017-1 to extend the filing date for FinCEN Form 114 - FBAR for certain individuals with signature authority over but no financial interest in one or more foreign financial accounts to April 15, 2019. FinCEN has previously issued identical extensions that applied to similarly situated individuals.

Winston & Strawn's Tax Controversy and Litigation Practice

Our tax controversy practice is one of the cornerstones of Winston & Strawn's tax practice. Many of our tax attorneys devote a substantial portion of their practice to tax controversy matters, with several attorneys concentrating their entire practice on these matters.

Winston & Strawn's tax controversy practice represents our clients' interests at all administrative and judicial levels. Our nationally recognized team of tax litigators, some of whom are former government trial attorneys, has litigated some of the most significant civil and criminal tax cases in U.S. history. Our tax controversy attorneys have presented, negotiated, and resolved hundreds of cases with IRS appeals offices around the country, and the scope of our appeals practice covers virtually every taxpayer-contested issue. Our team of trial attorneys also regularly represents clients in mediations, arbitrations, tax litigation, and trials before the U.S. Tax Court, the U.S. Court of Federal Claims, federal district courts, and state courts. When necessary, we handle cases for clients in the federal circuit courts of appeal and the U.S. Supreme Court. We have also represented clients in grand jury investigations; Senate PSI investigations; Independent Counsel investigations; before the Director of Practice of the Treasury Department; and other administrative tribunals. In addition, one of our attorneys recently served as an Independent Examiner for a Swiss Bank under the Department of Justice's Swiss Bank Program.

Our tax controversy attorneys represent major financial institutions, multinational corporations, other public corporations, and significant privately held corporations, exempt organizations, high net worth individuals, and large estates in administrative and judicial proceedings against the IRS and the Department of Justice.

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