Bank Secrecy Act - 31 USC 5321(a)(5)(C)

Willfulness

Proposed amendment

31 USC 5321(a)(5)(C) is amended to add flush language at the end of the section to read as follows:

The determination of willfulness shall require the proof of actual intent to violate any provision of section 5314 by a standard of clear and convincing evidence. A person shall be presumed not to have acted willfully when they shall have complied with their obligations under this section prior to the time that they have been notified by the Department of the Treasury or its delegate that they are under audit or investigation for failure to comply with the provisions of 31 USC 5314.

Reasons for change

The Bank Secrecy Act provides establishes a penalty for willful failure to maintain foreign bank account records or file foreign bank account report forms are fifty percent (50%) of the highest balance in the account per year. This provision was originally aimed at drug smugglers, terrorist financiers, and other criminals to deprive them of the financial results of their crimes. Recently, however, the Department of Justice has taken this weapon designed for those who threaten our society and begun to use it against United States citizens and other taxpayers instead of the criminals for which it was enacted.

The Department of Justice has asserted that willfulness for failure to file foreign bank account report forms does not require proof of actual intent. They assert that it may be proven by inference from the failure to disclose the existence of the account in response to Question 7 on Schedule B of Form 1040. *U. S. v. Zwerner,* Case No. 13-22082-CIV-ALTONAGA/Simonton (S. D. Fla) (hereinafter "*Zwerner*"), Government's Motion for Summary Judgment, Document 21 at p. 15.; *U. S v. Williams,* 489 Fed.Appx. 655, 2012 WL 2948569 (4th Cir 2012). They have also asserted that a taxpayer not making inquiry of their obligations to file this form constitutes willful blindness to obligations meeting the willful standard. *Id.*

The Department of Justice also has asserted that the proper standard for determination of willfulness is a predominance of the evidence, *Id.*at p. 12, and not the clear and convincing evidence used to establish fraud or evidence beyond a reasonable doubt as one would find in a criminal charge.

Willfulness is akin to fraud, which is required to be proven by actual intent. The penalties asserted by the Department of Justice for willful violations are significant penalties. In the tax area, where penalties for this type of behavior have been asserted, the Government is required to prove intent by clear and convincing evidence. I.R.C. §7454(a). The same should be true here.

Likewise, where a person files a foreign bank account form after the required due date that is substantially complete, under ordinary circumstances the person should not be assessed a penalty of 50% per year of the balance of the account for failure to file a foreign bank account form.

The Non-BSA Examiners Lead Sheet for Bank Secrecy Act investigations, the manual used by the Internal Revenue Service, instructs IRS auditors to commence an investigation into violations of the Bank Secrecy Act without notifying the taxpayer. If a person voluntarily files a foreign bank account report form before being contacted by the Internal Revenue Service that is substantially correct, while they may be subject to a non-willful penalty under 31 USC 5321(a)(5) (B) in the absence of reasonable cause, they should not be subject to the severe 50% per year penalty of 31 USC 5321(a)(5)(C). The rule for Bank Secrecy Act examinations should follow the same rules that apply to audits under the Internal Revenue Code. There is no penalty when a taxpayer amends a tax return in ordinary circumstances before they are contacted by the IRS.

We represent an individual, for example, where a taxpayer filed a substantially complete foreign bank account form for 2007 on March 24, 2009, approximately nine months after the due date of June 30, 2008, and before being contacted by the Internal Revenue Service. The IRS then audited the individual for two and a half years. At the end of the audit, the IRS issued a letter stating that the taxpayer did not owe any additional tax and was not subject to any penalty under the Internal Revenue Code. However, because the taxpayer had filed the foreign bank account report form nine months later, the taxpayer was assessed a penalty of slightly less than half a million dollars, half of the amount that she had inherited from her foreign parents and 50% of the highest account balance for the year for willfully failing to file a foreign bank account report form. In making this assessment, the IRS made no findings of fact with respect to intent or willfulness. They simply assessed the penalty because the taxpayer had not initially checked the box on her income tax return stating that she had a foreign bank account.