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Tax

Court Orders Repatriation of Funds to Settle Multimillion-Dollar FBAR Penalties

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Recently, the United States District Court for the Southern District of Florida conducted a de novo review of a Magistrate Judges' recommendations for how the U.S. government may compel a taxpayer's repatriation of assets in order to satisfy a multi-million-dollar FBAR penalty. Significantly, the Court agreed with the recommendations—resulting in an exceptional ruling that emphasizes both the continuing personal jurisdiction over a taxpayer and the authority of a court to force repatriation of assets to satisfy taxpayer's FBAR penalties. The Court's ruling should highlight the: (1) importance of timely and accurately reporting/filing FBARs, and (2) vulnerability of assets located outside the United States and owned by taxpayers who maintain control over those assets.

Factual Findings

Taxpayer's Background

Taxpayer, born and raised in Germany in 1955. His father was a successful businessman who made numerous gifts of substantial sums to Taxpayer over many years. Indeed, the first particularly significant gift was made in 2001, when Taxpayer's father transferred an existing Swiss bank account into Taxpayer's name. Ultimately, as the court notes, Taxpayers assets are derived from these gifts and bequests.

Although educated, Taxpayer never took courses in accounting, investing, or law. Among other ventures, he opened a gym and worked in real estate sales. Taxpayer became a legal permanent resident of the United States in 1995 and a U.S. citizen in 2000. He moved to and lived full-time in Switzerland in 2010 until returning to the United States in 2016.

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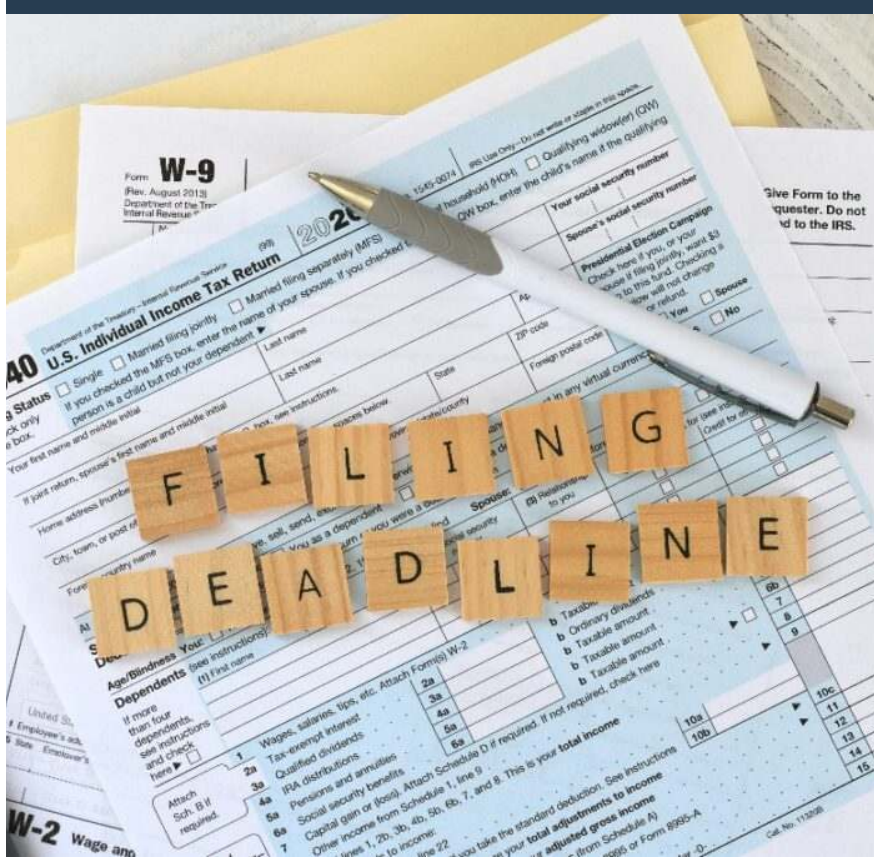

Since 2001, Taxpayer accumulated millions in funds in multiple Swiss and Costa Rican accounts. According to the court, Taxpayer never directed the bankers on investment decisions and never disagreed with their recommendations.

Taxpayer always used CPAs for U.S. tax return preparation. In 2006, Taxpayer told his CPA that he received gifts from his father and that his primary residence at the time was Costa Rica. According to Taxpayer, the CPA told him that gifts without a U.S. connection are not reportable. However, the court notes that Taxpayer's 2006 return included an FBAR reporting an interest in one of his bank accounts (even though he had many bank accounts). According to Taxpayer, the one account was reported precisely because that account had a U.S. connection since money was sent from the U.S. to the bank account.

According to Taxpayer, it wasn't until 2010, just before his move back to Switzerland, that he became aware of his actual reporting issues. He participated in the OVDI program, disclosing financial holdings, 17 accounts in Switzerland, and 4 accounts in Costa Rica for years 2003 to 2010. However, he ended up opting out of the OVDI program and his case was referred for investigation (i.e., he would be subject to an ordinary audit).

The IRS audit determined that Taxpayer's 2006-2009 FBAR violations were willful and finally arrived at a penalty assessment of $13,729,591.

Procedural Background

In late August of 2018, the government brought suit against Taxpayer for willful FBAR noncompliance. The five-day bench trial resulted in a final judgment for $12,555,813, plus accrual of late payment of penalties and interest. On October 23, 2021, Taxpayer appealed to the United States Court of Appeals for the Eleventh Circuit—this appeal is pending.

In light of the fact that Taxpayer had still not satisfied judgment, and he had not requested a stay of execution of judgment pending appeal, the government subsequently filed a Motion to Repatriate Foreign Assets with the United States District Court for the Southern District of Florida. In the Motion, the government maintained that Taxpayer lacks assets located within the United States to satisfy the judgment; however, Taxpayer's Swiss bank accounts are sufficient to satisfy the judgment.

Initially, the court referred the Motion to a Magistrate Judge for a Report and Recommendations (R&R). The resulting R&R recommended granting the Motion, concluding that:

> **the Court has the authority, under the FDCPA and its express incorporation of the All Writs Act, 28 U.S.C. §1651, to order Schwarzbaum to repatriate his foreign assets by virtue of its personal jurisdiction over him and that Schwarzbaum has no legal basis to resist a court order requiring him to repatriate his foreign assets.**

Taxpayer objected to the findings, the government responded and on October 25, 2021, the District Court reviewed the Motion and conducted a de novo review of the R&R.

Analysis

The United States District Court for the Southern District of Florida adopted the Magistrate Judge's R&R, holding that a court is authorized to order a party under its jurisdiction to repatriate foreign assets when it is necessary or appropriate to support a writ of garnishment under the Federal Debt Collection Procedures Act (FDCPA) in order to satisfy an FBAR penalty assessment. More specifically, the Court determined that it could compel repatriation considering that: (1) the incorporation of the All Writs Act in the FDCPA is abundantly clear, and (2) the Court maintains undisputed personal jurisdiction over Taxpayer.

In reaching its decision, the Court considered that "the FDCPA expressly provides for the issuance of various writs, including writs of execution and writs of garnishment." In support of that point, the Court cited 28 U.S.C. § 3202(a): "[a]ll property in which the judgment debtor has a substantial nonexempt interest shall be subject to levy pursuant to a writ of execution."

While the Court conceded that the FDCPA does not expressly provide for orders of repatriation, the Court clarified that the FDCPA incorporates the All Writs Act. Citing 28 U.S.C. §1651, the Court stated that federal courts are empowered to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." According to the Court, the incorporation of the All Writs Act into the FDCPA clearly reflects Congress's intent to authorize courts to take necessary measures to aid their jurisdiction and secure their judgments.

Finally, the Court emphasized the irrelevance of whether or not Taxpayer's assets are within the Court's jurisdiction. According to the Court, case law is replete with decisions (even ones concerning federal tax liability collection) supporting "the principle that this Court has the authority to order a party to repatriate foreign assets pursuant to its personal jurisdiction over the judgment debtor." The Court further highlighted that the IRC language relied upon in a number of such cases was similar to the language used in the FDCPA. The Court stated that "[Taxpayer] has not pointed to a convincing basis for why the reasoning in these cases should not apply to the context of this case."

Conclusion

In the end, the Court found the "R&R to be well-reasoned and correct," and Taxpayer has been ordered to repatriate a sufficient amount of his assets located abroad to satisfy millions of dollars in FBAR penalties. Again, we want to urge our readers to consider the important lessons here: (1) prioritize your timely and accurate reporting/filing of FBARs, and (2) remember the very real vulnerability of any assets located outside the United States over which you maintain control. Attorneys at Frost Law have the experience in international tax law to help, if you have concerns about your tax matters please contact Partner Eli Noff at (410) 497-5947.

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