Federal Court Upholds Maximum Penalty for Willful FBAR Violation

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By Ryan Finley

A taxpayer's ignorance of her filing duties and a pre-2004 cap on penalties raise no material issues of fact that could establish that the IRS abused its discretion in assessing the maximum penalty in 2007.

According to the U.S. Federal Court of Claims' December 27 opinion granting the government's motion for summary judgment in *Alice Kimble v. United States*, No. 1:17-cv-00421, the IRS does not need to prove that taxpayer Alice Kimble understood and recklessly disregarded her foreign bank account reporting~~ obligations to assess penalties for a willful violation. The court also held that the nearly $700,000 penalty was not barred by the $100,000 limit on civil penalties in place before a 2004 statute raised the cap to the lesser of $100,000 or 50 percent of the account's value. Kimble claimed that she never reviewed her tax returns or knew about her FBAR filing duties and therefore she should not be subject to willful violation penalties.~~

The court rejected those arguments, holding that the stipulated facts concerning Kimble's conduct were sufficient to establish willfulness. "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 Plaintiff's conduct in this case was 'willful,'" the opinion says.

At some point before 1980, Kimble's father opened a Swiss UBS investment account and designated her as a joint owner, the decision says. She claimed that her father, who was Jewish, instructed her to never reveal the account to anyone in case they had to escape the United States to avoid future religious persecution. Kimble never asked the accountant who prepared her 2003-2008 tax returns about any obligations associated with the accounts or reported any of her offshore income until after UBS entered a 2009 deferred prosecution agreement requiring that it provide names and account information for U.S. citizens.

Kimble filed amended returns reporting her offshore income after entering the offshore voluntary disclosure program in 2009 and filed FBARs in 2012 for the UBS account and a French HSBC account, but she withdrew in 2013 after the closing agreement required her to pay a $377,000 penalty. The IRS determined during its subsequent audit that Kimble's failure was willful because she was listed as the sole owner of and actively managed each account, failed to disclose and tried to conceal the accounts' existence, and had significant offshore income without any business or family connection to France or Switzerland. The government also rejected the position that fear of persecution could be a reasonable cause for noncompliance with U.S. tax law.

The court granted the government's motion for summary judgment, holding that Kimble's objections raised no genuine issue of material fact that could show abuse of discretion by the IRS. Noting Kimble's concealment of the accounts, false representations on her tax returns, and failure to review her returns for accuracy, the decision rejects Kimble's argument that the IRS was required to provide all of the documents cited by the Internal Revenue Manual as helpful in establishing willfulness.

The decision hands the government a "total victory," Josh Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP told *Tax Notes*. He noted that the court applied a standard that requires reckless disregard despite its observation that Kimble had no obligation to mention her offshore accounts to her accountant.

"Interestingly, the court specifically noted that the taxpayer had no legal duty to disclose the offshore information to or ask about IRS reporting offshore requirements from the tax return preparer. While the court pointed out the lack of legal duty, the court found the taxpayer acted willfully to satisfy the willful FBAR civil penalty," Ungerman said.

The court's resolution of the seemingly factual question of willfulness at the summary judgment stage in this and other FBAR cases has become a troubling trend, according to Zhanna Ziering of Caplin & Drysdale. Ziering told *Tax Notes* that the presumption that taxpayers have reviewed every detail of their returns is sensible for reporting obligations and tax liability computations. However, applying the same logic to penalties for willfulness is "incredibly unnerving," she said.

"What I found incredibly troubling is the fact that the court found that reckless disregard was met just merely by the fact that the taxpayer did not review her individual returns and that she answered 'no' to the Question 7(a)," Ziering said. "So, essentially, the court is saying failure to review your returns and read your returns, cover to cover, and every small print in itself, is reckless disregard."

According to Ungerman, many practitioners are disappointed with the court's further holding that FBAR penalties are not subject to the $100,000 cap. The court held that the $100,000 limit set by the regulation, which has not been changed since Congress changed the maximum penalty in 2004, was automatically replaced by the maximum penalty stipulated by statute.

Robert Horwitz of Hochman Salkin Toscher Perez PC questioned this conclusion, which follows the Court of Claims' July assessment in *Norman v. United States*, No. 1:15-cv-00872. Noting that the regulation is the IRS's only published guidance on the issue, Horwitz told *Tax Notes* that the court appeared to give deference to the IRM on the requirements for establishing willfulness without showing any deference to the regulatory penalty cap.

"The second part of the decision, holding that the 50 percent penalty overrides the $100,000 maximum set by the regulation, was not unexpected given the opinion on this issue in *Norman*. The court's reasoning . . . that a statute replaces any preexisting contradictory regulation, ignores the fact [that] A) the regulation was reissued after enactment of the statute and B) the 50 percent maximum is not mandatory," Horwitz said. "Since it is a pronouncement by the agency tasked with administering the law, isn't it entitled to some [deference] — at least the *Skidmore* level of deference — by the courts, especially where it is the only published guidance from the agency?"

This part of the decision was not surprising, but the court's analysis of the issue was lacking, according to Ziering. "At the end of the day . . . essentially without [an] in-depth analysis, the court just said that the regulation is superseded by the statute and it is inconsistent with the statute."

Jennifer McLoughlin contributed to this article.