

District court refuses to dismiss FBAR penalty action against decedent's family

If you have an interest in (or authority over) a foreign financial account, you may have to electronically file a "Report of Foreign Bank and Financial Accounts" (FBAR) or face penalties. In the recent case of *U.S. v. Park*, a federal district court refused to dismiss an action to collect an FBAR penalty from a decedent's family. This article explores the details of the court's decision.

If you have an interest in (or authority over) a foreign financial account, you may have to electronically file a form called the "Report of Foreign Bank and Financial Accounts" (FBAR). Failing to file a required FBAR can result in penalties.

In the recent case of *U.S. v. Park*, a federal district court refused to dismiss an action to collect an FBAR penalty from a decedent's family. In the court's view, the IRS provided sufficient factual detail about the penalty and assessment, the penalty didn't exceed the statutory maximum, and the assessment survived the decedent's death.

FBAR fundamentals

Certain U.S. taxpayers with foreign accounts must file FinCEN Form 114 (FBAR) with the U.S. Treasury Department's Financial Crimes Enforcement Network. Generally, this filing requirement applies to anyone who had an interest in, signature on or other authority over any foreign financial accounts whose aggregate value exceeded \$10,000 at any time during the previous calendar year.

To be timely, the taxpayer must file Form 114 no later than the extended due date of his or her tax return — usually October 15. Willful failure to timely file an FBAR can result in civil penalties up to 50% of the amount in the unreported account.

To collect a civil FBAR penalty, the government must show four things:

1. The taxpayer is a U.S. citizen.
2. The taxpayer had an interest in or authority over a foreign account(s) with an aggregate value of \$10,000 or more.
3. The taxpayer willfully failed to file an FBAR to report the account(s) to the government.
4. The IRS timely assessed the penalty.

Facts of the case

The decedent in *Park* timely filed an FBAR for 2007, but he disclosed only three foreign accounts on it. In addition, on his original, timely filed 2007 tax return, he reported interest income of less than \$10,000 from one account. In 2008, the decedent failed to file an FBAR and, on his 2008 income tax return, he reported a similar amount of income from one foreign account.

In 2010, the decedent amended his 2007 and 2008 tax returns and filed his delinquent 2008 FBAR. On his amended 2007 income tax return, he reported almost \$240,000 of additional income. On his delinquent 2008 FBAR and amended 2008 tax return, the decedent reported 10 foreign bank accounts containing \$7 million and interest several times what he'd initially reported.

In 2011, the IRS began an audit of the decedent. He died in 2012, leaving his assets in a trust that became irrevocable at his death. His wife became the trustee.

In 2014, the IRS assessed a penalty against the decedent equal to 50% of his foreign assets (about \$3.5 million) for his willful failure to timely file a 2008 FBAR. The IRS claimed that his spouse was liable for the FBAR penalty assessed against him as the representative of his estate. The decedent's family countered that the IRS's FBAR claim failed because:

- There was insufficient detail about the penalty and assessment in the complaint,
- The penalty was invalid because it exceeded the amount allowed under regulations, and
- The IRS didn't assert the penalty during the decedent's lifetime, and it did not survive his death.

Court's decision

The court found that the IRS's complaint adequately alleged the FBAR penalty. The facts alleged supported a reasonable inference that a civil FBAR penalty was assessed and that:

- The decedent was a U.S. citizen who had an interest in, or authority over, one or more foreign accounts,
- Those accounts had an aggregate value of \$10,000 or more, and
- He'd willfully failed to file an FBAR to report the accounts.

Contrary to the family's argument, the IRS wasn't required to attach documentation of the assessment to its complaint. Further, the complaint alleged that the decedent had timely filed an FBAR for 2007, which was sufficient to show, at this state of the proceedings, that his failure to file one in 2008 was willful.

The court also held that the amount of the FBAR penalty wasn't limited by IRS regulations promulgated before the law was changed and not changed thereafter. Those regulations state that the penalty won't exceed \$100,000. However, in 2004, Congress increased the maximum FBAR penalty to the greater of \$100,000 or 50% of the amount in the unreported account.

Finally, the court rejected the family's claim that the FBAR penalty was invalid because it wasn't assessed against the decedent until two years after his death. However, the court determined that the pertinent date wasn't the assessment date, but the date the decedent's FBAR was due: June 30, 2009. Thus, the FBAR liability survived his death and could be collected from his heirs.

Critical task

If you or a family member has an interest in or authority over a foreign account, know that proper FBAR filings are a critical task. Ask your CPA for assistance in fully understanding and complying with the requirements. •