# Taxpayers Die but Their International Penalties Live On

HALE E. SHEPPARD, ESQ.

**This article analyzes a series of recent cases centered on post-death actions by the IRS and DOJ, giving special attention to the question of the survivability of FBAR penalties.**

A long list of cases over the past decade have centered on the proper definition of "willfulness" in the context of penalties for an unfiled, incomplete, or inaccurate FinCEN Form 114 (Report of Foreign Bank and Financial Accounts) ("FBAR"). However, those cases did *not* address some key issues, including (i) whether the Internal Revenue Service ("IRS"), with help from the Department of Justice ("DOJ"), can assess and/or collect penalties *after* the taxpayer who committed the FBAR violation dies, and (ii) if so, against whom can the IRS and DOJ take action, the deceased individual, a surviving spouse, the executor of the estate, beneficiaries of the estate, transferees, others?

Because the IRS has six years from the time an FBAR violation occurs to assess penalties, because taxpayers often grant voluntary extensions of the assessment-period with hopes of settling on favorable terms, because the IRS audit and administrative appeal process tends to be slow, because the DOJ generally waits to initiate a collection lawsuit until two years after the IRS finally assesses FBAR penalties, and because lawsuits of this type often last for years, the issue of post-death actions is remarkably common. This article analyzes a series of recent cases centered on post-death actions by the IRS and DOJ, giving special attention to the question of the survivability of FBAR penalties.

*HALE E. SHEPPARD (B.S., M.A., J.D., LL.M., LL.M.T.) is a Shareholder in the Tax Controversy Section and Chair of the International Tax Section of Chamberlain Hrdlicka. Hale defends businesses and individuals in tax audits, tax appeals, and Tax Court litigation, focused on both domestic and international issues. You can reach Hale by phone at (404) 658-5441 or by e-mail at hale.sheppard@chamberlainlaw.com.*

## Common International Tax and Information-Reporting Duties

To understand the issues in this article, readers must first have some basic knowledge about the obligations triggered by foreign account ownership. U.S. citizens and residents holding interests in foreign accounts have several duties, including the following:

- They must check the "yes" box on Schedule B (Interest and Ordinary Dividends) to Form 1040 (U.S. Individual Income Tax Return) to disclose the existence of the foreign account.
- They must identify the foreign country in which the account is located, also on Schedule B to Form 1040.
- They must declare all income on Form 1040 before depositing it into the foreign account, along with all passive income later generated by the account, such as interest, dividends, and capital gains.
- They generally must report the account on Form 8938 (Statement of Specified Foreign Financial Assets), which is enclosed with Form 1040.
- In situations where taxpayers hold the foreign account indirectly through a foreign corporation, they likely need to file Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations).
- They must electronically file an FBAR.

Failure to meet the preceding duties, without a good justification or excuse, leads to significant penalties. First, taxpayers omitting income from foreign activities and assets often face large U.S. tax liabilities, as well as penalties linked to the tax underpayments. Examples include negligence penalties equal to 20 percent of the tax debt, penalties rising to 40 percent in situations involving undisclosed foreign financial assets, and penalties reaching 75 percent where the IRS can prove civil fraud.[1] Taxpayers are also stuck with large interest charges, on both the tax liabilities and penalties.[2]

Second, if a taxpayer fails to file Form 8938 in a timely manner, then the IRS generally will assert a penalty of $10,000 per violation.[3] The penalty increases to a maximum of $50,000 if the taxpayer does not rectify the problem quickly after contact from the IRS.[4]

Third, holding an interest in a foreign corporation, particularly one categorized as a controlled foreign corporation ("CFC"), triggers more complications. Several categories of U.S. persons who are officers, directors, and/or shareholders of certain foreign corporations ordinarily must file a Form 5471 with the IRS.[5] If a person neglects to do so, then the IRS may assert a penalty of $10,000 per violation, per year.[6] This standard penalty increases at a rate of $10,000 per month, to a maximum of $50,000, if the problem persists after notification by the IRS.[7]

Lastly, taxpayers often face large sanctions for unfiled FBARs. The relevant law mandates the filing of an FBAR in situations where (i) a U.S. person, including U.S. citizens, U.S. residents, and domestic entities, (ii) have a direct financial interest in, have an indirect financial interest in, have signature authority over, and/or have some other type of authority over (iii) one or more financial accounts (iv) located in a foreign country (v) whose aggregate value exceeded $10,000 (vi) at any point during the relevant year.[8] In the case of non-willful violations, the maximum penalty is $10,000 per incident.[9] Higher penalties apply if willfulness exists. Specifically, when a taxpayer willfully fails to file an FBAR, or files an incomplete or inaccurate FBAR, the IRS may assert a penalty of $100,000 or 50 percent of the balance in the undisclosed account at the time of the violation, whichever amount is larger.[10] Given the multi-million dollar balances in many unreported accounts, and given that the IRS can impose both civil and criminal penalties for the same infraction, FBAR penalties can be severe.[11]

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The penalties described above can be significant, even when considered separately. They have the potential of becoming untenable, though, when the IRS decides to "stack" the penalties, asserting multiple penalties in connection with the same unreported foreign assets or activities. A District Court recently held that "stacking" certain international penalties did not violate applicable law or the constitution.[12]

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1 Section 6662; Section 6663.

2 Section 6621.

3 Section 6038D(d)(1); Reg. 1.6038D-8(a).

4 Section 6038D(d)(2); Reg. 1.6038D-8(c).

5 Section 6038; Reg. 1.6038-2; Section 6046; Reg. 1.6046-1; Section 6679; Reg. 301.6679-1; Instructions to Form 5471.

6 Section 6038(b)(1); Reg. 1.6038-2(k)(1)(i); Section 6046(f); Reg. 1.6046-1(k).

7 Section 6038(b)(2); Reg. 1.6038-2(k)(1)(ii); Section 6046(f); Reg. 1.6046-1(k).

8 31 U.S.C. section 5314; 31 C.F.R. section 1010.350(a).

9 31 U.S.C. section 5321(a)(5)(B)(i). This penalty cannot be asserted if the taxpayer was "non-willful" and there was "reasonable cause" for the violation. *See* 31 U.S.C. section 5321(a)(5)(B)(ii).

10 31 U.S.C. section 5321(a)(5)(C)(i).

11 31 U.S.C. section 5321(d) ("A civil penalty may be imposed under [31 U.S.C. section 5321(a)] with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.")

12 Sheppard, "What *Garrity* Teaches about FBARs, Foreign Trusts, 'Stacking' of International Penalties, and Simultaneously Fighting the U.S. Government on Multiple Fronts," 20(6) Journal of Tax Practice & Procedure 27 (2019).

DOJ.[13] This article chronicles below some recent cases on this crucial topic.

## Schoenfeld

The first noteworthy case was *United States v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld.*[14]

### Relevant Facts

The taxpayer, Steven, came to the United States from Hungary in the 1950s after internment in a German concentration camp during World War II. He later became a U.S. citizen. Steven's highest level of formal education was fifth grade, and he worked most of his adult life as a machinist in New York City. He inherited a commercial building in the 1990s, but realized that he lacked the ability to manage it effectively. Therefore, he sold the building, opened an account at UBS in Switzerland, and sent the sales proceeds to the account in 1993. As of June 30, 2009 (*i.e.*, deadline for filing the 2008 FBAR), the balance in the UBS account was $1,228,600.

Steven's son, Robert ("Son"), had signature authority over the UBS account, which he used to communicate with UBS representatives periodically about the status of the account over the years. Son worked in the financial services industry, as a stockbroker and account manager at major companies.

The account generated passive income each year, such as interest, dividends, and capital gains. Steven did not report such income items on his annual Forms 1040, he denied the existence of the UBS account on Schedule B to Forms 1040, and he never declared the account on an FBAR. Steven utilized a professional tax preparer for several years, but did not inform him about the foreign account.

In March 2009, UBS sent a letter to Steven indicating that it was ejecting U.S. accountholders, recommending that he contact a U.S. tax professional to obtain advice about his tax and information-reporting obligations, confirming that UBS was cooperating with the IRS and DOJ, and explaining possible consequences (including civil examinations and criminal investigations) for U.S. accountholders who fail to voluntarily disclose past transgressions.

In response to the letter from UBS, Steven closed the account in July 2010 and wired the funds to his domestic investment firm, Raymond James Financial Services. Son was listed as the sole beneficiary of, and the trading agent for, Steven's account there. Son also helped Steven with other financial affairs.

The details on the audit by the IRS are scarce, but the key is that the IRS assessed the highest possible penalty against Steven in September 2014 for not filing the 2008 FBAR. The penalty amount was $614,300, which was equal to 50 percent of the balance of the UBS account at the time of the violation.

Steven declined to pay the FBAR penalty. He then died in August 2015. Steven's will identified Son as the personal representative and sole beneficiary of the Estate. Son sent copies of the will to various parties in order to obtain Steven's property after his death, but he did not file the will publicly, initiate a probate proceeding, or otherwise notify creditors, like the IRS, of Steven's death.

### The Two Complaints Filed by the DOJ

In cases where a taxpayer refuses to pay the FBAR penalty, the law obligates the DOJ to file a collection lawsuit within two years of the date on which the IRS assessed the FBAR penalty. One day before the two-year deadline, the DOJ filed the Original Complaint with the proper District Court in September 2016. The case was styled *United States of America v. Steven Schoenfeld.* In the Original Complaint, the DOJ asked the District Court to enter judgment against Steven and in favor of the U.S. government for the FBAR penalty, as well as late-payment penalties and interest charges since the date of assessment. The problem, of course, is that Steven had been dead for over a year by the time the DOJ filed the

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[13] For detailed information about battles regarding "willful" FBAR penalties, please see the following articles by the same author: Sheppard, "Second Court Rejects 'Constructive Knowledge' Theory for Willful FBAR Penalties," 46(3) International Tax Journal 29 (2020); Sheppard, "More FBAR Penalty Losses and Lessons: The Significance of *Rum* and *Ott*," 45(5) International Tax Journal 17 (2019); Sheppard, "*Flume, Boyd, and Cohen*: Three Recent FBAR Cases Yielding Important New Lessons," 45(4) International Tax Journal 31 (2019); Sheppard, "*United States v. Horowitz*: Sixth Case Analyzing Constructive Knowledge as Determinant of FBAR Penalties," 45(2) International Tax Journal 23 (2019); Sheppard, "Appellate Court Jeopardizes First Holding of Non-Willfulness in FBAR Penalty Case: Round Three of the *Bedrosian* Battle," 30(5) Journal of International Taxation 37 (2019); Sheppard, "Court Bucks the Trend in Willful FBAR Penalty Cases: Merely Signing Tax Returns Does Not Establish Willfulness," 97(1) Taxes—The Tax Magazine 23 (2019); Sheppard, "What Constitutes a 'Willful' FBAR Violation? Comprehensive Guidance Based on Eight Important Cases," 29(11) Journal of International Taxation 33 (2018); Sheppard, "Court Holds that Pervasive Ignorance Is No Defense to Willful FBAR Penalties: This and Other Lessons from *United States v. Garrity*," 44(4) International Tax Journal 51 (2018); Sheppard, "Willful FBAR Penalty Case Shows Importance of Protecting Privileged Communications: What *Kelley-Hunter* Adds to the Foreign Account Defense Discussion," 44(1) International Tax Journal 15 (2018); Sheppard, "Analysis of the Reasonable Cause Defense in Non-Willful FBAR Penalty Case: Teachings from *Jarnagin*," 128 JTAX 6 (April 2018); Sheppard, "First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of *Bedrosian* for Future Foreign Account Disputes (Part 1)," 128 JTAX 12 (February 2018); Sheppard, "First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of *Bedrosian* for Future Foreign Account Disputes (Part 2)," 128 JTAX 14 (March 2018); Sheppard, "Can Recent 'Willful' FBAR Penalty Cases against Taxpayers Help Tax Firms Fend Off Malpractice Actions?" 43(4) International Tax Journal 33 (2017); Sheppard, "Government Wins Fourth Straight FBAR Penalty Case: Analyzing *Bohanec* and the Evolution of 'Willfulness'," 126 JTAX 110 (March 2017); Shepard, "Government Wins Second Willful FBAR Penalty Case: Analyzing What *McBride* Really Means to Taxpayers," 118 JTAX 187 (April 2013); Sheppard, "Third Time's the Charm: Government Finally Collects 'Willful' FBAR Penalty in *Williams* Case," 117 JTAX 319 (December 2012); Sheppard, "District Court Rules That Where There's (No) Will, There's a Way to Avoid FBAR Penalties," 113 JTAX 293 (November 2010).

[14] 344 F. Supp. 3d 1354, 122 AFTR2d 2018-6040 (DC Fla., 2018). The information in this segment of the article derives from the following sources: Complaint filed September 29, 2016; Amended Complaint filed December 14, 2016; Defendant's Motion to Dismiss Amended Complaint Or In the Alternative For Summary Judgment and Incorporated Memorandum of Law filed January 5, 2017; Response in Opposition to Defendant's Motion to Dismiss Amended Complaint Or In the Alternative For Summary Judgment and Incorporated Memorandum of Law filed January 19, 2017; Defendant's Second Motion to Dismiss Amended Complaint Or In the Alternative For Summary Judgment and Incorporated Memorandum of Law filed October 24, 2017; Response in Opposition to Defendant's Second Motion to Dismiss Amended Complaint Or In the Alternative For Summary Judgment and Incorporated Memorandum of Law filed December 11, 2017. *See also* United States v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld, 123 AFTR2d 2019-2334 (DC Fla., 2019).

Original Complaint, naming Steven, and only Steven, as a defendant.

Approximately one month after the DOJ filed the Original Complaint, an attorney communicating on behalf of "the Schoenfeld family" sent a letter to the DOJ referencing the case, explaining that Steven was dead, and indicating that no probate proceeding had been opened because there were no assets that required probating.

Thus updated, the DOJ filed an Amended Complaint with the District Court in December 2016. This one was styled differently, *United States of America v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld.* In explaining these two new defendants, the Amended Complaint states that (i) Steven died in 2015, (ii) the claim against Steven is enforceable against his estate pursuant to 28 U.S.C. section 2404, and (iii) Son is named as a defendant because Steven had no surviving spouse, Son is the closest living relative, and, upon Steven's death, all his assets were distributed to Son.

In summary, the Original Complaint named only Steven as a defendant, and it was filed with the District Court in a timely manner, within two years of the assessment of the FBAR penalty. By contrast, the Amended Complaint named the Estate and Son (as a distributee of the Estate) as defendants, and it was filed after the expiration of the applicable two-year period.

#### Positions Advanced by Defendants

Counsel for the defendants filed two Motions with the District Court, essentially asking it to determine that the DOJ lacked legal grounds to bring an FBAR penalty collection action against Steven, his estate, and/or Son. These Motions contain a long list of theories on which defendants base their positions, some of which are too tedious and hyper-technical to cover in this article. Summarized below are the most comprehensible and relevant arguments raised by the defendants.

- A dead person lacks the capacity to be sued under Federal Rule of Civil Procedure 17(b). Steven was dead at the time that the DOJ filed the Original Complaint, so he lacked capacity to be sued, so he was not a valid defendant, so the Original Complaint was invalid from the outset.
- Under Federal Rule of Civil Procedure 11, the DOJ had an affirmative duty to reasonably ascertain the identity of the proper defendant before filing the Original Complaint. The DOJ did not make reasonable inquiries, such that it cannot claim lack of knowledge now to absolve itself of its error of naming a dead man, Steven, as the sole defendant in the Original Complaint.
- The two-year period to bring an FBAR penalty collection lawsuit under 31 U.S.C. section 5321(b)(2)(A) has expired. The IRS assessed an FBAR penalty against Steven on September 30, 2014; therefore, it had until September 30, 2016, to start a lawsuit. The Original Complaint, while timely, should be nullified because it named a dead man, Steven, as the only defendant. Because the Original Complaint was void and thus never existed, the filing of an Amended Complaint beyond the two-year period does not save the DOJ, because there are no available remedies, such as amendment of the Original Complaint, substitution of defendants, or relation-back of the Amended Complaint to the date on which the Original Complaint was filed.
- The DOJ cannot rely on 28 U.S.C. section 2404 to name the estate as a defendant. This provision states the following: "A civil action for damages commenced by or on behalf of the United States . . . *shall not abate on the death of a defendant but shall survive and be enforceable against his estate* as well as against surviving defendants." This provision would apply only if the DOJ had filed the Original Complaint at a time when Steven was alive, and Steven had died later. It has no relevance to a situation, like this one, where the only named defendant, Steven, was already dead when the DOJ filed the Original Complaint.
- Under Florida law, an estate has no capacity to be sued in its own name; all proceedings must be directed by and toward the personal representative of the estate. In its Amended Complaint, the DOJ names Son as a defendant, not as the personal representative of the estate, but rather as a "distributee." Accordingly, even if the estate were a proper defendant, which it is not, the DOJ failed to engage the person authorized to act on behalf of the Estate.
- The DOJ does not state in the Amended Complaint, as required, a specific legal theory on which a distributee would be liable for the civil FBAR penalties. To the extent that the DOJ is claiming some type of transferee liability under Section 6901, this theory is flawed here because Section 6901 only applies in cases of particular "taxes" under Title 26 of the U.S. Code (*i.e.*, the Internal Revenue Code), not to civil FBAR penalties assessed under Title 31.
- The FBAR penalty is punitive/criminal, instead of remedial/civil, in nature; therefore, it does not survive the death of Steven. When he died, the collection action died, too. Evidence of the punitive character of the "willful" FBAR penalty is apparent from the relevant figures: The UBS account that Steven failed to disclose

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on the 2008 FBAR generated $8,781 in unreported income, yet the FBAR penalty was $614,300.

**Rulings and Analysis by the District Court**

This article explores the three most relevant rulings by the District Court below.

First issue. A major question was whether a *deceased* individual, like Steven, can be a defendant in an FBAR penalty collection lawsuit. The District Court swiftly dispensed with this matter, stating that "[u]nder Florida law, a decedent lacks the capacity to be sued . . . Thus, there is no dispute that this action could not proceed against [Steven]."[15]

Second issue. This article previously explained that the DOJ filed an Amended Complaint with the District Court styled *United States of America v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld.* The Amended Complaint explains the following grounds for pursuing these two new defendants: (i) The claim against Steven is enforceable against his Estate pursuant to 28 U.S.C. section 2404 because Steven died in 2015; and (ii) The claim against Steven is also enforceable against Son because he is the closest living relative, and, upon Steven's death, he inherited all Steven's assets. In challenging the Motions filed by the defendants seeking to dismiss all claims, the DOJ added yet another theory; that is, even if the first two grounds described in the Amended Complaint fail, the DOJ may nevertheless proceed against the estate and Son on equitable principles. Each of the three grounds advanced by the DOJ is set forth below.

*Pursuing the estate under 28 U.S.C. section 2404:* The relevant provision, 28 U.S.C. section 2404, states the following:

> A civil action for damages commenced by or on behalf of the United States . . . shall not abate *on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.*

The District Court began its analysis by explaining that an estate's capacity to be sued is dictated by the law of the state where the court is located, which, in this case, is Florida. Under Florida law, an estate is not an entity that can be a party to litigation, only its personal representative can. Despite state law, the DOJ argued that it can still sue the Estate under federal law, 28 U.S.C. section 2404, because of the broad definition of "estate" for these purposes.

The District Court recognized that there were no decisions directly on point in the Eleventh Circuit, so it turned to a leading District Court case in Kansas, which held that the term "estate" in this context means all property in which the decedent had an interest at the time of death, including any property transferred to others, by will or by the laws of intestate succession. Despite this positive start for the DOJ, the District Court swiftly discredited the argument that the DOJ could legally pursue Steven's estate under 28 U.S.C. section 2404. The District Court explained that the plain language of the provision, along with its legislative history, indicate that it only contemplates the continuation of a legal action that was brought against a defendant who died *after* the action started, which was not the situation with Steven, who died *before* the DOJ filed the Original Complaint.

*Pursuing Son as the sole distributee:* The DOJ underscored in the Amended Complaint that Son is the closest living relative of Steven, he is identified as the personal representative of the estate in Steven's will, and he was the sole distributee of Steven's property after his death, including the funds from the unreported UBS account. For these reasons, and others, the DOJ maintained that it should be able to pursue Son for the unpaid FBAR penalty.

The District Court explained that the issue of whether a distributee is a proper party to a lawsuit has arisen most frequently in the context of determining the proper party for substitution under Federal Rule of Civil Procedure 25, the relevant portion of which is as follows:

> Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, [then] the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative.

Although the DOJ did not substitute Son under Federal Rule of Civil Procedure 25 after Steven's death, the District Court noted that case law regarding substitution of distributees is "instructive" to the issue at hand, which is the capacity of Son, as a distributee, to be sued by the DOJ. The District Court readily resolved this issue, pointing out that, in applying Federal Rule of Civil Procedure 25, many other courts have determined that substitution can be made by an executor, administrator, or distributee of an estate. Adhering to this precedent, the District Court confirmed that the DOJ could pursue Son:

> Here, there is no genuine dispute that [Son] is the sole distributee of the Estate, as [Son] testified that he received 100% of his father's assets . . . Thus, the Court finds that as a distributee of the estate, [Son] has the capacity to be sued under Rule 17. *Accordingly, as to [Son], the Motion is due to be denied, as the Government may pursue its claim against him.*[16]

*Pursuing Estate or Son as bad actors:* The DOJ showed little restraint in criticizing what it considered bad acts by Son, characterizing them as the cause of all the procedural problems. The DOJ stated the following in support of its request for a chance to attack the Estate and/or Son under equitable principles:

> Defendants attempt to capitalize on their choice not to probate [Steven's] estate. With knowledge of [Steven's] outstanding debts [including the large FBAR penalty already assessed by the IRS], Defendants opted to distribute his assets quietly outside the law. Because of that strategic decision, a number of Florida probate requirements were not met: [Steven's] estate was not publicly administered; his personal representative was not formally appointed; and [his] creditors, including the United States, were not notified of his death.

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[15] Order filed September 25, 2018, pg. 8.

[16] Order filed September 25, 2018, pg. 24 (emphasis added).

[17] Response in Opposition to Defendant's Second Motion to Dismiss Amended Complaint Or In the Alternative For Summary Judgment and Incorporated Memorandum of Law filed December 11, 2017, pgs. 1-2.

[18] Order filed September 25, 2018, pg. 26.

[19] Order filed September 25, 2018, pgs. 31-32.

> Defendants now contend that these omissions, which are entirely of their own creation, preclude the United States' suit. As one would suspect, the law does not permit a decedent's successor in interest to avoid known federal liabilities, and bar the United States' claims, by privately distributing the decedent's assets. As detailed below, the United States' claim survives [Steven's] death and is enforceable against the Defendant Estate and its distributee.[17]

The District Court acknowledged that courts have an interest in not rewarding parties with unclean hands, but it refused to utilize its judicial discretion here. With notably little analysis, the District Court stated that it would not apply equitable principles to override the law because the DOJ did not provide a sufficient legal basis for doing so, particularly against a defendant, the estate, that lacks the legal capacity to be sued.

Third issue. The final issue covered by the District Court was whether the cause of action against Steven for collection of FBAR penalties assessed against him during his lifetime disappears, or "abates," upon his death. Abatement would occur if the FBAR penalty were considered penal/criminal in nature, instead of remedial/civil. Putting a finer point on it, the District Court was tasked with deciding whether a "willful" FBAR penalty, constituting 50 percent of the value of the unreported foreign account at the time of the violation (regardless of the size of the income tax liability caused by the non-disclosure, regardless of whether the value on the date of the violation was an aberration and far exceeded the value throughout the relevant year, regardless of whether the funds in the unreported account were pre-tax or post-tax, and regardless of other mitigating factors) should be considered remedial/civil or penal/criminal.

The District Court first acknowledged that there was no federal statute specifically addressing whether an FBAR penalty collection action survives the death of a taxpayer, so it had to look to federal common law for answers. Based on a recent Supreme Court case, the District Court applied a two-part test. The District Court first needed to determine whether Congress expressed a preference for treating the penalty as civil or criminal.[18] The District Court swiftly determined that Congress intended the FBAR penalty to be civil, resting largely on the fact that the relevant provision, 31 U.S.C. section 5321 is titled "Civil Penalties," while the following provision, 31 U.S.C. section 5322, is called "Criminal Penalties."

The second part of the test required the District Court to analyze seven factors to decide whether the FBAR penalty, which was intended as a civil penalty, is so punitive in purpose or effect that it has been transformed into a criminal penalty. These factors, which are less than optimal in terms of clarity, are described below:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

The District Court handled the first three factors quickly, explaining that the FBAR penalty involves a monetary fine (not imprisonment), monetary fines have traditionally been viewed as civil, and, while the intent of the taxpayer can affect the size of the fine, the IRS can assess an FBAR penalty regardless of the mindset of the taxpayer. With respect to the fourth factor, the District Court acknowledged that large FBAR penalties promote retribution and deterrence, which are the historical aims of punishment, but maintained that *all* civil penalties have some degree of these characteristics, and this does not necessarily convert them into criminal penalties. Regarding the fifth factor, the District Court recognized that a willful FBAR violation can trigger both civil and criminal penalties, but emphasized the fact that Congress enacted two separate provisions (*i.e.*, 31 U.S.C. section 5321 and 31 U.S.C. section 5322) shows its intent to create two different violations and remedies. In addressing the sixth factor, the District Court emphasized that, in addition to retribution and deterrence, large FBAR penalties have other purposes, including recouping lost tax revenues, and reimbursing the U.S. government for the significant expense of conducting an examination, administrative appeal, and litigation. Finally, concerning the seventh factor, the District Court found that the FBAR penalty is not excessive, citing multiple cases upholding penalties equal to 50 percent of unreported tax liabilities, as well as one District Court case decision labeling the highest FBAR penalty appropriate. The District Court summarized its holdings in this manner:

> Having carefully considered Congress's expressed preference that the FBAR penalty be considered a "civil sanction" and the seven . . . factors, the Court finds no indication much less "the clearest proof" necessary to establish that the FBAR penalty is, in fact, penal in nature.[19]

**The District Court stated that it would not apply equitable principles to override the law because the DOJ did not provide a sufficient legal basis for doing so, particularly against a defendant, the estate, that lacks the legal capacity to be sued.**

The District Court went on to distinguish various cases cited by the defendants for the notion that the highest FBAR penalty is "disproportionately punitive." Interestingly, in explaining why all the authorities cited by the defendants are unpersuasive, the District

Court clarified that it would not, and should not, contemplate the actual financial effect on Steven, the estate, or Son. Alluding to the statements by the defendants the total tax liability associated with the unreported foreign account in 2008 was $1,377, while the FBAR penalty was $614,300, the District Court refused to take into consideration these figures because binding precedent requires the District Court to evaluate the relevant statute on its face (*i.e.*, 31 U.S.C. section 5321), and not the resulting penalties in a particular situation, to determine if the penalty should be considered penal/criminal in nature. "Thus, the court will not evaluate the specific [FBAR] fine assessed against [Steven]," stated the District Court.[20]

## Moser

In addition to pursuing distributees, the IRS has also hounded executors for FBAR penalty liabilities. One example is *United States of America v. David Moser and John Moser, Co-Executors of the Estate of Walter Moser.*[21] This case involves Walter Moser, who held an unreported foreign account, got audited by the IRS, and was assessed a willful penalty in April 2015 for not filing a 2007 FBAR. Walter died within a year, which was *after* the FBAR penalty had been assessed but *before* the two-year period for the DOJ to file a collection lawsuit had expired. His two sons, David and John, were appointed co-executors of his estate. The DOJ filed a timely collection lawsuit in District Court in April 2017, naming the two sons as defendants in their capacity as co-executors, and requesting that the District Court "enter judgment in favor of the United States and against David and John Moser, in their capacities as the co-executors of the decedent estate of Walter Moser . . ."

## Garrity

Adding to the list of persons from whom recompense is sought, the IRS and DOJ have been known to pursue "fiduciaries" of an estate. An illustration is *United States v. Diana M. Garrity, Paul G. Garrity, Jr., and Paul M. Sterczala, as fiduciaries of the estate of Paul G. Garrity, Sr., deceased.*[22]

The key events in this case were the following. The taxpayer died at age 84 in February 2008, and a probate case was opened shortly thereafter, in March 2008. Within two months, by May 2008, the IRS had started an audit of the taxpayer. In 2009, the funds from the unreported accounts were distributed among the taxpayer's three sons, only one of whom was also considered a "fiduciary" of the taxpayer's estate by the IRS. In February 2013, five years *after* his death, the IRS assessed the highest possible FBAR penalty against the taxpayer for not filing a 2005 FBAR. It totaled $936,691.

The DOJ ultimately realized that voluntary payment would not be forthcoming, and it started a timely FBAR penalty collection action in District Court in February 2015. Interestingly, the IRS did not pursue the "distributees" of the funds from the undisclosed accounts, naming instead three individuals as "co-fiduciaries" to the estate.

Many FBAR cases are decided by judges, but the fiduciaries opted for a jury. Unfortunately, the members of the jury sided with the DOJ on all points, rendering the following decisions: (i) The taxpayer had a financial interest in, signature authority over, or some other type of authority over the unreported foreign account in 2005; (ii) His failure to file the 2005 FBAR was "willful"; and (iii) The amount of the penalty was proper because it was equal to, or less than, 50 percent of the balance in the unreported account as of the date of the violation.

## Kelley-Hunter

Another recent FBAR penalty case of interest is *United States of America v. Nancy E. Kelley, individually and as representative of the Estate of Burt Hunter.*[23]

### Background, Audit, and Penalties

Nancy and Burt, both U.S. citizens, moved to France in 1998. The account on which the IRS and DOJ focused was held at UBS in Switzerland. Although unclear from the record, it appears that Nancy and Burt, or one of their advisors, formed a foreign corporation to hold the UBS account in order to obscure the true ownership. This entity, established in Mauritius and controlled by just one bearer share, was called Towers International, Inc. The evidence demonstrated that Nancy and Burt controlled the UBS account, despite the existence of Towers International, Inc.

In February 2009, Nancy and Burt received a notice from UBS that it had disclosed the account to the U.S. government. Four months later, Nancy filed a late 2007 FBAR and a timely 2008 FBAR, reporting the UBS account.

The IRS later opened an audit, eventually assessing a willful penalty related

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[20] Order filed September 25, 2018, pg. 35.

[21] Civil Action No. 2:17-cv-02891 (DC N.J., 2017). The information about the case derives from the following sources: Complaint filed April 27, 2017; and Answer and Demand for Jury Trial filed June 19, 2017.

[22] Case No. 3:15-cv-243 (D.C. Conn.). The information about this case derives from the following sources: Complaint and Jury Demand filed February 20, 2015; Defendant's Answer and Affirmative Defenses filed April 24, 2015; Expert Report by Howard B. Epstein, CPA dated April 28, 2017; Memorandum and Order regarding Standard of Proof filed April 3, 2018; Plaintiff's Motion in Limine to Exclude the Testimony of Howard B. Epstein filed April 3, 2018; Plaintiff's Memorandum in Support of Its Motion in Limine to Exclude Opinion Testimony of Howard B. Epstein filed April 3, 2018; Defendant's Opposition to Plaintiff's Motion in Limine to Exclude Opinion Testimony of Howard B. Epstein filed April 24, 2018; Joint Trial Memorandum filed May 4, 2018; Stipulation regarding Determination of Factual and Legal Issues filed May 30, 2018; Memorandum and Order regarding Proposed Expert Testimony of Howard B. Epstein filed June 1, 2018; Jury Instructions filed June 12, 2018; and Verdict Form filed June 13, 2018.

[23] 120 AFTR2d 2017-5566 (DC D.C., 2017). The information about this case derives from the following sources: Complaint filed December 10, 2015; Answer filed October 28, 2016; Motion for Default Judgment as to Estate of Burt Hunter filed July 11, 2017; Order Granting Motion for Default Judgment as to Estate of Burt Hunter filed July 27, 2017; Motion for Summary Judgment against Nancy Kelley-Hunter filed October 16, 2017; Order Granting Motion for Summary Judgment against Nancy Kelley-Hunter filed December 12, 2017; and Memorandum Opinion filed December 12, 2017.

[24] Civil Case No. 16 C 10787 (DC Ill., 2017); Complaint filed November 21, 2016; Third Amended Complaint filed August 10, 2018; Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint filed September 28, 2018; Plaintiff's Opposition to Motion to Dismiss filed October 30, 2018; United States v. Jung Joo Park et al, 120 AFTR2d 2017-6074 (DC Ill., 2017); United States v. Jung Joo Park et al, 123 AFTR2d 2019-1981 (DC Ill., 2019).

to the 2007 FBAR in December 2013. Both Nancy and Burt had a reportable interest in the UBS account, such that the IRS originally assessed the most extreme penalty against each of them; that is, a 50 percent penalty for Nancy, and a separate 50 percent penalty for Burt. The taxpayers did not pay the FBAR penalties. Consequently, the DOJ filed a Complaint in District Court within the two-year period, in December 2015.

#### Husband Dies and Focus Shifts to Wife

Burt died in January 2016, approximately one month *after* the DOJ filed its Complaint, at which point the focus of the litigation shifted solely to Nancy. First, in May 2016, the DOJ filed a Motion with the District Court to remove Burt as a defendant and substitute him with Nancy, as representative of Burt's estate. The District Court approved the substitution. Next, in October 2016, Nancy filed an Answer in the case, clarifying in the opening sentence that the Answer was being filed "solely in her individual capacity and not in any respect on behalf of her late husband or in any representative capacity." Nancy never filed an Answer or any other pleading in her role as representative of Burt's estate, and the deadline for doing so passed. The effect of such inaction was that all facts alleged by the DOJ in the Complaint concerning Burt were deemed to be admitted. Accordingly, the DOJ filed a Motion for Default Judgment against Nancy, asking the District Court to rule that she, in her capacity as representative of Burt's estate, was personally liable for the 50 percent FBAR penalty assessed against Burt. The District Court granted the Motion for Default Judgment, thereby imposing on Nancy a bill for Burt's FBAR penalty, plus all the interest and late-payment penalties that had accrued since the IRS had assessed the penalty nearly four years earlier, in December 2013.

#### Additional Holdings by the District Court

In its Complaint, the DOJ emphasized the fact that, with respect to 2007, the taxpayers (i) held a multi-million dollar account at UBS through a foreign entity, Towers International, Inc., (ii) did not report the passive income generated by the account on Schedule B of the 2007 Form 1040, despite the fact that an e-mail shows that a UBS representative sent them this data, (iii) did not acknowledge the existence and location of the UBS account on Schedule B of the 2007 Form 1040, and (iv) did not file a timely 2007 FBAR. The DOJ also underscored that Nancy self-prepared the 2007 Form 1040, and both Nancy and Burt swore to its accuracy and completeness under penalties of perjury.

The record reveals that Nancy and Burt retained at least two reputable U.S. law firms to defend them throughout the FBAR litigation, but such attorneys ceased to participate when Nancy and Burt stopped paying their fees, refused to follow their advice, and/or insisted on disobeying mandates by the District Court regarding discovery and other matters. Ultimately, the DOJ asked the District Court to find in its favor concerning the FBAR penalty assessed against Nancy by filing a Motion for Summary Judgment. Nancy never filed any documents in opposition, so the District Court ruled in favor of the DOJ, again.

The District Court issued a rather short Opinion, indicating that the pivotal element, willfulness, "can prove challenging to establish, but not here." In deciding that willfulness existed and that the DOJ was entitled to collect the FBAR penalty against Nancy, the District Court noted the following: (i) Nancy personally prepared and filed Forms 1040 in earlier years disclosing foreign accounts, such that she was aware of the obligation to do so; (ii) Nancy sent e-mails to her accountant "that display a consciousness of guilt"; and (iii) Willful blindness satisfies the required mental state for a willful FBAR violation, and Nancy "certainly acted with at least that degree of intent."

> **In addition to pursuing distributees, the IRS has also hounded executors for FBAR penalty liabilities.**

### *Park*

Another case shows just how expansive the DOJ can be in identifying parties who are, or who might be, liable for an FBAR penalty assessed against a deceased taxpayer. It is *United States of America v. Jung Joo Park, individually and as trustee of the Que Te Park Declaration of Trust and as the De Facto representative of the estate of Que Te Park et al.*[24]

#### Overview of the Facts

Que Te Park ("Mr. Park") was a U.S. citizen, originally from South Korea, who died in July 2012. He was survived by Jung Joo Park ("Surviving Spouse Park"), and three children, Charles Park, James Park, and Nina Park, all of whom are U.S. citizens. Mr. Park operated businesses that sold bracelets that supposedly affected the "chi" of the wearer to relieve pain, arthritis, and other ailments. The products were sold through various outlets, including cable TV infomercials. Mr. Park was wildly successful for a time, with large sales and profits. He later encountered problems with the Federal Trade Commission, bankruptcy courts, and others.

In 2007, Mr. Park placed certain assets in a domestic revocable trust, established by the Que Te Park Declaration of Trust ("Domestic Trust"), which became irrevocable upon his death. Mr. Park was the grantor and original trustee, Surviving Spouse Park was the successor trustee, and the three children were successor co-trustees, but only if Surviving Spouse Park were unable and/or unwilling to fulfill her role. The terms of the Domestic Trust required, among other things, that the acting trustee pay all claims allowable against the estate of Mr. Park upon his death. Moreover, the terms mandated that, when Mr. Park died, the acting trustee was to divide the assets in the Domestic Trust into a "Marital Trust" for the benefit of Surviving Spouse Park, and a "Family Trust" for the benefit of Surviving Spouse Park during her lifetime, followed by distributions to the descendants of Mr. Park,

including his three children, upon her death.

Also, in 2007, Mr. Park executed a will, naming Surviving Spouse Park as executrix, and naming the three children as successor co-executors. The will indicated that, upon the death of Mr. Park, essentially all his assets should have been transferred to the Domestic Trust. The will was not probated in the United States after the death of Mr. Park, such that, at the time that the DOJ filed the Complaint in the District Court to recover the FBAR penalty, no personal representative or administrator had been appointed to officially act on behalf of the estate of Mr. Park. Nevertheless, Surviving Spouse Park always acted as a representative of the estate before the IRS, apparently notifying the IRS, incorrectly, that Mr. Park died without a will and without any assets.

Mr. Park filed a timely 2007 FBAR, but he omitted seven out of 10 foreign accounts, which were located in Switzerland, China, and South Korea. He did not submit a timely 2008 FBAR, waiting until June 10, 2010 (approximately one year after the deadline) to file.

When he died in 2012, Mr. Park had various foreign assets, the largest of which were the unreported foreign bank accounts and various real properties in South Korea. Although the will indicated that all such assets belonged to the Domestic Trust, Surviving Spouse Park and Charles Park, with the assistance of South Korean probate attorneys, sold the real properties and distributed the proceeds of over $3.6 million directly to Surviving Spouse Park and the three children.

#### Creative Theories of Liability

The IRS started an audit in 2011, learned of Mr. Park's death in 2012, and eventually assessed a willful FBAR penalty for 2008 of approximately $3.5 million in November 2014. The DOJ then filed an FBAR penalty collection lawsuit in November 2016, exactly two years from the date on which the penalty was assessed.

The initial Complaint filed with the District Court contained seven separate counts, only the most relevant of which are discussed in this article. Count I simply asks the District Court to reduce the FBAR penalty assessed by the IRS to a judgment.

Count Two claims that, under Illinois common law principles, FBAR penalties are recoverable from the Domestic Trust, and, to the extent that the assets in the Domestic Trust are insufficient to cover the total amount due (which had reached approximately $3.98 million at the time that the DOJ filed the initial Complaint), then the DOJ can seek recovery from "any recipient of assets" from the Domestic Trust.

31 U.S.C. section 3713(a)(1)(B) states that a claim of the U.S. government shall be paid first when the assets of an estate of a deceased debtor, in the custody of the executor or administrator, are not enough to pay all debts. For its part, 31 U.S.C. section 3713(b) generally provides that a representative of an estate paying any part of a debt of the estate before paying a claim of the U.S. government is liable to the extent of any shortfall to the U.S. government.

Based on these rules, along with Illinois common law regarding transferee liability, Count Three of the Complaint filed by the DOJ alleged the following: (i) Surviving Spouse Park, as trustee of the Domestic Trust and as the *de facto* representative of the estate of Mr. Park, was required to first pay the claims of the U.S. government, including the FBAR penalty; (ii) By signing joint Forms 1040 for 2004 through 2007, Surviving Spouse Park admitted to having knowledge of the foreign accounts, and she knew or should have known about the possibility of an FBAR penalty against Mr. Park for not filing a timely 2008 FBAR; (iii) Despite having such information and notice, Surviving Spouse Park distributed property belonging to the Domestic Trust to persons other than the U.S. government; (iv) As trustee of the Domestic Trust, Surviving Spouse Park had a fiduciary obligation to pay the FBAR penalty; and (v) To the extent that the assets of the Domestic Trust cannot fully satisfy the FBAR penalty because of the improper distributions that Surviving Spouse Park made as trustee, then she will be personally liable under 31 U.S.C. section 3713.

Count Four attempts to set aside "fraudulent" transfers of assets of the Domestic Trust to Surviving Spouse Park and the three children. This allegation was founded on the following reasoning by the DOJ. Mr. Park purportedly transferred his interest in the Domestic Trust to the Marital Trust, of which Surviving Spouse Park is a trustee and beneficiary ("Marital Transfer"). Mr. Park also purportedly transferred property of the Domestic Trust to the Family Trust, of which defendant Surviving Spouse Park is a trustee, and of which Surviving Spouse Park and the three children are beneficiaries ("Family Transfer"). Surviving Spouse Park later transferred certain property of the Domestic Trust to each of the three children ("Subsequent Transfers"). The claim of the U.S. government arises out of the 2008 FBAR violation, which occurred on June 30, 2009. Thus, at the time that the Marital Transfer, Family Transfer, and Subsequent Transfers took place, Mr. Park had already committed the FBAR violation. The Marital Transfer, Family Transfer, and Subsequent Transfers were made without receiving reasonably equivalent value in exchange, and were made when Mr. Park was insolvent.

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[25] United States v. Jung Joo Park et al, 120 AFTR2d 2017-6074 (DC Ill., 2017); United States v. Jung Joo Park et al, 123 AFTR2d 2019-1981 (DC Ill., 2019).

[26] 123 AFTR2d 2019-1981 (DC Ill., 2019).

[27] *Id.* (internal citations omitted).

[28] Case No. 19-24026-CIV- Moore (DC Fla.). The information about this case derives from the following documents: Defendants' Motion to Dismiss for Failure to State a Claim, filed November 25, 2019; Order on Motion to Dismiss, filed April 27, 2020; Defendants' Motion for Reconsideration of Order Denying Motion to Dismiss, filed May 4, 2020; Defendants' Reply in Support of Motion for Reconsideration of the Court's Order Denying their Motion to Dismiss, filed May 21, 2020; and Order on Motion for Reconsideration, filed June 9, 2020. *See also* Velarde, "Another District Court Weighs in Favor of FBAR Survivability," Tax Analysts Doc. 2020-16422, 2020 Tax Notes Today Federal 83-7 (04/29/2020); Velarde, "Government Time Bar 'End Run' Attacked in FBAR Survivability Case," Tax Analysts Doc. 2020-19879 (05/26/2020); Velarde, "Court Won't Reconsider FBAR Penalty Survivability Holding," Tax Analysts Doc. 2020-22157, 2020 Tax Notes Today International 112-3 (06/10/2020).

[29] United States v. Jacqueline D. Green et al, Case No. 19-24026-CIV-Moore (DC Fla.), Order on Motion to Dismiss, filed April 27, 2020, pg. 14.

[30] *Id.*, pg. 15.

Therefore, they were "fraudulent" as to creditors of Mr. Park, including the U.S. government.

**Efforts to Dismiss Certain Counts**

The three children and Surviving Spouse Park tried, more than once, to convince the District Court to dispense with several FBAR penalty theories (*i.e.*, Counts) by filing Motions to Dismiss different versions of the Complaint filed by the DOJ.[25] The District Court ultimately rejected all the arguments, yielding one particularly interesting discussion.

The children observed the following: Mr. Park died in July 2012, his assets in South Korea were liquidated and sold between November 2012 and January 2013, and the IRS did not assess the FBAR penalty until November 2014. At the time of assessment, Mr. Park could not have paid the penalty because he was dead, and nobody (including Mr. Park, his estate, Surviving Spouse Park, or the three children) could have paid a penalty before it existed. Citing a number of tax cases, the DOJ countered that the FBAR liability did not arise on the date of assessment, but rather when the violation for not filing a 2008 FBAR occurred (*i.e.*, June 30, 2009), and all distributions of Mr. Park's assets occurred thereafter. The DOJ went on to argue that "[n]ot only did Mr. Park's FBAR liability arise before his death . . . it also survives his death, and the FBAR penalty can be collected against his heirs."[26]

The District Court sided with the DOJ, relying on *Schoenfeld* and *Garrity* in reaching the following conclusion:

> The estate of a taxpayer who fraudulently concealed a portion of his income during his lifetime, but died before he personally filed a fraudulent return, cannot thereby avoid a liability the taxpayer himself could not have avoided if his conduct had been uncovered while he was alive. By the same logic, the estate of a person who willfully fails to file an FBAR form during his lifetime cannot avoid the penalty that the person could not have avoided if he had lived . . . The [DOJ's] claim based on Mr. Park's failure to file a 2008 FBAR form survives his death and is enforceable against his estate.[27]

## *Green*

Another interesting and recent case about the survivability of FBAR penalties was *United States v. Jacqueline D. Green, as Personal Representative of the Estate of Marie Green and as Co-Trustee of the Marie Mary Green Revocable Trust, and Bert Green, as Co-Trustee of the Marie Mary Green Revocable Trust.*[28]

The taxpayer was a U.S. citizen who died in August 2018. Before her death, the taxpayer had interests in and/or signature authority over several foreign accounts going back to the 1980s. She held these accounts personally, jointly with her deceased husband, or indirectly through Panamanian corporations. She had some numbered accounts, and she submitted false declarations regarding the status of the ultimate beneficiaries. The accounts were located with financial institutions in Israel and Switzerland. The taxpayer applied for the Offshore Voluntary Disclosure Program ("OVDP") in October 2013, but the IRS later "removed" her. In June 2017, the IRS assessed penalties of about $2.1 million against the taxpayer for "willful" FBAR violations in 2010 and 2011.

She died soon thereafter, in August 2018. The taxpayer did not pay the penalties before her death, and her children, as representatives of her estate and co-trustees of her revocable trust, also declined to pay. Thus, the DOJ filed a timely Complaint in District Court, pursuing payment from the two children.

The children later filed a Motion to Dismiss for Failure to State a Claim, arguing that the FBAR penalties essentially disappeared when the taxpayer died, and even if the penalties survive her death, the DOJ had not proven that the taxpayer's violations were "willful." The DOJ disagreed, of course, countering that FBAR penalties survive the death of the transgressor and the Complaint plausibly alleges a claim for relief. This article only focuses on the first issue.

The District Court held in favor of the DOJ, relying in large part on the earlier decisions in *Schoenfeld* and *Park*. The District Court pointed out the following. First, the relevant statute refers to FBAR sanctions as "civil penalties," indicating that Congress intended to create a civil penalty. Second, the U.S. government suffered monetary harm because of the taxpayer's conduct, namely, loss of income tax revenue and significant expenses investigating unreported foreign accounts. Third, the FBAR penalty has a remedial purpose, which is to allow the U.S. government to recover the monetary harm. Fourth, the FBAR penalty is not wholly disproportionate to the harm incurred by the U.S. government. Fifth, the Supreme Court and others have ruled that tax provisions, which are similar in amount to the FBAR penalty, were reasonable in view of the costs that the U.S. government incurs to investigate misconduct and compensate it for harm. Finally, the District Court stated that "granting a windfall to estates of violators of the FBAR requirements because the violator suffered the paradoxical fortune and misfortune of passing away after the violation occurred and before the Government filed suit against him or her for FBAR violations contradicts the remedial purpose of the FBAR filing requirements."[29]

The District Court summarized its determination about the survivability of FBAR penalties as follows:

> In sum, the FBAR penalty is the proverbial square peg in the round hole; it fits perfectly in neither the round holes of the remedial-penal dichotomy. Rather, the FBAR penalty is primarily remedial with incidental penal effects. Accordingly, the FBAR penalties . . . . survive [the taxpayer's] death.[30]

**Adding to the list of persons from whom recompense is sought, the IRS and DOJ have been known to pursue "fiduciaries" of an estate.**

### *Jones*

Two recent related cases, involving two spouses, one of whom died long ago, are interesting in that they show that old age represents no deterrent to FBAR penalty actions. These cases are styled *Jones v. United States* and *Jones, as Executor, Estate of Jeffrey L. Jones, v. United States.*[31]

Jeffrey Jones was born in New Zealand, lived there over 30 years, later relocated to Canada, and ultimately moved to California. His wife, Margaret Jones, was born in Canada and later settled in California with Jeffrey. They both became U.S. citizens in 1969. They each had high school educations, but no tax-related training or education. They worked for much of their lives as a dressmaker and secretary. They later started buying, repairing, and renting or selling properties. Jeffrey held certain foreign accounts in his name, Margaret held some in hers, and they held others jointly. All foreign accounts, totaling 11, were located in countries with which they had a logical connection, New Zealand and Canada.

The taxpayers did not report their passive income from the foreign accounts on their joint 2011 Form 1040, they checked the "no" box in response to the foreign account question on Schedule B, and they did not file a timely 2011 FBAR. Margaret indicated that she, and Jeffrey during his lifetime, believed that they would not be subject to U.S. income tax on the foreign funds until they repatriated them, which never occurred.

The accountant with whom the taxpayers had worked for over 25 years indicated to the IRS that he knew that the taxpayers had previously lived in Canada, he never asked them specifically about foreign accounts or foreign income, he was not familiar with FBAR reporting duties because he had no clients with international activities, and he did not review Schedule B with the taxpayers.

Jeffrey died in March 2013, when he was 93 years old. Margaret, as executor of his estate, then sought legal advice about how to handle estate issues in New Zealand. Margaret claimed that she first learned about Jeffrey's personal accounts in New Zealand at that time, and started taking actions to correct matters. For instance, she filed a timely 2012 FBAR, filed delinquent FBARs for earlier years whose assessment-periods remained open, filed qualified amended returns ("QARs") for 2011 and 2012 reporting income from the foreign accounts, and later applied for the Streamline Domestic Offshore Procedure ("SDOP"). Margaret did not include the foreign accounts held individually by Jeffrey in the SDOP because of incomplete guidance from the IRS about post-death participation and her inability to make accurate sworn statements about the intent of a deceased person.

The IRS started an audit of her SDOP submission, rejected Margaret's certification of non-willfulness, and, ultimately, assessed the highest possible penalties for "willful" FBAR violations, by Jeffrey and Margaret, in March 2019. By that time, Jeffrey had already been dead for six years. Margaret paid a portion of all penalties, both individually and as executor of Jeffrey's estate, submitted Claims for Refund with the IRS, and then started refund lawsuits in District Court, at which time she was 90 years old.

The District Court dispensed with certain issues via Cross-Motions for Summary Judgment by the parties, but the battle continues as of the writing of this article.[32] It appears that the taxpayers did not raise the issue/defense of the survivability of FBAR penalties with respect to Jeffrey in its filings, and the District Court did not address it in its Order related to the Cross-Motions for Summary Judgment.[33]

### *Kahn*

One recent case confirms the notion that the DOJ, in its quest to recover FBAR penalties, will pursue multiple executors of an estate. The case is called *United States v. Jeffrey Kahn, as Co-Executor of the Estate of Harold Kahn, Joel Kahn, as Co-Executor of the Estate of Harold Kahn.*[34]

The taxpayer held two accounts at Credit Suisse in 2008 for which he never filed an FBAR. The highest combined balance that year was approximately \$8.5 million. The IRS assessed a "willful" FBAR penalty, *after* which the taxpayer died in July 2017. Four months later, in December 2017, the DOJ filed a Complaint in District Court to reduce to judgment the penalty of about \$4.25 million. Counsel for the co-executors of the taxpayer's estate stipulated (*i.e.*, admitted) that the taxpayer was willful in not filing his FBAR, but claimed that the proper penalty could not exceed \$100,000 per account as a result of an inconsistency between the applicable law and regulations, promulgated at different times. The DOJ filed a Motion for Summary Judgment, asking the District Court to uphold the penalty of \$4.25 million. It did.

### *Maleh*

The DOJ has become impatient recently in pursuing FBAR penalties, fil-

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[31] Jones v. United States, 125 AFTR 2020-2067 (DC Calif., 2020). The author reviewed the following documents in preparing this segment of the article: Complaint for Illegal Exaction, filed June 16, 2019; Answer and Counterclaim, filed August 12, 2019; and Answer to Counterclaim and Demand for Jury Trial, filed September 3, 2019. *See also* Jones, as Executor, Estate of Jeffrey L. Jones, v. United States, Case 2:19-cv-00173 (DC Calif.). The author reviewed the following documents in preparing this segment of the article: Complaint for Illegal Exaction, filed January 8, 2019; Answer and Counterclaim, filed April 15, 2019; Answer to Counterclaim and Demand for Jury Trial, filed May 3, 2019; and Order Regarding Motions for Summary Judgment, filed May 11, 2020.

[32] Athanasiou, "FBAR Penalty Arbitrary and Capricious, U.S. Court Finds," Tax Analysts Doc. 2020-18568, 2020 Tax Notes Today Federal 94-10 (05/14/2020).

[33] Jones, as Executor, Estate of Jeffrey L. Jones, v. United States, Case 2:19-cv-00173 (DC Calif.). Answer to Counterclaim and Demand for Jury Trial, filed May 3, 2019. This document presents 11 affirmative defenses, but non-survivability of civil FBAR penalties is not among them.

[34] Case No. 17-cv-7258 (DC N.Y.), Memorandum and Order, September 22, 2019; United States v. Jeffrey Kahn, as Co-Executor of the Estate of Harold Kahn, Joel Kahn, as Co-Executor of the Estate of Harold Kahn, Case No. 19-3920 (CA-2), Initial Brief by Defendants-Appellants, June 9, 2020.

[35] Civil No. 3:20-cv-06293 (DC N.J.), Complaint filed May 22, 2020.

[36] *Id.*

[37] Civil No. 20-cv-1377 (DC D.C.), Complaint filed May 22, 2020.

[38] *Id.*

ing complaints with District Courts before probate estates have even been opened. One example is *United States v. Jean Doe, as Executor of the Estate of Murray Maleh*.[35] The DOJ alleged the following key facts in this case: The taxpayer was a U.S. citizen by birth, he opened a Swiss account in the 1980s, he later formed a Panamanian corporation, he transferred approximately $4 million in 2006 from his personal Swiss account to another Swiss account held by the Panamanian corporation, he then transferred the funds from the Swiss corporate account to an Israeli bank in 2009, and, finally, he transferred the funds in 2012 to an account held by a third-party at the same Israeli bank. Moreover, the DOJ claims that the taxpayer did not report the passive income generated by foreign accounts on his annual Forms 1040, he failed to file FBARs for many years, and when he started doing so in 2011, he only reported a small account in Canada, while omitting the large accounts in Switzerland and Israel.

The taxpayer died in January 2014, the IRS assessed FBAR penalties in May 2018, representatives of the taxpayer unsuccessfully challenged the penalties with the Appeals Office, and the DOJ ultimately filed a collection suit in District Court in May 2020 seeking approximately $1.8 million. The DOJ acknowledges its eagerness in the Complaint, explaining the following to the District Court: "On information and belief, no probate estate has yet been opened for [the taxpayer]. Upon the opening of the estate, the [DOJ] intends to amend the Complaint to name the administrator or executor of the estate as the real party in interest."[36]

## Ratzersdorfer

Another instance of the DOJ forging ahead despite the non-existence of a probate estate for the violator is *United States v. Jane Doe, as Executor of the Estate of Marc Ratzersdorfer*.[37] The DOJ made the following allegations in this case: The taxpayer was a U.S. citizen by birth, he founded a diamond-trading business, he moved to Israel around 2006, he formed corporations in various countries and held accounts through them at four different Swiss banks, he worked with sophisticated foreign money managers, he did not report the passive income derived from the foreign accounts on his annual Forms 1040, he checked "no" in response to the foreign account inquiry on Schedule B, and he did not file FBARs.

The taxpayer died in December 2017, and the IRS assessed "willful" FBAR penalties for 2007, 2008, and 2009 in May 2018 totaling about $3.5 million. Nobody affiliated with taxpayer paid the penalties within a two-year period, so the DOJ filed a collection lawsuit with the District Court in May 2020. Again, the DOJ recognized its urgency, stating as follows to the District Court: "On information and belief, no probate estate has yet been opened for [the taxpayer]. Upon the opening of the estate, the [DOJ] intends to amend the Complaint to name the administrator or executor of the estate as the real party in interest."[38]

## Conclusion

This article underscores several points, including that old age seems to serve as no impediment to the IRS and DOJ seeking FBAR penalties, many taxpayers with FBAR violations die before or during the prolonged dispute process, and courts recently have accepted a wide range of theories for allowing the IRS and DOJ to assess penalties against and/or collect them from surviving spouses, beneficiaries of estates, transferees of funds, co-executors, and others. Given the number of pending cases containing these issues, as well as countless future ones, battles about the survivability of FBAR penalties are not finished. However, for now, those affiliated in any manner with unreported foreign accounts should understand the potential scope of liability, the likely challenges by the IRS and DOJ, and the need to hire representatives with specialized experience, if attacked.

**Two recent related cases, involving two spouses, one of whom died long ago, are interesting in that they show that old age represents no deterrent to FBAR penalty actions.**