

Recent Cases Give Hope to Offshore Account- Holders

Is the Judiciary Pushing Back Against the IRS?

Two recent cases and a recently-released Internal Revenue Service (IRS) Program Manager Technical Advice Memorandum have sent shockwaves through the voluntary disclosure community. All three developments give offshore account-holders something to cheer.

PMTA 2018-13

In previous client alerts, we have discussed the [definition of "willfulness"](#) in the context of offshore assets and, more recently, the [closing of the Offshore Voluntary Disclosure Program \(OVDP\)](#). The Department of Justice (DOJ, on behalf of the IRS) has argued repeatedly since 2014 that courts should refine the definition of willfulness. According to the DOJ, "willfulness" should have one meaning for civil offenses related to the annual filing requirement for foreign bank account reports (FBARs) and a different meaning for criminal offenses related to FBARs. Hence it was little surprise that the [Program Manager Technical Advice \(PMTA\) 2018-13](#) (dated May 23, 2018, released July 17, 2018) concluded that the IRS believes the "civil willfulness standard . . . includes not only knowing violations of the FBAR requirements, but willful blindness to the FBAR requirements as well as reckless violations of the FBAR requirements." The PMTA ever so slightly extends the existing [IRS Internal Revenue Manual](#) definition of "Civil Willfulness", which provides that "willfulness may be imputed under the concept of 'willful blindness' or 'reckless disregard'."

How is this good for offshore account-holders? The PMTA provides detailed insight in to the IRS position on the definition of "willful" in the civil context. Notwithstanding the merits of the IRS position, knowing the tools with which the IRS is working is useful information for taxpayers in current (or anticipated) disputes with the IRS over foreign assets or accounts.

United States v. Colloit and United States v. Garrity

In even more exciting news, recently the defendant in *United States v. Colloit*, No. AU-16-CA-01281-SS (W.D. Tex May 16, 2018), successfully argued that the IRS could not impose a penalty in excess of \$100,000 per year per account for willful FBAR violations.

In *Colloitt*, the taxpayer argued that Treasury had issued valid regulations, subject to a notice and comment period, setting the maximum willful FBAR penalty at \$100,000 for any year, even if an account is valued at greater than \$100,000. The IRS argued that the regulations were issued when the Internal Revenue Code (IRC) provided a maximum penalty of \$100,000. When the underlying IRC provision changed (removing the \$100,000 cap), the regulations were automatically rendered invalid with regard to the cap.

The taxpayer argued, and the court agreed, that Treasury had the opportunity to revise the regulations since the law change but failed to substantively amend or remove the \$100,000 cap. Thus, the IRS was bound by the regulation that limited the FBAR penalty to \$100,000 per year per account. The *Colloitt* case provided an unusual circumstance where the taxpayer argued for application of a regulation and the IRS argued that its own regulation was invalid.

Although the IRS has said that it will appeal *Colloitt* and that it is not binding on its actions against other offshore account-holders, other taxpayers have taken immediate notice. After *Colloitt*, the defendant in *United States v. Garrity*, No. 3:15-cv-00243 (D. Conn. Apr. 3, 2018), filed a motion July 11, 2018 to ask the district court in its case to cap any willful penalties at \$100,000 per account, per year in light of the same regulations cited in *Colloitt*. The *Garrity* motion is still pending.

In the meantime, the taxpayer victory in *Colloitt* is inspiring others to argue a willful penalty cap. Soon, those that already paid a penalty in excess of \$100,000 per year, per account may sue the IRS for refunds. Only time will tell if these efforts will lead to more taxpayer victories.

Tax attorneys at Hanson Bridgett LLP provide guidance to taxpayers and advisors regarding the various options available to address foreign account and asset reporting delinquencies. Taxpayers or their representatives with questions about the IRS OVDP or other programs should contact Erin Fraser at efraser@hansonbridgett.com or the [Hanson Bridgett Tax Practice Group](#).

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