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From: [REDACTED]
Sent: Monday, May 11, 2020 7:46:49 PM
To: [REDACTED]
Cc: [REDACTED]
Bcc:
Subject: RE: Results of Call with Exam's 6038(b) Experts

Hi

This email addresses whether exam is required to assert the section 6038 penalty against spouses of those who have a filing requirement under that section. I've copied [REDACTED] to give them the opportunity to weigh in on whether we generally pursue penalties against the spouse in these situations.

Exam is not required to assert the penalty against the spouse because the Secretary and his delegates have discretion under section 7803(a)(2)(A) to decide whether to assert penalties. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

As you conclude in your email, Exam is permitted to assert the penalty against the wife as a constructive owner of the foreign corporation under the attribution rules of section 318(a) which are incorporated by section 6038(e)(2). As a result, the penalty can be assessed separately and individually against each spouse. We also agree there is no joint and several liability for spouses under section 6038(b), even if the spouses filed their income tax return jointly. Section 6013(d)(3) provides for joint and several liability for spouses who file jointly, but only for income taxes.

We also want to clarify that innocent spouse relief under section 6015 would not apply here. As the court pointed out in *Wyly*, 552 B.R. 338 (Bankr. N.D. Tex. 2016), innocent spouse relief does not apply to the penalty in section 6038 – it only applies to income tax liability. This does not mean, however, that relief cannot be provided for reasonable cause, which the court applied in *Wyly*. Section 6038(c)(4)(B) provides for reasonable cause relief. And regulation 1.6038-2(k)(3) requires that a person seeking reasonable cause relief must (1) make an affirmative showing (2) in a written statement (3) and sign it under penalties of perjury.

I hope this helps. Please let us know if you have any follow up questions.