

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:02:EMishory
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to: Caroline Gonzalez
Acting Program Manager - Offshore and Entity Team
(Small Business/Self-Employed)

Bryan Stiernagle
Program Manager – Offshore Compliance Initiative
(Large Business & International)

Denise L. Golden
Appeals Team Manager – International Team 6
(Office of Appeals)

from: Blaise G. Dusenberry
Senior Technician Advisor, Branch 1
(Procedure & Administration)

subject: Burden of Proof and Standard for Willfulness Under 31 U.S.C. 5321(a)(5)(C)

ISSUES

1. Section 5321(a)(5)(C) of Title 31 provides the maximum penalty amount for civil willful violations of the foreign bank and financial account reporting and recordkeeping requirements under 31 U.S.C. 5314 (FBAR requirements). What is the standard for willfulness?
2. What is the burden of proof for establishing that a civil violation of the FBAR requirements is willful?

CONCLUSIONS

1. The standard for willfulness under 31 U.S.C. 5321(a)(5)(C) is the civil willfulness standard, and 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.
2. The burden of proof for establishing that a civil violation of the FBAR requirements is willful is preponderance of the evidence.

BACKGROUND

Under 31 U.S.C. 5314(a) and 31 C.F.R. 1010.350, every United States person that has a financial interest in, or signature or other authority over, a financial account in a foreign country must report the account to the Commissioner of Internal Revenue annually on a Report of Foreign Bank and Financial Accounts (FBAR). On the FBAR, the United States person must report information about the account, including the high balance for the year being reported. The penalty for violating the FBAR requirement is set forth in 31 U.S.C. 5321(a)(5). The maximum amount of the penalty depends on whether the violation was non-willful or willful. The maximum penalty amount for a non-willful violation of the FBAR requirements is \$10,000. 31 U.S.C. 5321(a)(5)(B)(i). The maximum penalty amount for a willful violation is the greater of \$100,000 or fifty-percent of the balance in the account at the time of the violation. 31 U.S.C. 5321(a)(5)(C) & (D). The statute and the regulations do not define willfulness.

ANALYSIS

1. The standard for willfulness.

“Willful” is a “word of many meanings whose construction is often dependent on the context in which it appears.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007). In the criminal context, the Supreme Court has interpreted the term “willful” or “willfully” narrowly, limiting liability to knowing violations. *Id.* at 59 (citing *Bryan v. United States*, 524 U.S. 184, 191–192 (1998)); see also *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 200–201 (1991). The Court in *Safeco* noted that this narrow reading is generally limited to the criminal context, where it is “characteristically used to require a criminal intent beyond the purpose otherwise required for guilt,” *Ratzlaf, supra*, at 136–137, or an additional “‘bad purpose,’” *Bryan, supra*, at 191, or specific intent to violate a known legal duty created by highly technical statutes, *Cheek, supra*, at 200–201. This contrasts with “willfulness” when it is used in a civil law. Where “willfulness” is a statutory condition of civil liability, the Supreme Court has generally interpreted “willfulness” to not only include knowing violations of a standard, but reckless ones as well. *Safeco, supra*, at 59. Willful blindness to the obvious or known consequences of one’s action also generally satisfies a “willfulness” requirement in the civil context. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

Consistent with the Supreme Court’s interpretation of the word “willful” in the civil context, courts have held that the standard for “willfulness” for civil FBAR violations includes recklessness and willful blindness. The Fourth Circuit in *United States v. Williams*, 489 F. App’x 655, 660 (4th Cir. 2012), reversed for clear error the district court’s finding that willfulness had not been established, because the taxpayer’s “undisputed actions establish reckless conduct.” The district court in *Bedrosian* rejected the argument that in order for the government to sustain a civil willful FBAR penalty, it must meet the standard used in the criminal context and show “that the actions

amounted to a voluntary, intentional violation of a known legal duty. See *Cheek v. United States*, 498 U.S. 192, 201 (1991).” *Bedrosian v. United States*, No. CV 15-5853, 2017 WL 4946433, at *3 (E.D. Pa. Sept. 20, 2017) (on appeal to the 3d. Cir. on other grounds). *Id.* The court in *United States v. McBride*, 908 F. Supp. 2d 1186, 1210 (D. Utah 2012), held that willfulness for civil FBAR violations includes both recklessness and willful blindness, as did the court in *United States v. Bohanec*, 263 F. Supp. 3d 881, 889 (C.D. Cal. 2016). As the court in *Bedrosian* noted, every federal court to have considered the willfulness standard for civil FBAR violations has concluded that the civil standard applies, and the standard includes “willful blindness”¹ and “recklessness”². No. CV 15-5853, 2017 WL 4946433, at *3. The court in *Garrity* similarly noted that numerous courts have found that “willfulness” in the civil FBAR context includes reckless conduct. *United States v. Garrity*, 2018 WL 1611387, at *6 (D. Conn. Apr. 3, 2018) (citing cases holding that “willfulness” for civil FBAR violations includes recklessness, and noting that “defendants cite no case in which a court has held to the contrary.”)

2. The burden of proof.

As is the case with the standard for willfulness, the courts are uniform with regard to the burden of proof for civil FBAR penalties; the government bears the burden of proving liability for the civil FBAR penalty by a preponderance of the evidence. As the court in *Bohanec*, 263 F. Supp. 3d at 889, noted, the Supreme Court has held that a heightened, clear and convincing burden of proof applies in civil matters “where particularly important individual interests or rights are at stake.” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). Important individual interests or rights include parental rights, involuntary commitment, and deportation. *Huddleston*, 459 U.S. at 389. However, the preponderance of the evidence standard applies where “even severe civil sanctions that do not implicate such interests” are contemplated. *Id.* at 390. The court in *Bohanec*³ held that civil FBAR penalties do not rise to the level of “particularly important individual interests or rights,” and accordingly, the preponderance of the evidence standard applies. *Bohanec*, 263 F. Supp. 3d at 889. This was also the holding of the court in *United States v. Williams*, No. 1:09-cv-437, 2010 WL 3473311 (E.D.Va. Sep. 1, 2010), rev'd on other grounds, *United States v. Williams*, 489

¹ “Willful blindness” is established when an individual “takes deliberate actions to avoid confirming a high probability of wrongdoing and [when he] can almost be said to have actually known the critical facts.” *Global-Tech Appliances, Inc., supra*, 131 S. Ct. at 2070-71. In the tax reporting context, the government can show willful blindness by evidence that the taxpayer made “a conscious effort to avoid learning about reporting requirements.” *Williams, supra*, 489 F.App’x at 659-60. Additionally, the failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved, may lead to a conclusion that the violation was due to willful blindness. See IRM 4.26.16.6.5.1.

² The recklessness standard is met “if the taxpayer (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.” *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989)

³ In CCA 200603026, the office suggested that the clear and convincing standard should apply, but subsequent cases have not sustained this position.

Fed.Appx. 655 (4th Cir.2012), the court in *McBride*, 908 F. Supp. 2d at 1201, and the court in *Bedrosian*, 2017 WL 4946433, at *3. As the court in *Garrity* recently noted, every court that has answered the question [of the burden of proof] has held that the preponderance of the evidence standard governs suits by the government to recover civil FBAR penalties. 2018 WL 1611387, at *3 (D. Conn. Apr. 3, 2018).

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