International Tax Dispute

IRS Claims It Can Revive Closed Assess

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ment-Periods

The IRS's conflicting position with respect to FBAR penalties might take many taxpayers, as well as their tax defense counsel, by surprise.

Time is on the taxpayer's side during a tax dispute, at least initially. That is because the Internal Revenue Service ("IRS") must identify a problematic return among millions, conduct an audit, and issue a final notice of proposed changes before the assessment-period expires. The normal timeframe for the IRS to accomplish all such actions is three years from the date on which the taxpayer files the relevant return.

Exceptions exist, of course. The Internal Revenue Code contains various provisions dictating that the assessment-period in a particular case is extended, sometimes indefinitely, when a taxpayer has engaged in some wrongdoing. The IRS takes advantage of these *involuntary* extensions whenever possible, as it opens the possibility of imposing larger amounts of taxes, penalties, and interest. Taxpayers can *voluntarily* prolong assessment-periods with the IRS, too, if they see a financial, tactical, or some other benefit in doing so. This happens by executing a Form 872 (Consent to Extend the Time to Assess Tax) or similar document. Regardless of the reason for granting the IRS an extension with respect to *tax* issues, the key is that it must occur while the current assessment-period remains open. Once it lapses, it cannot be revived, period.

Some taxpayers might be aware of the no-revival-of-closed-assessment-periods rule in the context of *tax* issues, but few likely know about the IRS's contrary position when it comes to undeclared foreign accounts. The IRS was obligated to reveal its stance in response to a recent demand under the Freedom of Information Act. Those savvy enough to find and analyze the obscure materials were surprised to learn that, from the IRS's perspective, it can solicit and rely on extensions of time to impose penalties for FinCEN Form 114 ("FBAR") violations, even though the IRS obtained such extensions *after* the previous assessment-period had expired.

This article explains common ways that taxpayers *involuntarily* extend assessment-periods, specific rules and obligations associated with *voluntarily* extensions, and the divergent positions taken by the IRS regarding the restoration of closed periods when it comes to taxes and FBAR penalties.

Involuntary Extensions of Assessment-Periods

The IRS generally has three years from the date on which a taxpayer files a return to assess additional taxes and penalties related to that return.[1] The IRS can extend the three-year period in various situations, only a few of which are described in this article.

Unfiled, Late, or Incomplete Information Returns. Individual taxpayers with foreign assets and/or activities ordinarily must do several things with the IRS, including filing all necessary international information returns. For example, they have to report foreign financial assets, as this term is broadly defined, on Forms 8938 (Statement of Specified Foreign Financial Assets). In situations where taxpayers hold interests in, or have certain other links to, foreign entities, they need to disclose them on Forms 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations), Forms 8865 (Return of U.S. Persons with Respect to Certain Foreign Partnerships), Forms 8858 (Information Return of U.S. Persons with Respect to Foreign Disregarded Entities and Foreign Branches), or Forms 3520 (Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts), depending on the classification of the entities.[2]

Section 6501(c)(8), which is an exception to the general three-year rule for assessment, applies to cases where a taxpayer fails to file certain international information returns.[3] This provision states that, if a taxpayer does not submit a required return, such as a Form 8938 or Form 5471, then the assessment-period *never* starts to run. The IRS, therefore, has an endless opportunity to audit not only the unfiled international information returns, but also the tax returns to which they should have been attached in the first place. This essentially prevents taxpayers with international non-compliance from running out the clock with the IRS.[4]

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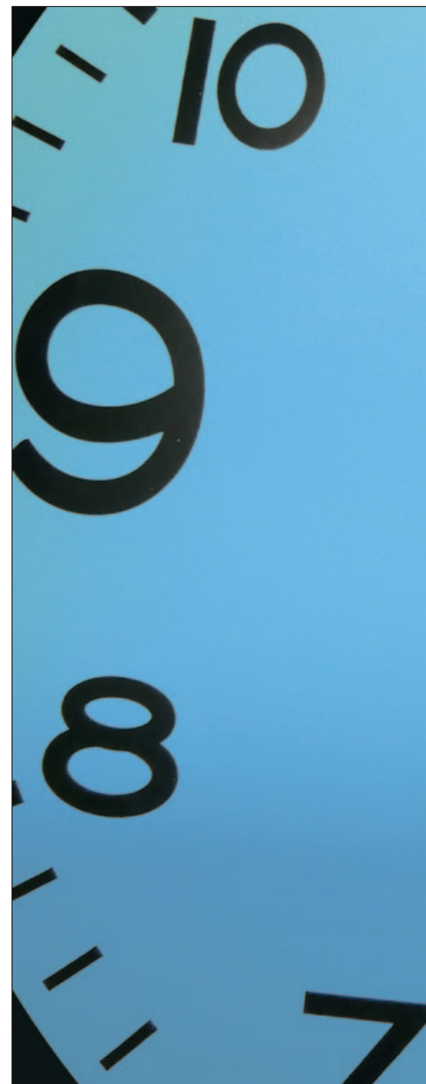
Congress has adopted a broad interpretation of which tax returns, events, or periods are exposed to prolonged IRS scrutiny. In particular, legislative history states that "related items" include (i) adjustments with respect to any item that should have been disclosed on an international information return, (ii) adjustments to any other item on a tax return, to the extent that it is affected by the undisclosed item, and (iii) penalties and interest related to those two adjustments.[5]

The IRS, likewise, has issued various types of internal guidance featuring an expansive interpretation of its powers under Section 6501(c)(8). Specifically, the IRS issued a memorandum to staff concluding that the extended assessment-period "applies to the entire return and not only to the tax deficiency attributable to the information which was not reported, unless the failure to provide the required information is due to reasonable cause and not willful neglect."[6] The IRS also released an International Practice Unit, which underscores that the assessment-period remains open indefinitely, not only when a taxpayer fails to file Forms 5471, but also when he files ones that are not "substantially complete."[7]

Substantial Income Omissions. The preceding segment addressed the IRS's ability to expand assessment-periods indefinitely where taxpayers have missing, delinquent, or incomplete international information returns. The IRS has similar powers in cases of unreported income.

The relevant provision states that if (i) a taxpayer omits income from a tax return, *and either* (ii) such omitted income exceeds 25 percent of the gross income that the taxpayer actually reported on the tax return, *or* (iii) such omitted income is more than $5,000 *and* is attributable to one or more foreign financial assets covered by Form 8938, then the IRS can assess income taxes within six years of the date on which the taxpayer files the relevant tax return.[8] The primary consequence of this provision is that relatively minor amounts of omitted income can keep the assessment-period open a full six years, instead of the normal three. It takes little to reach the threshold of $5,000 in today's economy.



The IRS has provided several examples of instances in which taxpayers will be subject to scrutiny for six years, including the following:

> Taxpayer filed his 2005 federal income tax return on or before April 15, 2006. The return contains a more-than-25-percent omission of income, including an omission of more than $5,000 of income attributable to a foreign financial

1 Section 6501(a).

2 For a detailed discussion of common international filing requirements, *see* Hale E. Sheppard, "Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting," 42(3) *International Tax Journal* 5 (2016); Hale E. Sheppard, "Extended Assessment Periods and International Tax Enforcement: *Rafizadeh v. Commissioner*, Unreported Foreign Assets, and Use of FATCA Weapons," 44(5) *Journal of International Taxation* 25 (2018); and Hale E. Sheppard, "Lessons from an International Tax Dispute: Three Interrelated Cases, in Three Different Proceedings, Generating Three Separate Liabilities," 46(5) *International Tax Journal* 43 (2020).

3 Section 6501(c)(8).

4 Public Law 111-147 (March 18, 2010), Title V, Subtitle A, Parts I through V, Section 511(b) (emphasis added).

asset. Because the statute of limitations is six years from the filing date of the return for both the "more-than-25-percent omission of income" and the "omission of more than $5,000 of income attributable to a foreign financial asset," the statute of limitations will not expire before April 15, 2012 . . . .[9]

False or Fraudulent Returns. The third tactic utilized by the IRS, in both international and domestic disputes, is to allege that the taxpayer engaged in some seriously bad acts. If a taxpayer files a false or fraudulent return with intent to evade tax, the IRS may assess tax at any time.[10]

To benefit from an endless assessment-period, the IRS must establish, by clear and convincing evidence, that there is a tax underpayment, and such underpayment is attributable to fraud.[11] Fraudulent intent is determined at the time a taxpayer signs a tax return with the intention of filing it, or when the return is actually filed.[12] Each allegation of fraud is decided on its own particular facts, and no single factor is decisive. However, several common indicators, known as "badges of fraud," exist. They include (i) understatement of income, (ii) inadequate records, (iii) failure to file tax returns, (iv) implausible or inconsistent explanations of behavior, (v) fictitious transactions and entities, (vi) concealment of assets, (vii) failure to cooperate with tax authorities, (viii) engaging in illegal activities, (ix) attempting to conceal such activities, (x) dealing in cash, and (xi) not making estimated tax payments.[13] The taxpayer's level of sophistication is another relevant factor in determining fraud.[14]

Undisclosed Listed Transactions. If a "participant" in a matter that the IRS has classified a "listed transaction" fails to enclose

5 U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment to the House Amendment to H.R. 1586, Scheduled for Consideration by the House of Representatives on August 10, 2010. JCX-46-10. Aug. 10, 2010, pg. 37. *See also* Chief Counsel Advisory 201147030 (Nov. 25, 2011).

6 IRSIG SBSE-25-0312-022 (March 09, 2012) (emphasis added).

7 "Failure to File the Form 5471 – Category 4 and 5 Filers – Monetary Penalty." International Practice Unit (updated as of October 7, 2015); *See also* IRS Program Manager Technical Advice 2014-018 (2015) (explaining the coverage of Section 6501(c)(8) in the context of unfiled Forms 8938 by an executor).

8 Section 6501(e)(1)(A); U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, The "Hiring Incentives to Restore Employment Act," under Construction by the Senate. JCX-4-10 (Feb. 23, 2010), pgs. 64-66; Public Law 111-147, Hiring Incentives to Restore Employment Act, Section 513(d), March 18, 2010.

9 IRSIG SBSE-25-0312-022 (March 09, 2012).

10 Section 6501(c)(1).

11 Section 7454(a); Tax Court Rule 142(b); Section 6663.

12 *Merritt v. Commissioner*, 3011 F.2d 484, 487 (5th Cir. 1962); *Wilson v. Commissioner*, 76 T.C. 623 (1981); *Coleman v. Commissioner*, T.C. Memo. 1988-538.

13 *Meier v. Commissioner*, 91 T.C. 273 (1988). *See also Toushin v. Commissioner*, 223 F.3d 642 (7th Cir. 2000); *Bradford v. Commissioner*, 796 F.2d 303 (9th Cir. 1986); *Hicks Co. v. Commissioner*, 56 T.C. 982 1971).

14 *Graves v. Commissioner*, T.C. Memo. 1994-616; *See also Gow v. Commissioner*, T.C. Memo. 2000-93.

a Form 8886 (Reportable Transaction Disclosure Statement) with the proper tax return, then the assessment-period with respect to such return can remain open for a long time. In particular, the IRS preserves the right to audit and make changes until one year after, the earlier of, when the participant eventually files the Form 8886, or when a material advisor provides the IRS certain data about the transaction.[15] During the prolonged assessment-period, the IRS has authority to assess *any* taxes, penalties and interest, whether or not they are directly related to the listed transaction.[16]

The duty to file Forms 8886 applies not only to reportable transactions (which encompass listed transactions), but also to those that are "substantially similar." This term covers any transaction, which is expected to obtain the same or similar tax consequences as a reportable transaction, and which is either factually similar or based on a similar tax strategy.[17] The regulations underscore that taxpayers must broadly construe the concept of substantially similar in favor of making disclosures to the IRS.[18] They also state that a transaction may be substantially similar to a reportable transaction, even though it involves different entities and/or tax provisions.[19] The IRS has also issued multiple Private Letter Rulings, Field Service Advisories, General Counsel Memos, and other guidance over the years concluding that particular transactions are substantially similar to one reportable transaction or another.[20] The courts, likewise, have expansively interpreted the concept of substantially similar in upholding penalties for unfiled Forms 8886.[21]

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15 Section 6501(c)(10); Section 6707A(c)(2); Treas. Reg. § 1.6011-4(b)(2).

16 Treas. Reg. § 301.6501(c)-1(g)(7); *See also* Treas. Reg. § 301.6501(c)-1(g)(8) (Example 14).

17 Treas. Reg. § 301.6011-4(c)(4).

18 *Id.*

19 Treas. Reg. § 301.6011-4(c)(4).

20 *See, e.g.*, Private Letter Ruling 201017076 (substantial similarity to Notice 95-34), Field Service Advice 200218014 (substantial similarity to Notice 2001-16), Chief Counsel Advice 200712044 (substantial similarity to Notice 2005-13), Chief Counsel Advice 200929005 (substantial similarity to Notice 2004-8).

21 *See, e.g.*, *Polowniak v. Commissioner*, T.C. Memo 2016-31 (substantial similarity to Notice 2004-8), *Blak Invest-*

Voluntary Extensions of Assessment-Periods

A taxpayer can *voluntarily* grant the IRS additional time to complete its audit, generally by executing Form 872 or the appropriate version thereof.[22] Interesting and often unappreciated issues regarding voluntary extensions are discussed below.

No Extensions Needed, in Theory. The IRS has historically claimed that its auditors, known as Revenue Agents, should complete their jobs within the normal three-year period and refrain from asking taxpayers for more time. Indeed, the IRS proudly made the following announcement more than 60 years ago:

> It has been a long-established policy of the [IRS] to secure a consent, extending the statutory period of limitation, *only in a case involving unusual circumstances*.... It is the policy and purpose of the [IRS] to keep to an absolute minimum the number of consents obtained from taxpayers. The audit program of the [IRS] is set up to obtain the completion of the examination of returns within the present statutory period of limitation whenever possible.[23]

Fast forward several decades and the IRS continues to make similar statements about its efficiency in conducting audits, as follows: "It is the policy of the [IRS] to secure consents to extend the period of time to assess tax only in cases involving unusual circumstances . . . Every attempt should be made to resolve cases before it is necessary to extend the statute of limitations. If it is necessary to extend the statute, the period of extension should be no longer than is necessary to complete the examination and other administrative actions."[24]

The preceding IRS statements are incompatible with current reality. The norm in modern times is for the IRS to seek one or more Forms 872 from taxpayers in essentially every audit. Consequently, learning more about related IRS duties and taxpayer rights is important.

IRS Obligations When Requesting Extensions. The Internal Revenue Manual contains instructions for IRS personnel to ensure that they do not violate taxpayer rights mandated by Congress when it comes to seeking voluntary extensions. The Internal Revenue Manual explains, for example, that the IRS must notify taxpayers of the following rights: (i) the right to refuse to extend the assessment-period, (ii) the right to request that the extension be limited to particular issues, and (iii) the right to request that the extension be limited to a specific period of time.[25]

Reasons Why Taxpayers Might Extend. There are a number of reasons why it might be advantageous for taxpayers to *voluntarily* extend the assessment-period in certain situations. For example, the audits might be proceeding positively, and the taxpayers believe that the IRS will ultimately see things their way if the Revenue Agent has enough time to analyze all supporting documentation, conduct the necessary interviews, gather data from third parties, etc.

Another motive for extending might be financial: Taxpayers hope to avoid incurring the costs associated with escalating a dispute past the audit level, seeking review by the Appeals Office and/or the Tax Court.

Other taxpayers extend assessment-periods to distract or misdirect the IRS. This often occurs when the IRS is auditing recent years, the taxpayers took some aggressive tax positions in earlier years, and they want to keep the IRS focused on mundane contemporary matters, while allowing the time to inquire about past issues to expire without notice.

Still other taxpayers, particularly large companies, grant extensions to the IRS with the goal of resolving matters discreetly at the audit level, thereby avoiding negative publicity, the angst of officers and board members, and loss of investor confidence.

Timing might be another key consideration. Taxpayers under scrutiny by the IRS for a widespread issue might voluntarily extend their own assessment periods, such that *other* taxpayers facing the same tax challenges might lead the charge and set positive precedent in Tax Court. In other words, taxpayers with weaker cases, higher levels of risk aversion and/or smaller budgets might prolong audits to allow other taxpayers to bear the brunt of the fight with the IRS.

Taxpayers might also grant the IRS an extension of the assessment-period in instances where the Revenue Agent has concluded the audit, and the Appeals Office demands that a minimum of 12 or 18 months remain open as a precondition to reviewing any Protest Letter filed by taxpayers disputing unfavorable Examination Reports.

Finally, some taxpayers, applying long-term strategic thinking, grant extensions to build a foundation for shifting the burden of proof to the IRS, if matters eventually end up in Tax Court. There is a general presumption in federal tax disputes that determinations made by the IRS during an audit are correct.[26] Exceptions exist. For instance, if taxpayers introduce "credible evidence" in a court proceeding with respect to any factual issue relevant to ascertaining the tax liability, then the burden of proving such issue switches to the IRS.[27] Putting the burden of proof back on the IRS only occurs, though, where the taxpayers have complied with all substantiation requirements and have "cooperated

ments et al. v. Commissioner, 133 T.C. 431 (2009) (substantial similarity to Notice 2000-44), *Our Country Home Enterprises, Inc. v. Commissioner*, 145 T.C. 1 (2015) (substantial similarity to Notice 2007-83); *Turnham v. United States*, 123 AFTR 2d 2019-2042 (D.C. Alabama 2019) (substantial similarity to Notice 95-34), and *Interior Glass Systems, Inc. v. United States*, 123 AFTR 2d 2019-XXXX (9th Cir. 2019) (substantial similarity to Notice 2007-83).

22 Section 6501(c)(4)(A). Other common extension forms consist of Form 872-A (Special Consent to Extend the Time to Assess Tax), Form 872-B (Consent to Extend the Time to Assess Miscellaneous Excise Taxes), Form 872-D (Consent to Extend the Time on Assessment of Tax Return Preparer Penalties), Form 872-H (Consent to Extend the Time to Assess Tax on a Trust), Form 872-P (Consent to Extend the Time to Assess Tax Attributable to Partnership Items), Form 2750 (Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty), and Form SS-10 (Consent to Extend the Time to Assess Employment Taxes. *See* IRM Exhibit 25.6.22-1. For the sake of simplicity, this article only refers to Form 872.

23 Rev. Proc. 57-6 (emphasis added).

24 IRM § 25.6.22.2.1 (3-26-2019).

25 IRM § 25.6.22.3 (3-26-2019). IRS personnel normally meet these notification duties by providing taxpayers with Form 872, Letter 907 (Request to Extend Assessment Statute), Letter 967 (Consent Extending Period of Limitation Transmittal), and Publication 1035 (Extending the Assessment Period).

with reasonable requests by the [IRS] for witnesses, information, documents, meetings, and interviews."[28] The legislative history underscores that taxpayers are *not* required to grant the IRS extensions of the assessment-period in order to be deemed cooperative in this context.[29] At the same time, however, the history states that cooperation includes taxpayers exhausting all available administrative remedies, including filing Protest Letters and addressing matters with the Appeals Office[30] As explained above, granting an extension of the assessment-period normally is a prerequisite to being heard by the Appeals Office.

Contrary Positions Regarding Revival

Unbeknownst to many taxpayers and practitioners, the IRS has adopted contrary positions when it comes to whether late extensions (*i.e.*, those granted by a taxpayer *after* the previous assessment-period has expired) are valid. The IRS believes

26 Tax Court Rule 142(a)(1).

27 Section 7491(a)(1). *See also* Philip N. Jones, "The Burden of Proof: The Tax Court Responds to the Eighth Circuit's Directive," 100 Journal of Taxation 243 (April 2004); Joni Larson, "Burden of Proof in the Tax Court after the IRS Restructuring and Reform Act of 1998 and Shea v. Commissioner," 36 Gonzaga Law Review 49 (2000/2001); Adriana Wos-Mysliwiec, "The Internal Revenue Restructuring and Reform Act of 1998: Does It Really Shift the Burden of Proof to the IRS?" 14 St. John's Journal of Legal Commentary 301 (Fall 1999); David A. Baker and William R. Franzen, "20,000 Litigants and 2 Million Audits: The True Impact of Shifting the Burden of Proof," 13 Probate and Property 45 (March/April 1999); Lisa M. Ivancic and Richard E Coppage, "Taxpayers Remain Burdened Despite Shifted Burden of Proof," 62 Practical Tax Strategies 284 (May 1999).

28 Section 7491(a)(2). Taxpayers, other than individuals, must also meet net worth threshold.

29 U.S. House of Representatives, Internal Revenue Service Restructuring and Reform Act of 1997, Report 105-364, 105th Congress, 1st Session, October 31, 1997, pgs. 56-57.

30 *Id.*

31 Section 6501(a); Section 6501(c)(4)(A).

32 Section 6501(c)(4)(A) (emphasis added).

33 Treas. Reg. § 301.6501(c)-1(d) (emphasis added).

34 *See, e.g.*, *United States v. Spohrer*, 38 AFTR 2d 76-5832 (Dist. Ct. FL 1976); *Cary v. Commissioner*, 48 T.C. 754, 760 (1967); *Berry v. Commissioner*, 97 T.C. 339, 347 (1991).

35 Internal Revenue Service. Large Business & International Concept Unit. Overview of Statute of Limitations on Assessment of Tax (Nov. 6, 2019) (emphasis added); "IRS Updated Practice Unit on Limitations Period for Assessing Tax," 2020 Tax Notes Today International 71-22 (April 10, 2020).

36 Internal Revenue Service. Voluntary Disclosure Practice Examiner Guide Paper (Rev. 1/26/22); IRS Voluntary Disclosure Practice Examiner's Guide Is Available, 2022 Tax Notes Today Federal 138-24 (July 19, 2022); Andrew Valverde, "IRS Voluntary Disclosure Guide Reveals New Details of Practice," 2022 Tax Notes Today Federal 138-3 (July 20, 2022).

37 Internal Revenue Manual § 4.26.17.3.1.3 (12-11-2019); Internal Revenue Manual Exhibit 4.26.17-6.

38 IRS Voluntary Disclosure Practice Examiner's Guide Is Available, 2022 Tax Notes Today Federal 138-24 (July 19, 2022), pg. 39 (emphasis in original).

39 IRS Voluntary Disclosure Practice Examiner's Guide Is Available, 2022 Tax Notes Today Federal 138-24 (July 19, 2022), pg. 38.

40 IRS Voluntary Disclosure Practice Examiner's Guide Is Available, 2022 Tax Notes Today Federal 138-24 (July 19, 2022), pg. 48 (emphasis added).

the following: No, when it comes to tax-related issues, but yes for FBAR penalties. This inconsistency is fleshed out below.

Extensions for Tax-Related Issues. This article previously explained that the IRS generally has three years from the date on which a taxpayer files a return to assess additional taxes and penalties related to such return, but taxpayers can agree to expand this period.[31] Such agreement will only be effective, however, if made *before* the current assessment-period expires. The key provision, Section 6501(c)(4), clarifies this crucial timing issue:

> Where, before the expiration of the time prescribed for the assessment *of any tax* imposed by [the Internal Revenue Code], both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.[32]

The relevant regulations also explicitly recognize that a "dead" assessment-period, so to speak, cannot be resuscitated later via agreements between taxpayers and the IRS:

> The time prescribed by Section 6501 for the assessment of any tax [with certain limited exceptions] may, *prior to the expiration of such time*, be extended for any period of time agreed upon in writing by the taxpayer and the district director or an assistant regional commissioner. The extension shall become effective when the agreement has been executed by both parties. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.[33]

A number of cases over the years have held, consistent with the language in Section 6501(c)(4) and the underlying regulations, that waivers granted by taxpayers *after* expiration of an assessment-period are ineffectual.[34] The IRS has affirmed this reality to its personnel, explaining in a recent training document that the "critical factor" with Forms 872 is that the assessment-period "must still be open when the requirement is executed by both parties [because] it is *an agreement to extend* the statute of limitations on assessment, *not an agreement to revive* an expired statute of limitations."[35]

Extensions for FBAR Penalties. The IRS freely released certain information about its comprehensive voluntary disclosure program. It also disclosed other documents, this time against its will. Specifically, a news source obtained the Voluntary Disclosure Practice Examiner Guide Paper ("Guide Paper") through a demand under the Freedom of Information Act.[36] The Guide Paper suggests that timing matters are radically different when it comes to FBAR penalties. It encourages Revenue Agents to secure from taxpayers the FBAR equivalent of Form 872, which is called the "Consent to Extend the Time to Assess Civil Penalties Provided by 31 U.S.C. 5321 for FBAR Violations" ("FBAR Consent").[37] The Guide Paper also indicates that the "FBAR statute may be extended or waived by the taxpayer *after expiration*. In other words, an expired FBAR statute *can be resurrected* with taxpayer consent."[38] The Guide Paper goes on to explain that an FBAR Consent "is a common law waiver" of the assessment-period, while a Form 872 "is an anomaly for waivers in that it requires an open statute in order to extend."[39] The Guide Paper later states that "unlike Title 26 statutes, Title 31 FBAR statutes *can be resurrected after the statute expires* through the execution of a consent."[40]

Conclusion

Sophisticated taxpayers are hyper-aware of timing issues, particularly the dates on which relevant assessment-periods normally expire. They also understand that taxpayers can *involuntarily* prolong the audit phase by, among other things, neglecting to file international information returns, omitting a substantial amount of income from tax returns, engaging in fraud, or not disclosing listed transactions. Equally known is that taxpayers can *voluntarily* grant the IRS additional time, if doing so benefits them in some manner. Finally, while they might not be able to point to the pertinent provision in the Internal Revenue Code, many taxpayers appreciate that, when it comes to tax-related issues, an assessment-period cannot be revived after it has expired.

The IRS's conflicting position with respect to FBAR penalties might take many taxpayers, as well as their tax counsel, by surprise. It also raises a number of questions: What is the legal support for resurrection of closed FBAR periods? Has the IRS's theory survived scrutiny by any court? Did the IRS publish its position anywhere other than in one internal Guide Paper, which was only released upon legal demand? Is the IRS actively seeking FBAR Consents from taxpayers in situations where the normal assessment-period has lapsed? If so, is the IRS revealing to taxpayers that the relevant period has already expired when it solicits an FBAR Consent, consistent with notification principles applicable to Forms 872? Taxpayers and advisors, particularly those with international reach, eagerly await answers to these and other questions. ●