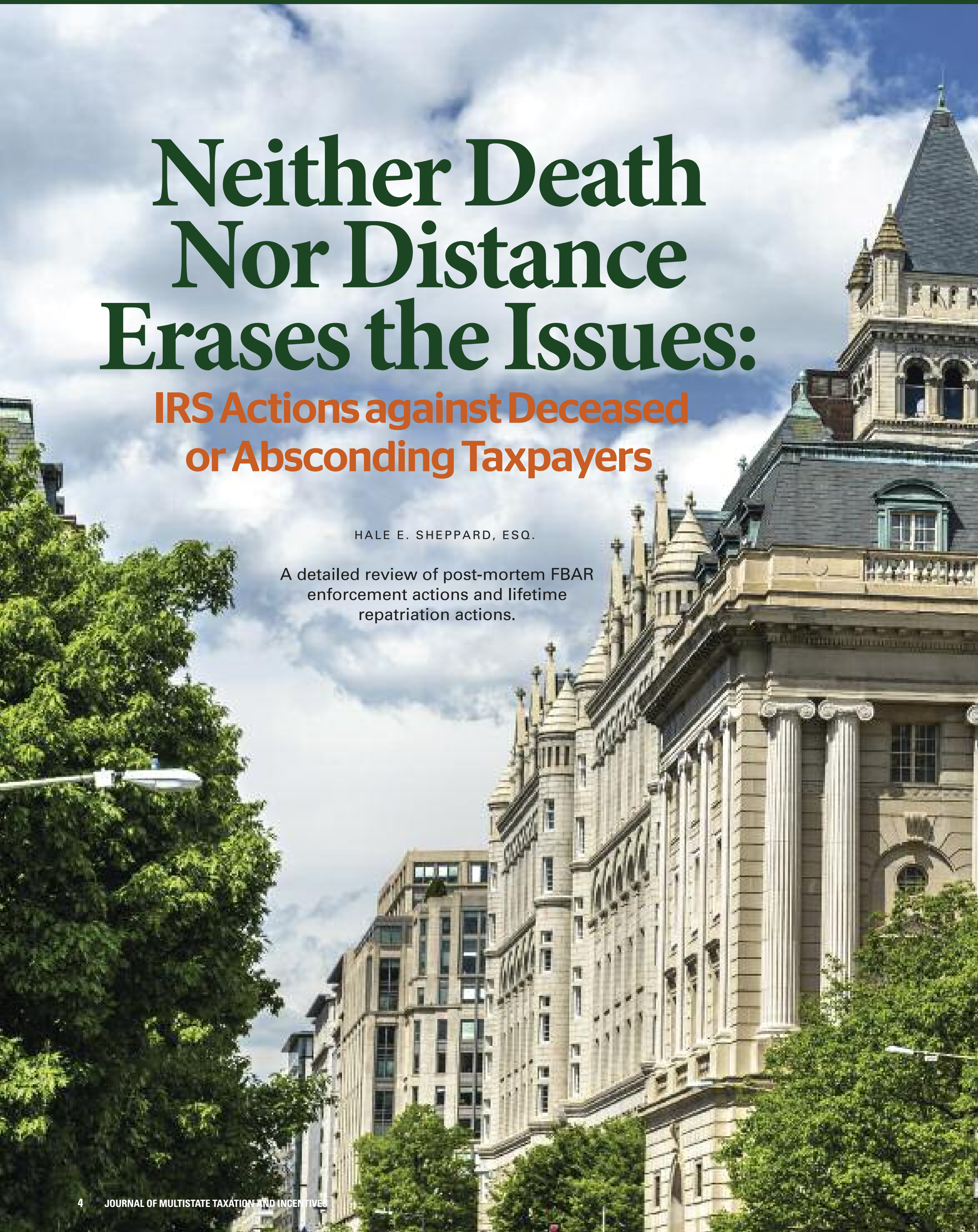

Neither Death Nor Distance Erases the Issues:

IRS Actions against Deceased or Absconding Taxpayers

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A detailed review of post-mortem FBAR enforcement actions and lifetime repatriation actions.

Panicked people

often do not think clearly, and this applies to taxpayers facing large liabilities with the IRS. Some assume that they can escape financially unharmed if they can just keep the IRS from reaching their assets during their lifetimes. Other taxpayers, adopting a variation on this theme, believe that they will remain unscathed as long as they keep their assets, and sometimes themselves, outside the United States forevermore. Sure, these theories have some initial allure, but they are flawed because the IRS, along with the Department of Justice ("DOJ") and the District Courts, have many tools for pursuing tax debts from parties related to deceased taxpayers and from living taxpayers who make a run for it.

This article explains international obligations that can trigger significant liabilities, examines recent cases where the government pursued liabilities from surviving spouses, executors of estates, trustees, distributees, and fiduciaries, identifies the main tools available to the IRS, DOJ, and District Courts in international tax collection cases, and analyzes the use of Repatriation Orders over time.

Common International Duties

To understand the issues addressed in this article, readers must first have some basic knowledge of the obligations triggered by owning foreign accounts and other assets. These include, but are certainly not limited to, 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 foreign accounts;
- They must identify the foreign countries in which the accounts are located, also on Schedule B to Form 1040;
- They must electronically file a FinCEN Form 114 ("FBAR") to provide many details about foreign accounts;
- They must report foreign financial assets, as this term is broadly defined, on Form 8938 (Statement of Specified Foreign Financial Assets);
- In situations where taxpayers hold interests in and/or have certain other links to foreign entities, they must report them on Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations), Form 8865 (Return of U.S. Persons with Respect to Certain Foreign Partnerships), Form 8858 (Information Return of U.S. Persons with Respect to Foreign Disregarded Entities and Foreign Branches), or Form 3520 (Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts), depending on the classification of the entities;
- They must file a Form 8833 (Treaty-Based Return Position Disclosure) if they are claiming that the application of a treaty between the United States and another country overrules or modifies normal treatment; and
- They must declare on Form 1040 income derived from all sources around the world, including income generated by foreign assets.

Failure to meet the preceding duties, without an acceptable justification or excuse, triggers significant penalties.[1] The penalties, often large all by themselves, have the potential of becoming untenable when the IRS decides to "stack" them, asserting multiple penalties in connection with the same unreported

foreign assets, income, or activities. A District Court recently held that "stacking" certain international penalties does not violate applicable law or the U.S. Constitution.[2]

Pursuing Debts Stemming from Deceased Taxpayers

Many taxpayers, particularly those who are old and/or infirm when the IRS first learns of their non-compliance, hope that they can avoid their day of reckoning by keeping the IRS at bay while they are alive. That idea is logical, but misguided, because the government has various legal avenues to pursue payment from different

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parties *after* the offending taxpayer dies. Several recent cases, analyzed below, demonstrate the breadth of the government's reach.

Schoenfeld

One noteworthy case is *United States v. Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld.*[3] It demonstrates that the government will chase those who receive money from deceased taxpayers on which U.S. income taxes were never paid.

The taxpayer, Steven, inherited a commercial building 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 such account in 1993. Steven's son ("Son") had signature authority over the account, which he used to communicate with UBS representatives periodically about financial matters over the years. Steven did not report the passive income derived from the foreign account on his annual Forms 1040, he denied the existence of the account on Schedules B to Forms 1040, and he never filed FBARs. UBS sent Steven a letter in March 2009 indicating, among other things, that it was ejecting U.S. account holders like him. Steven, therefore, closed the account and wired the funds to a domestic investment firm. Son was listed as the sole beneficiary of, and the trading agent for, Steven's account there.

The IRS assessed the highest possible penalty against Steven in September 2014 for not filing the 2008 FBAR. 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.

[1] See, e.g., 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); Sheppard. "IRS Issues New Form 14457 and Instructions regarding Its Comprehensive Domestic and International Voluntary Disclosure Program: Analyzing Key Aspects," 46(4) International Tax Journal 41 (2020).

In cases where a taxpayer refuses to pay the FBAR penalty, the DOJ must file a collection lawsuit within two years of the date on which the IRS assessed the penalty. One day before the two-year deadline, the DOJ filed the Original Complaint with the proper District Court. The case was styled *United States of America v. Steven Schoenfeld*. The DOJ asked the District Court to enter judgment against Steven in the Original Complaint. The problem, of course, was that Steven had been dead for over a year by that time. Approximately one month later, an attorney for Steven's family sent a letter to the DOJ, explaining that Steven was dead, and indicating that no probate proceeding had been opened.

Thus updated, the DOJ filed an Amended Complaint with the District Court. 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 other words, the DOJ had changed its target from Steven, who was dead, to his estate and Son, as the person who received assets from the estate. In explaining these two new defendants, the Amended Complaint states that Steven died in 2015, the claim against Steven is enforceable against his estate under applicable federal law, and Son is a proper defendant because Steven had no surviving spouse, Son is the closest living relative, and, upon Steven's death, all assets were distributed to Son.

Counsel for the defendants filed two Motions with the District Court, asking it to determine that the DOJ lacked legal grounds to bring an FBAR penalty col-

2 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).

3 344 F. Supp. 3d 1354 (DC FL 2018). See also *Estate of Steven Schoenfeld and Robert Schoenfeld, a distributee of the Estate of Steven Schoenfeld*, 123 AFTR 2d 2019-2334 (DC FL 2019).

4 See 31 U.S.C. section 5321 and 31 U.S.C. section 5322.

5 Civil Action No. 2:17-cv-02891 (DC N.J. 2017).

6 Case No. 3:15-cv-243 (D.C. Conn. 2018).

lection action against the estate and/or Son. The most relevant rulings by the District Court are discussed below.

The District Court explained that the issue of whether a distributee, like Son, 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 pertinent portion states that "[i]f a party dies and the claim is not extinguished, [then] the court may order substitution of the proper party." The District Court readily resolved this issue, pointing out that, in applying Federal Rule of Civil Procedure 25, many courts have determined that executors, administrators, or distributees of an estate can be substituted. Adhering to this precedent, the District Court confirmed that the DOJ could pursue Son.

The District Court also addressed whether the cause of action against Steven for collection of FBAR penalties, assessed against him during his lifetime, disappears or "abates" upon his death. The District Court first acknowledged that there is no federal statute specifically addressing whether an FBAR penalty collection action survives the death of a taxpayer, so it looked 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. The District Court swiftly determined that Congress intended the FBAR penalty to be civil, resting largely on the fact that the relevant provision is titled "Civil Penalties," while the following provision, which was not imposed against Steven, is called "Criminal Penalties."[4]

The second part of the test required the District Court to analyze seven factors to decide whether the FBAR penalty, intended as a civil penalty, is so punitive in practice that it has transformed into a criminal penalty. 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. 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, one civil and the other criminal, shows its intent to create two different violations and remedies. In addressing the sixth factor, the District Court explained that, in addition to deterrence, large FBAR penalties have other purposes, including recouping lost tax revenues and reimbursing the U.S. government for expenses related to enforcement. Finally, concerning the seventh factor, the District Court found that the FBAR penalty is not excessive, citing multiple cases.

The District Court ultimately concluded that the FBAR penalty is remedial/civil in nature, not penal/criminal, such that it did not "abate" upon the death of Steven, the taxpayer who committed the violation.

Moser

The IRS has also hounded executors of estates for FBAR penalties. One example is *United States of America v. David Moser and John Moser, Co-Executors of the Estate of Walter Moser.*[5] The taxpayer 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. The taxpayer died within a year, which was *after* the IRS had assessed the FBAR penalty, but *before* the two-year period for the DOJ to file a collection lawsuit had expired. His two sons were appointed co-executors of his estate. The DOJ filed a timely collection lawsuit in District Court, 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 [the two sons], in their capacities as the co-executors of the decedent estate . . ."

Garrity

The IRS and DOJ have also pursued 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.* [6]

The taxpayer died at age 84 in 2008, and a probate case was opened shortly thereafter. Within two months, the IRS started an audit of the taxpayer. The funds from unreported accounts were distributed among the taxpayer's three sons in 2009. In 2013, five years *after* his death, the IRS assessed the highest possible FBAR penalty against the taxpayer for not filing an FBAR for 2005.

The DOJ realized that voluntary payment would not be forthcoming, so it started a collection action in District Court against three "co-fiduciaries" to the estate. The members of the jury sided with the DOJ on all points, deciding that the deceased taxpayer had a reportable interest in the foreign account, his failure to file an FBAR was willful, and the amount of the penalty was proper because it was equal to, or less than, 50% of the balance in the unreported account as of the date of the violation.

Kelley-Hunter

Other cases demonstrate that the government will hound individuals in their capacity as surviving spouses and representatives of their deceased spouse's estate. A good example is *United States of America v. Nancy E. Kelley, individually and as representative of the Estate of Burt Hunter.*[7]

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 account, likely for purposes of obscuring ownership. The evidence demonstrated that Nancy and Burt controlled the account, despite the foreign corporation inserted as an intermediary.

In 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.

The IRS opened an audit, eventually assessing a willful penalty related to the 2007 FBAR. Both Nancy and Burt had a reportable interest in the UBS account, such that the IRS originally assessed the highest penalty against each of them; that is, a 50% penalty for Nancy, and a separate 50% penalty for Burt. The taxpayers did not pay the penalties. Consequently,

the DOJ filed a Complaint in District Court in December 2015.

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. The DOJ filed a Motion with the District Court to remove Burt as a defendant and substitute Nancy, as representative of Burt's estate. The District Court approved the substitution. Nancy never filed an Answer or any other pleading in her role as representative of the 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% FBAR penalty assessed against Burt. The District Court granted the Motion, thereby imposing on Nancy a bill for Burt's FBAR penalty. The District Court also ruled in favor of the DOJ with respect to the FBAR penalties imposed against Nancy in her personal capacity.

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; John Doe, as personal representative of the Estate of Que Te Park; Charles Park, individually, and as successor co-trustee of the Que Te Park Declaration of Trust; James Park, individually and as suc-*

[7] 120 AFTR 2d 2017-5566 (D.C. Co. 2017).

[8] Civil Case No. 16 C 10787 (N.D. Ill. 2017); *Jung Joo Park et al*, 120 AFTR 2d 2017-6074 (ND. Ill. 2017); *Jung Joo Park et al*, 123 AFTR 2d 2019-1981" (ND. Ill. 2019).

[9] *See* 31 U.S.C. section 3713(a)(1)(B) and 31 U.S.C. section 3713(b).

[10] *See* 31 U.S.C. section 3713(a)(1)(B) and 31 U.S.C. section 3713(b).

cessor co-trustee of the Que Te Park Declaration of Trust; and Nina Park, individually, and as successor co-trustee of the Que Te Park Declaration of Trust.[8] Unpacking this case reveals that the DOJ pursued various family members of the deceased taxpayer in their roles as trustee of a trust, successor co-trustees of a trust, *de facto* representative of an estate, and personal representative of an estate.

Mr. Park was a U.S. citizen, originally from South Korea, who died in 2012. He was survived by his wife ("Surviving Spouse"), and three children, all of whom are U.S. citizens. In 2007, Mr. Park placed certain assets in a domestic revocable trust ("Domestic Trust"), which became irrevocable upon his death. Mr. Park was the grantor and original trustee, Surviving Spouse was the successor trustee, and the three children were successor co-trustees. 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.

In 2007, Mr. Park also executed a will, naming Surviving Spouse as executrix, and identifying the three children as successor co-executors. The will indicated that, upon the death of Mr. Park, essentially all his assets would be transferred to the Domestic Trust. The will was not probated in the United States after Mr. Park's death, such that no personal representative or administrator was appointed. Nevertheless, Surviving Spouse always acted as a representative of the estate before the IRS, apparently notifying the IRS,

[11] *United States v. Jung Joo Park et al*, 120 AFTR 2d 2017-6074 (ND. Ill. 2017); *United States v. Jung Joo Park et al*, 123 AFTR 2d 2019-1981 (ND. Ill. 2019).

[12] *United States v. Jung Joo Park et al*, 123 AFTR 2d 2019-1981 (ND. Ill. 2019) (internal citations omitted).

[13] Case No. 19-24026-CIV- Moore, DC Southern District of Florida. 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 (April 29, 2020); Velarde, "Government Time Bar 'End Run' Attacked in FBAR Survivability Case," Tax Analysts Doc. 2020-19879 (May 26, 2020); Velarde, "Court Won't Reconsider FBAR Penalty Survivability Holding," Tax Analysts Doc. 2020-22157, 2020 Tax Notes Today International 112-3 (June 10, 2020).

incorrectly, that Mr. Park died without a will or assets.

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. Despite the fact that the will indicated that all such assets belonged to the Domestic Trust, Surviving Spouse, with the assistance of South Korean probate attorneys, sold the real properties and distributed the proceeds directly to Surviving Spouse and the three children.

The IRS started an audit, learned of Mr. Park's death, and eventually assessed a willful FBAR penalty for 2008. The DOJ then filed a timely FBAR penalty collection lawsuit.

The initial Complaint filed with the District Court contained seven separate counts, only the most relevant of which are discussed here. The DOJ argued that, under Illinois common law principles, to the extent that the assets in the Domestic Trust are insufficient to cover the total amount due the IRS, the DOJ can seek recovery from "any recipient of assets" from the Domestic Trust. That would mean the Surviving Spouse and three children.

Applicable federal law states that a claim of the U.S. government shall be paid first when the assets of an estate of a deceased debtor, which are in the custody of the executor or administrator, are not enough to pay all debts.[9] It also generally provides that a representative of an estate who pays any part of a debt of the estate before paying a claim of the U.S. government is personally liable for any shortfall.[10] Based on these rules, the DOJ alleged that Surviving Spouse, in her capacity as trustee of the Domestic Trust and *de facto* representative of Mr. Park's estate, was personally liable to the IRS.

The three children and Surviving Spouse tried to convince the District Court to dispense with the case by filing various Motions.[11] They presented the following reasoning: Mr. Park died in 2012, his assets in South Korea were liquidated in 2013, and the IRS did not even assess the FBAR penalty until 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, or the three children) could have paid a penalty before it even existed.

The DOJ countered that the FBAR liability did not arise when the IRS assessed it, but rather when the violation for not filing a 2008 FBAR occurred, *i.e.*, June 30, 2009. The DOJ underscored that all distributions of Mr. Park's assets took place after that date.

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.[12]

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.[13] There, the DOJ tracked down the personal representative of the deceased's estate and the co-trustees of her trust.

The taxpayer was a U.S. citizen who had a reportable interest in several foreign accounts. 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 in Israel and Switzerland. The taxpayer applied for the Offshore Voluntary Disclosure Program ("OVDP") in 2013, but the IRS later "removed" her. In 2017, the IRS assessed penalties for willful FBAR violations.

The taxpayer died soon thereafter, in 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 refused to pay. Thus, the DOJ filed a Complaint in District Court, pursuing payment from the two children.

The children filed a Motion asking the District Court to dismiss the case. They argued that the FBAR penalties disappeared when the taxpayer died, and even if the penalties survived her death, the DOJ had not proven that the taxpayer's violations were willful. The DOJ disagreed, of course, countering that penalties survive the death of the transgressor and the Complaint sufficiently alleged the violations.

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, not a criminal one. Second, the government suffered monetary harm because of the taxpayer's conduct, namely, loss of tax revenue and significant expenses investigating her unreported foreign accounts. Third, the FBAR penalty has a remedial purpose, which is to allow the government to recover the monetary

14 Case No. 19-24026-CIV- Moore, Order on Motion to Dismiss (DC Fla. 2020), pg. 14.

15 Case No. 17-cv-7258, Memorandum and Order (DC NY 2019).

16 Civil No. 3:20-cv-06293, Complaint (DC N.J. 2020).

17 Civil No. 3:20-cv-06293, Complaint (DC N.J. 2020), Paragraph 4.

18 Civil No. 20-cv-1377, Complaint (DC D.C. 2020).

19 *Id.*, Paragraph 4.

20 Section 7402(a).

21 28 U.S.C. sections 3001 through 3308.

22 28 U.S.C. section 3001(a)(1).

23 28 U.S.C. section 3002(8).

24 28 U.S.C. section 3002(3)(b).

25 28 U.S.C. section 3202(a); 28 U.S.C. section 1651.

26 IRM section 5.21.3 (01-07-2016).

27 IRM section 5.21.3.1 (01-07-2016).

28 IRM section 5.21.3.6 (01-07-2016).

harm. Fourth, the FBAR penalty is not wholly disproportionate to the harm incurred by the government. Fifth, the Supreme Court and others have ruled that tax provisions, which feature penalties similar in amount to the FBAR penalty, were reasonable in view of the costs that the government incurs to investigate misconduct. Finally, in holding that penalties survive the death of the taxpayer who committed the offense, the District Court observed the following:

> [G]ranting 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.[14]

Kahn

Another case confirms 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.*[15]

The taxpayer held two accounts at Credit Suisse in 2008 for which he never filed an FBAR. The IRS assessed a willful FBAR penalty, *after* which the taxpayer died, in 2017. A few months later, the DOJ filed a Complaint in District Court to collect the penalty. Counsel for the co-executors of the estate admitted that the taxpayer was willful in not filing his FBAR, but claimed that the penalty could not exceed $100,000 per account because of an inconsistency between the applicable law and regulations. The DOJ filed a Motion for Summary Judgment, asking the District Court to uphold the entire penalty. It did.

Maleh

The DOJ has become impatient recently in pursuing FBAR penalties, filing Complaints with District Courts *before* probate estates have been opened. One example is *United States v. Jean Doe, as Executor of the Estate of Murray Maleh.*[16] The DOJ alleged the following key facts in this case: The taxpayer was a U.S. citizen, he opened a Swiss account, he later formed a Panamanian corporation, he transferred approximately $4 million in 2006 from his personal Swiss account to a 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 sent the funds in 2012 to an account held by a third party at the same Israeli bank. Moreover, the DOJ claimed that the taxpayer did not report the passive income generated by foreign accounts on his annual Forms 1040, did not 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 2014, the IRS assessed FBAR penalties in 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 2020. 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."[17]

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.*[18] The DOJ made the following allegations in this case: The taxpayer was a U.S. citizen, he founded a diamond-trading business, he moved to Israel around 2006, he formed corporations in various countries and held accounts through them at 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 2017, and the IRS assessed large FBAR penalties in 2018. Nobody affiliated with the taxpayer paid the penalties within a two-year period, so the DOJ filed a collection lawsuit with the District Court in 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."[19]

Repatriation Orders and Other International Collection Tools

If death is not on the horizon, some taxpayers with large liabilities try to find refuge by simply leaving, moving their assets and/or themselves to a foreign country. Regrettably for such taxpayers, the government does not subscribe to the out-of-sight-out-of-mind theory.

Authorities for Recovering Foreign Assets. The IRS and DOJ have two main laws on which they rely in asking District Courts to assist with international collection actions, including issuing Repatriation Orders. These essentially force taxpayers to send money or other property back to the United States, such that the government can use it to satisfy or reduce an outstanding U.S. tax liability.

The first law is Section 7402(a), which authorizes District Courts to issue Orders and render judgments as may be necessary and appropriate to enforce the "internal revenue laws." It goes on to clarify that such remedies are "in addition to and not exclusive of" all other remedies permitted by other courts to enforce such laws.[20]

The second set of laws, known as the Federal Debt Collection Procedures Act ("FDCPA"), is broader.[21] It describes the procedures for recovering not only amounts related to "internal revenue laws," but also all "judgments on a debt" to the government.[22] The concept of "judgment" broadly encompasses any court judgment, order, or decree in favor of the government in a civil or criminal proceeding regarding a debt.[23] The term "debt" is also flexible in this context, meaning any amount owed to the government on account of many things, such as a fine, assessment, penalty, restitution, damages, interest, tax, recovery of costs, etc.[24] The FDCPA explains that District Courts may enforce a judgment via a long list of remedies, which includes issuing all "writs necessary and appropriate" to aid enforcement.[25]

The IRS's main source of guidance to its personnel, the Internal Revenue Manual ("IRM"), contains a segment called "Collection Tools for International Cases."[26] It explains that several administrative and judicial tools exist to reach assets in international collection cases. Among these are levying on a U.S. branch of a foreign financial institution, seeking a special court writ to temporarily prevent a taxpayer from departing the United States, having a receiver appointed to identify and gather foreign assets, utilizing a treaty to make a Mutual Collection Assistance Request, and/or filing a lawsuit soliciting a Repatriation Order.[27] With respect to the last item, seeking a Repatriation Order, the IRM explains that this will not occur until the IRS demonstrates to the relevant District Court that the taxpayer has an outstanding tax liability, there is a reasonable basis to believe that the taxpayer has assets outside the United States, levying on domestic assets is not enough to fully pay the liability, and the District Court has personal jurisdiction over the taxpayer.[28]

Survey of Relevant Cases. Few people seem to realize it, but the IRS and DOJ have been utilizing Repatriation Orders for many decades. Several noteworthy cases are examined below in chronological order.

Clough

The taxpayer in *United States v. Clough* was convicted of tax evasion in 1973, and the DOJ began a civil action to recover approximately $217,000 in federal income tax liabilities soon thereafter.[29] In 1974, the District Court issued a Repatriation Order, mandating that the taxpayer transfer to the government the total amount due from foreign accounts. Instead of paying, the taxpayer fled, crossing into Canada two weeks later. The District Court held him in contempt of the Repatriation Order.

About 15 years later, the U.S. authorities captured the taxpayer and put him in prison to serve his earlier sentence for tax evasion. When he was set to be transferred to a halfway house, the District Court, showing a remarkable memory, instructed that the taxpayer not be released until he complied with the Repatriation Order issued many years ago or proved that he could not. The taxpayer filed a memorandum, arguing that he made all reasonable efforts to comply with the Repatriation Order while in Canada but was unable to do so because he had given all his property to his spouse pursuant to an "irrevocable" power of attorney. The District Court did not buy this, nor did the Court of Appeals. Therefore, the Repatriation Order and related Contempt Order stood.

29 Case No. CV-73-02105-SW (9th Cir. 1991); *see also* "Ninth Circuit Affirms Order Finding that Tax Evader Did Not Purge Himself of Contempt for Not Repatriating Funds to Government," 91 Tax Notes Today 232-42 (Oct. 9, 1991).

30 446 F. Supp. 90 (N.D. Cal. 1978).

31 53 AFTR 2d 84-1463 (D.C. Cal. 1984).

32 923 F. Supp. 1289 (D.C. Mo. 1995).

33 111 AFTR 2d 2013-1738 (D.C. Fla. 2013); See also *Grant*, 101 AFTR 2d 2008-2676 (D.C. Fla. 2008).

34 727 F.3d 1100 (D.C. Co. 2013).

35 District Court, Case No. 3:18-CV-05189, Order on Motion for Summary Judgment (W. D. Wash. 2021); Judgment Granted Against Tax Evaders for Taxes, Lien Foreclosure, 2021 Tax Notes Today Federal 63-26 (March 31, 2021).

36 125 AFTR 2d 2020-1323 (D.C. FL 3/20/2020).

37 *Schwarzbaum*, Case No. 9:18-CV-81147, Plaintiff United States' Motion to Repatriate Foreign Assets, (D.C. Fla. 2021).

McNulty

In 1973, the taxpayer in *United States v. McNulty* won a sweepstakes in Ireland, yielding him about $130,000.[30] In an effort to avoid U.S. taxes, the taxpayer transferred the funds to an account in Jersey, the largest of the Channel Islands between England and France. The taxpayer was then convicted of tax evasion and imprisoned for his actions.

In 1978, the DOJ prevailed in its tax collection suit against the taxpayer. Because he had no material assets in the United States to pay his debt, the DOJ filed a Motion asking the District Court to issue a Repatriation Order, obligating the taxpayer to transfer the funds from the account in Jersey to the government pursuant to Section 7402. Pointing to cases going back all the way to 1962, the District Court explained that "it is relatively well established that this [District Court] may issue such an order." After further analysis of judicial precedent, the District Court issued a Repatriation Order requiring the taxpayer to remit the foreign funds within 60 days. It concluded with the following observation:

> It is clear, then, that this [District Court], by virtue of its jurisdiction over the [taxpayer], has the power to order him to repatriate assets located in the foreign bank. Moreover, there appears to be little hesitation on the part of courts to issue such orders.

Greene

The government convicted the taxpayer in *United States v. Greene* of tax evasion.[31] Shortly thereafter, and while his conviction was pending appeal, the taxpayer liquidated a significant amount of his U.S. assets and transferred them to a foreign bank. The Court of Appeals later upheld the conviction, and the taxpayer was imprisoned. When the IRS learned of the foreign transfer, it immediately made a so-called jeopardy assessment. The taxpayer, in turn, filed a Petition with the Tax Court challenging the amount of the assessment.

The DOJ responded by filing a Motion with the District Court, seeking a Repatriation Order under Section 7402, forcing the taxpayer to send back approximately $356,000 to cover his tax liability. The District Court determined that the Repatriation Order was appropriate in light of the criminal conviction for tax evasion, sudden transfer of assets abroad, and the taxpayer's imminent release from prison. In reaching its conclusion, the District Court broadly stated that "[r]epatriation is appropriate where the record shows a sub-

stantial tax liability exists and the government's ability to collect the tax might otherwise be jeopardized."

Pozgay

The IRS assessed more than $700,000 in tax liabilities against the taxpayer in *United States v. Pozsgay.*[32] The taxpayer failed to pay such liabilities and transferred funds outside the United States. Therefore, the DOJ filed a Complaint with the District Court seeking a Repatriation Order. The taxpayer, through an attorney, claimed that he was financially unable to comply with the Repatriation Order or to participate in a deposition with the DOJ regarding his assets, but he initially failed to supply an affidavit or any other evidence to support his claim. Accordingly, the District Court issued a default Repatriation Order under Section 7402 and intimated that it might incarcerate the taxpayer if he failed to comply.

Grant

The DOJ filed a collection lawsuit against the taxpayers in *United States v. Grant* in 2000.[33] The District Court ruled in favor of the DOJ, showing a tax liability of more than $36 million. Later, the District Court issued a Repatriation Order in 2005, directing the taxpayers to remit the assets in two foreign trusts to satisfy the tax liability. The taxpayers refused to obey. Instead, they engaged in a multi-year "scheme" by which they had significant funds transferred from foreign trusts to accounts held in the names of their children and then they used such funds to pay their personal expenses. Given this behavior, the District Court held the taxpayers in contempt of the Repatriation Order. It also issued a permanent injunction against the taxpayers pursuant to Section 7402, demanding that they not further dissipate funds in the foreign trusts, that they regularly request data from the foreign trustees, and that they remit to the government all future distributions of income or principal from the foreign trusts.

Barrett

The taxpayers in *United States v. Barrett* apparently filed a 2007 Form 1040 claiming some unwarranted credits for tax withholding.[34] The IRS issued them a refund based on the false credits, which the taxpayers transferred out of the country, to a bank in Uruguay. The IRS later audited and assessed a liability against the taxpayers of about $325,000. The taxpayers refused to

[38] *See* 31 U.S.C. section 3717(e)(2), 31 U.S.C. section 3717(a), 28 U.S.C. section 1961, and 28 U.S.C. section 3011.

[39] Valverde, "DOJ Predicts Dramatic Increase in Repatriation Orders," 2021 Tax Notes Today International 92-4 (May 13, 2021); Athanasiou, "U.S. Seeks Repatriation Order Against FBAR Litigant," 2021 Tax Notes Today Federal 107-7 (June 4, 2021).

pay, so the DOJ filed a lawsuit asking the District Court in 2010 to reduce the tax liability to judgment and issue a Repatriation Order, requiring the taxpayers to bring back the money sent to Uruguay. The taxpayers did not respond to the Complaint filed by the DOJ, so the District Court issued a default judgment against them. The District Court later affirmed the Repatriation Order in 2013 after a status conference. Interestingly, the District Court also issued a special writ against the taxpayers pursuant to Section 7402, preventing them from traveling to Uruguay (or elsewhere) to be with their ill-gotten money.

Weathers

The taxpayers in *United States v. Weathers* created two entities, allegedly for estate planning purposes, and then transferred eight real properties to such entities.[35] In 2005, the taxpayers were convicted of tax evasion, owing the IRS approximately $4 million. The DOJ filed a lawsuit seeking to reduce the tax liabilities to judgment, foreclose federal tax liens on various domestic properties, and obtain a Repatriation Order obligating the sale of all foreign assets, including real property in Belize, and return of the proceeds to the government. The District Court agreed that a Repatriation Order was appropriate under Section 7402(a). Its succinct reasoning was as follows: "In light of the [taxpayers'] prior criminal conviction for tax evasion and their extensive outstanding liabilities, an order to sell the property and apply the proceeds to the outstanding liabilities is justified."

Schwarzbaum

The most recent case involving a Repatriation Order is *United States v. Schwarzbaum.* [36]

The taxpayer in this case was born in Germany and lived in many different countries, namely, Spain, Costa Rica, Switzerland, and the United States. The taxpayer became a Green Card holder in 1993 and a U.S. citizen in 2000. The taxpayer had a reportable interest in 20 accounts during the relevant years. In 2009, UBS sent the taxpayer a letter indicating that the IRS was seeking information about U.S. account holders, like him. The taxpayer, through a Swiss attorney, unsuccessfully attempted to prevent UBS from disclosing his data. He then applied for the OVDP, opted out, and faced an IRS audit. The Revenue Agent imposed willful FBAR penalties for 2006 through 2009.

The taxpayer refused to pay such penalties, so the DOJ started a collection lawsuit in District Court. The District Court held in favor of the DOJ for nearly all years on grounds that the taxpayer showed "recklessness" and "willful blindness" regarding his FBAR duties. The taxpayer still refused to pay, so approximately one year later the DOJ filed a Motion with the District Court, asking it to issue a Repatriation Order obligating the taxpayer to transfer sufficient funds from abroad to cover his growing liability with the government.[37] Interestingly, the DOJ was not only demanding payment of the $12.5 million FBAR penalties previously approved by the District Court, but also pre-judgment interest, post-judgment interest, late-payment penalties, and a special "surcharge" equal to 10% of the total debt owed.[38] These items increased the total amount due from about $12.5 million to $18.3 million.

The DOJ alleged that the taxpayer sold his personal residence in the United States, moved to Switzerland, transferred essentially all his assets to Switzerland, and took other actions, both before and after the FBAR penalty trial, in an effort to render himself "judgment proof." Based on information obtained during the discovery process, the DOJ explained that the taxpayer had more than $49 million in assets in Switzerland, which he could use to pay his U.S. liability. The DOJ emphasized to the District Court the perversity of the situation:

> [The taxpayer] should not be allowed to avoid paying his judgment debt any longer by keeping his funds in foreign bank accounts when it was the maintenance of similar, unreported foreign accounts that he was found liable for in the first place. This course of action is even more egregious since it was [the taxpayer's] willful concealment and failure to report his Swiss accounts that incurred liability under the Bank Secrecy Act in the first place.

Conclusion

This article demonstrates that the IRS and DOJ have enjoyed notable success recently in persuading District Courts to accept a wide range of theories for assessing liabilities against and/or collecting them from not only taxpayers, but also surviving spouses, executors of estates, trustees, distributees, fiduciaries and others. Further, this article shows that many District Courts are receptive to issuing Repatriation Orders, forcing tax debtors to remit foreign funds and other property to the government, pursuant to Section 7402 and/or the FDCPA. With the current focus on the tax gap and the anticipated increase in Congressional funding for IRS enforcement, similar government actions likely will rise in the near future. Indeed, during recent tax conferences, attorneys for the IRS and DOJ predicted that their use of Repatriation Orders would be "dramatically increasing" and that they are ready to pair these with criminal tax charges, if taxpayers refuse to comply.[39] In light of this reality, taxpayers with health or age issues, as well as those holding assets overseas, should retain professionals with specialized international experience before engaging in tax assessment or collection battles. ■