Aroeste v. United States: Narrow FBAR Dispute Generates Broad Victories for All Taxpayers

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I. Introduction

International tax disputes often create important guidance, some obvious, some not. *Aroeste* is a great example.[1] Those looking no further than the surface likely consider this case just another dispute, like countless others, about penalties for failing to properly disclose a foreign account by filing FinCen Form 114 ("*FBAR*"). Sure, the case involves the mundane issue of FBAR penalties, but it presents exciting and novel issues, too. It makes noteworthy rulings about whether dual residents can seek FBAR protection in tax treaties, whether late filing of certain information returns permanently deprives taxpayers of claiming beneficial positions, and whether taxpayers must follow legislative rules issued by the Internal Revenue Service ("IRS") by way of a Notice instead of a regulation. This article, the second in a series, explores these important issues and others generated by the case.[2]

II. Gaining and Losing U.S. Resident Status

Readers need some background about U.S. residency matters in order to appreciate the legal issues in *Aroeste*.

Generally, an individual is considered a "U.S. person" for tax purposes if he is either a U.S. citizen or resident. This characterization is critical because, once an individual becomes a U.S. person, he normally is subject to all U.S. tax obligations. These include filing annual Form 1040 (*U.S. Individual Income Tax Returns*) with the IRS, paying taxes in a timely manner, and potentially submitting a long list of international information returns.

Determining whether an individual is a U.S. *citizen* is relatively easy, but confirming status as a U.S. *resident* can be tricky. An individual can become a U.S. resident in four ways, one of which is obtaining a Green Card from the U.S. immigration authorities, thereby becoming a "lawful permanent resident."[3] The

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Internal Revenue Code states that a Green Card holder maintains such status as long as it "has not been revoked (and has not been administratively or judicially determined to have been abandoned)."[4] The regulations echo this sentiment, stating that U.S. resident status continues "unless it is rescinded, or administratively or judicially determined to have been abandoned."[5]

In 2008, Congress introduced another manner of losing U.S. resident status, which is most relevant to this article. It inserted the following language:

> An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the [IRS] of the commencement of such treatment.[6]

Sure, the case involves the mundane issue of FBAR penalties, but it presents exciting and novel issues, too.

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In summary, once an individual becomes a U.S. resident by obtaining a Green Card, he keeps this classification until one of three things occurs: (i) The proper authorities revoke the Green Card; (ii) The individual abandons his Green Card, and the appropriate administrative agency or court issues a ruling confirming such abandonment; or (iii) The individual takes the position that he is not a U.S. resident thanks to the applicable treaty, and he files the necessary items with the IRS to claim his non-resident status, including Form 1040-NR (*U.S. Nonresident Alien Income Tax Return*), Form 8833 (*Treaty-Based Return Position Disclosure*), and Form 8854 (*Initial and Annual Expatriation Statement*). The third way of losing U.S. residency status applies to so-called "dual resident taxpayers." These are individuals considered residents, for tax purposes, of both the United States and a foreign country.[7]

III. Relevant Aspects of the Treaty

A glimpse at the treaty in effect between the United States and Mexico ("Treaty") is necessary.[8] Article 1(1) states that the Treaty only applies to persons who are "residents" of the United States and/or Mexico. Article 4(1) explains that, for Treaty purposes, the term "resident" means any individual who, under the laws of the United States and/or Mexico, is subject to tax in a country because of his domicile, residence, or other criteria.

Article 4(2) of the Treaty contains the tie-breaker rules, which come into play when a person is considered a resident of *both* the United States and Mexico applying the general rules. They focus on various factors, such as the country in which a person has a permanent home, close personal and economic relations, a habitual abode, citizenship, *etc*. The Technical Explanation to the Treaty summarizes the residency analysis as follows:

> The determination of residence for purposes of the [Treaty] looks first to domestic law criteria. A person subject to tax as a resident … under the law of *one* of the Contracting States is a resident of that State. If that person is *not* a resident of the *other* Contracting State for tax purposes under its domestic law criteria, he or it need look no further. If such a person is a dual resident, [then Article 4(2)] provides a series of tests for assigning a single residence to an individual.[9]

IV. FBAR Duties and Penalties

U.S. persons, including U.S. residents, ordinarily have several duties if they have a financial interest in, or certain authority over, foreign accounts whose aggregate balance exceeds $10,000. Among these obligations is filing an FBAR. Neglecting this obligation can spark huge sanctions. In the case of non-willful violations, the penalty is $10,000.[10] The FBAR penalty increases significantly, though, where the inaction is willful. Specifically, the IRS may assert a fine equal to $100,000 or 50 percent of the balance in the account at the time of the violation, whichever amount is larger.[11]

V. Analysis of Newest Case

The battles in *Aroeste* are numerous. This article explores just two.

A. Main Facts

Husband was born, raised, and educated in Mexico. He also worked in Mexico throughout his career, until he retired in 2012. He filed annual Mexican tax returns as a Mexican resident. He has lived in Mexico City for more

than 50 years. He has a condo in Florida, too, which he bought in 1980 and uses for vacations.

Husband obtained his Green Card around 1984, and he never formally relinquished it. Wife, by contrast, became a U.S. citizen in 2011 and maintained that status. In 2012 and 2013, Husband had a reportable interest in five accounts in Mexico, whose total balance surpassed $10,000. Husband filed a joint Form 1040 with Wife for those two years, did not attach Form 8833 indicating that he was a Mexican resident under the Treaty, and did not file Form 8854.

Husband became aware of possible U.S. non-compliance around 2014. Based on the advice of legal counsel, he applied to resolve matters with the IRS through the Offshore Voluntary Disclosure Program ("OVDP"). Husband later hired new legal counsel, who notified the IRS in 2016 that Husband wanted to "opt out" of the OVDP and avoid the standard penalties. The IRS initiated an audit, and Husband filed as part of that process Forms 1040-NR for 2012 and 2013, claiming married-filing-separately status, and enclosing Forms 8833. He did submit Forms 8854.

Four years later, in 2020, the IRS assessed FBAR penalties of $50,000 for each of 2012 and 2013, for a total of $100,000. Logic dictates that the IRS imposed a lower penalty for "non-willful" violations. Husband paid a portion of the penalties and then filed suit in District Court seeking return of the money, along with discharge from all remaining amounts for both years. The Department of Justice ("DOJ"), predictably, counterclaimed. It wanted to keep the amount that Husband already submitted, as well as obtain payment of the outstanding balance.

B. Discovery Battle

The District Court basically put the case on hold, indicating that it would wait for the Supreme Court to rule on another FBAR case addressing whether penalties should be imposed on a per-account or per-year basis. Despite this general pause, the District Court permitted the taxpayers and the DOJ to continue litigating the following two issues: Whether Husband was a resident of Mexico under the Treaty, and whether Husband was a "U.S. person" required to file FBARs for the two years at issue. A discovery disagreement arose, and the parties asked the District Court to intervene.

The taxpayers demanded "the entire administrative record" from the audit, and the DOJ refused to provide it. The District Court observed that the complete record was a "voluminous document" consisting of about 7,000 pages, only a small portion of which implicated FBAR matters.

The District Court, after hearing the basic positions of both sides, ordered them to file a Joint Discovery Motion, along with legal briefs focused on two questions. First, how is Husband's status under the Treaty relevant to the issue of whether he was obligated to file FBARs? Second, assuming that his status is pertinent, how is getting access to the entire record "relevant and proportional" to determining whether Husband was a "U.S. person" for FBAR purposes? After considering the Joint Discovery Motion and corresponding briefs, and after listening to additional advocacy during a conference, the District Court discussed two issues.

It makes noteworthy rulings about whether dual residents can seek FBAR protection in tax treaties, whether late filing of certain information returns permanently deprives taxpayers of claiming beneficial positions, and whether taxpayers must follow legislative rules issued by the Internal Revenue Service ("IRS") by way of a Notice instead of a regulation.

1. First Issue

With respect to whether the Husband's status under the Treaty is relevant to the imposition of FBAR penalties, the District Court began by underscoring that the answer depends "on the application of multiple, interconnected statutes and regulations."[12] The District Court explained that the parties disagreed as to whether Husband's status under the Treaty has an effect on whether he is considered a "U.S. person" for FBAR purposes. The taxpayers argued that if Husband is a Mexican resident under the Treaty, then he would *not* be a "U.S. person" when it comes to FBAR duties. The DOJ, by contrast, maintained that the Treaty analysis is immaterial because the Treaty only deals with taxes under Title 26 of the Internal Revenue Code, whereas FBAR obligations derive from Title 31 of the U.S. Code.

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The District Court sided with the taxpayers. It noted that the term "U.S. person" in the context of FBARs encompasses U.S. citizens and U.S. residents, with the latter being defined by cross-reference to Title 26. Specifically, the applicable FBAR regulation states that "a resident of the United States is an individual who is a resident alien under [Section 7701(b) of Title 26] and the regulations thereunder," with a few alterations.[13] The District Court went on to explain that Code Sec. 7701(b) indicates that an individual can achieve U.S. residency in several ways, one of which is by becoming a lawful permanent resident, otherwise known as a Green Card holder.[14]

The District Court decision in Aroeste v. United States is positive, of course. Husband no doubt cheered not having to pay $100,000 in FBAR penalties. Also, other taxpayers surely appreciated the rulings that filing late Forms 8833 does not eliminate the ability to claim a treaty-based position, and the APA prevents the IRS from issuing legislative rules by way of Notices.

The District Court explained that Husband had been a lawful permanent resident for many years. Therefore, he was a resident alien and, by extension, a U.S. resident. Husband, consequently, is presumed to be a U.S. person required to file FBARs. The question thus becomes whether the Treaty offers Husband "an escape hatch."

Further emphasizing the importance of the Treaty, the District Court ruled that "a determination of [Husband's] tax residency status under the Treaty is directly relevant to—indeed it is outcome determinative of—the issue of whether he was required to file the FBARs at issue in this lawsuit." The District Court added that if the entire administrative record is relevant and proportional to deciding Husband's residency status under the Treaty, then it is discoverable, and the DOJ should hand it over.

2. Second Issue

The District Court then turned to the next issue, which was whether the entire administrative record was relevant to ascertaining Husband's residency status under the Treaty. It dealt with this matter swiftly, holding that the DOJ must relinquish all materials related to the two years for which FBAR penalties were imposed, 2012 and 2013, but not for the other years audited by the IRS.

The DOJ presented a series of arguments opposing this ruling, all of which the District Court discarded. The District Court supplied a few quotable lines broadly favoring the taxpayers in the discovery dispute. For instance, with regard to relevancy, it stated the following:

> As the Court has already concluded, [Husband's] residency under the Treaty is a potentially dispositive issue in this matter. If under the Treaty, he was a Mexican resident in 2012 and 2013, he would have no obligation to file FBARs; but if he was a resident of the United States during this time frame, he is liable for some amount of FBAR penalties. [Husband] seeks to prove he was a Mexican resident for tax purposes, and thereby avoid any liability for his admitted failure to file FBARs. The IRS's administrative record bears directly on that issue. It is, therefore, relevant to this matter.

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C. FBAR Penalty Battle

The taxpayers presumably received all the documents requested in discovery pursuant to the District Court's Order, described above. The next major action in the case was the filing of Motions for Summary Judgment by both Husband and the DOJ. They asked the District Court to resolve matters, before trial, based solely on the facts and documents before it already.

Husband essentially argued that he was not a U.S. person thanks to the Treaty, such that he was not required to file FBARs for 2012 and 2013. The DOJ, for its part, suggested that Husband was a U.S. person during the relevant years because he did not timely claim that he was a Mexican resident pursuant to the Treaty; that is, he did not file Forms 1040-NR enclosing Forms 8833 until years after the fact, after he opted-out of the OVDP, and after the IRS audit had begun. Moreover, Husband never filed Forms 8854.

The District Court divided its ruling into several sub-issues.

1. Whether Husband Was a U.S. Person for FBAR Purposes

As explained above, the term "U.S. person" in the context of FBARs encompasses U.S. citizens and U.S. residents, with the latter defined by cross-reference to Title 26. The *FBAR rules under Title 31*, in other words, allude to terminology found in the *tax rules under Title 26*. Specifically, the applicable FBAR regulation states that a U.S. resident is an individual who qualifies as a resident alien under Code Sec. 7701(b) and the underlying tax regulations.[15] The District Court explained that Husband had been a resident alien (*i.e.*, a Green Card holder) and, by extension, a U.S. resident, for many years. Therefore, he is presumed to be a U.S. person required to file FBARs.

2. Whether Husband Waived Treaty Benefits by Filing Late

The District Court next explained that, in order to establish Mexican residency under the Treaty, and thereby avoid reporting obligations imposed on U.S. persons, Husband must have filed Forms 1040-NR enclosing Forms 8833. The District Court noted that Husband did not do this for 2012 and 2013 until years after the normal deadline, in late 2016, as part of the IRS audit.

The DOJ argued that this delinquency proves that Husband failed to comply with the express language of Code Sec. 7701(a)(6). In particular, Husband supposedly failed to properly notify the IRS of his desire to be treated as a Mexican resident and to not waive his Treaty benefits. Husband conceded that applicable law requires filing of Forms 8833, but disagrees about the consequences for not doing so. The contrasting positions can be summarized as follows. On one hand, the DOJ believed that the absence of timely Forms 8833 deprives Husband of Treaty benefits altogether. On the other hand, Husband maintained that the proper sanction for late Forms 8833 is a fine of merely $1,000 per year, as specifically set forth in Code Sec. 6712. The District Court, after reviewing the relevant tax provision and distinguishing several cases involving unfiled Forms 8833, held in favor of Husband. It reasoned that the appropriate punishment was an annual penalty of $1,000, period.

Some might be surprised by the District Court's decision in this regard, but it finds support in other contexts that might be unfamiliar to those who do not handle employment tax disputes. *Medical Emergency Care Associates* is a case focused on whether a company was entitled to the benefits of Code Sec. 530.[16] Congress introduced Code Sec. 530 over 40 years ago, as part of the Revenue Act of 1978, in an effort to counter aggressive worker-classification audits by the IRS on small businesses.[17] Code Sec. 530 might be called the Holy Grail of worker-classification cases; the company that satisfies all criteria obtains two major benefits. First, the IRS may not assess any back employment taxes, penalties, or interest charges against the company. Second, the IRS cannot obligate the company to reclassify the relevant workers as employees going forward, regardless of the fact that applicable law supports reclassification. The company effectively gets a free pass for past and future behavior.

One of the criteria that companies must satisfy is known as reporting consistency. This essentially means the company filed information returns in a manner consistent with the workers being independent contractors; that is, the company submitted annual Forms 1099-NEC (*Non-Employee Compensation*) with the IRS.[18] Neither the relevant statute nor the legislative history addresses when, exactly, a company must file Forms 1099-NEC in order to take advantage of Code Sec. 530.[19] However, the IRS has long taken the position that they must be filed in a timely manner.[20]

Husband will relish this discrete victory, and taxpayers will continue to follow this multi-faceted dispute to see what other new guidance it might generate.

The company in *Medical Emergency Care Associates* had contracts with hospitals to provide doctors to staff emergency rooms. The company, relying on longstanding industry practice, classified the doctors as independent contractors for 1996. The deadline for filing Forms 1099-NEC was February 28, 1997. The company did not file them until months after the deadline. The IRS later audited and concluded that the doctors should have been classified as employees. The company disputed this characterization by filing a Petition with the Tax Court. The only issue was whether the company met the reporting consistency criteria, which would dictate whether it was eligible for the benefits of Code Sec. 530.[21]

The Tax Court, applying time-honored principles of statutory construction, first noted that the relevant provision, Code Sec. 530, says nothing about the need for timely filing.[22] The Tax Court went on to acknowledge that timely filing of returns is required throughout the Internal

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Revenue Code. It underscored, though, that the sanctions for late-filing of Forms 1099-NEC are already contained in Code Secs. 6721-6724, which address "Failures to Comply with Certain Information Reporting Requirements." In the case of delinquent Forms 1099-NEC, the IRS can assert a penalty of $50 per return, with a maximum penalty of $250,000 per year.[23] The Tax Court then made the following ruling about the interrelationship between Code Sec. 530 and the normal penalties:

> Nothing in the language or legislative history of Section 530 leads us to the conclusion that denial of Section 530 relief was meant to be an additional penalty for the failure to timely file information returns, particularly under the circumstances in this case ... The [IRS] is entitled to require timely filing and to impose a penalty [under Sections 6721 through 6724], when appropriate, for failure to timely file, but not the penalty [the IRS] seeks to impose here [*i.e.*, deprivation of Section 530 relief to the taxpayer].[24]

3. Whether Husband Had to File Forms 8854

The DOJ next suggested that, even if the IRS had accepted the late Forms 1040-NR enclosing Forms 8833 submitted by Husband during the audit, he nonetheless would not be entitled to Treaty benefits because he failed to enclose Forms 8854 telling the IRS that he was "expatriating" from the United States, as required by Notice 2009-85.

Readers need a little backstory to understand this issue. Some taxpayers who decide to renounce their affiliation with the United States get stuck with an unexpected bill.[25] They must pretend to sell all their property at fair market value the day before they depart and pay the resulting income taxes to the IRS.[26] This so-called "exit tax" only applies to "covered expatriates."[27] A "covered expatriate," which normally includes long-term Green Card holders, is one who has an average U.S. income tax liability during the past five years exceeding a particular amount, who has a net worth surpassing a certain threshold, or who cannot certify that he has been in full U.S. tax compliance for the past five years.[28] If an expatriate fails even one of the preceding three tests, then he will be considered a "covered expatriate," subject to the exit tax. The expatriation date for Green Card holders is the day on which they cease to be lawful permanent residents.[29] This occurs in several ways, including when an individual takes the position with the IRS that he is a resident of a foreign country under the tie-breaker rules of a treaty by filing Form 1040-NR, Form 8833, and Form 8854, if necessary.[30]

In *Aroeste*, Husband argued that he was not required to file Form 8854 because, well, the IRS broke the rules to begin with. The District Court sided with Husband. Citing several recent cases in which the IRS was admonished for improperly creating rules solely by issuing a Notice, the District Court held that "Notice 2009-85 is not binding authority as it fails to comply with the Administrative Procedures Act." It then added that the following:

> [B]ecause Notice 2009-85 has not been subject to a notice-and-comment procedure, it does not comply with the APA and thus is not binding. As such, [Husband] was not required to file Form 8854 with his amended returns.

Those following recent case law would know that the decision by the District Court in *Aroeste* about Notice 2009-85 was not altogether surprising. Why? Several courts have recently invalidated other types of IRS guidance released in violation of the Administrative Procedures Act ("APA"). Take, for example, *Green Valley Investors, LLC*, a Tax Court case centered on conservation easement donations.[31] The IRS claimed in that case that the partnerships were entitled to a charitable deduction of $0 because they allegedly failed to satisfy all technical requirements. The IRS also maintained that the partnerships warranted various sanctions, among them the so-called "reportable transaction penalty," because the tax understatements were related to "syndicated" transactions, as set forth in Notice 2017-10. The partnerships disagreed and filed a Petition with the Tax Court.

The parties later lodged multiple Motions for Partial Summary Judgment on assorted issues, including whether the IRS had authority to impose a reportable transaction penalty in the first place. The Tax Court explained that the APA involves a three-step procedure, dictating that agencies, like the IRS, must (i) issue a general notice to the public about proposed rulemaking, (ii) allow interested persons to provide input, by submitting comments and/or participating in hearings, and (iii) feature in the final rule a "concise general statement" of its "basis and purpose." The Tax Court acknowledged the existence of certain exceptions, including that the APA applies to "legislative rules," but not to "interpretive rules." The Tax Court ultimately ruled that Notice 2017-10 characterizing "syndicated" easement transactions as "reportable transactions" was a "legislative rule," such that it had to be issued in accordance with the APA.[32] Additionally, the Tax Court implied that its ruling would have wider applicability. It stated that it "intends to apply this decision setting aside

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Notice 2017-10 *to the benefit of all similarly situated taxpayers who come before us*."[33]

Green Valley Investors constitutes just one in a growing list of APA-related problems for the IRS. Here are some others. A District Court held that the IRS violated the APA when it issued Notice 2016-66 identifying certain micro-captive insurance arrangements as "transactions of interest."[34] Likewise, the Sixth Circuit Court of Appeals ruled that the IRS improperly ignored the APA when it published Notice 2007-83 calling trusts using cash life insurance policies listed transactions.[35] Another District Court determined that the IRS failed to comply with the APA in issuing temporary regulations for the dividends-received-deduction under Code Sec. 245A.[36] Finally, the IRS issued a Chief Counsel Advisory indicating that the IRS cannot argue that taxpayers must file both Form 8275 (*Disclosure Statement*) and Form 8886 (*Reportable Transaction Disclosure Statements*) to avoid the increased economic substance penalty for undisclosed transactions because the sole source of this double duty, Notice 2010-62, contravenes the APA.[37]

4. Whether Husband Was a Mexican Resident

After deciding that Husband was a U.S. person under Code Sec. 7701(b), the District Court turned to whether he was a Mexican resident under the Treaty. Because Husband was a resident of both the United States and Mexico, the tie-breaker rules came into play. The District Court first had to determine where Husband had a "permanent home," which is defined as one available to him at all times. The District Court pointed out that the condo in Florida, as well as the two houses in Mexico, were continuously available to Husband. Therefore, the District Court looked to the next factor, where Husband had his "center of vital interests." It landed on Mexico because Husband spent more than 75 percent of his time there, voted there, kept his cars and personal belongings there, sought medical treatment there, maintained health insurance there, sourced his mobile phone there, received mail there, and maintained most of his social and family connections there.

5. Whether Husband Had to File FBARs Anyway

The DOJ did not seriously challenge Husband's position, or the District Court's conclusion, regarding Mexican residency under the tie-breaker rules of the Treaty. Instead, it essentially argued that they did not matter, because as a dual resident, Husband was still required to file an FBAR. The DOJ grounded its position in the Preamble to the FBAR regulations, which indicates that if a dual resident elects out of U.S. residency status under a treaty, such action does not relieve him from disclosing foreign accounts. The relevant text from the Preamble is as follows:

> FinCEN believes that individuals who elect to be treated as residents for tax purposes under Section 7701(b) should file FBARs only with respect to foreign accounts held during the period covered by the election. A legal permanent resident who elects under a tax treaty to be treated as a non-resident for tax purposes must still file the FBAR.[38]

The District Court dismissed this contention by the DOJ for one major reason; the Preamble was inconsistent with and inferior to higher authorities. In particular, the District Court explained that the DOJ's argument "does not refute the plain language of the FBAR regulations, which explicitly invoke provisions of Title 26, including the provision that requires consideration of an individual's status under an applicable tax treaty for the purpose of determining whether an individual is a U.S. person subject to FBAR filing."

The District Court's refusal to prioritize language in a Preamble over that in the regulations is consistent with judicial decisions in other contexts. Preambles might help resolve ambiguities or provide insight into concerns and objectives during the creation of rules, but they lack "operative effect."[39]

6. Whether Husband Owed FBAR Penalties

The District Court dispensed with some additional squabbles between the parties, which this article does not cover. It ultimately held in favor of Husband, liberating him from large FBAR penalties and upholding minor penalties for filing late Forms 8833. The District Court summarized its thoughts as follows:

> The Court finds [Husband] is a U.S. person, but ceased to be treated as a lawful permanent resident of the United States because he commenced to be treated as a resident of Mexico under the Treaty, did not waive the benefits of such Treaty, and notified the [IRS] of the commencement of such treatment. Thus, [Husband] is not subject to FBAR penalties … The Court further finds [Husband] untimely notified the [IRS] of the commencement of the treatment as a resident of Mexico, and thus is subject to penalties pursuant to [Section 6712] equal to $1,000 per failure to timely report his Treaty position, totaling $2,000 for 2012 and 2013.

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VI. Conclusion

The District Court decision in *Aroeste* is positive, of course. Husband no doubt cheered not having to pay $100,000 in FBAR penalties. Also, other taxpayers surely appreciated the rulings that filing late Forms 8833 does not eliminate the ability to claim a treaty-based position, and the APA prevents the IRS from issuing legislative rules by way of Notices. Things are not all rosy, though. Two Tax Court cases involving Husband are still pending; the IRS is seeking from him additional income taxes, tax-related penalties, and other sanctions for unfiled Forms 5471 (related to foreign corporations) and unfiled Forms 3520 and Forms 3520-A (related to foreign trusts).[40] Moreover, given the grounds on which the District Court ruled in favor of Husband, taxpayers were deprived of further insight into what constitutes "non-willfulness" and "reasonable cause" in the FBAR context. Husband will relish this discrete victory, and taxpayers will continue to follow this multi-faceted dispute to see what other new guidance it might generate.

ENDNOTES

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1 *A. Aroeste*, District Court, Southern District of California, Case No. 22-cv-682-AJB-KSC, Order on Joint Discovery Motion, Feb. 13, 2023; Order on Cross-Motions for Summary Judgment, Nov. 20, 2023; Andrew Valverde, "Mexican Treaty Dual Resident Scores Big Win in FBAR Dispute," 2023 Tax Notes Today Federal 224-9 (Nov. 22, 2023).

2 Hale E. Sheppard, *Does Residency Status under a Treaty Affect FBAR Duties? Court Ponders Potential "Escape Hatch" for Taxpayers*, 49, 2 INT'L TAX J. 21 (2023).

3 Code Sec. 7701(b)(1)(i); Reg. §301.7701(b)-1(b).

4 Code Sec. 7701(b)(6).

5 Reg. §301.7701(b)-1(b)(1).

6 Code Sec. 7701(b)(6), Flush Language. This was added by the Heroes Earnings Assistance and Relief Tax Act of 2008, Public Law 1110-245, Code Sec. 301(c)(2)(B); U.S. Joint Committee on Taxation, "Technical Explanation of H.R. 6081, the "Heroes Earnings Assistance and Relief Tax Act of 2008, JCX-44-08 (May 20, 2008) (emphasis added).

7 Reg. §301.7701(b)-7(a)(1).

8 The Treaty is comprised of the (i) Convention between the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with First, Second and Additional Protocol (1992); (ii) Treasury Department Technical Explanation of Convention and First, Second and Additional Protocol (1992); (iii) Second Additional Protocol (2003); (iv) Treasury Department Technical Explanation of the Second Additional Protocol (2003).

9 Treasury Department Technical Explanation of Convention and First, Second and Additional Protocol (1992) (emphasis added).

10 31 USC § 5321(a)(5)(B)(i) (as in effect after Oct. 22, 2004).

11 31 USC § 5321(a)(5)(C)(i), (D)(ii) (as in effect after Oct. 22, 2004).

12 31 CFR § 1010.350(a).

13 31 CFR § 1010.350(b)(2).

14 Code Sec. 7701(b)(1)(A)(i).

15 31 CFR § 1010.350(b)(2).

16 *Medical Emergency Care Associates, S.C.*, 120 TC 436, Dec. 55,154 (2003).

17 P.L. 95-600 (1978), Code Sec. 530.

18 Code Sec. 530(a)(1); Rev. Proc. 85-18, 1985-1 CB 518.

19 Code Sec. 530(a)(1); S. Rep. 95-1263, 95th Cong., 2nd Sess. (1978).

20 Rev. Rul. 81-224, 1981-2 CB 197; Rev. Proc. 85-18, 1985-1 CB 518; TAMs 8251012 (1982), 8302008 (1982), 8322005 (1983), 8403002 (1983), 8424005 (1984), 8703002 (1986).

21 *Medical Emergency Care Associates, S.C.*, 120 TC 436, 440, Dec. 55,154 (2003).

22 *Medical Emergency Care Associates, S.C.*, 120 TC 436, 443, Dec. 55,154 (2003).

23 Code Sec. 6721(a).

24 *Medical Emergency Care Associates, S.C.*, 120 TC 436, 444, Dec. 55,154 (2003).

25 Code Sec. 877A.

26 Code Sec. 877A generally applies to individuals who cease to be U.S. citizens or lawful permanent residents on or after June 17, 2008. *See* Notice 2009-85, IRB 2009-45, 598.

27 Code Sec. 877A(a)(1).

28 Code Sec. 877A(g)(1)(A); Notice 2009-85, IRB 2009-45, 598, Section 2(A).

29 Code Sec. 877A(g)(3)(B).

30 Code Sec. 7701(b)(6); *See also* Internal Revenue Service. International Practice Unit, "Determining Tax Residency Status of Lawful Permanent Resident." Dec. 15, 2014.

31 *Green Valley Investors, LLC*, 159 TC No. 5, Dec. 62,122 (2022).

32 *Green Valley Investors, LLC*, 159 TC No. 5, 15, Dec. 62,122 (2022).

33 *Green Valley Investors, LLC*, 159 TC No. 5, Dec. 62,122, footnote 22 (2022) (emphasis added).

34 *CIC Services, LLC*, DC-TN, 2023-1 USTC ¶50,162, 129 AFTR 2d 2022-1119 (2022).

35 *Mann Construction, Inc.*, CA-6, 2023-2 USTC ¶50,267, 27 F4th 1138 (2022); Kristen A. Parillo, "Mann Construction Didn't Vacate Listing Notice Nationwide," 2023 Tax Notes Today Federal 58-11 (Mar. 23, 2023).

36 *Liberty Global, Inc.*, DC-CO, 2022-1 USTC ¶50,134, 129 AFTR 2d 2022-1373 (2022).

37 CCA 202244010 (Nov. 4, 2022); "Microcaptive Transactions Are Adequately Disclosed on Form 8886," 2022 Tax Notes Today Federal 214-21 (Oct. 3, 2022); Internal Revenue Service, Policy Statement on the Tax Regulatory Process, March 8, 2019.

38 76 FR 10238 (Feb. 24, 2011).

39 *See, e.g.*, Congressional Research Service. Statutory Interpretation: General Principles and Recent Trends, Report 97-589 (Sep. 24, 2014), pg. 37; Lars Noah, *Diving Regulatory Intent: The Place for a Legislative History of Agency Rules*, 51, 2 HASTINGS LAW J. 255, 306314 (2000); Jennifer Nou, *Regulatory Textualism*, 65, 1 DUKE LAW J. 81 (Oct. 2015); Kent Roach, *The Uses and Audiences of Preambles in Legislation*, 47, 1 MCGILL LAW J. 129 (2001–2002).

40 *See A. Aroeste*, DC-CA, 2023-2 USTC ¶50,220, Tax Court Docket Nos. 13024-20 and 15372-20, Order, May 13, 2022.

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