Can Recent "Willful" FBAR Penalty Cases Against Taxpayers Help Tax Firms Fend Off Malpractice Actions?

*By Hale E. Sheppard**

I. Introduction

The courts have issued several high-profile decisions in recent years upholding big penalties against taxpayers for "willfully" failing to disclose their foreign accounts by filing a FinCEN Form 114 or its predecessor, Form TD F 90-22.1 ("FBAR"). In doing so, the courts have adopted some fairly extreme positions, finding that (i) the government is only required to prove willfulness by a preponderance of the evidence instead of by clear and convincing evidence; (ii) the government can establish willfulness by showing that a taxpayer either knowingly or recklessly violated the FBAR duty; (iii) recklessness might exist where a taxpayer fails to inform his accountant, return preparer, or other tax advisor about foreign accounts; (iv) recklessness might also exist where a taxpayer is "willfully blind," which occurs when the taxpayer does not read and understand every aspect of a Form 1040, including all schedules attached to the Form 1040 and any separate forms referenced in the schedules (including the FBAR); and (v) a taxpayer's motives for not filing an FBAR are irrelevant because nefarious, specific intent is not necessary to trigger the highest FBAR penalty.

This is bad news for taxpayers with hidden accounts, but could it be good news for tax and accounting firms being sued for malpractice in connection with unfiled FBARs and other international information returns? This is the novel issue addressed in *Miksic v. Boeckermann Grafstrom Mayer, LLC,* a case where the accountants attempted to deflect allegations of wrongdoing by taking a page from the government's playbook.[1] The accountants argued, among other things, that a taxpayer/client who "willfully" violates his FBAR duties (according to the ultra-broad definition of "willfulness" established by recent court decisions) cannot place blame on his accountants. This article examines this unique issue, which is likely to recur and evolve as the international rules become increasingly complex, tax and accounting firms commit errors more frequently, and the IRS devotes additional resources to international tax enforcement.

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II. Critical Background Information

The importance of *Miksic v. Boeckermann Grafstrom Mayer, LLC* is lost if one does not understand a few preliminary things: The significance of signing Form 1040 and the obligation to file international information returns.

A. Declaration on Form 1040

One must grasp what taxpayers are declaring to the IRS when they execute their annual Forms 1040. Taxpayers must sign and date their Forms 1040 in order for them to be valid. Unless they pay very close attention to the small print, most taxpayers likely are unaware that they are making the following broad, sworn statement to the U.S. government:

> Under penalties of perjury, I declare that *I have examined this return and accompanying schedules and statements*, and to the best of my knowledge and belief, they are true, correct, and accurately list all amounts and sources of income I received during the tax year.

B. Obligation to File International Information Returns

One must also possess some knowledge about the duties to file international information returns. *Miksic v. Boeckermann Grafstrom Mayer, LLC* involves FBARs, Forms 3520 (*Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*), Forms 3520-A (*Annual Information Return of Foreign Trust with a U.S. Owner*), and Forms 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*). These returns are addressed below.

1. Duty to Report Foreign Financial Accounts—FBARs

Congress enacted the Bank Secrecy Act in 1970.[2] One purpose of this legislation was to require the filing of certain reports, like the FBAR, where doing so would be helpful to the U.S. government in carrying out criminal, tax, and regulatory investigations.[3] Among the important provisions of the Bank Secrecy Act is 31 USC §5314. This statute, in conjunction with the corresponding regulations and FBAR Instructions, requires the filing of an annual FBAR in cases where (i) a U.S. person, including U.S. citizens, U.S. residents, and domestic entities, (ii) had a direct financial interest in, had an indirect financial interest in, or had signature authority or some other type of authority over (iii) one or more financial accounts (iv) located in a foreign country (v) whose aggregate value exceeded $10,000 (vi) at some point during the year at issue.[4]

Congress enacted new FBAR penalty provisions in 2004.[5] The IRS may now impose a penalty on any U.S. person who fails to file an FBAR when required, period.[6] In the case of non-willful violations, the maximum penalty is $10,000 per violation,[7] but the IRS cannot assert this penalty if the violation was due to "reasonable cause."[8] Higher penalties apply where willfulness exists. Specifically, in situations where a taxpayer deliberately failed to file an FBAR, the IRS can assert a penalty equal to $100,000 or 50 percent of the balance in the account at the time of the violation, whichever amount is larger.[9] Given the astronomical balances in some unreported accounts, and given that the government can grab half that amount each year when taxpayers act willfully, FBAR penalties can be enormous.

Generally, U.S. citizens and U.S. residents have four main duties when they hold a reportable interest in a foreign financial account: (i) report all income deposited into and/or generated by the account on the relevant federal income tax return (*i.e.*, Form 1040), (ii) check the "yes" box in Part III of Schedule B to Form 1040 to disclose the existence and location of the account, (iii) electronically file an FBAR, and (iv) report the account on a Form 8938 (*Statement of Specified Foreign Financial Assets*), depending on the facts.

With respect to the second duty described above, Part III of Schedule B to Form 1040 contains a foreign-account inquiry and a cross-reference. The IRS has slightly modified and expanded this language over the years, with the materials for 2016 stating the following:

> At any time during 2016, did you have a financial interest in or a signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? *See instructions. If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements*. If you are required to file a FinCEN Form 114, enter the name of the foreign country where the financial account is located.

2. Duty to Report Foreign Trusts—Form 3520 and Form 3520-A

Code Sec. 6048 requires the filing of a Form 3520 and/or Form 3520-A in certain situations involving foreign trusts.

A Form 3520 generally must be filed in three circumstances. First, the responsible party generally must file a Form 3520 within 90 days of certain "reportable events,"

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such as the creation of any foreign trust by a U.S. person, the transfer of any money or other property (directly or indirectly or constructively) to a foreign trust by a U.S. person, and the death of a U.S. person if the decedent was treated as the "owner" of any portion under the grantor trust rules or if any portion of the foreign trust was included in the gross estate of the decedent.[10] Second, a U.S. person ordinarily needs to file a Form 3520 if he receives during a year (directly or indirectly or constructively) any distribution from a foreign trust.[11] Finally, if a U.S. person receives, as a gift or inheritance, from an individual who is not a U.S. person, property (including money) totaling more than $100,000 during a given year, then he must file a Form 3520.[12]

For its part, a Form 3520-A normally must be filed if, at any time during the relevant year, a U.S. person is treated as the "owner" of any portion of the foreign trust under the grantor trust rules.[13]

Part III to Schedule B of Form 1040 presents the following question about foreign trusts:

> During 2016, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? *If "Yes," you may have to file Form 3520. See instructions on back*.

The IRS's Instructions to Schedule B expand on the foreign trust concept, providing the following guidance:

> Line 8. If you received a distribution from a foreign trust, you must provide additional information. For this purpose, a loan of cash or marketable securities generally is considered to be a distribution. *See Form 3520 for details*. If you were the grantor of, or transferor to, a foreign trust that existed during 2016, you may have to file Form 3520. Don't attach Form 3520 to Form 1040. Instead, file it at the address shown in its instructions. If you were treated as the owner of a foreign trust under the grantor trust rules, you are also responsible for ensuring that the foreign trust files Form 3520-A. Form 3520-A is due on March 15, 2017, for a calendar year trust. *See the instructions for Form 3520-A for more details*.

3. Duty to Report Foreign Corporations—Form 5471

Four categories of U.S. persons who are shareholders, officers, and/or directors of certain foreign corporations must file a Form 5471 with the IRS[14]:

- A Category 1 filer no longer exits.
- A Category 2 filer is a U.S citizen or U.S. resident who is either an officer or director of a foreign corporation in which a U.S. person has acquired during the relevant year (i) 10 percent or more of the stock in the foreign corporation or (ii) an additional 10 percent or more of the stock in the foreign corporation.
- A Category 3 filer encompasses several types of persons, including any U.S. person who acquires stock in a foreign corporation, and when such stock is added to any stock that the U.S. person already owns, the U.S. person owns 10 percent or more of the foreign corporation.
- A Category 4 filer is a U.S. person who had "control" of a foreign corporation for at least 30 consecutive days during the relevant year.
- A Category 5 filer is a "U.S. shareholder" who/that owns stock in a controlled foreign corporation for at least 30 consecutive days during the relevant year and who/that held the stock on the last day of the relevant year.[15]

Form 5471 is filed as an attachment to the U.S. person's federal income tax return.[16] If a person fails to file a Form 5471, files a late Form 5471, or files a "substantially incomplete" Form 5471, then the IRS may assert a penalty of $10,000 per violation, per year.[17] This standard penalty increases at a rate of $10,000 per month, to a maximum of $50,000, if the problem persists after notification by the IRS.[18] The IRS will not impose penalties if there was "reasonable cause" for the violation.[19]

III. Recent Cases Addressing "Willful" FBAR Penalties

Along with comprehending the basics about FBARs, Forms 3520, Forms 3520-A, and Forms 5471, one must be current on legal affairs regarding the concept of "willfulness" in order to appreciate the importance of *Miksic v. Boeckermann Grafstrom Mayer, LLC*. Federal courts have issued four recent decisions in civil FBAR cases, each favoring the U.S. government and creating an expansive definition of the term "willful" non-compliance. These four decisions are reviewed below, overlooking the non-critical facts and legal/tax positions.[20]

A. *Williams*—First Case

The first case concerning the imposition of a "willful" FBAR penalty was *Williams*, a multi-year, multi-issue case, with stops in the U.S. Tax Court ("*Williams I*"),[21] the U.S. District Court ("*Williams II*"),[22] and, ultimately, the Fourth Circuit Court of Appeals ("*Williams III*").[23] Here, we address only *Williams III*, in an abbreviated fashion, because of its focus on the issue of "willfulness."

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1. The Government's Arguments

The government's main position on appeal was that the District Court erred, as a matter of law, in determining which elements must be present to prove "willfulness" in the context of a civil FBAR violation, as opposed to a criminal one.[24] Citing various decisions from the Supreme Court and appellate courts, the government maintained that, where willfulness is a condition of civil liability: (i) the concept of willfulness is broad enough to cover both reckless and knowing violations; (ii) it is not necessary to prove that the taxpayer had an improper motive or bad purpose to show willfulness; and (iii) evidence of a taxpayer's actions to conceal income, in conjunction with the taxpayer's failure to seek information about foreign account reporting requirements, suffices to show willfulness.[25] The government argued that the District Court arrived at its conclusion that the taxpayer did not willfully violate the FBAR rules because of its belief that the taxpayer lacked "motivation to willfully conceal" the foreign accounts after November 2000, *i.e.*, after the time that the Swiss authorities had interviewed the taxpayer and frozen the relevant accounts at the request of the U.S. government. According to the government, the issue of whether the taxpayer had an improper motive for not filing a timely FBAR is not determinative of the willfulness question, so the District Court erred in basing its findings on the supposed absence of improper motivation.[26]

2. Decision by the Fourth Circuit Court of Appeals

The Fourth Circuit Court of Appeals began its analysis by criticizing the legal standards on which the District Court made its taxpayer-friendly decision. In particular, the Court of Appeals indicated that the District Court should not have focused on the taxpayer's motivation for not filing a timely FBAR, and, inasmuch as it did, the District Court made an impermissible leap.[27]

Then, noting various judicial precedents in the *criminal* arena, the Court of Appeals went on to explain what it considered the proper legal standard to be applied. The Court of Appeals explained that (i) willfulness can be inferred from taxpayer conduct designed to conceal financial information, and (ii) willfulness can also be inferred from a taxpayer's conscious effort to avoid learning about reporting requirements, *i.e.*, "willful blindness" exists where a taxpayer knew of a high probability of a tax liability yet intentionally avoided the pertinent facts.[28] In situations where willfulness is a condition for *civil* liability, the Court of Appeals indicated that this covers both knowing violations and reckless violations of a standard.[29] It then clarified that the taxpayer's actions or inactions in this case constituted, at a minimum, "reckless conduct, which satisfies the proof requirement [for civil FBAR violations]."[30]

Sparing no punches, the Court of Appeals stated that "the evidence as a whole leaves us with a definite and firm conviction that the district court clearly erred in finding that [the taxpayer] did not willfully violate [the FBAR rules]."[31] The Court of Appeals supported its decision on several grounds, including the following. The Court of Appeals pointed out that the taxpayer signed his Form 1040 for 2000 under penalties of perjury, thereby swearing that he had examined the Form 1040, as well as all schedules and statements attached to such Form 1040, and that all items were true, accurate, and complete. The Court of Appeals then explained that taxpayers who execute a tax return are deemed to have constructive knowledge of such return, and the taxpayer in this case was no exception to that principle. According to the Court of Appeals, the instructions on Line 7a in Part III of Schedule B to the 2000 Form 1040 (*i.e.*, "see instructions and exceptions and filing requirements for Form TD F 90-22.1") put the taxpayer on inquiry notice of the FBAR duty.[32] The taxpayer testified that he did not review his 2000 Form 1040 in general or read the information in Schedule B in particular. The Court of Appeals interpreted this inaction as conduct designed to conceal financial information, a conscious effort to avoid learning about reporting requirements, and "willful blindness" to the FBAR requirement.[33]

B. *McBride*—Second Case

Williams III sparked much controversy and confusion, but the debate over its significance did not last long because the second case addressing civil "willful" FBAR penalties, *J. McBride*, was decided less than four months later.[34]

The majority of the elements were undisputed, leaving the focus squarely on the question of whether Mr. McBride had "willfully" failed to file FBARs for 2000 and 2001. Indeed, 18 pages of the District Court's 25-page legal analysis were devoted solely to the "willfulness" issue. Breaking this into digestible pieces is thus required.

1. Standard for Determining Willfulness in Civil FBAR Cases

Adhering to a line of reasoning presented earlier by the Fourth Circuit Court of Appeals in *Williams III*, the District Court indicated that "willfulness" in this context includes not only knowing FBAR violations but also reckless ones.[35] The District Court, citing to precedent from the Supreme Court as well as *Williams III*, then explained that "willful blindness" satisfies the willfulness standard in both criminal and civil contexts.[36] Finally, the

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District Court noted that willful intent can be proven by circumstancial evidence, and reasonable inferences can be drawn from the facts because direct proof of a taxpayer's intent is rarely available.[37]

2. Taxpayer Had Constructive Knowledge of the FBAR Requirement

The District Court next turned to Mr. McBride's level of knowledge of the FBAR filing requirement. Its ultimate conclusion on this issue is remarkably clear, but the District Court's analysis meandered somewhat. The District Court cited the general rule that all taxpayers are charged with knowledge, awareness, and responsibility for all tax returns executed under penalties of perjury and filed with the IRS. The District Court then underscored that the only case thus far to examine willfulness in the context of civil FBAR penalties was *Williams III* and summarized the government-favorable holdings in that case. The District Court next recognized that several cases stand for the proposition that the taxpayer's signature on a tax return does not, by itself, prove that the taxpayer had knowledge of the contents of the return. The District Court distinguished such cases, though, by emphasizing that the language therein about "knowledge of the contents of the return" refers to the taxpayer's awareness about specific figures on the return. When dealing with the FBAR situation, the District Court pointed out that "knowledge of what instructions are contained within the form is directly inferable from the contents of the form itself, even if it were blank."[38] Fortifying its position, the District Court went on to cite and quote various criminal cases, including a criminal FBAR case, where the courts attributed to the taxpayer knowledge of the contents of a return based solely on the taxpayer's signature on the tax return.[39] The District Court, eliminating any ambiguity about its stance on constructive knowledge, rendered the following holding:

> Knowledge of the law, including knowledge of the FBAR requirements, is imputed to McBride. The knowledge of the law regarding the requirement to file an FBAR is sufficient to inform McBride that he had a duty to file [an FBAR] for any foreign account in which he had a financial interest. McBride signed his federal income tax returns for both the tax year 2000 and 2001. Accordingly, McBride is charged with having reviewed his tax return and having understood that the federal income tax return asked if at any time during the tax year he held any financial interest in a foreign bank or financial account. The federal income tax return contained a plain instruction informing individuals that they have the duty to report their interest in any foreign financial or bank accounts held during the taxable year. McBride is therefore charged with having had knowledge of the FBAR requirement to disclose his interest in any foreign financial or bank accounts, as evidenced by his statement at the time he signed the returns, under penalty of perjury, that he read, reviewed, and signed his own federal income tax returns for the tax years 2000 and 2001, as indicated by his signature on the federal income tax returns for both 2000 and 2001. As a result, McBride's willfulness is supported by evidence of his false statements on his tax returns for both the 2000 and the 2001 tax years, and his signature, under penalty of perjury, that those statements were complete and accurate.[40]

3. Taxpayer Had Actual Knowledge of the FBAR Requirement

More importantly, explained the District Court, Mr. McBride had actual knowledge of the FBAR filing requirement. The District Court identified four items in support of this determination. First, Mr. McBride read pamphlets and other promotional materials, which explained the duty to report an interest in foreign financial accounts. Second, Mr. McBride testified at trial that the purpose of adopting the plan was to avoid disclosure of certain assets and the payment of taxes thereon. Third, Mr. McBride engaged in an evasive course of conduct with the revenue agent during the audit, lying about certain facts and withholding information and documentation. Finally, Mr. McBride made statements at trial that contradicted his earlier sworn statements during the discovery phase of the trial.

4. Taxpayer Acted with Reckless Disregard or Willful Blindness

The District Court identified a long list of items that, together, supposedly demonstrate that Mr. McBride either willfully or recklessly disregarded the obvious risk of tax-related problems (including FBAR violations) because of his participation in the plan. These items included the following: (i) Mr. McBride reviewed the memo and enclosed newspaper article from an accountant before the relevant years expressing concern about the validity of the plan; (ii) Mr. McBride was already concerned about the promoters of the plan well before he filed his Form 1040 for 2000; (iii) Mr. McBride knew that the purpose of the plan was to avoid taxation and certain reporting requirements; (iv) Mr. McBride knew the plan involved the use of foreign entities held by nominees; (v) Mr. McBride's initial impression of the plan was that it constituted "tax evasion"; (vi) Mr. McBride did not seek a legal opinion or guidance from outside, independent counsel; (vii) Part III of Schedule B to Form 1040 contained a "plain instruction" regarding

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disclosure of foreign accounts; and (viii) Mr. McBride did not discuss with or provide information to either of his accountants regarding the plan.[41]

5. Edging Toward Strict Liability

Although not entirely clear, it appears that Mr. McBride argued that he was aware of the FBAR filing requirement but decided not to comply because of his belief, based to a certain extent on the analysis by his accountant, that he did not possess a sufficient interest in the foreign accounts under the peculiar FBAR attribution rules. As the culimination to its 18-page analysis of the "willfulness" issue, the District Court effectively concluded that if a taxpayer executes and files his Form 1040, then all failures to file FBARs, regardless of the validity of the taxpayer's rationale for not filing, are willful and vulnerable to maximum sanctions:

> [E]ven if the decision not to disclose McBride's interest in the foreign accounts was based on McBride's belief that he did not hold sufficient interest in those accounts to warrant disclosure, that failure to disclose those interests would constitute willfulness. Because McBride signed his tax returns, he is charged with knowledge of the duty to comply with the FBAR requirements. Whether McBride believed [that his accountant] had determined that a disclosure was not required is irrelevant in light of [the applicable case], which states that the only question is whether the decision not to disclose was voluntary, as opposed to accidental. The government does not dispute that McBride's failure to comply with FBAR [sic.] was the result of his belief that he did not have a reportable financial interest in the foreign accounts. However … the FBAR requirements did require that McBride disclose his interest in the foreign accounts during both the 2000 and 2001 tax years. As a result, McBride's failure to do so was willful.[42]

C. *Bussell*—Third Case

The third case involving civil willful FBAR penalties was *Bussell*.[43] In that case, the District Court determined that the U.S. government was entitled to summary judgment because the taxpayer agreed not to dispute the contentions that she willfully failed to file an FBAR reporting the relevant foreign account for 2006, and she willfully failed to report the existence of such account in Part III of Schedule B of Form 1040 for 2006. As if the concession by the taxpayer were insufficient, the District Court proceeded to explain that the evidence in the case also confirmed willfulness and that, in the context of civil FBAR penalties, the concept of willfulness encompasses "reckless disregard of a statutory duty":

> Moreover, the record demonstrates that Defendant was willful in failing to report her financial interest in the Subject Account. Although § 5321(a)(5) does not define willfulness, courts adjudicating civil tax matters have held that an individual is willful where he/she exhibits a reckless disregard of a statutory duty. *See Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 57 (2007). Here, Defendant clearly acted with reckless disregard. Defendant has been convicted of bankruptcy fraud and tax fraud for her failure to disclose offshore accounts, and Defendant has been subjected to civil penalties for her failure to disclose offshore bank accounts. Defendant is aware of her statutory duty to report offshore accounts. Nevertheless, Defendant filed her 2006 tax return without reporting the Subject Account, and without filing an FBAR Form. Instead of reporting the Subject Account, Defendant liquidated the Subject Account shortly after filing her tax returns [and moved the funds to yet another undisclosed foreign bank]. Accordingly, the Government's Motion is granted to the extent that Defendant willfully failed to report her interest in the Subject Account for 2006.[44]

D. *Bohanec*—Fourth Case

The most recent case involving civil FBAR penalties, *Bohanec*, was decided in December 2016.[45] The facts of the case, as well as the positions of the parties, have been cobbled together using various sources.[46]

1. Positions Advanced by the Parties

The legal/tax positions advanced by the Bohanecs and the U.S. government did not contain any surprises, largely adhering to the arguments previously advanced in *Williams III* and *McBride*. For example, the attorneys for the Bohanecs highlighted the following points: (i) The taxpayers are elderly and have little formal education; (ii) They had never even heard of the FBAR filing requirement by June 30, 2008; (iii) The U.S. government must prove, by clear and convincing evidence, and not by merely the preponderance of the evidence, that the Bohanecs committed a "voluntary, intentional violation of a known legal duty"; (iv) Because the Bohanecs never filed any Forms 1040 after 1998 until they started participating in the Offshore Voluntary Disclosure Program ("OVDP") over a decade later, they did not affirmatively and inaccurately

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check the "no" box in response to the foreign-account question in Part III of Schedule B of Form 1040, and they were not placed on some type of constructive or inquiry notice of the FBAR by way of the cross-reference in Part III of Schedule B; (v) *Williams III* and *McBride* were wrongly decided with respect to the proper scope of "willfulness" in the context of FBAR penalties; and (vi) The Bohanecs did not "willfully" violate their FBAR duty for 2007.

The U.S. government seemed to appreciate that the evidence tending to show that the Bohanecs acted willfully regarding the FBAR duty was considerably weaker than the proof of the improprieties of the taxpayers in *Williams III*, *McBride*, and *Bussell*. Likely for this reason, the U.S. government did not attempt to argue that the Bohanecs had actual knowledge of the FBAR duty and deliberately chose to ignore it. The government argued, instead, that the Bohanecs were "reckless" and "willfully blind" about FBARs, stating that they "consciously avoided learning of the obligations of U.S. citizens concerning foreign accounts" and "[i]f the Bohanecs did not understand their obligations under the Bank Secrecy Act of 1970, it is because they chose not to inquire about them and preferred to remain in ignorance in circumstances in which non-reckless individuals would have at least inquired as to the obligations of a U.S. citizen regarding foreign accounts."

2. Decision by the District Court

The District Court first recited the applicable statutes and regulations mandating FBAR filing. The District Court then underscored that the relevant authorities do not contain a definition of "willfulness," such that one must look to court precedent and other sources. Next, the District Court quickly dispensed with the position advanced by the Bohanecs that willfulness only encompasses intentional violations of known legal duties because no court has adopted this argument in the civil FBAR penalty context and because the Bohanecs cited in support of their position only criminal cases (not civil penalty cases) wherein the defendants must have so-called specific intent to be convicted. Referencing *Williams III*, *McBride*, and *Bussell*, as well as a Supreme Court decision, the District Court determined that the concept of "willfulness" for civil FBAR penalty purposes extends to reckless disregard of a statutory duty.

The District Court ultimately concluded that the U.S. government proved, by a preponderance of the evidence, that the Bohanecs were "at least recklessly indifferent to a statutory duty" for the following reasons:

- They were reasonably sophisticated business people, as evidenced by the fact that they negotiated highly favorable deals with the exclusive U.S. distributor of certain camera products; they circumvented supply limitations by making an arrangement with a Canadian distributor; they developed a worldwide reputation and conducted business with customers all over the globe; they always used a return preparer to complete the U.S. tax returns for their camera business; they secured two patents without professional assistance; and they managed the construction of a home in Mexico.
- They were at least reckless, if not willfully blind, about their reporting obligations related to the UBS account, as demonstrated by the fact that they did not provide UBS with their home address in the United States; never told anyone about the account (other than their children); never consulted an attorney, accountant, or banker about potential requirements related to the UBS account; and never used a bookkeeper or otherwise kept organized books once the UBS account had been opened.
- Their claims that they were unaware of or misunderstood their FBAR duties lacked credibility because Part III of Schedule B of their Form 1040 from 1998 put them on notice that they needed to file an FBAR; they deposited pre-tax sales commissions into the UBS account and directed certain foreign customers to do the same; and they made several transfers of funds from the UBS account to other foreign and domestic accounts.
- The Bohanecs made several misrepresentations to the IRS in connection with the 2009 OVDP, including stating that all funds in the UBS account were comprised of after-tax amounts, filing "false" Forms 1040 for 2003 through 2008 that omitted income from e-Bay sales, and filing FBARs for 2003 through 2008 that did not declare foreign accounts in Austria and/or Mexico.

Based on the preceding, the District Court held that the FBAR violation for 2007 was "willful," such that the maximum penalty should apply.

IV. Malpractice Case Involving International Penalties

The facts in *Miksic v. Boeckerman Graftstrom Mayer, LLC* are somewhat murky. Below is a summary of the relevant portions of the case, prepared from various sources.[47]

A. Overview of Relevant Facts

Mr. Miksic was born, raised, and primarily educated in Croatia. He graduated from a Croatian university with a degree in mechanical engineering. In 1973, when he was

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approximately 25 years old, he moved to the United States, started a business, Cortec Corporation, and eventually became a U.S. citizen. He is not an accountant, enrolled agent, financial planner, or any other type of professional with specific skills, education, or training about the U.S. tax system. Therefore, he retained a U.S. accounting firm, Boeckerman Graftstrom Mayer, LLC ("Accounting Firm").[48] He began working with the Accounting Firm in 1978, and his primary contact at the firm for nearly 30 years retired around 2006, at which point others at the Accounting Firm took over the relationship.

The Accounting Firm prepared Forms 1040 for Mr. Miksic and Forms 1120-S for Cortec Corporation for decades, seemingly without incident. The problems began, and the longstanding professional relationship started to sour, when the IRS initiated an audit of Cortec Corporation in 2010. This audit quickly spread to Mr. Miksic personally.

The issues and questions raised by Miksic v. Boeckermann Grafstrom Mayer, LLC *are likely to recur and evolve as the international rules become more complex, professional firms commit errors with greater frequency, and the IRS devotes additional resources to international tax enforcement.*

The IRS audit uncovered that Mr. Miksic owned (i) at least two Croatian entities, EcoCortec and Cortec Hrvatska, for which he had not filed annual Forms 5471; (ii) a Liechtenstein trust, the "Rust Foundation," for which he had not filed Forms 3520 and Forms 3520-A; and (iii) various foreign accounts, in Croatia and Switzerland, for which he had not filed FBARs. It appears that, as part of the audit process, Mr. Miksic retained new accountants and attorneys to prepare and submit to the IRS all missing international information returns, arguing in each instance that the past non-compliance should not be penalized because it was the result of "reasonable cause."

As anyone who works with the IRS on international issues would anticipate, the IRS asserted significant sanctions for the reporting violations, including $60,000 in Form 5471 penalties, approximately $540,000 in Form 3520 and Form 3520-A penalties, and over $1.4 million in FBAR penalties on grounds that the non-disclosure of foreign accounts was "willful." Mr. Miksic claims that the total penalties were substantially higher than this, reaching over $2.1 million.[49] The District Court, for its part, simply acknowledged the confusion: "The Court was unable to determine, based on the parties' briefings and a thorough review of the record, the exact amount of IRS penalties. The parties themselves offered different amounts … and the Court was unable to resolve the discrepancies based on the parties' citations to the record."[50]

Regardless of the correct amount of the penalties, Mr. Miksic took the position that the Accounting Firm should be responsible for paying them. He filed a lawsuit raising the following allegations against the Accounting Firm: accounting malpractice, breach of contract, unjust enrichment, negligent misrepresentation, and breach of fiduciary duty. Mr. Miksic sought damages for the international information return penalties, back taxes, legal fees to defend against the IRS audit, and legal fees to bring the lawsuit against Accounting Firm.

B. Main Positions of Accounting Firm

The Accounting Firm defended itself by making the following points, and more. First, during the relevant years, 2005 through 2010, the Accounting Firm sent Mr. Miksic an engagement letter, which clarified the following:

> We will prepare your [insert relevant year] federal and requested state income tax returns from information that you will furnish to us. We will not audit or otherwise verify the data you submit, although it may be necessary to ask you for clarification of some of the information. We will furnish you with questionnaires and/or worksheets to guide you in gathering the necessary information. Your use of such forms will assist in keeping pertinent information from being overlooked. *It is your responsibility to provide all the information required for the preparation of complete and accurate returns*. You should retain all the documents, cancelled checks, and other data that form the basis of income and deductions. These may be necessary to prove the accuracy and completeness of the returns to a taxing authority. *You have the final responsibility for the income tax returns and, therefore, you should review them carefully before you sign them*.

Second, the Accounting Firm also sent Mr. Miksic a tax questionnaire each year, which contained the following specific questions about foreign income, foreign taxes, foreign trusts, and foreign accounts: "Did you have any foreign income or pay any foreign taxes during the year?"

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and "Were you a grantor or transferor for a foreign trust, have an interest in or signature or other authority over a bank account, securities account, or other financial account in a foreign country?"

Third, Mr. Miksic did not complete the annual tax questionnaire and did not personally handle the return-preparation issues. He delegated these duties to the chief financial officer for Cortec Corporation, who was supposedly aware of all international aspects and instructed to remit all appropriate data to the Accounting Firm. Mr. Miksic did not review the Forms 1040 or Forms 1120-S before he signed them because, from his perspective, his time was too valuable and he lacked the requisite patience. He also neglected to instruct the chief financial officer to conduct this review, a reality that the chief financial officer tried to characterize as a "miscommunication." Whatever you call it, it seems that nobody outside the Accounting Firm was reviewing the tax returns for accuracy and completeness before they were filed with the IRS.

Fourth, the Accounting Firm specifically asked Mr. Miksic, through the chief financial officer, for information about foreign financial accounts before the FBAR filing deadlines for 2006, 2008, and 2010. Mr. Miksic only revealed the existence of certain accounts in Croatia, omitting the Swiss account and others.

Fifth, Mr. Miksic never mentioned to the Accounting Firm the existence of the Rust Foundation in Liechtenstein or the related account with UBS in Switzerland, despite the fact that he took approximately $1 million in distributions from this foreign trust from 2005 through 2008, and that he received letters from the Swiss Federal Tax Administration and a Swiss law firm about potential U.S. tax duties and consequences of the foreign trust/account arrangement.

Sixth, the IRS has already determined that Mr. Miksic's failure to file accurate FBARs was "willful." This was largely based on the fact that (i) Mr. Miksic told the IRS during the audit that he did not disclose the foreign accounts to the Accounting Firm because it did not ask about them; (ii) the FBARs filed with the IRS as part of the audit was not even correct, with certain accounts missing; and (iii) Mr. Miksic had actual knowledge of his FBAR duty because he filed one for 2006 and perhaps earlier years.

Seventh, the Accounting Firm maintained that, even if it were at fault, Mr. Miksic would still be unable to recover damages because he, too, was a cause of the problem by willfully ignoring his duty to file FBARs, Forms 3520, and Forms 3520-A. The attorneys for the Accounting Firm explained this argument in the following manner, citing to *Williams III*, *McBride*, and other recent cases for support:

> By signing his tax documents, Miksic had at least constructive knowledge of their contents. Miksic's signature on his 1040 Form is *prima facie* evidence that, at a minimum, he understood questions 7a and 8 in Part III, "Foreign Accounts and Trusts," of Schedule B for his Form 1040, and the directions under those questions regarding any FBAR and Forms 3520 filing requirements. Miksic therefore knew (or had, at a minimum, constructive knowledge) about his FBAR filing requirements for his foreign accounts, and his Form 3520 and 3520A filing requirements for the Rust Foundation before he filed his taxes for tax years 2005 through 2010 … Miksic's own fault and willful misconduct bars any recovery under the fundamental doctrine of *in pari delicto*.[51]

C. Main Points by Mr. Miksic

The briefing of the issues was fairly extensive in the case, and Mr. Miksic advanced several arguments as to why the Accounting Firm should be liable for covering his bill with the IRS. These included, but were not limited to, the following: (i) The Accounting Firm did not follow-up with Mr. Miksic about the annual tax questionnaires that he never completed and returned; (ii) The Accounting Firm never specifically asked him about foreign accounts; (iii) The Accounting Firm knew or should have known about the foreign accounts because it filed an FBAR for 2006 for Mr. Miksic and because the Accounting Firm checked the "yes" box in response to the foreign-account inquiry in Part III of Schedule B to Forms 1040 for 2008 and 2009, identifying "Croatia" as the location of the accounts; (iv) As evidenced by the financial statements that the Accounting Firm prepared for Cortec Corporation as part of its audit services, the Accounting Firm was aware of the existence of EcoCortec in Croatia, yet failed to advise Mr. Miksic to file Forms 5471 reporting this and any other foreign corporation; and (v) The Accounting Firm never specifically inquired about foreign trusts, and Mr. Miksic did not understand that the "Rust Foundation" would be considered a trust.

D. Opinion of the District Court

As explained above, Mr. Miksic sought damages for the international information return penalties (*e.g.*, FBARs, Forms 3520, Forms 3520-A, and Forms 5471), back taxes, legal fees to defend against the IRS audit, and legal fees to bring the lawsuit against the Accounting Firm. In partially granting the Accounting Firm's motion for summary judgment, the District Court indicated in its

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memorandum opinion and order that Mr. Miksic cannot recover penalties related to Forms 5471 (because the IRS had already abated them in full), back taxes, or legal fees related to the current lawsuit against the Accounting Firm. What remains in dispute, therefore, are (i) the penalties concerning FBARs, Forms 3520, and Forms 3520-A, totaling around $1.95 million, and (ii) legal fees to defend against the IRS audit.

The most significant aspect of the District Court's decision is perhaps the most obscure; it is found in footnote 8, the last one. The consequence of this placement means that it likely has been overlooked by many. As explained above, the Accounting Firm defended itself using the doctrine of *in pari delicto*, which would preclude recovery by Mr. Miksic because of his own contributory wrongful conduct. The Accounting Firm argues that this doctrine applies because (i) Mr. Miksic failed to review his Forms 1040 before signing them to identify any missing or inaccurate data; (ii) he withheld information about the foreign accounts and the ownership of the Rust Foundation, even after receiving letters from the Swiss Federal Tax Administration and a Swiss law firm about potential U.S. tax obligations; and (iii) he ultimately signed the Forms 1040 under penalties of perjury, which included the inquiries and information in Part III of Schedule B about foreign accounts and foreign trusts. In short, in an effort to deflect responsibility for penalties and fees, the Accounting Firm sounded a lot like the U.S. government in *Williams III*, *McBride*, *Bussell*, and *Bohanec*, claiming that Mr. Miksic was engaged in "willful" misconduct by signing Forms 1040 without first scouring each page, schedule, statement, and cross-reference, particularly those related to foreign accounts and foreign trusts.

The District Court indicated that it could not rule on the motion for summary judgment at this time about the applicability of *in pari delicto* or its impact on the liability for penalties concerning FBARs, Forms 3520, and Forms 3520-A because there was a genuine dispute of material fact on the relevant issues.

V. Interesting Issues

Miksic v. Boeckermann Grafstrom Mayer, LLC, like most tax cases, contains interesting issues, many of which go unnoticed. Several of these obscure issues are discussed below.

A. Accounting Firm Borrows One from the IRS's Playbook

Undoubtedly, the most notable aspect of the case is that the Accounting Firm presents a novel argument, attempting to twist to its advantage one of the positions that the government has successfully raised in recent civil FBAR penalty cases.

As indicated above, the Accounting Firm contended that it should be free from financial responsibility, pursuant to the doctrine of *in pari delicto*, because Mr. Miksic "willfully" violated his duties. This suggested the Accounting Firm is evidenced by the fact that Mr. Miksic signed Forms 1040 every year, the jurat on Forms 1040 indicated that he had reviewed each page, schedule (including Schedule B containing the specific questions about foreign accounts and foreign trusts), and statement, yet he did not ask Accounting Firm any questions about foreign accounts and/or trusts, did not provide to Accounting Firm all information about foreign accounts and/or trusts, and did not file FBARs, Forms 3520, and Forms 3520-A. In other words, the Accounting Firm adopted the government-favorable holdings in *Williams III*, *McBride*, *Bussell*, and *Bohanec*, trying to apply them as a defense to malpractice liability.

Interestingly, the District Court stated, on the last page of the memorandum opinion and order, way down in footnote 8, that it would *not* accept the Accounting Firm's argument because the FBAR cases cited were not directly on point:

> [Accounting Firm] also contends that Miksic's signature on his tax return serves as his constructive notice of the contents and is *prima facie* evidence that he understood questions on his tax return regarding FBAR and Form 3520 filing requirements. [Accounting Firm] cites to *United States v. Williams*, 489 Fed. Appx. 655, 659 (4th Cir. 2012) (finding that a signature was *prima facie* evidence the taxpayer reviewed the return and that line 7a put the taxpayer on inquiry notice of FBAR requirements); *United States v. McBride*, 908 F. Supp. 2d 1186, 1208 (D. Utah 2012) (finding as a matter of law that a taxpayer who signs his return is charged with having reviewed that return and with having knowledge of his foreign account disclosure requirement); *Thomas v. UBS AG*, No. 11–4798, 2012 WL 2396866, at *5 n. 2 (N.D. Ill. June 21, 2012) (finding that "[t]he simple yes-or-no question of Schedule B makes it inconceivable that [a taxpayer] could have misinterpreted this question"). *However, none of these cases were accounting malpractice cases or discussed the in pari delicto defense, and thus, they do not assist the Court in making such a determination. These cases instead generally involved whether the IRS could assess penalties against taxpayers for willfully violating the Internal Revenue Code section requiring an annual report of foreign financial interests.*

B. Just One of Many Malpractice Cases to Come

Regardless of the ultimate outcome, *Miksic v. Boeckermann Grafstrom Mayer, LLC* is noteworthy because it constitutes just one of many, many similar cases that likely will arise in the future. The field of international tax is undeniably complex now; it gets more convoluted each day, and with increasing global mobility, the number of taxpayers with international issues is escalating quickly. Combine this with the fact that some accountants and attorneys, motivated by personal financial gain, refuse to refer clients to international tax specialists, even when the need is obvious. The result has been, and will continue to be, lawsuits raising claims for accounting or legal malpractice, breach of fiduciary duty, negligence, intentional misrepresentations, breach of contract, and more, in connection with alleged failures to provide proper international tax advice, file international information returns, or timely apply for the appropriate voluntary disclosure program with the IRS.

Here are some examples of cases filed thus far:

- *Mombaers v. Patterson*[52] (Superior Court of California) (malpractice claim regarding foreign currency transactions and FBARs),
- *Luth v. S.D. Daniels & Company, P.C.*[53] (Supreme Court of New York) (claim seeking $2.7 million in damages related to FBAR penalties),
- *Leader-Cramer v. Caras & Shulman*[54] (Superior Court of Massachusetts) (malpractice action related to failure to advise client to file Form 3520 to disclose receipt of foreign inheritance),
- *In re Enesco Group, Inc.*[55] (breach of contract and professional malpractice claims against its Big 4 accounting firm for failure to file Forms 5471 for 18 foreign subsidiary corporations for two years),
- *Mitschele v. Schultz*[56] (malpractice claims involving failure to elect foreign earned income exclusion, to report foreign-source income, and to file FBARs),
- *Ginzburg v. Sharp & Associates*[57] (malpractice and constructive fraud claim related to failure to timely enroll client in voluntary disclosure program and inflating legal and accounting fees),
- *Gilmore v. Tratner*[58] (professional negligence and emotional distress claim related to lack of FBAR filings),
- *Cavanaugh v. Dominic Massoni, CPA*[59] (claims of professional negligence, breach of fiduciary duty, and breach of contract for filing a Form 1040NR instead of Form 1040 as a Green Card holder, for not filing a Form 8854 after returning to Canada, and not filing FBARs while still a U.S. person),
- *Lyons v. Fulton*[60] (claims of professional negligence, breach of contract, breach of fiduciary duty related to failure to file FBARs), and
- *Simonsen v. Everett*[61] (claims of professional negligence for failure to file FBAR for foreign account and failure to file Form 8858 for foreign disregarded entity).

C. Rethinking Tax Questionnaires

Part of the problem for the Accounting Firm in *Miksic v. Boeckermann Grafstrom Mayer, LLC* was that (i) while its engagement letter contained clear language placing responsibility for the accuracy of the returns on Mr. Miksic, it did not mandate that he actually sign such letter annually; (ii) while it sent Mr. Miksic an annual questionnaire, it did not refuse to prepare tax and information returns when he declined to complete and return the questionnaire; and (iii) while the questionnaire featured certain questions about foreign income, foreign accounts, and foreign trusts, it did not offer great specificity about how such technical terms are defined for purposes of FBARs, Forms 3520, Forms 3520-A, Forms 5471, *etc*. These practices are common for many accounting professionals; they are also dangerous from a liability perspective.

With respect to the third problem noted above (*i.e.*, the failure to adequately define technical terms), consider the following. One would expect nowadays that most accounting firms circulate a questionnaire to clients asking them, among other things, whether they have any foreign accounts. In the case of the Accounting Firm, it asked clients whether they "have an interest in or signature or other authority over a bank account, securities account, or other financial account in a foreign country?" The potential problems with asking such general questions are numerous, but three jump out.

1. Unexpected Definition of Foreign Account

Many clients likely would be unfamiliar with the definition of "foreign account" for FBAR purposes; that is, they would not know that all the following items fall within this broad category: savings accounts, checking accounts, time-deposit accounts, certificates of deposit, securities accounts, brokerage accounts, commodity futures or options accounts, insurance policies with cash surrender value, annuities with cash surrender values, mutual fund or similar pooled fund, retirement accounts, pensions, *etc*.[62] If the clients are unaware that all the preceding items, and perhaps more, are deemed to be "financial accounts" for FBAR purposes, they could easily omit certain information when completing the annual questionnaire despite their intention of fully disclosing.

2. Determining the Connection with an Account

Even if the clients somehow know the broad and unexpected definition of "foreign accounts" in the FBAR context, they might not understand when they have a reportable interest in such accounts. The relevant law generally requires the filing of an FBAR in cases where a U.S. person had a direct financial interest in, *or* had an indirect financial interest in, *or* had signature authority or some other type of authority over certain foreign accounts. These three categories are easy to state for tax professionals but often difficult to comprehend for taxpayers.

A taxpayer has a "direct financial interest" in all accounts for which he is listed as the owner of the account (including situations where he is a joint owner with one or more other persons) and all accounts for which he has legal title, regardless of whether he holds the accounts for his personal benefit or for the benefit of others.[63]

The second category is somewhat trickier. A taxpayer has an "indirect financial interest" in each financial account in a foreign country for which the owner of record or the holder of legal title of the account is any of the following: (i) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the taxpayer; (ii) a corporation in which the taxpayer owns, directly or indirectly, more than 50 percent of the voting power or the total value of the shares; (iii) a partnership in which the taxpayer owns, directly or indirectly, more than 50 percent of the interest in profits or capital; (iv) any other entity (other than certain trusts described below) in which the taxpayer owns, directly or indirectly, more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits; (v) a trust if the taxpayer is the trust grantor and has an ownership interest in the trust for U.S. tax purposes; and (vi) a trust in which the taxpayer either has a present beneficial interest in more than 50 percent of the assets or from which the taxpayer receives more than 50 percent of the current income.[64]

The third category also surprises some. A taxpayer has "signature or other authority" over a foreign account if he has the ability (either alone or jointly with another person or persons) to control the disposition of money, funds, or assets held in a financial account by communicating (either orally or in writing) with the institution where the account is maintained.[65]

3. Kids with Foreign Accounts

An inquiry in a tax questionnaire about foreign accounts of a client would do nothing to address an equally important issue for many clients, *i.e.*, foreign accounts held by their children. Here is a typical scenario. Before coming to the United States, parents establish accounts in their home/foreign country in the name of their children. These accounts are opened for any number of completely legitimate purposes—to safeguard money for education expenses, to establish a way for relatives and friends to make cash gifts to the children on special occasions, or to amass funds to be distributed to the children when they graduate from college, get married, *etc*. The problem arises years later, when the family moves to the United States and all members, including the children, become U.S. persons for tax purposes. The parents have no tax-related skills, training, or experience when they arrive in the United States. Therefore, they do the logical thing, *i.e.*, they hire a U.S. accountant. It never occurs to the parents to mention to the accountant that their children have financial accounts in their home/foreign country, which, by that time, have grown in size and generate material amounts of passive income each year. The possibility of the minor children having U.S. tax issues never dawns on the accountant either, and he neglects to ask the parents any questions about the children, other than to confirm that they can be counted as dependents on the Form 1040 of the parents. The result is that no U.S. taxes are paid and no U.S. international information returns (including FBARs) are filed with respect to the accounts of the children. Many tax professionals are unaware of the following FBAR instructions, which expressly state that a U.S. child is not excused from his FBAR filing duty, regardless of his age or capacity:

- For purposes of the FBAR, the term "person" means "an individual (*including a minor child*) and legal entities …"[66]
- The term "U.S. person" means "United States citizens (*including minor children*); United States residents; entities, including, but not limited to, corporations, partnerships, or limited liability companies created or organized in the United States or under the laws of the United States; and trusts or estates formed under the laws of the United States."[67]
- "Responsibility for Child's FBAR: *Generally, a child is responsible for his or her own FBAR report*. If a child cannot file his or her own FBAR for any reason, such as age, the child's parent, guardian, or other legally responsible person must file it for the child."[68]

The preceding items focus solely on potential FBAR troubles caused by the fact that inquiries in tax questionnaires often lack sufficient detail to adequately address complex international issues. However, similar dilemmas exist in connection with foreign financial assets (Forms 8938), foreign trusts (Forms 3520 and Forms 3520-A), foreign corporations (Forms 5471), foreign-owned

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domestic corporations and foreign corporations operating in the United States (Forms 5472), *etc.*, where the concepts are tricky and the relevant terminology is often dense, inconsistent, and/or counterintuitive.[69]

VI. Conclusion

Regardless of the ultimate outcome of *Miksic v. Boeckermann Grafstrom Mayer, LLC*, the case teaches some valuable lessons. It reinforces the idea that the international tax and information-reporting rules are challenging and amorphous; the IRS is prone to assert large penalties for non-compliance; the courts are inclined to uphold such penalties and adopt broad interpretations of "willful" conduct; and taxpayers/clients, embittered about the major blow to their pocketbooks, sometimes seek to shift the blame (and the cost) to their tax professionals. The case also highlights the issue of whether a taxpayer who "willfully" violated his FBAR duty, according to the expansive definition used by the IRS and certain courts, can recoup the amount of FBAR penalties he was forced to pay. The issues and questions raised by *Miksic v. Boeckermann Grafstrom Mayer, LLC* are likely to recur and evolve as the international rules become more complex, professional firms commit errors with greater frequency, and the IRS devotes additional resources to international tax enforcement.

ENDNOTES

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1 *Miksic v. Boeckermann Grafstrom Mayer, LLC*, Civil No. 15-cv-00539-JRT-BRT (D.C. Minn.).
2 Bank Secrecy Act (P.L. 91-508), Title I and Title II (Oct. 26, 1970).
3 *Id.*, at §202.
4 31 USC §5314; 31 CFR §1010.350(a).
5 American Jobs Creation Act (P.L. 108-357) (Oct. 22, 2004).
6 31 USC §5321(a)(5)(A).
7 31 USC §5321(a)(5)(B)(i).
8 31 USC §5321(a)(5)(B)(ii).
9 Code Sec. 5321(a)(5)(C)(i).
10 Code Sec. 6048(a)(1); Code Sec. 6048(a)(4). The term "responsible party" means (i) the grantor, in situations where an *inter vivos* trust is created, (ii) the transferor, in cases involving a "reportable event," other than a transfer by reason of death, and (iii) the executor of a decedent's estate.
11 Code Sec. 6048(c)(1).
12 Code Sec. 6039F(a).
13 Code Sec. 6048(b)(1). The grantor trust rules are located in Code Secs. 671 to 679.
14 Code Sec. 6038; Reg. §1.6038-2; Code Sec. 6046; Reg. §1.6046-1; Code Sec. 6679; Reg. §301.6679-1; Instructions to Form 5471.
15 In this context, the term "U.S. shareholder" means any U.S. person who/that owns (directly, indirectly, or constructively) 10 percent or more of the foreign corporation.
16 Code Sec. 6038(a)(2); Reg. §1.6038-2(i).
17 Code Sec. 6038(b)(1); Reg. §1.6038-2(k)(1)(i); Code Sec. 6046(f); Reg. §1.6046-1(k).
18 Code Sec. 6038(b)(2); Reg. §1.6038-2(k)(1)(ii); Code Sec. 6046(f); Reg. §1.6046-1(k).
19 Reg. §1.6038-2(k)(3)(i) and (ii).
20 For more detailed information about the recent court battles regarding "willful" FBAR penalties, please see the following articles by the same author: Hale E. Sheppard, *Government Wins Fourth Straight FBAR Penalty Case: Analyzing Bohanec and the Evolution of "Willfulness,"* 126 J. TAXATION 110 (2017); Hale E. Shepard, *Government Wins Second Willful FBAR Penalty Case: Analyzing What McBride Really Means to Taxpayers*, 118 J. TAXATION 187 (2013); Hale E. Sheppard, *Third Time's the Charm: Government Finally Collects "Willful" FBAR Penalty in Williams Case*, 117 J. TAXATION 319 (2012); Hale E. Sheppard, *District Court Rules That Where There's (No) Will, There's a Way to Avoid FBAR Penalties*, 113 J. Taxation 293 (2010).
21 *J.B. Williams*, 131 TC 54, Dec. 57,547 (2008).
22 *Williams*, DC-VA, No. 1:09-cv-437, 2010 WL 347221 (Sept. 1, 2010).
23 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
24 *Williams*, CA-4, 489 Fed. Appx. 655 (2012), Opening Brief for U.S. Government, filed February 25, 2011, at 33.
25 *Williams*, CA-4, 489 Fed. Appx. 655 (2012), Opening Brief for U.S. Government, filed February 25, 2011, at 34–35.
26 *Williams*, CA-4, 489 Fed. Appx. 655 (2012), Opening Brief for U.S. Government, filed February 25, 2011, at 35–36.
27 *Williams*, CA-4, 489 Fed. Appx. 655 (2012), at footnote 5.
28 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
29 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
30 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
31 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
32 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
33 *Williams*, CA-4, 489 Fed. Appx. 655 (2012).
34 *J. McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, Findings of Fact, Conclusions of Law, and Order (Nov. 8, 2012). *See also McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.
35 *McBride* Slip Opinion, at 32.
36 *McBride* Slip Opinion, at 32–33.
37 *McBride* Slip Opinion, at 33.
38 *McBride* Slip Opinion, at 36–37.
39 *McBride* Slip Opinion, at 37–38.
40 *McBride* Slip Opinion, at 38–39 (internal citations omitted).
41 *McBride* Slip Opinion, at 42–49.
42 *McBride* Slip Opinion, at 48–49 (internal citations omitted).
43 *Bussell*, 117 AFTR 2d 2016-439 (District Court, C.D. California, Dec. 8, 2015).
44 *Bussell*, 117 AFTR 2d 2016-439 (District Court, C.D. California, Dec. 8, 2015) at *5.
45 *Bohanec*, 118 AFTR 2d 2016-5537 (District Court, C.D. California, Dec. 8, 2016).
46 Complaint by U.S. Government to Reduce FBAR Penalty to Judgment, filed June 9, 2015; Answer by Taxpayers to Complaint to Reduce FBAR Penalty to Judgment, filed July 27, 2015; Memorandum of Contentions of Fact and Law by U.S. Government, filed October 3, 2016; Memorandum of Contentions of Fact and Law by Taxpayers, filed October 3, 2016; Trial Brief by U.S. Government, filed October 25, 2016; Proposed Findings of Fact and Conclusions of Law by U.S. Government, filed October 25, 2016; Exhibit and Witness List by U.S. Government, filed November 1, 2016; Proposed Findings of Fact and Conclusions of Law by Taxpayers, filed November 7, 2016; Supplemental Proposed Findings of Fact and Conclusions of Law by U.S. Government, filed November 7, 2016; and *Bohanec*, 118 AFTR 2d 2016-5537 (District Court, C.D. California, Dec. 8, 2016).
47 Verified Complaint and Jury Demand; Answer; Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment; Memorandum in Opposition to Defendants' Motion for Summary Judgment; Defendants' Reply Memorandum of Law in Further Support of Their Motion for Summary Judgment; Memorandum Opinion and Order on Defendants' Motion for Summary Judgment and Defendants' Motion to Exclude Expert Testimony dated March 28, 2017.
48 According to the documents filed with the court, Boeckerman Graftstrom Mayer, LLC was formerly known as Johnson, West & Co., PLC.
49 Memorandum in Opposition to Defendants' Motion for Summary Judgment, at 5–6.
50 Memorandum Opinion and Order on Defendants' Motion for Summary Judgment and De-

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fendants' Motion to Exclude Expert Testimony dated March 28, 2017, footnote 2.

[51] Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, at 38–39 (internal citations omitted).

[52] *Mombaers v. Patterson*, 2012 WL 2396085, No. CV 486710.

[53] *Luth v. S.D. Daniels & Co. P.C.*, 2011 WL 6471102, No. 652066/2011.

[54] *Leader-Cramer v. Caras & Shulman*, 2013 WL 5827361, No. MICV2013-04569.

[55] *In re Enesco Group, Inc.*, DC-IL, 61 Bankr. Ct. Dec. 142 (Bankr. 2015), 2015 WL 5152379.

[56] *Mitschele v. Schultz*, 36 A.D.3d 249, 826 NY.S.3d 14 (2006).

[57] *Ginzburg v. Sharp & Associates*, 2012 WL 1748620 (Fla. Cir. Ct 2012), No. 12-CA-006930.

[58] *Gilmore v. Tratner*, 2011 WL 3602626 (Cal. Superior Ct. 2011), No. BC467110.

[59] *Cavanaugh v. Dominic Massoni, CPA*, 2013 WL 5172902 (Cal. Superior Ct. 2013).

[60] *Lyons v. Fulton*, 2013 WL 2474628 (Cal. Superior Ct. 2013).

[61] *Simonsen v. Everett*, 2013 WL 228922 (Cal. Superior Ct. 2013).

[62] 31 CFR §1010.350(c).

[63] 31 CFR §1010.350(e)(1).

[64] 31 CFR §1010.350(e)(2).

[65] 31 CFR §1010.350(f)(1).

[66] *BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts* (FinCEN Form 114) (June 2014) (v1.3), at 5.

[67] *BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts* (FinCEN Form 114) (June 2014) (v1.3), at 5–6.

[68] *BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts* (FinCEN Form 114) (June 2014) (v1.3), at 6. This language was added by the government in June 2014.

[69] For more information about thorny issues related to these international information returns, please see the following articles by the same author: Hale E. Sheppard, *Flume v. Commissioner and Form 5471 Penalties for Unreported Foreign Corporations: A Glimpse at Unique Aspects of International Tax Disputes*, TAXES—THE TAX MAGAZINE, 2017; Hale E. Sheppard, *IRS Finalizes Form 5472 Regulations for Foreign-Owned, Domestic, Disregarded Entities*, INT'L TAX J., January–February 2017, at 13; Hale E. Sheppard, *IRS Proposes Form 5472 Filing Duty for Foreign-Owned Disregarded Entities*, INT'L TAX J., July–August 2016, at 17; Hale E. Sheppard, *Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting*, INT'L TAX J., May–June 2016, at 5; Hale E. Sheppard, *Form 5471: How Does New IRS Guidance Impact the "Substantially Complete" Defense*? TAXES—THE TAX MAGAZINE, April 2016, at 39; selected for republication in INT'L TAX J., March–April 2016, at 33; Hale E. Sheppard, *Forms 5472 for Certain Foreign and Domestic Corporations: New Filing Procedures, New Automated Penalties, New Abatement Standards, and More*, TAXES—THE TAX MAGAZINE, May 2015, at 45–60; Hale E. Sheppard, *Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules after IRS Issues Final Regulations*, INT'L TAX J., March–April 2015, at 25; Hale E. Sheppard, *The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance*, INT'L TAX J., May–June 2012, at 11–32.

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