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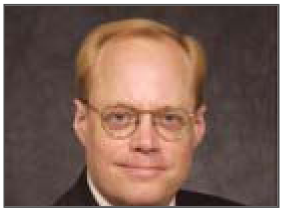

Robert W. Wood

THE TAX LAWYER

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What's The FBAR Statute Of Limitations?

(Photo credit: wikipedia)

FBARs are those annoying foreign account reporting forms that are now so important. Fail to file one–especially if you also fail to report income on your tax return–and you can be liable for more than the account balance in penalties. You can even go to jail.

You may want a better fix than just waiting for the statute of limitations to run. Still, just how ***long*** do you have to worry? The IRS says 6 years, judged from when the FBAR was due. That's June 30 following the calendar year being reported. For instance, the 2012 FBAR was due June 30, 2013, and the statute runs on June 30, 2019.

But could the feds use another date? Maybe. According to 31 U.S.C. 5321(b), the statute of limitations is 6 years from the "transaction." There is no authoritative interpretation when a transaction occurs, but the Internal Revenue Manual (IRM) says it's the FBAR due date.

Oddly, the IRS authority in this area isn't so clear. FBARs are administered by another unit of the Treasury Department, the Financial Crimes Enforcement

Network—FinCEN. It's an odd balance of power. Some say the IRS doesn't get credit when someone is convicted of FBAR violations. It's considered a financial (not a tax) crime.

Still, the IRS has some sway. Back in 2003, FinCEN delegated its authority to enforce FBAR penalties to the IRS, as reported in this IRS news release. Plus, the IRS recently amended the IRM to clarify the procedures for the IRS Appeals Office to review FBAR penalties.

However, the IRM is generally not authoritative, much less binding on the IRS. What's more, despite this delegation of authority to the IRS, the Tax Court *does not* have jurisdiction to consider FBAR penalties. The Tax Court said so in *Williams v. Commissioner*.

All this can make you wonder. Suppose you cleaned up your foreign account and foreign income problems *prospectively*, but never fixed the past and never filed FBARs. Are you safe after 6 years? There is little authority, in part because of the Tax Court's lack of jurisdiction over FBAR penalties.

It seems to give the IRS tremendous discretion with FBAR penalties. Many taxpayers are reluctant to take their chances in federal court. Instead, some taxpayers may accept the penalties imposed by the IRS or the IRS Appeals Office.

When it comes to the statute of limitations, closing off your exposure by closing accounts and hoping 6 years elapses might seem palatable if you don't mind waiting. But quietly closing accounts and disposing of funds could conceivably backfire. It can be viewed as evidence of evasion or consciousness of guilt. It could conceivably put you in a *worse* position than if you had kept the accounts open and started reporting them prospectively.

Suppose you close your accounts and wait 6 years without incident? Plainly, 6 years can be a long and agonizing wait as you hope you are not caught. But thereafter, you are safe, right?

Probably, but there's some difference of opinion and little authority. Some argue that covering something up can be a continuing criminal violation. That could conceivably mean the statute of limitations never runs. That may seem to be a crazy possibility, but there is some support for this notion in income tax cases.

As this discussion suggests, the choices can be tough and the stakes can be high. There can be big civil penalties and even possible criminal ones at stake. Get some legal advice based on your facts and be careful.

You can reach me at Wood@WoodLLP.com. *This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*