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# Penalties

## *The IRS' Authority to Seize Assets in Foreign Jurisdictions to Satisfy FBAR Penalties*

By Megan L. Brackney and Luke H. Ryan

In this article, Brackney and Ryan discuss the Internal Revenue Service's (IRS') ability to seize offshore assets to collect delinquent Report of Foreign Bank and Financial Accounts (FBAR) penalties.

On May 12, 2021, Thomas J. Sawyer of the U.S. Department of Justice (DOJ) Tax Division opined that the United States was likely to see a dramatic increase in repatriation orders as the IRS focuses its collection efforts on pursuing international assets.<sup>1</sup> "It hinges on jurisdiction over the taxpayer or the person controlling the property," Sawyer explained.<sup>2</sup> "[O]nce we get that jurisdiction, the court has broad authority to order repatriation. ... The standards are really not that demanding."<sup>3</sup>

Repatriation orders are one of the many tools available to the IRS to obtain money owed by delinquent taxpayers, and it appears the IRS is making good on Sawyer's prediction and will use repatriation orders as the Service's primary means of seizing assets held overseas. As discussed below, this will have the most profound effects on taxpayers with assets abroad, who refuse to pay their FBAR penalties, and over whom courts in the United States have personal jurisdiction.

### **I. The IRS' Increasing Use of Repatriation Orders to Satisfy Outstanding FBAR Penalties**

The Bank Secrecy Act of 1970, 31 U.S.C. §5311 *et seq.*, requires all U.S. citizens to "keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency."<sup>4</sup> Failure to comply with these reporting requirements by timely filing a FBAR can result in severe civil monetary penalties.<sup>5</sup> Where a taxpayer violates 31 U.S.C. §5314 by failing to timely file the FBAR, the penalty for a non-willful violation "shall not exceed \$10,000."<sup>6</sup> Where the failure to file was willful, the maximum penalty is increased to the greater of either \$100,000 or 50 percent of the amount of the transaction or balance in the account at the time of the violation.<sup>7</sup>

While the IRS' authority to penalize such taxpayers is clear, it can be difficult for the Service to collect FBAR penalties when the violator does not reside or keep property in the United States. In those types of cases, the IRS faces significant jurisdictional obstacles to seizing money held by a foreign bank or obtaining personal jurisdiction over the individual residing abroad. In addition, the IRS often is faced with the problem of even locating and contacting the taxpayer after a penalty assessment. That being said, the IRS and the U.S. DOJ are not powerless. Indeed, one need look no further than the recent FBAR enforcement cases against Isac Schwarzbaum<sup>8</sup> and Charles and Kathleen Barrett<sup>9</sup> to see how the IRS and DOJ may utilize the tools at its disposal to reach across borders and recover outstanding FBAR penalties. As Daniel N. Price, formerly of the IRS Office of Chief Counsel (Small Business/Self-Employed Division) recently explained, the IRS is "looking to make referrals" to the DOJ for repatriation orders, especially in relation to FBAR penalty cases.<sup>10</sup> "We realize that just getting the judgment isn't necessarily the full win," he explained, "so we're looking at the next step."<sup>11</sup>

## A. Repatriation orders

A repatriation order, issued by a federal district court, requires a taxpayer who has transferred assets from the United States to a foreign country or acquired assets in a foreign country, to which the IRS is entitled, to transfer such property into the United States. To obtain a repatriation order, the IRS must demonstrate (1) an outstanding tax liability<sup>12</sup>; (2) a reasonable basis that the taxpayer has assets outside the United States; (3) that a levy on the taxpayer's domestic assets, if any, is not sufficient to satisfy the tax liability; and (4) that the district court is able to obtain personal jurisdiction over the taxpayer. Additionally, the IRS must demonstrate that the taxpayer is either in the United States or a U.S. Territory or that the taxpayer likely will be returning to, or passing through, the United States. The court will then order the taxpayer to return the property to the United States so that the property may be disbursed to the IRS. If the taxpayer refuses to comply with the order of repatriation, the court may hold the taxpayer in contempt, order the taxpayer's detention, or impose other civil penalties until the taxpayer complies with the order.

Before seeking a repatriation order, the IRS' Internal Revenue Manual (IRM)<sup>13</sup> requires the Service to first exhaust meaningful enforcement against the taxpayer's domestic property, and that the IRS serve—and enforce

as needed—a levy on the domestic bank branch if the property is held in a foreign banking institution with a U.S. branch. Additionally, if the taxpayer's foreign accounts are located in a country subject to a Mutual Collection Assistance Request (MCAR) treaty, the IRM requires the IRS to make such a request rather than seek a repatriation order.

A recent example of a repatriation order is *United States v. Schwarzbaum*.<sup>14</sup> At issue in that case is a \$13 million FBAR penalty that the IRS assessed against the taxpayer, Isac Schwarzbaum.<sup>15</sup> After Schwarzbaum refused to pay, the government filed suit in the Southern District of Florida to enforce the penalty.<sup>16</sup> Following a five-day bench trial, the district court ruled that Schwarzbaum had willfully failed to file the required FBARs. The district court, however, ruled that the IRS miscalculated Schwarzbaum's FBAR penalties, recomputed the penalties itself, and entered judgment against Schwarzbaum. Schwarzbaum appealed to the Eleventh Circuit.

While Schwarzbaum's appeal was pending, the government moved to enforce the judgment and to repatriate sufficient foreign assets to satisfy the FBAR penalty.<sup>17</sup> The district court granted the government's motion, adopting the report and recommendation of a magistrate judge who had concluded that the issuance of the repatriation order was appropriate pursuant to the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. §3001 *et seq.*, and the All Writs Act, 28 U.S.C. §1651.<sup>18</sup> The district court explained that, "[t]he incorporation of the All Writs Act into the FDCPA is clear."<sup>19</sup> "Indeed," the court continued,

interpreting the FDCPA in the manner Schwarzbaum urges would strip the FDCPA of any meaning or power where the United States obtains a valid judgment against an individual otherwise subject to the Court's jurisdiction, but who holds the majority of his assets overseas. Such a result would be inconsistent with the broad flexibility afforded by the FDCPA in enforcement of judgments.<sup>20</sup>

Shortly thereafter, Schwarzbaum filed a second notice of appeal, this time challenging the district court's repatriation order.<sup>21</sup> While both of Schwarzbaum's appeals were pending, however, the district court granted Schwarzbaum's motion to stay execution of the repatriation order after finding that "the equities weigh heavily in favor of granting a stay" and Schwarzbaum had "presented a substantial case on the merits."<sup>22</sup> The following month, the Eleventh Circuit granted in part

Schwarzbaum's first appeal, vacated the district court's judgment, and remanded the case for the IRS' recalculation of Schwarzbaum's FBAR penalty.<sup>23</sup>

The Eleventh Circuit's decision, however, did not address whether the district court's repatriation order was appropriate, dashing hopes that the three-judge panel would clarify whether the government's new approach is viable.<sup>24</sup> The court sidestepped the issue by ruling only that the IRS had incorrectly assessed Schwarzbaum's FBAR penalties, and the district court had erred in calculating and imposing new penalties instead of remanding the case to the IRS, as required under the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*

## II. The IRS' Other Collection Tools for International Cases

In addition to the repatriation procedure described above, the IRS has other tools to collect FBAR penalties from delinquent taxpayers. Code Sec. 7402(a) empowers federal courts "to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws."<sup>25</sup> The statute further provides that such remedies "are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."<sup>26</sup>

In addition to repatriation orders, section 5.21.3 of the IRM describes the following administrative and judicial collection tools available to the IRS to reach offshore assets in international cases<sup>27</sup>:

- Writs *ne exeat republica*,
- Customs orders or prevent departure orders,
- MCAR,
- Levies on a domestic branch of a financial institution for funds held offshore, and
- Appointments of a receiver.

### A. Writs *ne exeat republica*, Customs Orders, and Prevent Departure Orders

A writ *ne exeat republica* is a temporary remedy against a person—not his or her property—to restrain the individual from leaving the jurisdiction of the United States. Code Sec. 7402 authorizes the writ, and the IRM explains that the writ is most appropriate where the delinquent taxpayer (1) is about to leave the United States and is unlikely to

return, or has already left the United States but is likely to return and, thus, may be subject to detention by the writ; and (2) has conveyed or concealed cash or other property to remove it from the United States. The writ's purpose is to preserve a court's power to protect the government's ability to collect by another means, such as a repatriation order.

One notable example of the IRS utilizing the writ *ne exeat republica* is *United States v. Barrett*.<sup>28</sup> In that case, the government obtained the writ and a repatriation order to recover approximately \$325,000 from taxpayers who had traveled to Ecuador and refused to repay their tax liability. The defendants had filed a fraudulent tax return that resulted in an approximately \$217,000 tax refund to which they were not entitled. In 2010, the district court issued a writ *ne exeat republica* to restrain the Barretts—who had relocated to Ecuador—should they ever revisit the United States. In 2013, the Barretts did just that, the U.S. Marshals detained them, and the district court ordered them to turn over their passports and any international travel documents and to remain in the United States. Around the same time, the United States moved to hold the Barretts in contempt of the repatriation order. In November 2013, a magistrate judge found the Barretts in contempt of the repatriation order and recommended that they be confined in a half-way house until they purged their contempt by paying the tax or repatriating their assets from Ecuador. Although the Barretts were able to purge the contempt, the district court nevertheless denied their request to discharge the writ *ne exeat republica* until they repaid another approximately \$16,000 and either sold certain property and turned over the proceeds to the government or they proved, with credible evidence, that they could not sell the property.

Another enforcement tool, similar to the writ *ne exeat republica*, is a customs order or prevent departure order. These are administrative actions that the IRS can utilize to prevent a non-U.S. citizen from exiting the United States pending the resolution of a collection matter. The authority for such orders is found in 22 C.F.R. §46.2(a) which provides that "[n]o alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interest of the United States." The IRM explains that IRS officers seeking such an order should maintain close coordination with their counterparts in the Treasury Enforcement Communications System (TECS) because the TECS coordinator may need to provide instructions to the Department of Homeland Security to prevent the individual from leaving the

country. If an individual subject to a prevent departure order attempts to exit the United States, a Customs Officer he or she will detain him or her and notify the IRS, and a Revenue Officer will provide further instructions.

## B. Mutual Collection Assistance Request

Next, the IRS can utilize an outgoing MCAR to seek assistance from five treaty partners in order to collect taxes owed by an individual who resides in or has assets in the treaty country. MCAR authorizes a counterparty to the treaty to—upon the request of the other country, such as the United States—take whatever action(s) that country would take to collect its own taxes in order to collect on behalf of the requesting counterparty to the treaty. The MCAR even permits collection of taxes owed to the United States through the treaty partner's bankruptcy proceedings. Currently, the United States has signed MCAR treaties with Canada, Denmark, France, the Netherlands, and Sweden. On January 24, 2013, the United States and Japan signed a protocol that contains a provision to permit the United States and Japan to collect taxes on behalf of each other. This collection assistance, however, has been delayed because both countries have not yet ratified the protocol.

## C. Levies on a Financial Institution's Domestic Branch

Depending on whether the taxpayer is subject to personal jurisdiction by U.S. courts at the time the levy is made, the IRS may utilize procedures in Reg. §301.6332-1(a)(2) to levy banks in business in the United States but with deposits held in a branch outside the United States. If the foreign bank account is in a country subject to a MCAR, the IRM recommends that the IRS request the treaty partner use its own domestic authority to collect from the bank located in the country. The IRM explains that this collection method is useful in situations where the taxpayer has a substantial final tax liability and he or she has made no effort to pay and has transferred funds from a U.S. bank account into an offshore account.

## D. Appointment of a Receiver

Code Sec. 7402 also authorizes the IRS to seek appointment of a receiver through a civil action brought in a federal district court. A receivership places a responsible

individual, known as the receiver, under the direction of the court in order to control a taxpayer's assets. The receivership allows the court—not the IRS—to control and conserve the assets of the delinquent taxpayer or liquidate the taxpayer's assets in an orderly and efficient manner. The receiver is not an agent of the IRS, but rather, he or she acts under the control and authority of the court to (1) conserve property subject to tax liens; (2) maintain the business as an ongoing concern; (3) return property to the owner when all debts have been satisfied; (4) liquidate the business, if necessary, to pay creditors; and (5) file all tax returns that come due during the receiver's control of the business. Requests for appointment of a receiver are usually in conjunction with other applications by the IRS, such as for repatriation or *ne exeat republica*. The IRM explains that revenue officers should consider seeking a receiver when a delinquent taxpayer's assets may depreciate without outside intervention, or when a taxpayer is able to dispose of his or her assets fraudulently to the detriment of creditors, including the IRS.

## III. Conclusion

Depending on the outcome of Schwarzbaum's still-pending appeal of the district court's repatriation order, the IRS' use of repatriation orders and other tools for assessing and collecting FBAR penalties is likely to stay. Indeed, the government's recent successes in court appears likely to bolster its efforts to expand FBAR enforcement and collection of penalties regardless of where the delinquent taxpayer resides or possesses the property.

In essence, *Schwarzbaum* and *Barrett* provide a handy procedure for the government to strengthen its foreign asset collection efforts by (1) obtaining writs *ne exeat republica* against delinquent taxpayers living abroad; (2) detaining those taxpayers when they set foot on U.S. soil; and (3) using that acquired personal jurisdiction over the taxpayer to obtain repatriation orders, punishable on pain of contempt. Further, as the DOJ's Thomas Sawyer and the IRS' Daniel Price both indicated, "there is a lot of talk" about selecting criminal cases to drive compliance, and a significant number of repatriation cases would indicate that there is a problem, and the DOJ may need to send a criminal message to aid enforcement efforts.<sup>29</sup>

"[W]e can force [delinquent taxpayers] to repatriate," Sawyer explained during a recent discussion regarding a situation where a taxpayer may try to settle a FBAR case that could involve collection difficulties.<sup>30</sup>

“[T]he fact that they’re even asking that question means they think they can get away with it,” Sawyer said, adding that criminal charges could also be warranted in such a case based on the delinquent taxpayer’s conduct.<sup>31</sup> “The facts that we need to show to make a criminal case are

really essentially the same that we need to make [for] the repatriation order. It’s just that there’s a higher standard of proof.”<sup>32</sup>

Whether the federal courts of appeals will agree is an open question. Stay tuned.

## ENDNOTES

<sup>1</sup> See Andrew Velarde, *DOJ Predicts Dramatic Increase in Repatriation Orders*, TAX NOTES FEDERAL, 171 (May 17, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 31 U.S.C. §5314(a).

<sup>5</sup> See generally *id.* §5321.

<sup>6</sup> *Id.* §5321(a)(5)(B).

<sup>7</sup> *Id.* §5321(C)–(D). A taxpayer who had reasonable cause for failure to file a FBAR will not be subject to penalties. *Id.* §5321(a)(5)(B)(ii).

<sup>8</sup> Schwarzbaum, 24 F.4th 1355 (11th Cir. 2022).

<sup>9</sup> Barrett, 2014 WL 321141 (D. Colo. Jan. 29, 2014).

<sup>10</sup> Velarde, *DOJ Predicts Dramatic Increase in Repatriation Orders*.

<sup>11</sup> *Id.*

<sup>12</sup> Under the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. §3001 *et seq.*, the debtor must have an outstanding judgment or tax liability to the U.S. government. See

generally Schwarzbaum, 2021 WL 4958307, at \*4 (S.D. Fla. Oct. 26, 2021).

<sup>13</sup> See [www.irs.gov/irm/part5/irm\\_05-021-003#idm140469013371520](http://www.irs.gov/irm/part5/irm_05-021-003#idm140469013371520).

<sup>14</sup> 24 F.4th 1355 (11th Cir. 2022).

<sup>15</sup> See *id.* at 1362.

<sup>16</sup> Schwarzbaum, No. 18 Civ. 81147 (S.D. Fla.).

<sup>17</sup> *Id.*, Dkt. No. 115 (S.D. Fla. June 3, 2021).

<sup>18</sup> Schwarzbaum, 2021 WL 3540008, at \*1 (S.D. Fla. June 30, 2021), *report and recommendation adopted*, 2021 WL 4958307 (S.D. Fla. Oct. 26, 2021).

<sup>19</sup> Schwarzbaum, 2021 WL 4958307, at \*5.

<sup>20</sup> *Id.*; see also Schwarzbaum, No. 18 Civ. 81147, Dkt. No. 129 (S.D. Fla. Nov. 5, 2021) (ordering repatriation and explaining that the defendant was indebted to the United States in the total amount of \$18,559,609.01, comprising civil penalties pursuant to 31 U.S.C. §5321(a)(5), pre-judgment interest pursuant to 31 U.S.C. §3717(a), post-judgment interest pursuant to 28 U.S.C. §1961, late payment penalties pursuant to 31 U.S.C. §3717(e)(2), and

a surcharge of ten percent of the debt owed in accordance with 28 U.S.C. §3011).

<sup>21</sup> Schwarzbaum, No. 18 Civ. 81147, Dkt. No. 134 (S.D. Fla. Jan. 3, 2022).

<sup>22</sup> Schwarzbaum, 2021 WL 6197777, at \*1 (S.D. Fla. Dec. 28, 2021).

<sup>23</sup> See Schwarzbaum, 24 F.4th at 1367.

<sup>24</sup> The Eleventh Circuit also did not address Schwarzbaum’s argument that the FBAR penalty constituted an excessive fine under the Eighth Amendment.

<sup>25</sup> Code Sec. 7402(a).

<sup>26</sup> *Id.*

<sup>27</sup> See [www.irs.gov/irm/part5/irm\\_05-021-003#idm140469013371520](http://www.irs.gov/irm/part5/irm_05-021-003#idm140469013371520).

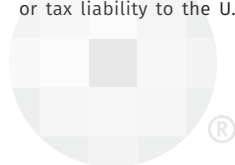
<sup>28</sup> 2014 WL 321141 (D. Colo. Jan. 29, 2014).

<sup>29</sup> Velarde, *DOJ Predicts Dramatic Increase in Repatriation Orders*.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



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